British Institute of International and Comparative Law

# Global Perspectives on Corporate Climate Legal Tactics: UK National Report

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British Institute of International and Comparative Law

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**Revision History**

Version 1.1 includes some minor clarifications.

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# Foreword

This report seeks to map and analyse the trends and possibilities in corporate climate litigation in the United Kingdom (UK), with a particular focus on England. It commences by making some general comments about the overall 'scene' in the UK, the scope of what might be considered *litigation*, and how this report reflects what might be considered *climate* litigation.

In general, the politico-legal scene in the UK at the moment is not geared towards a progressive response to climate change. Incremental development of the law might still be possible in a private law context. There would still undoubtedly be value in pursuing litigation that – for instance – tests what courts are willing to do with private law duties. However, potential changes of government in the UK, and / or strong judicial statements about climate change and human rights from Strasbourg, could shift this trend. Be that as it may, for now we are working within an era of judicial restraint.

Including for the above reason, the net of what might be considered 'climate litigation' has been cast quite broadly. The other reasons include, first, this is a sensible way to understand climate litigation, or adjudication, in general.[1] Second, in the UK context most of the directly effective activity fits within this broader framing. As such for both backward- and forward-looking reasons, failing to include anything but a very narrow category of action in the courts would not give a true picture. Third, appealing to regulatory enforcement does not mean more traditional litigation has been abandoned. For one thing, a regulatory approach can be effective both by itself or combined with litigation,[2] but also, if the regulator fails this can also result in litigation as discussed below. The obvious limitation to this approach is the scope of powers and the objectives of the regulator.

This report focuses predominantly on strategic litigation that has been or could be brought to challenge climate contribution or climate damage, fitting within the project scope. However, this is not to say that this is the only activity in the courts (or other tribunals) that might influence either climate law or policy. It is likely that actions taken inadvertently, to protect individual interests, will have an impact.[3] Also, there has been,

[1] Kim Bouwer, 'The Unsexy Future of Climate Change Litigation' (2018) 30 Journal of Environmental Law 483; See Elizabeth Fisher and Eloise Scotford, 'Climate Change Adjudication: The Need to Foster Legal Capacity: An Editorial Comment' (2016) 28 JEL 1. It would probably be more coherent to use the 'adjudication' terminology used by Fisher and Scotford, but climate litigation has stuck as a term.

[2] Kim Bouwer and Joana Setzer, 'Climate Litigation as Climate Activism: What Works?' (British Academy 2020) <https://www.thebritishacademy.ac.uk/publications/knowledge-frontiers-cop26-briefings-climate-litigation-climate-activism-what-works/>.

[3] See Bouwer, 'The Unsexy Future of Climate Change Litigation' (n 1).

and will continue to be, litigation that either does or appears to push back against climate law or policy. In some instances, this is done in order directly to resist climate policies, for instance, the actions that have been taken by airlines to protect their own interests.[4] These are likely to be brought in domestic or international courts, or other tribunals by corporations against states, against other corporations,[5] or against activists.[6] However, climate policies could also be opposed because their impacts on vulnerable people or communities are unjust or disproportionate.[7]

Finally, in approaching this exercise we have sought to map across the areas identified in the project scope, and evaluate prospects of success of ongoing or future actions. The report also flags ongoing or potential areas for litigation, and suggests where successful areas might lie in the future, which has involved some educated speculation. This includes the caveat that making any claims about what is meant by 'effective' is fairly hazardous territory, as the impacts of climate litigation are still poorly understood. The main points to understand are that successful climate litigation is not reducible to a court win, and there are many ways in which even failed litigation can 'work' towards better governance.[8] But there is also not a clean line between successes and better climate governance; successful litigation could lead to unintended consequences, obfuscation or malicious compliance. Big wins could also encourage a sense of complacency and distract from more granular forms of governance.[9] Where effects are known or relatively clear, there have been stated.

[4] Catherine Higham and others, 'Climate Change Law in Europe' (Grantham Research Institute on Climate Change and the Environment and Centre for Climate Change Economics and Policy, London School of Economics and Political Science 2023), 7; Matteo Fermeglia and others, '"Investor-State Dispute Settlement" as a New Avenue for Climate Change Litigation' (Grantham Research Institute on climate change and the environment, 2 June 2021) <https://www.lse.ac.uk/granthaminstitute/news/investor-state-dispute-settlement-as-a-new-avenue-for-climate-change-litigation/>; Joanne Scott and Lavanya Rajamani, 'EU Climate Change Unilateralism' (2012) 23 European Journal of International Law 469.

[5] Fermeglia and others (n 4). UK-specific activity here might increase if the UK does leave the Energy Charter Treaty, see Damian Carrington, 'UK could quit 'climate-wrecking' treaty, minister announces', The Guardian, 1 September 2023.

[6] This could include defamation actions or SLAPP suits brought to silence environmental activists or journalists.

[7] Annalisa Savaresi et al, 'Just Transition Litigation: A New Knowledge Frontier' [2023] SSRN eLibrary <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4561679>.

[8] Bouwer and Setzer (n 2).

[9] Kim Bouwer, 'Lessons from a Distorted Metaphor: The Holy Grail of Climate Litigation' (2020) 9 Transnational Environmental Law 347.

# 1. Causes of Action

## A. Climate Change Law/Environmental Law Statutory Provisions

The UK is signatory to and has ratified the Paris Agreement (PA) and UNFCCC. There has been some litigation – although not against corporates – concerning the effect or potential influence of the PA on national law. This includes whether the UK's commitments under the PA could be said to be 'policies' that should be taken into account in making decisions under the Planning Act.[10] Some litigation has also engaged with the question of what it means to be 'consistent' with the PA and further to this the approach that should be taken to the interpretation of the PA in a public law context, i.e. that the interpretation of the provisions of the Act are 'tenable.'[11]

The Climate Change Act 2008 (CCA) is domestic legislation that provides the framework for the management of the UK net carbon account through successively stringent budgets, towards the achievement of a long-term national target. It imposes a headline duty on the Secretary of State to reduce the UK carbon account by at least 100% relative to 1990 (the baseline year) levels, by 2050 (the 'net zero' target).[12] Additional duties relate to the setting and meeting of carbon budgets,[13] annual and periodic reporting to Parliament,[14] a duty to prepare and report on 'proposals and policies' for meeting the carbon budgets.[15] The nature or content of the proposals or policies is not prescribed;[16] however, the Secretary of State is also required to provide an explanation and modifying policy plan if the specified targets are not met.[17]

The Committee on Climate Change (CCC) advises the Secretary of State and Parliament on the setting and achievement of budgets and targets, including the 2050 target,[18]

[10] *R (on the application of Friends of the Earth Ltd and others) v Heathrow Airport Ltd* [2020] UKSC 52.
[11] *Georgia Elliott-Smith v SoS for BEIS and others* [2021] EWHC 1633 (Admin).
[12] Section 1(1).
[13] Section 4(1). Save for the 2020 budget, which is to be 26% lower than the 1990 baseline (section 5(1)(a)). The Secretary of State has a power to set ranges for later years (section 5(1)(c), and he must also set indicative annual budget ranges for each year (section 12 (1) ).
[14] Sections 16, 18(1) and 20(1) and (2).
[15] Sections 13 and 14.
[16] Mark Stallworthy, 'Legislating Against Climate Change: A UK Perspective on a Sisyphean Challenge' (2009) 72 The Modern Law Review 412.
[17] Sections 18(8) and 19(1), and 20(6) in relation to the 2050 target.
[18] Sections 3(1)(a) 2050 target or baseline year; section (7)(1)(a) amending target percentages; section 9(1)(a) and 34 consulting on carbon budgets and s22(1)(a) on the alteration of carbon budgets; 17(4)(c) on carrying amounts between budgetary periods; section 33(1), 34(1)(a) and (b).

and reports to Parliament concerning progress made towards specific budgets and targets, including reference to whether these are likely to be met.[19]

Litigation about the substantive obligations under the CCA has been attempted but never progressed to a hearing.[20] The procedural obligations in the CCA are enforceable against the Secretary of State for (what was then the department of) Business, Energy and Industrial Strategy, but not (it would appear for now) against other Secretaries of State even if their policies and plans are relevant for climate change law and policy.[21] This has recently been demonstrated by means of a challenge to the approval of the government's Net Zero Strategy. The Secretary of State had failed to comply with section 13 of the CCC by not properly considering the quantitative contribution that particular proposals and policies would make to meeting the carbon budgets, how to make up the shortfall in meeting the sixth carbon budget, and the consequent risk to the Net Zero Strategy being realised.[22] Also, the Net Zero Strategy was not sufficiently detailed, meaning it did not satisfy the reporting obligations under section 14.[23] As a consequence a Carbon Budget Delivery Plan was published on 30 March 2023; at the time of writing this Plan is subject to a further challenge. Of course, in this way these procedural findings *could* come to have substantive implications; quite simply, if the government is required to show how its plans deliver against the carbon budgets this should require it to put in place more robust plans. It is questionable whether this is occurring however, as key departments continue to fail to deliver on CCC recommendations.[24]

None of this *directly* affects corporate actors, although frameworks put in place to achieve carbon budgets will affect corporate actors in an indirect way. Furthermore, it has been suggested the Net Zero Strategy case could provide some form of a blueprint for how courts might look to assess company transition plans in the future.[25]

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[19] Section 36(1)(a) – (c). The Climate Change Committee's reports express increasing concern, see Climate Change Committee, '2023 Progress Report to Parliament' (2023) <https://www.theccc.org.uk/publication/2023-progress-report-to-parliament/>.

[20] Permission was refused in both *R (Plan B Earth and others) v SoS for BEIS* [2018] EWHC 1892 (Admin) and *R (oao Plan B and others) v The Prime Minister and others* [2021] EWHC 3469 (Admin).

[21] *R (oao Global Feedback) v SoS DEFRA and SoS ESNZ* [2023] EWCA Civ 1549.

[22] *R (on the application of Friends of the Earth Ltd and others) v Secretary of State for the Business, Energy and Industrial Strategy (the net zero litigation)* [2022] EWHC 1841 (Admin).

[23] *ibid.*

[24] Tom Dooks, 'Better Transparency Is No Substitute for Real Delivery' (*Climate Change Committee*, 27 June 2023) <https://www.theccc.org.uk/2023/06/28/better-transparency-is-no-substitute-for-real-delivery/>.

[25] Clifford Chance, 'UK NET ZERO STRATEGY RULED UNLAWFUL LEAVING UNCERTAINTY OVER UK CLIMATE POLICY' <https://www.cliffordchance.com/content/dam/cliffordchance/briefings/2022/07/uk-net-zero-strategy-ruled-unlawful-leaving-uncertainty-over-uk-climate-policy.pdf>, 5.

The UK has landmark new legislation – the Environment Act 2021 – which sets out a broad framework that will form the basis of the government's environmental commitments, and also incorporates environmental principles (although in a fairly weak way).[26] The purpose of the framework created by the Act is to hold the government to account in relation to failures to comply with environmental law.[27] The Act also creates the Office for Environmental Protection (OEP), which has a range of enforcement powers, as well as softer 'scrutiny and advice' powers.[28] Again, one could envisage a situation where a public authority made policy or took action that impacted on corporates.

The OEP's Strategy and Enforcement Policy sets out a monitoring and enforcement regime that applies against public authorities.[29] This can create a targeted and strategic enforcement approach.[30] The enforcement powers include interventions including investigations, information gathering, reporting, recommendations and decision notices.[31] This can also involve court proceedings, through the system of environmental review, a bespoke form of legal remedy. The OEP can apply for environmental review if it considers that a public authority (to which it has issued a decision notice) has not complied with environmental law, and that the failure is serious.[32] Environmental review broadly follows judicial review procedure.[33] The Strategy and Enforcement Policy also notes that the OEP has the powers to take more conventional enforcement actions. These include the power to bring judicial or statutory review, subject to certain criteria as to urgency and seriousness being met.[34]

There is scope for the OEP to act as an intervenor in any judicial review relating to an alleged failure to comply with environmental law where it considers that any such failure would be serious.[35] Seriousness is defined in the OEP's Strategy and Enforcement Policy and includes at 4.2(a) that a factor in assessing seriousness is: 'whether the conduct raises any points of law of general public importance. This may be, for example, by

[26] Section 17(1) requires the Secretary of State to prepare a policy statement on environmental principles, which according to section 17(5) includes the principles of integration, prevention, polluter pays, precaution and rectification at source.
[27] Section 31 Environment Act 2021.
[28] Although it may struggle to retain independence, see Maria Lee, 'Brexit and the Environment Bill: The Future of Environmental Accountability' (2022) 13 Global Policy 119, 122.
[29] Section s 31 – 41 and schedule 3, paragraphs 4 – 15 Environment Act 2021.
[30] Kate Tandy 'The seasons alter: The Office for Environmental Protection and a new approach to environmental enforcement', *elaw*, UKELA, April 2023, 14.
[31] These are called 'bespoke enforcement functions' see 3.2. of the Strategy and Enforcement Policy.
[32] Section 38(1) Environment Act 2021.
[33] Section 38 and schedule 3, paragraph 12, Environment Act 2021. The process for environmental review is specified in CPR54.25 supplemented by Practice Direction 54E.
[34] Section 39(1)(a) and (b) Environment Act 2021.
[35] Section 39(7) Environment Act 2021.

setting a precedent with wider potential implications (beyond those of the case) or addressing an important area of law where clarification would be valuable or important'.[36] The manner in which these powers are being used already shows ambition.[37] For instance, the OEP is an intervenor in the case of *Finch*, in which a decision is awaited at the time of writing (see below).[38] In the intervention, the OEP asks the Court to clarify the law on assessing the indirect effects of developments in general, and their 'scope 3' greenhouse gas emissions in particular.[39]

Can the OEP take enforcement action when it comes to climate change? The Environment Act explicitly states that the OEP should avoid any overlap with the Climate Change Committee in serving its functions.[40] In its Strategy and Enforcement Policy, however, the OEP asserts its enforcement powers, saying as follows: 'The CCC does not have an enforcement role, whereas we can enforce against legislation concerning climate change that falls within our remit as environmental law. For example, where we intend to issue an information notice concerned with greenhouse gas emissions under our enforcement functions (section 3.4), we will notify the CCC and provide appropriate details.' So it does seem the OEP is aware it will have to take the leading role on enforcement about climate change (where appropriate). The question is where and when it will do this, and whether it would act on matters brought to its attention.

EU law has always formed an important but not exclusive part of UK environmental law.[41] After a fairly tempestuous journey, the Retained EU Law (Revocation and Reform) Act (REUL) was given Royal Assent on 29 June 2023. The REUL no longer contains the controversial 'sunset' clauses that would have seen the automatic revocation of a host of EU legislation at the end of 2023. However, it still gives Ministers wide-ranging powers over the next three years to amend or revoke EU laws,[42] 'without any effective oversight from Parliament'.[43] Other EU law becomes 'assimilated', although the status of this is unclear, and EU caselaw is not binding.[44] The wording of the 2021

[36] The OEP's Strategy and Enforcement Policy is available at: https://www.theoep.org.uk/strategy-and-enforcement-policy.

[37] Details of the OEP's interventions and investigations may be found here: https://www.theoep.org.uk/our-casework.

[38] Appealing *R (on the application of Sarah Finch on behalf of the Weald Action Group) v Surrey County Council and others* [2022] EWCA Civ 187.

[39] The intervention can be found here: https://www.theoep.org.uk/report/oep-files-written-submissions-ahead-supreme-court-hearing.

[40] Section 23(5)(a) Environment Act 2021.

[41] Stuart Bell and others, *Environmental Law* (Ninth Edition, Oxford University Press 2017), 95.

[42] Sections 9 - 16 REUL

[43] ClientEarth Communications 'REUL Act creates uncertainty for UK environmental protections' 6 July 2023, available at https://www.clientearth.org/latest/latest-updates/news/reul-act-creates-uncertainty-for-uk-environmental-protections/#:~:text=What%20is%20the%20Retained%20EU,as%20'retained%20EU%20law.

[44] Section 6 RUEL Act. See UKELA Briefing Paper on the Retained EU Law (Revocation and Reform) Act 2023, UK

Environment Act seems to contemplate EU environmental law remaining in place;[45] however, the extensive powers conferred by the REUL, along with the REUL's vague approach to environmental protection, make this unlikely. In any case, it is hard to predict how the unravelling of EU law will happen, although it is expected that REUL will become weaker and less clear.[46]

As such this entire area is 'at risk' and fairly unstable. Apart from risk to the environment, this also creates risk to commercial and business interests.[47] Certain corporations may try to exploit this period of regulatory uncertainty, which could result in increased litigation although in a challenging context. But also, the fact that EU law is about to be repealed may prompt a surge in litigation under these provisions. The time limits under REUL present a vanishing window in which to leverage and mobilise different regulatory structures before they are repealed, and there is potential for an increase in litigation while the relevant EU law is still on the books.

Irrespective of the fate of retained EU law, it is or should be accepted that the UK will continue to be subject to EU law as the latter's 'global reach' imposes standards on its trading partners.[48] A very clear and pertinent example of this can be seen in the new (proposed) Corporate Sustainability Due Diligence Directive (CSDDD).[49] In its current form, the CSDDD aims to set 'a horizontal framework for better human rights and environmental protection, creating a level playing field for companies within the EU and avoiding fragmentation resulting from Member States' national approaches'.[50] This means that large companies will have to adopt action plans for their climate change transitions, and also that these frameworks will no longer be voluntary, but create legally enforceable obligations.

There are at least three ways in which the CSDDD would be of relevance to the UK (and other non-EU countries). First of all, the CSDDD applies to non-EU companies with a turnover of 150 million euros or more – or a turnover of 40 million euros if more than 20 million euros was generated in high risk sectors, including food or agriculture, or that can be understood as extraterritorial in nature.[51] Second, Article 22 imposes civil

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Environmental Law Association, November 2023.

[45] Sections 112 – 113 Environment Act 2021

[46] UKELA (n 45), 3.

[47] Robert McCracken QC and Ned Westaway 'Retained EU law - Bonfire of Environmental Regulations?' FTBblog, 22 November 2022, available at https://www.ftbchambers.co.uk/elblog/view/retained-eu-law-bonfire-of-environmental-regulations.

[48] Joanne Scott, 'The Global Reach of EU Law' in Marise Cremona and Joanne Scott (eds), *EU Law Beyond EU Borders: The Extraterritorial Reach of EU Law* (OUP 2019).

[49] This forms part of the new 'Fit for 55' package which is part of the European Green Deal – see Higham and others (n 4), Section 2.2.

[50] ibid, Section 3.1.

[51] Article 2(2) of the CSDDD.

liability for non-compliance with the CSDDD, and this can extend to subsidiaries and business partners, both direct and indirect, in the supply chain. 'A company is liable for a damage if it can be demonstrated that the company intentionally or negligently failed to comply with the due diligence obligations laid down in the CSDDD, and as a result of such a failure a damage to the natural or legal person's legal interest protected under national law was caused.'[52] As such, therefore, a parent company domiciled in the EU, or with a sufficiently high turnover in the EU, could be held responsible for the actions of a subsidiary, which may not currently be possible under domestic systems. [53] This is not necessarily the case however, and the subsidiary could still be liable. Third, Article 15 of the directive requires large companies to 'adopt a plan to ensure that their business model and strategy are compatible with the transition to a sustainable economy and with the limiting of global warming to 1.5°C in line with the Paris Agreement'.

At the time of writing, the vote on acceptance of the CSDDD has been postponed as it lacks sufficient support, and it is unclear whether it will be adopted in its current, or an amended form in the future,[54] and if the latter what those amendments would look like. The implications of this new directive for climate litigation are apparently already being considered, [55] but as the liability issues are amongst those causing the *impasse*,[56] it is unclear what their fate will be. Irrespective, if some form of the CSDDD becomes law in the future, it will mean some kind of mandatory framework existing within the EU, and this will have implications for corporations trading with EU companies in an indirect way, whether or not the liability clauses survive.

## B. Human Rights Law

The UK has incorporated the European Convention on Human Rights (ECHR or Convention) into domestic law by means of the Human Rights Act 1998 (HRA). The HRA creates a remedy for violation of Convention Rights.[57] In addition, the HRA requires courts to develop the common law in such a way as to ensure coherency and consistency with the provisions of the Act.[58] But this does not mean open season on rights claims. Under UK law, the HRA has been used to protect 'environmental' rights in limited

[52] Higham and others (n 4), Section 3.1.
[53] ibid, Section 3.1.
[54] Simon Mundy 'Landmark EU Legislation hangs in the balance' *Financial Times*, 14 February 2024
[55] This claim is based on the knowledge of the UK International Expert Group (UK IEG) for the 'Global Toolbox on Corporate Climate Litigation' Project of the British Institute of International and Comparative Law <https://www.biicl.org/global-perspectives-ieg-uk>
[56] Mundy (n 54).
[57] Section 7 and 8.
[58] Section 6(3)(a).

circumstances,[59] but there is no constitutional right to a healthy environment as in other jurisdictions.[60] There has also been little success in establishing climate change human rights claims to date in the English courts.[61]

There is in theory scope for 'horizontal application' of human rights between private actors in UK law. The HRA does allow the Convention rights to have some impact on the development of the law in the private sphere. There is no legal provision for direct horizontal effect, and no precedent for this in UK law. However, sections 3 and 6 of the HRA provide some scope for human rights protections to shape statutory and common law duties –. Under section 6, the courts (as public authorities) have a duty to apply the law, in all cases before them, in a way that complies with the Convention rights. Section 3 creates a duty to interpret legislation compatibly with Convention rights 'so far as is possible to do so', and this applies equally to cases involving private bodies. In the recent 'net zero' litigation, the claimants argued that section 3(1) of the HRA required the relevant sections of the CCA to be interpreted in a way that was more consistent with Convention rights, which entailed better climate protections.[62] There were a number of technical reasons why the approach advanced by the claimants could not be sustained.[63] However, in addition, the court expressed a reluctance to exceed Strasbourg principles, when it came to climate change,[64] as it thought the claimants' proposed arguments went beyond the incremental development permitted by Strasbourg case law.[65] This does, however, imply that if any of the cases pending before the ECtHR succeed – or not succeed but nevertheless result in a strong normative statement on climate change and human rights – then this kind of argument might have better prospects of success in future cases, whether against public or private parties.

The extent of this 'horizontal' application between private parties is limited because Convention rights usually do not create free-standing obligations. There needs to be an existing cause of action – in statute or the common law – to ground the action. In theory, private obligations could be shaped using human rights but this has been used to modest effect rather than in a 'transformative' way. One could consider whether the UK is a good place for litigation against corporates for climate-related human rights harms – as explained above, this seems unlikely given the legal culture of the UK and

[59] Bell and others (n 41), 81.
[60] ibid, 85.
[61] See, for instance, *R (oao Plan B and others) v The Prime Minister and others* (n 20).
[62] *R (on the application of Friends of the Earth Ltd and others) v Secretary of State for the Business, Energy and Industrial Strategy (the net zero litigation)* (n 22), [261].
[63] ibid [264] - [266].
[64] ibid, [267].
[65] ibid, [275].

the approach taken by the courts in corporate accountability cases.[66] However, political changes may move the needle.

Preventing and redressing human rights harms deriving from climate change arguably also falls under the duties articulated by the United Nations Guiding Principles on Business and Human Rights (UNGPs).[67] These are now being fairly widely adopted globally with typical protection including social risks, with some referring to environmental protection; nevertheless, enforcement is patchy.[68] It has been argued that mandatory due diligence laws – whether they expressly incorporate climate and environmental concerns or not [69] – can be used either as the basis of a climate change challenge against a corporation, or in some other ways as evidence therein.[70]

There is no legislation adopting any kind of *general* 'climate due diligence' in the UK. There is a very specific climate due diligence measure related to imported deforestation, which is created by the Environment Act. Schedule 17 seeks to prohibit UK companies from relying on products from illegal deforestation (in the home country) in their supply chains. Schedule 17 also requires that a due diligence system be established for each regulated commodity, and that the relevant companies report annually on their due diligence exercise. This only applies to deforestation risks rather than wider harms. Further regulations are needed to clarify the scope of the provisions as well as how they will be enforced.

That this due diligence obligation applies to the financial sector has been made clear in the very new Financial Services and Markets Act 2023 (FSMA) which requires the Treasury to carry out a review 'to assess the extent to which regulation of the UK financial system is adequate for the purpose of eliminating the financing of the use of prohibited forest risk commodities'.[71] The Act makes explicit reference to Schedule 17 of the Environment Act.[72] The Act also contains a very vague section, which pertains to a more

[66] e.g. Richard Meeran, 'Tort Litigation against Multinational Corporations for Violation of Human Rights: An Overview of the Position Outside the United States' (2011) 3 City University of Hong Kong Law Review 1. The courts have decided these cases based on tort duties and do not make reference to human rights, see *Vedanta v Lungowe SC* [2019] UKSC 20. Note however that group standards and policies can be pertinent for questions of parental responsibility, including those produced for matters 'subject to external stakeholder expectations and external disclosures' *Okpabi v Shell (SC)* [2021] UKSC 3, [47].

[67] Chiara Macchi, 'The Climate Change Dimension of Business and Human Rights: The Gradual Consolidation of a Concept of "Climate Due Diligence"' (2021) 6 Business and Human Rights Journal 93, 94.

[68] Mikko Rajavuori, Annalisa Savaresi and Harro van Asselt, 'Mandatory Due Diligence Laws and Climate Change Litigation: Bridging the Corporate Climate Accountability Gap?' [2023] Regulation & Governance 1, Section 3.

[69] Macchi (n 67).

[70] Rajavuori, Savaresi and van Asselt (n 68), Section 4.

[71] Section 79(1) FSMA 2023.

[72] Section 79(2) FSMA 2023.

general 'sustainability disclosure'.[73] The provision specifies that the Treasury 'may' prepare a SDR (sustainability disclosure requirement) policy statement, which 'is a statement of the policies of His Majesty's Government concerning disclosure requirements in connection with matters relating to sustainability.'[74] Again, this is fairly vague and quite narrow, but any policy statement eventually produced could be a useful spur for increased or improved disclosure.

The Organisation for Economic Cooperation and Development Guidelines for Multinational Enterprises (OECD Guidelines) include a chapter on human rights reproducing the UNGPs' concept of the human rights duty of diligence and a chapter on Environment (Chapter VI) which requires corporations to perform an environmental due diligence process which resembles the human rights duty of diligence.[75] The new (2023) OECD Guidelines explicitly identify climate change as a matter to be addressed by conducting risk-based due diligence, and acknowledge that companies have a responsibility to achieve a just transition. They encourage corporations to 'disclose accurate information on GHG emissions and work towards their reduction.'[76] These guidelines have been utilised in complaints to OECD's UK National Contact Point (NCP). The UK NCP is responsible for raising awareness of the OECD Guidelines and for implementing the complaints mechanism.[77] Making an application to the UK NCP is relatively cheap and uncomplicated, the performance of the UK NCP is 'reasonably good' and it operates in an extra-territorial way due to its function and purpose; as such it is a very cost-effective way to target corporations outside the court system.[78] This is not a UK-specific strategy,[79] but it has been used to good effect in the UK. Actions include a complaint about greenwashing against BP (discontinued 'with benefits'),[80]

[73] Section 21 adds a new section 416A to the Financial Services and Markets Act 2000 (FSMA 2000).
[74] Section 416A(1) and (2) FSMA 2000 as amended.
[75] The OECD MNE guidelines can be found here: http://mneguidelines.oecd.org/mneguidelines/.
[76] Macchi (n 67), 100.
[77] See https://www.gov.uk/government/groups/uk-national-contact-point-for-the-organisation-for-economic-co-operation-and-development-guidelines#oecd-guidelines-for-multinational-enterprises.
[78] This claim is based on the knowledge and expertise of the UK IEG.
[79] For instance, the Sabin Center database lists at least one other complaint in Australia, but we are aware of others, and certainly all the UK complaints are not listed: https://climatecasechart.com/non-us-case-category/disclosures/
[80] Complaint against BP in respect of violations of the OECD Guidelines see http://climatecasechart.com/non-us-case/complaint-against-bp-in-respect-of-violations-of-the-oecd-guidelines/. This campaign was withdrawn, but as discussed above, this does not mean it was ineffective or failed to achieve its purpose. This still set a precedent and opened new strategies in terms of regulatory action against greenwashing: https://www.clientearth.org/latest/latest-updates/news/bp-greenwashing-complaint-sets-precedent-for-action-on-misleading-ad-campaigns/.

and one against UK Export Finance for financing fossil fuel projects abroad (refused).[81] It is not possible to provide a detailed overview of all the complaints, but a full list may be found here.[82] Further complaints remain outstanding.

## C. Tort Law

Claims brought in tort law would be for climate change damage i.e. related to the defendant's role in causing some harm. These include 'holy grail' claims, i.e. actions for compensation for climate change loss and damage;[83] systemic tort claims seeking a remedy other than compensation, e.g. increased mitigation ambition; and more routine cases. Private law doctrine does not accommodate climate change well in the holy grail context,[84] and the odds of a case like this succeeding in the UK have never been assessed as particularly good.[85] Systemic or framework litigation is also not likely to succeed if brought in tort.[86]

Comparing this to asbestos and tobacco litigation does lend some insights into the likely approach to be taken by the courts if an action of this nature were attempted. Most asbestos and tobacco cases were brought in negligence and / or breach of statutory duty; the claimant would have to show that a breach of the defendant's duty caused or contributed to the harm they suffered as a result. There was no real phenomenon of tobacco litigation in the UK courts. One group claim brought in England in 1993 eventually failed on limitation, and anyway was thought to be 'speculative'.[87] Litigation brought in Scotland (in delict) failed when the court did not accept that the claimant had not been aware of the risks of smoking, which he accepted.[88] There appear to have been various contingent factors which made that litigation particularly difficult, for

[81] Specific Instance to the UK NCP under the OECD Guidelines for Multinational Enterprises filed by Global Witness against UK Export Finance see http://climatecasechart.com/non-us-case/specific-instance-to-the-uk-ncp-under-the-oecd-guidelines-for-multinational-enterprises-filed-by-global-witness-against-uk-export-finance/.

[82] https://www.gov.uk/government/collections/uk-national-contact-point-statements.

[83] Bouwer, 'Lessons from a Distorted Metaphor' (n 9).

[84] David A Grossman, 'Warming up to a Not-So-Radical Idea: Tort-Based Climate Change Litigation' (2003) 28 Columbia Journal of Environmental Law 1; See e.g. Giedre Kaminskaite-Salters, 'Climate Change Litigation in the UK: It's Feasibility and Prospects' in Michael Faure and Marjan Peeters (eds), *Climate Change Liability* (Edward Elgar Publishing Limited 2011).

[85] Kim Bouwer, 'Climate Change and the Individual in the United Kingdom' in Makane Mbengue and Francesco Sindico (eds), *Climate Change Litigation - A Comparative Approach* (Springer 2021), Section 4.

[86] ibid, Section 3.1.

[87] Andrei Sirabionian, 'Why Tobacco Litigation Has Not Been Successful in the United Kingdom: A Comparative Analysis of Tobacco Litigation in the United States and the United Kingdom' (2005) 25 Northwestern Journal of International Law & Business 485, 498 - 9.

[88] *McTear v Imperial Tobacco* 2005 ScotCS Outer House 69. See discussion in L Friedman and R Daynard, 'Scottish Court Dismisses a Historic Smoker's Suit' (2007) 16 Tobacco Control e4.

instance, the claimant's failure to obtain Legal Aid,[89] but certainly no more damages litigation was attempted. Analysis suggests that this is not solely down to weakness on the merits; factors including funding availability and English (and Scottish) legal culture appear to have played more of a role.[90] Applications to the Advertising Standards Authority to prohibit claims made in relation to smoking or cigarettes have been more successful.[91]

Asbestos litigation has succeeded in the UK, but, with the exception of causation, there was nothing particularly contentious about the claimants' actions (as they had suffered actionable damage, with established duties of care owed to the claimants by the defendants, including under employer's liability). The claimant still has to prove all elements of the tort on a balance of probabilities.[92] The legal innovation in relation to causation, which was radical, is discussed further below.

Does the innovation in asbestos litigation pave the way for innovative climate change decisions? As highlighted above, the English courts have not shown any willingness to find creative solutions in relation to climate change issues. It is also in a different era now in terms of the legal and political culture of the UK, than the mid-noughties. What is unknown is whether political events and legal pressure in the UK or other jurisdictions will change this. For instance, if the claimants succeed in establishing that a 'climate system damage tort' exists in New Zealand, could that influence the English courts?[93] As a comparator, recent Supreme Court decisions (while positive in many respects in terms of their capacity to move beyond the endless struggles over jurisdiction that previously plagued many of these cases where there was a transnational element),[94]

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[89] ibid; Sirabionian (n 87).

[90] Sirabionian (n 87).

[91] ASA Ruling on British American Tobacco, December 2019 – see https://www.tobaccocontrollaws.org/litigation/major-litigation-decisions.

[92] Jenny Steele, *Tort Law: Text, Cases, and Materials* (Fifth Edition, Oxford University Press 2022), Part III.

[93] Maria Hook and others, 'Tort to the Environment: A Stretch Too Far or a Simple Step Forward?' (2021) 33 Journal of Environmental Law 195. At the time of writing, this action has been reinstated and given permission to proceed to trial: *Smith v Fonterra and others* [2024] NZSC 5.

[94] See *Vedanta v Lungowe SC* (n 66); *Okpabi v Shell (SC)* (n 66). It has been argued that these decisions might smooth the way for transnational climate cases – see Samvel Varvastian and Felicity Kalunga, 'Transnational Corporate Liability for Environmental Damage and Climate Change: Reassessing Access to Justice after Vedanta v. Lungowe' (2020) 9 Transnational Environmental Law 323. This certainly may be the case (temporarily) in relation to the question of whether the parent is capable of owing a duty of care, which is relevant for *jurisdiction,* but this might not be the outcome in terms of the approach taken to liability of corporate groups, or in terms of the impact this might have on corporate behaviour. It could be argued that the approach in *Lungowe*, if anything, would simply discourage parent companies from producing group-wide policies or exercising any control over their subsidiaries – although see Lucas Roorda, 'Broken English: A Critique of the Dutch Court of Appeal Decision in *Four Nigerian Farmers and Milieudefensie v Shell*' (2021) 12 Transnational Legal Theory 144. He argues that this would be very hard to do for large multinationals, particularly given increasing due diligence and disclosure

still reflects a cautious approach to parent company liability.[95] This is far from the wide-ranging innovation needed to establish climate duties, which seems unlikely without a culture change.

However, there could be tort litigation on a smaller scale where the impugned conduct does not concern the defendants' contribution to climate change in general, but a failing to take adequate steps to protect the claimant's interests in a context where some duty exists to do so.[96] In many such cases the claimant might be a corporate body or business, and the defendant a local authority. See the example in private nuisance, below.

Deception or misinformation claims might arise due to fossil fuel companies' knowledge of dangers of climate change, and suggestions or evidence that they 'actively concealed and downplayed those dangers and coordinated to misinform the public and prevent policymakers from taking action to reduce fossil fuel production and use'.[97] The impacts or effects of this are unknown.[98] Nevertheless, there might be scope for claims that deception and misinformation about climate change brought about the problem in and of itself, because it prevented adequate measures to manage fossil fuel production. Similar arguments are already being introduced in litigation elsewhere, including through their incorporation in climate liability cases – these sometimes raise arguments about the degree to which misinformation campaigns have contributed to climate harms.[99]

The provision of false information in more specific circumstances could also lead to 'greenwashing' actions, e.g. arising from misleading marketing statements, or other claims based on deception or misleading information.[100] I deal with these below in relation to tort, contract and consumer protection, as well as regulatory actions. Deceit and negligent misrepresentation (although torts) are discussed with fraudulent

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obligations that will apply to whole corporate groups. Also see Patrick Kenny, 'International Corporate Liability: The Past, Present, and Future of "Class Action Tourism" in England' (2023) 8 LSE Law Review 120.

[95] Russell Hopkins, 'England and Wales: The Common Law's Answer to International Human Rights Violations' in Ekaterina Aristova and Ugljesa Grusic (eds), *Civil Remedies and Human Rights in Flux* (Hart 2022), 148 - 150. For a discussion of how the recent Supreme Court decisions can be understood as part of the return to orthodoxy in approaches to establishing the duty of care, see Kim Bouwer, 'Substantial Justice?: Transnational Torts as Climate Litigation' (2021) 15 Carbon & Climate Law Review 188.

[96] E.g. *Holbeck Hall v Scarborough* [2000] 2 ALL ER 705 (Court of Appeal).

[97] Jessica Wentz and others, 'Research Priorities for Climate Litigation' (2023) 11 Earth's Future e2022EF002928, Section 2.2.

[98] ibid, Section 2.3.

[99] Joana Setzer and Catherine Higham, 'Global Trends in Climate Change Litigation:2022 Snapshot' (Grantham Research Institute on Climate Change and the Environment and Centre for Climate Change Economics and Policy, London School of Economics and Political Science 2022), 19.

[100] I am grateful to Ben Hall for our many conversations and exchanges about corporate liability for 'greenwashing'.

misrepresentation, which is a contractual remedy, in order to consider misrepresentation actions together.

### i. Public and private nuisance

These would be obvious choices for (holy grail) actions arising from climate change harms. Nuisance seeks to protect an individual's ability to use and enjoy their land freely without unwanted and unwarranted interference from others. Public nuisance can be prosecuted as a crime,[101] or claimants can sue in tort.[102] While the essence of private nuisance is about the enjoyment of property rights, public nuisance has a broader focus and protects a right 'not to be adversely affected by an unlawful act or omission whose effect is to endanger the life, safety, health etc of the public'.[103]

Section 79 of the Environmental Protection Act 1990 (EPA) provides that 'statutory nuisances' can include smoke, or fumes, 'dust, steam, smell or other effluvia', and 'any accumulation or deposit' emitted from a premises (as defined), so as to be prejudicial to health or a nuisance.[104] Section 79 also specifies that it is the 'duty of every local authority to cause its area to be inspected from time to time to detect any statutory nuisances which ought to be dealt with [in accordance with provisions about prosecutions] and, where a complaint of a statutory nuisance is made to it by a person living within its area, to take such steps as are reasonably practicable to investigate the complaint.'[105] Section 80 provides for 'summary proceedings' for statutory nuisances – a Local Authority which is 'satisfied that a statutory nuisance exists' can serve an 'abatement notice' requiring abatement or the execution of works that may be necessary for any of these purposes.[106] These provisions impose a duty on the relevant local authority. If it is satisfied on the balance of probabilities that a statutory nuisance exists then an abatement notice must be issued.[107] In addition to the provisions for the service of an abatement notice by a local authority, section 82 of the EPA provides for a person 'aggrieved by the existence of a statutory nuisance' to make a complaint to the magistrates' court. Where there has been a failure to comply with an abatement notice then a prosecution can ensue – this would normally be by the local authority but a private prosecution can be brought as well.[108]

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[101] Environmental Protection Act 1990 (EPA), part III.
[102] *Corby Group Litigation Claimants v Corby BC* [2008] EWCA Civ 463.
[103] *ibid*, [29].
[104] S79(1)(b) –(e) EPA.
[105] Section 79 EPA.
[106] Section 80(1) EPA.
[107] This is subject to some specific conditions imposed in respect of particular kinds of nuisance; however in general the above applies. Section 80(3) gives a person served with an abatement notice a right of appeal, the grounds for which are listed in Regulation 2(2) of the Statutory Nuisance (Appeals) Regulations 1995.
[108] *Sovereign Rubber Ltd v Stockport MBC* [2000] Env LR 194.

Public nuisance would probably not cover a claim for harm caused by historic GHG emissions,[109] but with the right local authority, and the right target (high emitting polluters) this could be an interesting and (as far as I'm aware) as yet unprecedented avenue for litigation.

The essence of private nuisance is the protection against indirect interference with the claimant's rights in land through 'unreasonable use' of land by a neighbour, resulting either in property damage or a reduction of the amenity value of the property.[110] This includes a protection against physical harm, but also, the protection of the use and enjoyment of land against interferences like noise, smells or pollution coming from neighbours.[111] Previous surveys of English law dismissed the idea that a private nuisance claim in relation to harm caused by greenhouse gas emissions would succeed.[112] This is because private nuisance requires a relationship between the unreasonable use and the interference, such that the nuisance can be traced from one to the other.[113] This is similarly the case in relation to nuisance claims brought in the UK courts in relation to climate harms suffered abroad but caused in part by UK registered companies.[114]

A significant issue that arises in nuisance is the causal connection between the defendant's activities and the claimant's harm: specifically, whether and to what extent a defendant's allegedly unlawful acts or omissions contributed to climate change, and whether that contribution can be fairly traced to the claimant's harm. So-called 'detection and attribution' science is advanced enough to establish on a balance of probabilities a 'sufficient causal nexus' exists between the defendant's conduct and the harms complained of.[115] It is not clear, however, that even if this is shown on the evidence that the legal test will be met. See further below.

However, as stated above, tort actions could also be brought in cases of failure to mitigate ongoing climate harms. An example is *Holbeck Hall,* a decided case brought in private nuisance because coastal erosion had resulted in a landslip, and the local

[109] Kaminskaite-Salters (n 84).
[110] Steele (n 92), Chapter 11.
[111] *St Helen's Smelting Co v Tipping* (1865) 11 HLC 642
[112] Kaminskaite-Salters (n 84); Richard Lord QC and others (eds), *Climate Change Liability: Transnational Law and Practice* (Cambridge University Press 2011).
[113] Kaminskaite-Salters (n 84).
[114] Vedantha Kumar and Will Frank, 'Holding Private Emitters to Account for the Effects of Climate Change: Could a Case Like Lliuya Succeed under English Nuisance Laws' (2018) 2 Carbon & Climate Law Review 110.
[115] Wentz and others (n 97), Section 2.1. They argue that this could be framed as a percentage reduction or in terms of a specific remedial order – but the claimant first needs to establish liability and the basis for that is unclear.

authority had done nothing to prevent it.[116] In the Court of Appeal, Lord Justice Stuart-Smith said that the duty arises when the hazard is known and the danger to the claimant's land is reasonably foreseeable, that is to say, it is a danger, which 'a reasonable man with knowledge of the defect should have foreseen as likely to eventuate in the reasonably near future.' It is the existence of the defect coupled with the danger that constitutes the nuisance; it is knowledge or presumed knowledge of the nuisance that involves liability for continuing it when it could reasonably be abated.[117] There have been other, settled cases for coastal erosion in the past, and others are currently being brought.

### ii. Negligent failure to mitigate or adapt to climate change

Corporate actors will have some kind of legal duty to take mitigation actions with respect to climate change, but it is unclear what the basis of any enforceable obligations might be.[118] In *Milieudefensie v Shell*, the District Court of the Hague found that oil major Shell owed a duty of care to the claimants to reduce emissions from its operations by 45% by 2030 relative to 2019 emission levels.[119] In doing so the court relied on the open standard of negligence in Dutch civil law – a social standard of due care – read with climate duties and human rights law. This has yielded a number of successor cases, with mixed results, all in other civil law countries.[120]

While not specific to corporate litigation, writing about the *Urgenda* decision,[121] commentators have argued that establishing a duty of care in relation to climate change would be much more challenging in English tort law.[122] In order to establish negligence under English law the claimant would have to establish a breach of duty and foreseeable damage resulting form that breach. The very specific framings of duty and harm present significant jurisprudential hurdles.[123] The likely defendants do not owe any kind of duty to the claimants, and causal tests which have been developed are constrained in application.[124]

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[116] See the discussion about continuing nuisance below – note that this case falls within the 'continuing nuisance' or *Sedleigh-Denfield* line of caselaw, where the defendant 'continues' the 'natural' nuisance by failing to take action, it is not a *Jalla* case.
[117] *Holbeck Hall v Scarborough* (n 96).
[118] Wentz and others (n 97), Section 2.3.2.
[119] *Milieudefensive v Shell* ECLI:NL:RBDHA:2021:5339.
[120] Setzer and Higham (n 99), 33.
[121] *Urgenda Foundation v the Kingdom of the Netherlands (I)* ECLI:NL:RBDHA:2015:7196.
[122] Josephine van Zeben, 'Establishing a Governmental Duty of Care for Climate Change Mitigation: Will Urgenda Turn the Tide?' (2015) 4 Transnational Environmental Law 339, 349 – 352.
[123] ibid, also see; Silke Goldberg and Richard Lord QC, 'England' in Richard Lord QC and others (eds), *Climate Change Liability: Transnational Law and Practice* (Cambridge University Press 2011), 457 – 475.
[124] van Zeben (n 122). See my discussion about causation below.

### iii. Negligent or strict liability for failure to warn

In general, there is no duty to warn in English law and liability in negligence rarely arises in relation to omissions.

### iv. Trespass

In English law, trespass to land involves the unjustifiable interference with land in immediate and exclusive possession of another.[125] It is not necessary to prove that harm was suffered to bring a claim, and is instead actionable per se.[126] There have been actions in trespass brought in the context of climate change, but most of these are prosecutions of climate change activists, and as such fall beyond the scope of the project.

Interference with land rights is covered by negligence and nuisance.

### v. Impairment of public trust resources

A series of 'civil rights' cases based on governmental failure to protect the 'atmospheric trust', and thereby causing climate change have been brought before a number of US and global courts.[127] The public trust cases are rooted in academic work that establishes both the concept of an 'atmospheric trust',[128] as well as the scientific basis for the claim and the structured relief sought.[129] The prospects of atmospheric trust litigation in the UK have been considered, and there are mixed views as to the prospects.[130] The prospects of freestanding civil rights cases of this nature succeeding in the English Courts are not particularly good.[131]

However, there are two factors which may change this. The first merits decision on an atmospheric trust case was handed down in the United States fairly recently.[132] In other contexts, climate change wins can percolate to other states; however, we see no signs of this happening with the English courts yet. In addition, the Good Law Project, an NGO, has initiated proceedings against the government in respect of their storms overflow plan, the policy that has resulted in the contamination of British seas and rivers.

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[125] Steele (n 92) Chapter 18.
[126] ibid.
[127] See https://www.ourchildrenstrust.org/.
[128] Mary Christina Wood, *Nature's Trust: Environmental Law for a New Ecological Age* (Cambridge University Press 2014).
[129] James Hansen and others, 'Assessing "Dangerous Climate Change": Required Reduction of Carbon Emissions to Protect Young People, Future Generations and Nature' (2013) 8 PLoS ONE e81648.
[130] Bradley Freedman and Emily Shirley, 'England and the Public Trust Doctrine' (2014) 8 Journal of Planning & Environment Law 839; but see Goldberg and Lord QC (n 123), 478.
[131] Bouwer, 'Climate Change and the Individual in the United Kingdom' (n 85), Section 2.3. This does not mean impossible, see for instance *Commissioner of Police of the Metropolis v DSD and another* [2018] UKSC 11.
[132] *Held v Montana* CDV-2000-307.

The litigation argues that the state has a fiduciary duty to safeguard vital natural resources and hold them in trust for the benefit of current and future generations. The Good Law Project notes that 'winning this case could set a landmark precedent which would enable campaigners to use the [doctrine] as a foundation for legal challenges to compel the Government to protect our shared natural environment.' [133] This is probably correct, and if this or a subsequent case succeeds, it could make public trust litigation a viable route for other environmental litigation, including relating to 'atmospheric trusts'. [134]

### vi. Fraudulent misrepresentation[135]

An action in fraudulent misrepresentation arises when a prospective contracting party misrepresents a fact to the other party intending that the other party should rely on it in entering into the contract, which the other party does and loss is caused by the misrepresentation. Consumers might come across this as product mis-selling but fraudulent misrepresentation is a common claim in contract; the claimants might also claim in the tort of deceit. Fraudulent misrepresentation requires the false representation to have been made knowingly, without belief in its truth, or recklessly as to its truth. A successful claimant can have a contract rescinded and seek damages. The correct approach to damages has also been recently confirmed by the Court of Appeal as those flowing directly from the transaction, regardless of any failure to mitigate on the part of the claimant.[136]

The claimant does have to show that he really relied on the representations made in entering the contract. What is unclear however is how conscious this reliance needs to be. Recent banking litigation suggested that a business cannot rely on inferred reliance; the defendant successfully sought summary dismissal on the basis that, to establish reliance on the implied representations (even assuming they were made), those acting on behalf of the claimants at the time must have given some actual thought to them.[137]

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[133] See https://goodlawproject.org/update/the-public-trust-doctrine-an-ancient-legal-principle-which-could-protect-our-environment-now-and-for-future-generations/#:~:text=Good%20Law%20Project%20is%20a,can%20make%20amazing%20things%20happen.

[134] For updates see https://goodlawproject.org/case/clean-waters/

[135] In this section I deal with the overlapping tort, contract and statutory causes of action that might arise in circumstances where a false statement of the defendant induces or somehow persuades the claimant into contract or other behaviours. As noted above, the questions of the defendant's state of mind, as well as the extent to which their influence must persuade the claimant, differs between each.

[136] See *Glossop Cartons and Print Ltd v Contact (Print & Packaging) Ltd* [2021] EWCA Civ 639 – the loss in case was the difference between the market value of the asset bought at transaction date and the price paid.

[137] *Leeds City Council and others v Barclays Bank and others* [2021] EWHC 363 (Comm). This was appealed but then settled.

The Divisional Court in the *Crossley* litigation (discussed below) pushed back against this approach, suggesting that less was needed.[138]

There is also statutory relief that provides for damages for the victim of reliance on a misstatement that induces a contract with the claimant.[139] The Misrepresentation Act creates 'near strict' liability,[140] and the claimant can seek a rescission of contract,[141] and damages.[142]

There is also a tort of deceit, which arises from a false statement of fact made by one person, knowingly or recklessly, with the intent that it shall be acted on by another, who suffers damages as a result.[143] The claimant must be able to prove dishonesty; a careless mistake will not suffice.[144] The defendant must intend for the claimant to act on their statements.[145] Where there is a duty of disclosure, under the common law, silence or partial truth can suffice.[146] It is likely that the same approach would be taken where the duty is created by a statute, [147] so probably including the s90 duty discussed below. The claimant also has to show that they relied on the false statement and that their damages flowed from it; however the test for this is not as stringent as in negligence. Regarding reliance, the defendant's conduct simply has to be among the factors causing the claimant to act as they did.[148]

The FSMA creates a special duty to compensate victims of misleading corporate disclosures. Section 90 provides that 'a person responsible for listing particulars is liable to pay compensation' to persons who have acquired securities 'to which the particulars

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[138] In *Crossley* (discussed below), the statements were much more simple than in *Leeds*, and the awareness requirement was interpreted more loosely. Notably, both were preliminary proceedings.
[139] Section 2(1) Misrepresentation Act 1967.
[140] Section 2(1) reads: (1)Where a person has entered into a contract after a misrepresentation has been made to him by another party thereto and as a result thereof he has suffered loss, then, if the person making the misrepresentation would be liable to damages in respect thereof had the misrepresentation been made fraudulently, that person shall be so liable notwithstanding that the misrepresentation was not made fraudulently, unless he proves that he had reasonable ground to believe and did believe up to the time the contract was made the facts represented were true.
[141] Section 2(2) Misrepresentation Act 1967.
[142] Section 2(3) Misrepresentation Act 1967.
[143] *Derry v Peek* (1889)14 App. Cas. 337.
[144] See Simon Deakin and Basil Markesinis, *Markesinis and Deakin's Tort Law* (Oxford University Press 2019), 454, ftn 10.
[145] *Peek* v. *Gurney* (1873) LR 6 HL 377.
[146] Deakin and Markesinis (n 144), 454. Notably, reference is specifically made in this regard to special duties of disclosure, referencing 'legislation which places companies under disclosure in relation to company prospectuses', with reference to the FSMA 2000.
[147] See ibid, 454, ftn 10.
[148] This is long established: *Edgington v Fitzmaurice* (1885) 24 Ch D 459, where the claimant was partly influenced by his own mistake.

apply',[149] and who has suffered loss as a result of an 'untrue or misleading statement' (which includes omissions, including those of information covered by general duties of disclosure).[150] This clearly refers to disclosures on the prospectus, and does not require dishonesty on the part of directors; directors can only be exempt if they can demonstrate a 'reasonable belief' in the truth of the statement, or (if relevant) that it was correct to omit it.[151] There also does not appear to be a requirement for claimants to show they relied on the statement, but they must not have *known* that the information was false or misleading.[152] Section 90A also provides for liability of 'issuers of securities' to persons who have suffered loss as a result of a misleading statement, dishonest omission in or delay in publishing information relating to the securities.[153] The Treasury has the power to make further regulations in relation to liability for disclosures about securities.[154] Actions may have been brought under section 90 of the FSMA already,[155] although no reported decision is available yet.

An action for the tort of negligent misrepresentation is also available, in addition to and whether or not there is any breach of contract claim, as the two can run concurrently.[156] In tort, a duty of care would only arise where the defendant assumed responsibility to the claimant in some respect, and (in most cases) the claimant could demonstrate reliance on the representations made.[157] If all elements are met, it would not matter if the defendant had not deliberately set out to deceive the claimant or a person in their position, but also, if the defendant's behaviour was deliberate this would not preclude a finding of negligence; what matters is that the defendant's behaviour falls short of the standard of care. Here, the claimant may seek damages for pure economic loss.[158]

In sum, there are a variety of (potentially overlapping) causes of action that might arise in circumstances where the claimant relied on the false statements of the defendant

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[149] Section 90(1)(a) FSMA 2000.
[150] Section 90(1)(b) FSMA 2000 read with sections 80 and 81.
[151] Schedule 10 Paragraph 1(2) FSMA 2000. There follows various provisions about the circumstances in which a statement must be corrected if it is found to be untrue (or incorrectly omitted) – see Paragraphs 1(3) and 3.
[152] Schedule 10 Paragraph 6 FSMA 2023.
[153] Section 90A FSMA 2000.
[154] Section 90B FSMA 2000.
[155] Simon Bishop and others, 'Climate Conscious Investing and the Butler-Sloss Decision' (*Essex Court Chambers*) <https://essexcourt.com/publication/climate-conscious-investing-and-the-butler-sloss-decision-week-2-series-3/> accessed 17 February 2024.
[156] Following *Henderson v Merrett Syndicates Limited* (1994) [1995] 2 A.C. 145.
[157] *Hedley Byrne & Co Ltd v Heller & Partners Ltd* (1963) [1963] UKHL 4. Donal Nolan and others, *Lunney & Oliphant's Tort Law: Text and Materials* (Seventh Edition, Oxford University Press 2023), Chapter 8.
[158] Nolan and others (n 157), Chapter 8. I discuss the possibilities for actions in negligent misrepresentation in relation to claims made about building energy performance, here: Kim Bouwer, 'When Gist Is Mist: Mismatches in Small Scale Climate Change Litigation' (2015) 27 Environmental Law and Management 11.

either about the environmental / climate benefits of a product, or (perhaps) about the risks and consequences of continuing to rely on the defendant's services or product.

Litigation resulted from the use of 'defeat devices' by Volkswagen that were deliberately designed to ensure that new vehicles would emit a level of pollutants that was permitted in terms of the relevant EU regulations under testing conditions, which was not the default or driving mode.[159] Giving rise to widespread legal mobilisation,[160] the English and Welsh case of *Crossley* was brought in breach of statutory duty (the relevant EU regulations), fraudulent misrepresentation (called 'the deceit claim'), breach of contract and under various consumer legislation.[161] *Crossley* settled not long after a second strike out application failed in December 2021, without admission of liability, but with an apology.[162]

### vii. Civil conspiracy

Conspiracy has been used, although as yet without success, in climate cases. Claims have been made that defendant emitters conspired to mislead the public with respect to the science of global warming, in an effort to create deviant science and suppress data with potential to harm their financial interests.[163] In some of the earlier 'holy grail' tort cases in the US, in addition to their other claims, the claimants alleged that the defendants had engaged in the tort of civil conspiracy, misleading the public about the issue and actively conspiring to delay public awareness.[164] These arguments were never heard.

Conspiracy in English law falls in the domain of the economic torts, which have the purpose of protecting a person in relation to his business. To ensure competition, he will only be protected from certain kinds of interference, principally those inflicted intentionally or deliberately. To establish wrongfulness in the economic torts, intention to harm is not enough; the defendant must have interfered with a pre-existing legal right of the claimant, or used independently unlawful means. Conspiracy is the sole

[159] These cases are 'about' nitrogen oxide, but they can clearly be considered to be climate cases: see Bouwer, 'The Unsexy Future of Climate Change Litigation' (n 1).
[160] This is discussed in Katharina van Elten & Britta Rehder, 'Dieselgate and Eurolegalism. How a scandal fosters the Americanization of European law' (2022) 29 Journal of European Public Policy, 281.
[161] *Crossley v Volkswagen* [2021] EWHC 3444, [5]. This judgment is from a strikeout application brought by the defendants. There was also a trial of preliminary issues the previous year – see *Crossley v Volkswagen* [2020] EWHC 783(QB). This action was brought under a GLO – see discussion below.
[162] A settlement of about £193m (excluding costs, for which a separate payment was made) were paid to 91,000 claimants. See https://www.leighday.co.uk/news/news/2022-news/settlement-of-the-english-and-welsh-vw-nox-emissions-group-litigation/.
[163] Rosemary Lyster, 'Climate Science at the Interface with Law- and Policy-Making', *Climate Justice and Disaster Law* (Cambridge University Press 2016), 10; Wentz and others (n 97), Section 2.2.
[164] *Native Villiage of Kivalina v Exxonmobil Corp* 696 F.3d 849 (9th Cir. 2012); *Comer v Murphy Oil USA, Inc* 839 F. Supp. 2d 849, 855–62 (S.D. Miss. 2012).

exception to the latter, where *lawful* means can ground a claim in conspiracy as long as a number of defendants conspired to harm the claimant.[165] The requisite intention, however, is 'malice', which is not consistently defined but generally seems to involve intention to harm the claimant without justification.[166] The focus is very much to injure the claimant in their trade or business, and it does not relate to broader societal conspiracies it seems.[167]

### viii. Product liability

Similarly, some of the early US 'holy grail' cases included product liability as a cause of action, in essence arguing that oil is a defective product which caused greenhouse gas emissions and contributed to man-made climate change. These actions were not heard on the merits, but in litigation arising from Hurricane Katrina the court noted that those products are used by all of us,[168] ignoring the obvious point of how little choice most consumers have over this.

In the UK, for now, consumer protection for defective products is derived from EU legislation and provides a fairly narrow remedy requiring damage. If a product or any of its component parts are defective, its manufacturer may be liable for damage under the Consumer Protection Act 1987 (CPA), or the common law of negligence (see above). Actions under the CPA or for negligence can be brought for death, personal injury and damage caused to private property as the result of a product defect.[169] However, no claim may be brought for damage to business property or for 'pure' economic losses. The Act imposes strict liability on manufacturers of defective products for harm caused by those products.[170] A product is defective for the purposes of the CPA if its safety – including not only the risk of personal injury but also the risk of damage to property – is not such as persons generally are 'entitled to expect'.[171] The court will take into account the 'state of the art' at the time of supply.[172]

The producer has a number of defences available if a claim is made;[173] these are specific to this tort and so will be considered here. This includes a 'development risks' defence, which creates a defence if the 'scientific and technical knowledge' at the time

[165] Deakin and Markesinis (n 144), 458.
[166] ibid, 459-60.
[167] ibid, 480.
[168] *Comer v Murphy Oil USA, Inc* (n 164).
[169] Section 5 CPA.
[170] Section 2 CPA.
[171] Section 3 (1) CPA.
[172] *A v National Blood Authority* [2001] 3 All ER 289.
[173] Section 4 CPA.

the product was manufactured was not such that the producer of a similar product might have been expected to discover the defect.[174]

[174] Section 4(1)(e) states: scientific and technical knowledge at the relevant time was not such that a producer of products of the same description as the product in question might be expected to have discovered the defect if it had existed in his products while they were under his control...'.

### ix. Insurance liability

There are a number of ways in which insurance liability might arise. Insurance companies which have had to pay out to insured persons or companies may seek to recover some of the costs of these payouts from those responsible. This is called a subrogated claim.[175] It is possible that if insurers do find themselves paying out climate damages, there might be subrogation claims brought either against defendants perceived to have 'caused' climate change, or against other parties e.g. local authorities, who have other duties to ameliorate harm. Please see the discussion above.

But also, if any of the actions outlined herein do succeed, it is likely that the damages and costs will be met, at least in part, by before-the-event insurance taken out by the defendants. This could include professional indemnity insurance held by directors or other officers. This is an area where it is possible to learn lessons from asbestos litigation. As with asbestos claims, insurers in climate cases also might seek to test the scope of their cover for certain losses, either seeking to reduce their contribution relying on the long story of climate change (e.g. that their liability must be limited because greenhouse gases emanate from many disparate sources, and some types of gases emitted decades, even centuries, ago have a cumulative effect that continues to affect the climate today),[176] or potentially seeking to repudiate the policy based on any connection of the insured in climate causing activities. Insurers might also seek to raise arguments that climate change constituted force majeure or damage caused by extreme weather events.[177] This of course depends on an action for climate harm succeeding.

### x. Unjust enrichment

This is typically brought as a damages action targeting the 'unjust enrichment' of a defendant at the expense of a claimant. Unjust enrichment is a 'unifying legal concept' which makes provision for the defendant to make 'fair and just restitution' for a benefit 'derived at the expense of the [claimant]'.[178] The focus is on whether the defendant has been enriched at the claimant's expense and not on whether the defendant has caused the claimant loss. To succeed in an action for unjust enrichment the claimant must demonstrate that the defendant was enriched at their expense, and that that enrichment was unjust.[179] Unjust could mean various things, for instance, if a claimant transfers a

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[175] See generally Rob Merkin and Jenny Steele, 'Introduction: Insurance in the Law of Obligations', *Insurance and the Law of Obligations* (OUP Oxford 2013).

[176] In asbestos litigation insurers have sought to avoid responsibility relying on arguments about exposure and causation - see *Durham v BAI (Run Off) Ltd* [2012] UKSC 14.

[177] Many standard contracts now have clauses about extreme weather and force majeure written in.

[178] Charles Mitchell, 'Unjust Enrichment' in Andrew Burrows (ed), *Principles of the English Law of Obligations* (Oxford University Press 2015), 3.05.

[179] *Menelaou v Bank of Cyprus* [2015] UKSC 66; ibid, 3.06 - 3.10.

benefit under duress or if their trust is exploited by the claimant. In general, however, unjust enrichment cannot be used to fix a bad deal or bargain, or if the outcome is provided for by agreement.[180]

In general, this is not a particularly well-settled area of law, and has not even been recognised as part of English law for very long.[181] This means unjust enrichment is, to some extent, still evolving as a legal remedy, and the categories are not closed.[182] Similarly to public / atmospheric trust cases, however, group actions are being brought now in the English courts relating to unjust enrichment from activities that involve human rights violations, so it may be that this becomes a more mainstream remedy in public interest litigation in due course.[183]

In other contexts it has been suggested that an action in unjust enrichment against a major emitter could side-step the doctrinal difficulties of a holy grail claim (in particular, the need to prove that the defendant's conduct had caused the harm). The argument is that 'unjust enrichment is intrinsically appropriate for climate change litigation because of its inherent ability to avoid the requirement that the defendant cause the plaintiff's injury, and its ability to instead focus on the benefits retained by the defendant'.[184]

## D. Company and Financial Laws

This section is roughly divided into substantive and procedural actions. Setzer and Higham distinguish these on the basis that procedural aspects relate mainly to the disclosure of climate-related information, whereas a substantive approach focuses more on questions about what prudent financial management means in the climate change context.[185] The latter could give rise to litigation focusing on the duties of directors, trustees or other officers to manage climate risk in a company or investment portfolio in a better way. Setzer and Higham identify a move towards cases focusing on substantive issues;[186] however, this does not mean that regulation around corporate climate disclosures – and the potential for litigation in this area – have had their day.

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[180] Held in *Barton v Morris* [2023] UKSC 3.
[181] Arguably first recognised in *Lipkin Gorman v Karpnale Ltd* [1988] UKHL 12.
[182] Mitchell (n 178).
[183] None of these cases as been decided as yet, but see Hopkins (n 95), 151 - 2.
[184] Aura Weinbaum, 'Unjust Enrichment: An Alternative to Tort Law and Human Rights in the Climate Change Context?' (2011) 20 Pacific Rim Law & Policy Journal 429, 451. This has been attempted but not heard – see e.g. *Comer v Murphy (Comer I)* Comer, No. 05-cv-436, D.E. 79 (S.D. Miss. Apr. 19, 2006).
[185] Setzer and Higham (n 99), 4.
[186] ibid, 4.

As discussed below, attempts to progress litigation based on substantive duties has not been successful, so continuing to focus on procedural obligations makes sense.

### Procedural

The purpose of corporate information disclosure in general is to indirectly influence behaviour by exerting 'pressure on firms to self-regulate and address poor environmental performance.' [187] The purpose of the climate change disclosure requirements discussed below is to ensure that companies are properly rising to the challenge of climate change both in terms of their emissions reduction or transition plans, but also in terms of material risks.[188] There is a fair amount of empirical evidence to suggest these rules are starting to marshal and organise capital providers/investors to coalesce around companies that are more cognisant of climate risk, as well as demanding portfolio companies diversify away from physical and transition risks.[189]

Companies registered in the UK are required to report on their climate change actions and assessment of risk. Previously the approach to this in the UK was 'piecemeal, confusing and incoherent, ultimately leaving compliance as a voluntary endeavour thereby weakening the effectiveness of [climate related disclosures] and diluting the ability of investors to promote the low-carbon transition.'[190] Several established climate change disclosure responsibilities can be derived from an 'implicit requirement to list the principal risks and uncertainties they face, which for many companies will now include climate'.[191] These are derived from the Companies Act 2006, and 'since April 2019 [there has been] an explicit mandatory requirement for quoted entities to report energy use and carbon emissions'.[192] Companies are required to report that they have considered how their activities will affect the environment.[193] The enforceability of the

[187] Karen Morrow, 'Informational Requirements and Environmental Protection' in Emma Lees and Jorge E Vinuales (eds) Comparative Environmental Law (OUP 2019) 974–76, at 991.
[188] Daniel Attenborough, 'Corporate Disclosures on Climate Change: An Empirical Analysis of FTSE All-Share British Fossil Fuel Producers' (2022) 23 European Business Organization Law Review 313.
[189] This claim is drawn from the experience and expertise of the UK IEG.
[190] Emily Webster, 'Information Disclosure and the Transition to a Low-Carbon Economy: Climate-Related Risk in the UK and France' (2020) 32 Journal of Environmental Law 279. See however Megan Bowman, *Banking on Climate Change: How Finance Actors and Transnational Regulatory Regimes Are Responding* (Kluwer Law International 2016), who at 181-198 explains that a direct regulatory approach is probably unsuited to a dynamic area like climate finance, and recommends a responsive and flexible approach. She writes only in the context of the financial sector however this certainly holds lessons in terms of corporate climate regulation more generally.
[191] Attenborough (n 188), 337.
[192] ibid. The requirement is in terms of s 416(4) of the Companies Act 2006.
[193] Under s172(1)(d) Companies Act 2006, as part of a general duty to promote the success of the company.

disclosure requirements has been entirely self-regulated, sometimes lacking meaningful content only affecting the company's share price or the impact on reputation.[194]

Significant efforts have been made to improve the clarity and consistency of regulation in this area. In 2022, new regulations were introduced requiring companies and LLPs to report in accordance with the Task Force on Climate-related Financial Disclosures (TCFD) framework.[195] However, this is not an end to uncertainty about the scope and implementation of disclosure requirements. Notably, some of the more direct, legislative requirements apply only to quoted companies, and it is not clear how far the reach of these would be in cases of corporate groups, particularly if the subsidiaries are all private companies.[196] Additionally, the TCFD has a variety of reporting gateways and one or more may apply, meaning that multiple or overlapping disclosures are required. It is also unclear what the scope of disclosure is.[197] A review by the Financial Reporting Council (FRC) the following year noted incremental improvements in terms of clarity and transparency, but that more could be done.[198] It also found that there were still across-the-board shortcomings in relation both to understandings of materiality, and the connections between financial disclosures and climate change.[199] This seems to raise possibilities for further enforcement actions.

What role do these disclosure regulations play in potential or future litigation? Investors may incur losses because the risk profile of a company was not properly assessed or disclosed. As Attenborough explains, 'it is a basic fact that companies and their directors are likely to face far greater liability exposure if they fail to assess and, where material, disclose meaningfully all financial risks associated with climate change for the company (i.e., physical and transition risks) so that investors can adequately factor these considerations into investment decisions.'[200] Any legal action brought in response to this might be quite narrow. First of all, some kind of action based on single materiality i.e. relating to the impacts on the company, might be viable; a case based on double

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[194] Isabelle Woods 'A closer look at the impact of the Task Force on Climate-related Financial Disclosures (TCFD) on companies and LLPs, SMEs, and supply chains' *elaw*, December 2022, 38.

[195] The Companies (Strategies Report) (Climate Related Financial Disclosure) Regulations 2022 amended sections 414C, 414CA and 414CB of the Companies Act 2006 and require certain publicly quoted companies and large private companies to incorporate TCFD disclosures in their annual reports. Similar provisions exist for LLPs. See https://www.gov.uk/government/news/uk-to-enshrine-mandatory-climate-disclosures-for-largest-companies-in-law.

[196] For instance, this could result in regulatory gamesmanship where risks are moved beyond the scope of the regulation – see Victor Fleischer, 'Regulatory Arbitrage' (2010) 89 Texas Law Review 227.

[197] Woods (n 194), 37.

[198] FRC, 'CRR Thematic Review of Climate-Related Metrics and Targets' (Financial Reporting Council 2023) <https://media.frc.org.uk/documents/Thematic_review_of_climate-related_metrics_and_targets_2023.pdf>.

[199] ibid.

[200] Attenborough (n 188), 332.

materiality i.e. relating to the impacts on the climate,[201] seems less viable. This does raise questions about the purpose of any such campaign and the assumptions that might be made that identifying climate risks will necessarily change corporate behaviour in a 'good' way. The correlation between company risks and addressing climate change are not necessarily the same; they may end up converging but they are not synonymous.[202] The question is what the legal basis might be for this and who might bring the proceedings (see above for a discussion of potential actions for misleading or wrong disclosure).

The Financial Conduct Authority (FCA) will play a significant role in any processes taken in relation to corporate disclosures. ClientEarth previously made effective use of the FCA role in a number of respects. First, some years ago, the NGO made a number of regulatory complaints about a lack of disclosure of company financial / climate risk. They targeted a number of companies, including insurers, and asked the FCA to take action.[203] The FCA declined to do so but had a series of conversations which, to some extent, changed company reporting.[204] The FRC also issued new guidance on climate reporting, in 2019,[205] with an express purpose of improving climate related disclosures. This provides a series of questions that specifically guides companies towards TCFD compliance.[206] In passing, as it is not an action in English law or the English courts, ClientEarth is also supporting the Church of England Pensions Board (brought in their capacity as an institutional shareholder, with others) in an action they are involved in against Volkswagen, related to the latter's refusal to release information about its corporate climate lobbying. The legal claim is based on the German Stock Corporation Act, and will test whether Volkwagen is legally competent to refuse an agenda item under which this issue would be discussed.[207]

As highlighted elsewhere herein, it is probably prudent in the UK context to make effective use of the regulator but this does not mean litigation becomes irrelevant, as if the regulator fails in an actionable way they could become the defendant. Guidance from the (as it then was) Department for Business, Energy and Industrial Strategy (BEIS)

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[201] Mattias Täger, '"Double Materiality": What Is It and Why Does It Matter?' (*Grantham Research Institute on climate change and the environment*, 21 April 2021) <https://www.lse.ac.uk/granthaminstitute/news/double-materiality-what-is-it-and-why-does-it-matter/> accessed 3 September 2023.

[202] Also see FRC (n 198).

[203] See for instance https://www.clientearth.org/latest/documents/fca-complaint-admiral-group-plc/ and https://www.clientearth.org/latest/documents/fca-complaint-lancashire-holdings-limited/.

[204] This claim is based on the knowledge of the UK IEG.

[205] FRC 'Climate-related corporate reporting: Where to next? October 2019, available at https://www.frc.org.uk/getattachment/22ee8a43-e8ca-47be-944b-c394ecb3c5dd/Climate-Change-v9.pdf.

[206] Ibid.

[207] See https://www.clientearth.org/latest/press-office/press/investors-turn-to-courts-after-vw-withholds-climate-lobbying-details/. ClientEarth note that this could have implications for other civil law systems.

specifies that the FCA has the 'responsibility and power' to make an application to the court for a revision of the accounts under section 456 of the Companies Act 2006.[208] ClientEarth relied on these provisions in pursuing Ithaca Energy. Ithaca has been listed on the London Stock Exchange since 2022, which required approval of its prospectus by the FCA. ClientEarth objected to Ithaca's listing prospectus.[209] It also brought a judicial review challenging the FCA's decision to approve Ithaca's prospectus on that basis that the climate change risks associated with Ithaca's business were not adequately disclosed, that as such it was not rational to conclude that the prospectus contained the information needed for an investor to make an informed assessment of Ithaca's financial position and prospects, and accordingly that the FCA should not have approved the prospectus.[210] The judicial review did not succeed, with the court finding that the FCA decision-making could only be challenged on public law grounds, i.e. as a matter for its discretion as the expert regulator[211] and that the FCA had not acted irrationally in approving the prospectus.

### Substantive

The substantive possibilities for corporate climate litigation arise in relation to the management and governance of corporate bodies in the context of climate change. The global inspiration for this is, of course, *Milieudefensie v Shell*.[212] Shell has appealed the decision, and the claimant has threatened further action on a personal liability basis if the decision is not complied with. After losing in the District Court, Shell moved its headquarters to London.

ClientEarth brought a derivative claim[213] against the directors of Shell for failing to manage the material and foreseeable risks posed to the company by climate change.[214] The importance of this approach cannot be understated. Derivative claims go to personal liability of directors and, as such, target company directors directly in their personal capacity. Because of the nature of the proceedings, a permission stage is built in to filter out unmeritorious claims; and ClientEarth failed to establish a prima facie

[208] Woods (n 194), 36.
[209] Natasha Turner ClientEarth: FCA approval of Ithaca Energy 'unlawful' for inadequate climate disclosure ESGClarity, 20 February 2023, available at https://esgclarity.com/clientearth-fca-approval-of-ithaca-energy-unlawful-for-inadequate-climate-disclosure/. Also see https://www.clientearth.org/latest/press-office/press/uk-financial-regulator-faces-legal-challenge-over-fossil-fuel-company-s-climate-risk-disclosures/
[210] *R (oao ClientEarth) v Financial Conduct Authority* [2023] EWHC 3301 (Admin), [3].
[211] As such, the court could not substitute its own view if that reached by the FCA was rational – see ibid, [21].
[212] *Milieudefensive v Shell* (n 119).
[213] Under 260(1) of the Companies Act 2006. I discuss the standing provisions for claims against companies understanding, below.
[214] ClientEarth, available at: https://www.clientearth.org/latest/press-office/press/clientearth-files-climate-risk-lawsuit-against-shell-s-board-with-support-from-institutional-investors/.

case that it should obtain permission to proceed as a derivative claim both on the papers and at an oral hearing.[215]

The basis of ClientEarth's claim was that the Board's failure to adopt and implement an energy transition strategy that gave appropriate weight and strategic consideration to climate risk, but also that was aligned with the Paris Agreement in terms of mitigation obligation,[216] was a breach of the directors' duties under the Companies Act 2006. It relied in particular on section 172 – the duty to promote the success of Shell - and section 174 - the duty to exercise reasonable care, skill and diligence.[217] ClientEarth's case was that the existing strategy excluded short- to medium-term targets to cut scope 3 emissions, which formed a significant part of the group's emissions.[218] Shell's net emissions are calculated to fall by just 5% by 2030, which is, of course, not consistent with the 45% reduction that was ordered in *Milieudefensie* in 2021. ClientEarth also alleged that the Board's failure to fully comply with the Dutch Court's judgment was also a breach of its legal duties under English law.[219] An injunction was sought compelling this action.

The problem with this approach is that, as long as the processes that have brought about a strategy are not wholly unreasonable, a court is unlikely to find that the outcome of those processes is objectionable.[220] ClientEarth was unable to establish a prima facie case either that proceedings should be brought or that the court should grant the relief required, in large part because of the internal management or business judgement rule. As the High Court said in the May judgment: 'the law respects the autonomy of the decision making of the Directors on commercial issues and their judgments as to how best to achieve results which are in the best interests of their members as a whole.'[221] Courts in general are very reluctant to step in and replace their judgement for that of company directors.[222] Courts place a lot of emphasis on the fact that directors have discretion in how they discharge their duties.[223] Claimants 'will need to articulate a

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[215] *ClientEarth v Shell and others (May)* [2023] EWHC 1137 (Ch); *ClientEarth v Shell and others (July)* [2023] EWHC 1897 (Ch).

[216] These are outlined in *ClientEarth v Shell and others (July)* (n 215) at [22].

[217] ibid, [20].

[218] See ClientEarth (n 83). The specific breaches are set out in ibid, [39].

[219] ibid. The High Court found that there was no duty in English law for the directors to take steps to ensure an order of a foreign court was obeyed – at [36].

[220] Pablo Iglesias-Rodríguez, 'ClientEarth v Shell Plc and the (Un)Suitability of UK Company Law and Litigation to Pursue Climate-Related Goals' (2023) 35 Journal of Environmental Law 445.

[221] *Clientearth v Shell and others (May)* (n 215), [47].

[222] See *Clientearth v Shell and others (July)* (n 215), [31] - [33]- in relation to section 174.

[223] Richard Honey KC, 'ClientEarth v Shell Plc: Review and Lessons for Future Climate Litigation' (*FTBblog*, 1 September 2023) <https://www.ftbchambers.co.uk/elblog/view/clientearth-v-shell-plc-review-and-lessons-for-future-climate-litigation>.

compelling reason and have a strong evidential basis in order to persuade a court to cut across that discretion. The judgment illustrates the likely deference that courts will pay to directors' judgements on complex matters.'[224]

This goes both to the content of the relevant clauses and their meaning and purpose. Section 172 in general is not a duty to report on environmental impacts. Section 172(1) speaks to the problem of managing and containing corporate externalities, and includes the need to take a long term view and consider things like the environment, community and business reputation. Each director must act in a way they consider, in good faith, would be most likely to promote 'the success of the company', but they must do so 'for the benefit of its [shareholders] as a whole'. This is assessed subjectively.[225] This subjective standard substantially reduces the likelihood of directors breaching the duty.[226]

The framers never intended for the 'regard list' in section 172(1) to be used for litigation;[227] rather, that part of the provision was intended simply to be discussed in disclosure (to invite investor-led demand),[228] and is thus instrumental to advancing the company's interests *for the benefit of its shareholders*. Proving that directors lacked the necessary belief will often be insurmountable, because establishing what the directors thought also undermines derivative claims. This is in no small part because future problems in establishing, at such a trial, the directors' mental state increases the likelihood of the court refusing permission. As such directors' general duties are not designed to act as a practical lever of managerial accountability, other than through the usual channels of corporate governance. These are better understood as creating scope for minority shareholders to raise challenges to decisions in meetings, and exert their influence there.[229]

In August 2023 the High Court refused ClientEarth's application for permission to appeal to the Court of Appeal and in November 2023 the Court of Appeal refused ClientEarth's renewed application for permission to appeal, bringing the litigation to an end.[230] The question then is what the implications of the litigation might be? It has been suggested that this might represent a shot across the bows for other corporates, on the

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[224] ibid.

[225] *Clientearth v Shell and others (July)* (n 215), [28] - [29].

[226] This was subject to discussion by the UK IEG.

[227] Paul Davies, *Introduction to Company Law* (3rd ed, OUP 2020), 49: '… those proposing what became section 172 did not suppose that litigation would be the main mechanism by which consideration of non-shareholder interests was enforced.'

[228] Under s 417 (repealed and now s 414C / 414CZA) Companies Act 2006.

[229] This claim is based on the discussion and exchanges in the UK IEG. This approach can be seen in the decisions, *ClientEarth v Shell and others (May)* (n 215), 58; ; *ClientEarth v Shell and others (July)* (n 215), [53].

[230] *ClientEarth v Shell Plc and others* [2023] EWCA 1866.

basis that more strategic litigation might be brought in future, and this could have various implications including reputation, share price, etc.[231] This could also be taken as a signal to governments to provide better regulation.[232] However, given the outcome and the costs implications, this litigation might also send the opposite message.

## E. Consumer Protection Laws

Consumer protection cases may arise in relation to poor information about climate change in purchased products. This is less about the harm caused by climate change and more about the 'harm' to a claimant whose mitigation actions are potentially fruitless due to misrepresentations or other wrongful communications from a defendant. These cases challenge inaccurate government or corporate narratives regarding contributions in the transition to a low-carbon future. This is already a feature of UK climate litigation.[233]

As discussed above, potential claims could arise for greenwashing in the common law. There are also regulatory protections which prohibit vendors from making unfounded claims about the environmental integrity of goods or services they provide. The Consumer Protection from Unfair Trading Regulations 2008 (CPUTR) prohibit misleading actions or the presentation of information in such a way that 'deceives or is likely to deceive' the average consumer,[234] or leads the consumer to enter into a transaction he would not have entered into otherwise.[235] These regulations also prohibit misleading omissions that includes the omission or obscuring of material information,[236] which might influence consumers to make decisions that they would not have made otherwise.[237]

CPUTR breaches can be subject to both criminal and civil enforcement. The regulations create new offences.[238] This means traders that breach the relevant provisions can be subject to prosecution (or other enforcement) by Trading Standards, or through the

[231] Ekaterina Aristova and Lionel Nichols, 'Climate Change on the Board: Navigating Directors' Duties' (Bonavero Institute Working Paper, November 2023).
[232] Iglesias-Rodríguez (n 220).
[233] Setzer and Higham (n 99).
[234] Regulation 5(2)(a) CPUTR.
[235] Regulation 5(2)(b) CPUTR.
[236] Regulation 6(1) CPUTR.
[237] Regulation 6(1)(d) CPUTR.
[238] For instance under regulation 9 a trader is guilty of an offence if he engages in a commercial practice which is a misleading action under most of regulation 5. Regulation 10 contains a similar provision in terms of misleading omissions under regulation 6.

magistrate's court, as every enforcement authority has a duty to enforce them.[239] The criminal penalties include fines or a term of imprisonment of up to two years.[240]

There are also rights to civil enforcement created by amendment to the regulations.[241] These are available where a consumer has entered into a contract or otherwise made a payment to a trader,[242] who has committed a prohibited practice, including misleading actions as defined in the original regulations.[243] The three main remedies available to a consumer are the right to unwind, the right to a discount, and the right to damages.[244] These can be enforced through the civil courts.[245]

Other consumer legislation specifies that goods sold must comply with any description applied to them,[246] and must be of satisfactory quality.[247] If these conditions are not met the Consumer Rights Act 2015 may offer a route to compensation. There is also a Digital Markets, Competition and Consumers Bill which is currently at report stage in the House of Commons, which could also improve consumer protections.

There is currently greenwashing litigation being brought as part of a PhD research project at Durham University. Ben Hall is developing legal participatory action research (PAR) as a methodology to identify and tackle weak climate governance, initially by challenging the legal legitimacy of environmental claims made of 'tradable green certificates' by domestic energy suppliers. In doing so he intends to highlight the ethical and logistical problems of using market mechanisms to tackle climate change. The project interrogates the legislative and regulatory framework, challenges spurious 'green' marketing claims in court and uses a novel approach to analyse this process. This research and litigation is ongoing.[248]

The Advertising Standards Authority (ASA) has also used regulatory action to challenge greenwashing. The ASA is an independent regulator of media advertising in the UK and can prosecute vendors which do not comply with an Advertising Code. It has an express purpose of supporting the 'net zero' target and placing high importance on sustainability, including through a review of legislation and investigation of specific

[239] Regulation 19(1) CPUTR.
[240] Regulation 13 CPUTR.
[241] Created by The Consumer Protection (Amendment) Regulations 2014 (CPAR).
[242] Regulation 27A(2) CPAR.
[243] Regulation 27B(1)(a) CPAR refers to misleading actions under regulation 5 of the CPUTR. There is no reference to omissions.
[244] Regulations 27E – 27K.
[245] Regulation 27K.
[246] Section 13 Sale of Goods Act 1979 and section 11 of the Consumer Rights Act 2015.
[247] Section 14 of the Sale of Goods Act 1979 and section 9 of the Consumer Rights Act 2015.
[248] See https://www.durham.ac.uk/staff/benjamin-hall2/.

issues linked to the theme. [249] It also targets advertising campaigns which are misleading, which it understands to mean that the basis of the environmental claims are not clear or unqualified, [250] and it specifically targets sectors identified by the CCC as having a 'high adverse impact' on the environment.[251]

Decisions include a finding that Shell's 'drive carbon neutral' campaign was misleading because consumers would interpret this to mean that Shell offered a carbon neutral fuel, which was not the case. The ASA ruled that the advertisement breached the Code of the Broadcast Committee of Advertising Practice (BCAP) rules on misleading advertising and environmental claims. The ASA stipulated that the advertisement must not appear in the 'complained of' form and that Shell UK Ltd must clarify that carbon offsetting is contingent on membership of a loyalty scheme.[252] The ASA has also ruled against HSBC relating to claims that it was making a positive environmental contribution,[253] and against Ryanair for claims it was a low emissions airline.[254] Further prosecutions are in train. Also, as outlined above, a number of complaints about greenwashing have been brought to the OECD NCP.

## F. Fraud Laws

This would require that the CPS prosecuted presumably a major emitter. This seems unlikely in the current context.

## G. Contractual Obligations

A contract is a legally binding promise (written or oral) by one party to fulfil an obligation to another party in return for consideration. A basic binding contract must comprise four key elements: offer, acceptance, consideration and intent to create legal relations. There are, of course, further rules that specify what each of these terms mean,

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[249] ASA News, ASA Statement on the regulation of environmental claims and issues in advertising, 23 September 2021, available at https://www.asa.org.uk/news/asa-statement-on-the-regulation-of-environmental-claims-and-issues-in-advertising.html.

[250] Committee on Advertising Practice 'The environment: misleading claims and social responsibility in advertising', Advertising Guidance, June 2023, available at https://www.asa.org.uk/static/d819e399-3cf9-44ea-942b82d5ecd6dff3/4d3c736f-1e59-471f-bf77e10614544b3b/CAP-guidance-on-misleading-environmental-claims-and-social-responsibility.pdf.

[251] Ibid, 6-7.

[252] Advertising Standards Authority's Ruling on Shell UK Ltd.'s Shell Go+ Campaign, see http://climatecasechart.com/non-us-case/advertising-standards-authoritys-ruling-on-shell-uk-ltds-shell-go-campaign/.

[253] ASA Ruling on HSBC UK Bank plc, see https://www.asa.org.uk/rulings/hsbc-uk-bank-plc-g21-1127656-hsbc-uk-bank-plc.html.

[254] ASA Ruling on Ryanair Ltd t/a Ryanair Ltd, see http://climatecasechart.com/non-us-case/asa-ruling-on-ryanair-ltd-t-a-ryanair-ltd/.

when a contract would be enforceable, and against whom. Here I flag some potential circumstances where contractual arrangements could be relevant in climate litigation.

First, there are myriad circumstances in which business arrangements are developed either to give effect to climate mitigation goals, or where some other kind of agreement has to include certain kinds of commitments to meet standards set by legislation or policy. Examples of the first kind might include forest carbon contracts,[255] which both potentially need to be enforced, but also might be subject to challenge on the basis of injustice, as a form of 'just transition litigation'.[256] Another example might be agreements for the tenancy or sale of property, that could be challenged on the basis that energy performance is not adequate.[257] It is also, of course, possible given the regulatory ambition deficit in the UK,[258] that contracts might try to go beyond regulation. An example of this might be trying to incorporate pressure to reduce embodied carbon in construction projects or other long-term projects, where there would be a risk of asset stranding, as the proposed development would be unlikely to be consistent with future standards and requirements.[259]

Second, there are contractual provisions that parties can put in place to encourage climate-friendly behaviour in commercial relationships. This is arguably a more systematised approach to the examples given above, and refers to the suite of contractual clauses developed by The Chancery Lane Project (TCLP). These go beyond management of risk and include mitigation goals. [260]

With the incorporation of mandatory climate disclosure rules into business governance, those who put climate-related clauses into supply agreements implicitly seem to believe that it is down to these agreements to govern climate change commitments of corporates (including smaller entities to which full disclosure obligations may not

[255] See the discussion of how these arrangements entrench private authority here: Natasha Affolder, 'Transnational Carbon Contracting : Why Law's Invisibility Matters' in A Claire Cutler and Thomas Dietz (eds), The Politics of Private Transnational Governance by Contract (Routledge 2017).

[256] Savaresi et al (n 7). Notably, the contract suite developed by TCLP (discussed below) do seek to address social issues and adhere to just transition principles – see Jennifer Ramos and The Chancery Lane Project, 'The Role of Contracts to Address Environmental Impacts in Supply Chains' in Susan A Maslow and David V Snyder (eds), *Contracts for Responsible and Sustainable Supply Chains: Model Contract Clauses, Legal Analysis, and Practical Perspectives* (ABA Publishing 2023), 186 - 8.

[257] I do however consider the prospects in relation to sales, which are not particularly good, here: Bouwer, 'When Gist Is Mist: Mismatches in Small Scale Climate Change Litigation' (n 155). Mandatory minimum energy efficiency ratings for rented property might change the position when it comes to tenancies.

[258] See Climate Change Committee (n 19).

[259] This claim is based on the knowledge and expertise of the UK IEG.

[260] See Jennifer Ramos, 'Shifting the Mindset of Commercial Lawyers to Rewire Contracts, to Mitigate Climate Change More Effectively in Practice: The Chancery Lane Project' (2021) 23 Environmental Law Review 3. Clauses at: https://chancerylaneproject.org/.

apply).[261] In service of this, many businesses have included 'generic compliance clauses' to incorporate environmental laws.[262] Examples of other kinds of agreement include clauses committing to sustainability and net zero requirements; 'green modifications' clauses in construction contracts to increase resilience against climate change; and agreements to improve energy efficiency. These could also be used in different kinds of documents and arrangements.[263] More might be needed to ensure 'components are put into contracts to help reduce climate-related liabilities and increase their shareholder value.'[264] For example, a 'green termination' clause allows the termination of a contract due to unsustainable activities.[265] Recently, the TCLP have also introduced a new group of clauses to help organisations prepare for the introduction of the CSDDD. As such, irrespective of the latter's fate, parties can and will continue to introduce climate change due diligence requirements through contracts.[266]

It is unclear whether all these 'climate' contracting clauses are entirely enforceable. It is likely that some aspects of TCLP's contract suite will be tested in court in years to come, either for 'pro' or 'anti' climate reasons.[267]

## H. Planning and Permitting Laws

Climate change litigation in the United Kingdom is dominated by public law challenges in a variety of areas relevant to climate change.[268] In most instances these arise as challenges to local or national planning decisions either granting or refusing permission for the construction of the desired development or infrastructure.[269] This could include both the grant or refusal of permission in relation to renewable energy projects or major emissions sources such as airports and incinerators, but also challenges to policy relating to projects. Some of these cases are brought as challenges or appeals under

[261] ibid.
[262] Woods (n 194), 38.
[263] Ramos and The Chancery Lane Project (n 256), 183 - 4, 186.
[264] ibid.
[265] ibid.
[266] For updates see https://chancerylaneproject.org/news/preparing-your-contracts-for-new-due-diligence-requirements/.
[267] This is the subject of ongoing work.
[268] See, for an overview Nigel Pleming and Ruth Keating, 'Climate Change Litigation in the United Kingdom: Planning, Energy and Protest' in Ivano Alogna, Christine Bakker and Jean-Pierre Gauci (eds), *Climate Change Litigation: Global Perspectives* (Brill Nijhoff 2021); or Birsha Ohdedar and Steven McNab, 'Climate Change Litigation in the United Kingdom' in Wolfgang Kahl and Marc-Philippe Weller (eds), *Climate Change Litigation: A Handbook* (CH Beck 2020).
[269] Elizabeth Fisher, Bettina Lange and Eloise Scotford, *Environmental Law: Text, Cases, & Materials* (Oxford University Press 2013), 807 - 836 explain these processes. This includes 'development' as contemplated in the Town and Country Planning Act 1990 and 'infrastructure' as defined in the Planning Act 2008.

statute,[270] but most are brought as judicial review applications. Judicial review is a narrow and discretionary remedy; in the main it is used to tackle unlawful decision-making processes, and the scope for challenging a decision or point of policy directly on its merits is extremely limited.[271] In addition, there are limits on standing and short limitation periods (discussed below) which can present particular challenges given the complex and technical nature of environmental disputes.[272]

There is an enormous range of decisions that have been handed down over the last few years, too many to discuss in detail.[273] In essence, most of these cases have challenged the decision granting (or refusing) permission for whatever-it-was, and / or questioned the integrity of the environmental impact assessment (or strategic environmental assessment) on which this decision was based, for failing adequately to take climate change into account. There is an astonishing range of ways to make this argument. To date, none of these cases has resulted in an uncomplicated court victory but some have resulted in strategic progress in other ways. [274] A notable example is the *ClientEarth (Drax)* litigation, a challenge to development consent for a gas plant.[275] Although the claimants lost the case, the project did not go ahead, and no other large-scale (non-CCS) gas projects have come forward since, including those previously in planning. Although these are public law cases against (usually) a minister of state, litigation of this nature does affect business interests as states either regulate,[276] or support or accelerate the closure of different emitters to give effect to these decisions.[277] For this reason, in

[270] For example *Preston New Road Action Group and Gayzer Frackman v SSCLG* [2018] EWCA Civ 9 (Court of Appeal).
[271] See for e.g. Richard Macrory, 'The Courts and the Environment', *Regulation, Enforcement and Governance in Environmental Law* (Hart Publishing 2009).
[272] Part 54.5 Civil Procedure Rules (CPR) and Fisher, Lange and Scotford (n 269), 263 – 264..
[273] See Joshua Kimblin, 'Climate Change, the Courts and the Constitution' (The Constitution Society 2022), Section 1; and also Pleming and Keating (n 268).
[274] Bouwer and Setzer (n 2), 8.
[275] *R (on the application of ClientEarth) v Secretary of State for Business, Energy and Industrial Strategy and Drax Power Limited* [2021] EWCA Civ 43.
[276] Hari M Osofsky, 'The Role of Climate Change Litigation in Establishing the Scale of Energy Regulation' (2011) 101 Annals of the Association of American Geographers 775, 775-83.
[277] Macchi (n 67), 104 - 6.

several such cases the proposed developer has participated as a defendant.[278] Directly affected corporations also can, and frequently do, participate as interested parties.[279]

The current legal position regarding challenges of this nature is that climate change is relevant and a material consideration in any decision making about development or infrastructure. The greenhouse gas emissions of a project can be a reason to refuse permission, even though they are '... not, of themselves, an automatic and insuperable obstacle to consent being given for any of the infrastructure for which [a relevant policy] identifies a need and establishes a presumption in favour of approval'.[280] Thus, how much weight to place on climate change issues is a matter for the decision-maker.[281] The Court of Appeal has confirmed that the statutory and policy arrangements for achieving net zero by 2050 'leave the Government a good deal of latitude in the action it takes to attain those objectives... as part of an economy wide transition' and that 'it is the role of Government to determine how best to make that Transition'.[282]

The most recent 'waves' of climate judicial reviews challenge the failure to assess Scope 3 emissions in fossil fuel projects in the UK and abroad,[283] as well as challenging the flow of public money to projects that are 'not aligned with climate action'.[284] In the latter case, the target is more specific: 'to increase the cost of capital for high emitting activities to the point where such activities become economically unviable even if they remain legally permissible'.[285] Notably, *Finch* is an example of the former case, in which the claimants seek to argue that the downstream emissions from (in this case) oil wells should have been assessed for permission lawfully to have been given. This case was before the Supreme Court in summer 2023, and at the time of writing the decision is awaited.

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[278] For instance, in *R (on the application of Sarah Finch) v Surrey County Council and others* [2020] EWHC 3566 (Admin) the developer acts as a second defendant throughout; similarly in *R (on the application of Friends of the Earth Ltd and others) v Heathrow Airport Ltd* (n 10), the defendant airport participated and in fact was the only defendant in the Supreme Court, as the Secretary of State did not appeal; in *Bristol Airport Action Network) v SSLUHC* [2023] EWHC 171 (Admin), the airport company participated as second defendant.

[279] For instance in *R (oao FOE) v SoS for UKEF and Chancellor of the Exchequer* [2023] EWCA Civ 14 (Court of Appeal) both the operating and primary financing company intervened; in *R (oao ClientEarth) v Financial Conduct Authority* (n 207) Ithaca was an interested party.

[280] *R (on the application of ClientEarth) v Secretary of State for Business, Energy and Industrial Strategy and Drax Power Limited* (n 275), [87].

[281] ibid, [87].

[282] *Packham v SoS Transport* [2020] EWHC 829 (Admin).

[283] *R (on the application of Sarah Finch on behalf of the Weald Action Group) v Surrey County Council and others* (n 38); *R (oao FOE) v SoS for UKEF and Chancellor of the Exchequer* (n 279).

[284] Setzer and Higham (n 99), 19. UK examples include *R (oao) Jeremy Cox and others v The Oil and Gas Authority and another* [2022] EWHC 75 (Admin); *R (oao FOE) v SoS for UKEF and Chancellor of the Exchequer* (n 279).

[285] Setzer and Higham (n 99), 19.

## I. Other Causes of Action

See my discussion about public trust cases above.

Questions can be raised about the fiduciary duties of trustees. There is a case for extending their fiduciary duties in respect of investments not only to consider financial returns of investments but also taking into account the social and environmental costs of investment choices. Recent guidance from the Financial Markets Law Committee – specifically focusing on pension fund trustees – emphasises that there is uncertainty as to what the fiduciary duties of trustees entail in the climate change context.[286] It highlights both that climate change and sustainability considerations should be considered to be financial factors,[287] and also that climate change issues are broad and wide-ranging, including litigation risk.[288] Compliance with existing climate change law and regulation may not be sufficient for trustees to discharge their duties.[289]

Questions about the duties of trustees in the climate change context have been before the UK courts in recent years; although the subject matter does diverge they are discussed here together to emphasise the importance of fiduciary duties in this area, and the judicial guidance already received in this context.

Litigation focused on divestment and financial management in the climate change context has arisen from the USS pension scheme inflicted on university lecturers. In *Ewan McGaughey and another v Universities Superannuation Scheme Limited*, the claimants were academics and USS contributors who brought a multiple derivative claim against the USS directors[290] under common law principles analogous to those under the Companies Act 2006 discussed above. Alongside several other issues relating to the (mal)administration of the scheme, the claimants argued that the failure of the scheme's directors to create a credible plan for disinvestment from fossil fuel investments had and would continue to compromise the scheme, being in breach of the s170 and 172 duties in the Companies Act 2006. The claimants argued that the failure to take these steps had prejudiced the trust which had caused them loss in consequence. They argued that the relevant trustees' duties should be interpreted consistently with Articles 2 and 8 of the ECHR and the Paris Agreement, to give effect to the long-term need for divestment.

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[286] Financial Markets Law Committee, 'Pension Fund Trustees and Fiduciary Duties: Decision-Making in the Context of Sustainability and the Subject of Climate Change' (2024), 1.
[287] ibid, 6.
[288] ibid, 7.
[289] ibid, 6-9.
[290] [2022] EWHC 1233 (Ch).

The High Court refused permission to bring a derivative action against USS. The court found that beneficiaries of a pension trust corporation can bring a derivative claim against its directors for breach of duty, and that it would exercise its discretion to do so in relation to some of the grounds, were the necessary requirements met.[291] However, the claimants' claims did not fall within the established exceptions that would enable them to do so in this case.[292] Specifically, it could not be shown that the directors had acted in a way that was a deliberate breach of duty and pursued their own interests at the expense of USS, particularly because they had complied with regulatory requirements. Also, the claimants lacked a sufficient interest to pursue the action as they could not show evidence of loss.

The dismissal was upheld by the Court of Appeal in summer 2023. It found that the claimants had failed to establish a prima facie case on loss (to themselves or the company), in relation to the allegation that the directors acted in bad faith. The Court of Appeal said that, in effect, this was an attempt to challenge management and investment decisions but there was nothing to suggest that powers had been used improperly.[293] The Court of Appeal also noted that the claim was well suited to be brought as a direct claim in breach of trust and there was no reason, save perhaps a desire to avoid certain procedural burdens, to seek to bring it as a derivative action. In effect, the claim was a challenge to the company's investment policy and 'should have been brought against it as just that'.[294]

As the Court of Appeal suggested, there may have been valid claims in *McGaughey* had it been pleaded differently, for instance, in breach of trust.[295] As such, there may have been potentially valid claims against the USS trustee in relation to some conduct (specifically, the valuation conducted in March 2020, the early days of the pandemic) but that claim would have been against the trustee and not against its directors.[296] Whilst such a claim may no longer be available to pursue as an avenue against USS,[297] it may provide insights for future litigation in similar cases.

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[291] This relates to the rule in *Foss v Harbottle* (1843) 2 Hare 461 which creates a number of exceptions, e.g. in cases of ultra vires and illegal acts; breach of fiduciary duties; or fraud or oppression against the minority shareholders'.

[292] Notably, this was approached as a common law claim, so the test for whether a derivative claim was arguable was subject to a common law test. The lengthy decision of the High Court sets out in detail what the requirements are – see *McGaughey v Universities Superannuation Scheme Ltd* [2022] EWHC 565 (Ch), [17] - [46].

[293] *McGaughey v Universities Superannuation Scheme Ltd (CA)* [2023] EWCA Civ 873.

[294] ibid, [186].

[295] ibid, from [182].

[296] Email from Philip Bennett, Durham Law School, 23 July 2023, on file with author.

[297] Ibid.

Further guidance regarding the scope of the powers of charity trustees can be found in *Butler-Schloss v Charity Commissioner*.[298] The claimants were charity trustees who approached the court for guidance as to whether it was permissible for them to pursue an investment policy that excluded investments inconsistent with the Paris Agreement, even if it meant a lower rate of return. Significantly, the respective charities had each adopted a policy in terms of which environmental protection and the alleviation of poverty were part of their charitable purpose.[299]

The court found that charity trustees' primary duty is to further the purposes of the trust, and that in doing so they have a discretion to exclude investments where they have a 'reasonable view' that those investments conflict with the said purpose,[300] but there was no legal requirement for them to do so.[301] That discretion must be exercised by reasonably balancing all relevant factors including the 'likelihood and seriousness of the potential conflict and the likelihood and seriousness of the potential financial effect'.[302] Although the Paris Agreement was binding only on its signatories, and determining what 'consistent' meant was not a simple task, its broad goals could be used as the basis for the formulation of a policy.[303] The judge also emphasised that in considering the 'financial effect' of a decision, trustees are entitled to take into account the risk that continuing to invest (in things inconsistent with charitable purpose) could damage their charity's reputation and decrease support amongst its supporters or the public at large.[304]

*Butler-Schloss* establishes that charitable trustees have a 'considerably wider latitude in determining a suitable investment policy than previously thought.'[305] Previously in the 'Bishop of Oxford' case [306] it was established that the purposes of a charity are usually best served by seeking to pursue maximum return on investments, and that trustees could depart from this principle only in 'comparatively rare' cases.[307] It can now be understood that trustees are permitted, but not required, to exercise their discretion to exclude certain investments including on the basis that they conflict with a charitable

[298] *Sarah Butler-Schloss and others v The Charity Commissioner for England and Wales v The Attorney General* [2022] EWHC 974 (Ch).
[299] ibid, [13], [14].
[300] ibid, [78].
[301] ibid, [73].
[302] ibid, [78].
[303] ibid, [23] - [27].
[304] ibid, [78].
[305] Cassandra Somers-Joce and Tim Koch, 'Butler-Sloss v The Charity Commission: The Pursuit of Charitable Purposes through ESG Investing' (Oxford Law Blogs, 9 July 2022) <https://blogs.law.ox.ac.uk/property-law-blog/blog-post/2022/07/butler-sloss-v-charity-commission-pursuit-charitable-purposes>.
[306] *Harries v Church Commissioners for England* [1992] 1 WLR 1241.
[307] Somers-Joce and Koch (n 305).

purpose. In doing so the court was clear that they must think about the relevant factors carefully and set out the basis for their decisions in writing;[308] undoubtedly with stronger reasons required the greater the financial detriment.[309]

It appears to be material to the court's reasoning that charities are trusts for a public benefit; in contrast private trusts do owe fiduciary and other duties to the beneficiaries who may enforce such duties.[310] This added weight 'to the conclusion that these are matters for the discretion of the trustees acting consistently with and so as to further the purposes of the trust'.[311] What the case does not address is whether trustees can breach their duty by not taking enough consideration of environmental risks and / or the need to align investment policies to broader climate change goals.[312] The emphasis placed by the court on the trustees' discretion means it is probably unlikely that members of the public could compel charities to divest.[313]

[308] *Sarah Butler-Schloss and others v The Charity Commissioner for England and Wales v The Attorney General* (n 298), [83] - [85].
[309] Somers-Joce and Koch (n 305).
[310] *Sarah Butler-Schloss and others v The Charity Commissioner for England and Wales v The Attorney General* (n 298), [43].
[311] ibid, [74].
[312] Bishop and others (n 155).
[313] Somers-Joce and Koch (n 305).

# 2. Procedures and Evidence

## A. Actors Involved

### i. Who is bringing climate litigation in the UK against corporations?

For public law challenges, in many instances, such actions are brought by individuals or groups of individuals, sometimes jointly with an NGO; or by NGOs; or (where a contrary decision) by proposed developers.

Corporate / consumer law challenges are brought by consumers, shareholders / affected beneficiaries, and NGOs.

NGOs are frequently 'usual suspects' – Friends of the Earth, ClientEarth and, more recently, the Good Law Project.

Litigation resisting climate actions either to protect property rights or to ensure a 'just transition' (see above) might be brought by companies or individuals.

### ii. Against whom has such litigation been brought?

Defendants include energy companies (e.g. Shell) or other high emitters (e.g. Volkswagen), banks (via the FCA) and vendors of various goods or services. However, as this report has suggested, targeted action against major emitters while (arguably) the most 'worthy' pursuit may not be the most viable. There are a host of other actions which target corporate climate change responses. Goldberg and Lord suggest as follows:

> *Whether or not "direct" cases involving actions against emitters and similar defendants for damages for the effect of climate are successful, it is very likely that there will be much litigation against professionals, public bodies, utility companies and other categories of defendant, for damage allegedly caused or contributed to by climate change. These cases typically [will] involve allegations that the defendant failed to factor in the effects of climate change, whether in designing buildings, planning civil engineering projects, or auditing accounts of a company exposed to climate-related risks. This type of potential for liability is of great significance not only to those directly at risk from such actions, but to their investors, lenders, insurers and professional advisers.*[314]

As such, and as outlined elsewhere herein, in some instances, a corporation is clearly the target even though they are not formally a party (e.g. Ithaca, Drax, Centrica, etc). In that context, the formal defendant could be the regulator (e.g. the FCA), a local authority, or the relevant Secretary of State.

[314] Goldberg and Lord QC (n 123), 459.

### iii. Who are/might be the third-party intervenors in corporate climate litigation?

There are instances where corporations have intervened in judicial review proceedings, as discussed above.[315] The OEP can also act as an intervenor in judicial reviews, as discussed above.

There are also webs of informal influence that must be taken into account. The climate litigation community of practice includes practitioners, NGOs / charities or other third sector organisations, and academics - the community shares knowledge and support on a relatively free basis.[316] The 'ecosystem' that exists in the corporate world includes asset managers, insurers, banks, regulators, shareholders, beneficiaries and trustees. These links and connections are crucial to enforcing climate regulations and making them work.[317] For instance, in the recent *Shell* litigation brought by ClientEarth there are institutional investors and investor bodies watching and openly supporting the litigation. Litigation funders also exert influence in terms of litigation strategy (see further below).

There will be webs of influence on 'the other side' as well, including funders. This of course includes lobbying by fossil fuel companies.[318] Influence is also exerted through disinformation campaigns run by the same, which involve public relations and advertising companies.[319]

### iv. Others

What I would call 'affected parties' may not be a party or even be an intervenor, but those who have corporate or financial interests that will be affected by the outcome of the litigation. For instance, in planning law cases this would include the proposed developer / funder of any project, but also any prospective developer of a similar project who would be affected by a strong precedent. For instance, if the *Finch* case mentioned above succeeds in the Supreme Court (or potentially, even if it does not), a sensible developer would ensure all future environmental impact assessments took account of downstream emissions. There might be a range of parties along a supply chain who have an interest in the outcome, and companies with a comparable business should pay attention. Whether or not it is explicit in the papers or the media framing or activism around the litigation, these 'affected parties' would frequently not be the target of the litigation. In the UK context, of course, relevant regulators such as the FCA will continue to be important.

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[315] See e.g. *R (oao FOE) v SoS for UKEF and Chancellor of the Exchequer* (n 279).
[316] This claim is made based on the knowledge of the author and the IEG.
[317] This claim is made based on the knowledge of the author and the IEG.
[318] Wentz and others (n 97). The contradiction in a defendant's lobbying activity and express environmental aims is currently subject to litigation. See the *Church of England* case, mentioned above.
[319] ibid; Oreskes and Conway (n 161).

## B. Approach of the courts to procedural issues in corporate climate litigation

### i. Standing

In general, a claimant must have a sufficient interest to bring proceedings, which in many instances must mean that the claimant can demonstrate that they have suffered from a kind of harm that would be actionable in the relevant proceedings, and that this is traceable to the defendant's conduct. This would differ based on the cause of action. For instance, to bring proceedings in nuisance a claimant must have proprietary rights in the affected land (see above). To bring an action based in human rights, a claimant must be able to establish victim status (also see above). For public law actions / judicial review, there are limits on standing which require that a 'sufficient interest' be demonstrated,[320] but this is interpreted in a very liberal way, such that anyone who is neither 'a busybody nor a troublemaker' could be found to have standing.[321] There is also a liberal approach to standing for representational bodies including NGOs.[322]

In relation to corporate claims, the claimants' standing might also be determined based on the capacity in which they bring proceedings. A derivative claim describes proceedings brought by a minority shareholder in relation to a cause of action vested in the company, seeking relief on its behalf.[323] Derivative claims are so described because the claimant's right to sue is not personal to them; rather, it derives from the right of the company – but which the company has failed properly to exercise. Where proceedings are brought under the Companies Act 2006, a claimant must seek permission to bring proceedings.[324] This is a two-stage process. In the first stage, the claimant must satisfy the court that a prima facie case for permission exists. In the second stage, the court will decide whether to grant permission for the claim to be continued. Factors the court must consider include whether the shareholder is acting in good faith in seeking to continue the claim, whether the act or omission is likely to be authorised or ratified, and the importance that a member acting in accordance with the duty to promote the company's success would attach to the claim. [325] The court shall

[320] Section 31 (3) Senior Courts Act 1981, although see *Walton v Scottish Ministers* [2012] UKSC 44.
[321] Bell and others (n 41), 334, citing *R v Somerset County Council, ex parte Dixon* [1998] Env LR 11.
[322] ibid, 335.
[323] Section 60(1) Companies Act 2006.
[324] Under Section 261(1). Permission will only be granted if the court thinks a prima facie case has been made out – see section 261(2). This is subject to a variety of considerations including whether the claimant themselves could be seen to be acting consistently with the general duty under s172 – see section 263.
[325] Section 263 Companies Act 2006.

have 'particular regard to any evidence before it as to the views of members of the company who have no personal interests, direct or indirect, in the matter.'[326]

Alternatively, a shareholder wishing to protect their own personal interests can bring an unfair prejudice petition.[327] The grounds for doing this are that a company's affairs are being conducted in an unfairly prejudicial manner to shareholders generally or to some shareholders (including at least the petitioner), or that an actual or proposed act or omission of the company is or would be unfairly prejudicial.[328] Similar restrictions also apply to common law claims.[329] The claimant must establish a prima facie case that the action should have permission, a higher bar to meet than simply the establishment of an arguable case.[330] Also see discussion in company/financial claims above, and defences.

### ii. Justiciability

In general, arguments that the claimant's action is not justiciable may reflect the manner in which the grounds of claim have been set out. Arguments might be made, for instance, that a tort claim would be better brought in public law. However, in this context, issues are mostly likely to arise in relation to the question of whether the issues before the court are of a nature that should be brought to court, or whether these are subject to Parliamentary accountability and best resolved there.

### iii. Jurisdiction

In general, at common law, the jurisdiction of the English Courts is based on valid service on the defendant. Jurisdiction can be challenged under Part 11 of the Civil Procedure Rules.

Where the defendant is outside the jurisdiction or where proceedings are brought in relation to matters arising outside the jurisdiction, the claimant may need the Court's permission to serve proceedings on the defendant. The claimant can apply to serve the claim form in the relevant place.[331] This would require the claimant to demonstrate that the foreign defendant was a necessary party to the proceedings, and that a real and triable issue exists between the parties.[332] The claimant would have to demonstrate that England was the proper place for the claim to be brought.

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[326] Section 263(4) Companies Act 2006.
[327] See Section 994 Companies Act 2006.
[328] Section 994(1) Companies Act 2006.
[329] *Prudential Assurance Co Ltd v Newman Industries Ltd (No 2)* [1982] Ch 204 at 222A.
[330] See discussion in *ClientEarth v Shell and others (May)* (n 215), [9] - [10]; *ClientEarth v Shell and others (July)* (n 215), [14] - [19].
[331] CPR 6.37(3).
[332] CPR 6 Practice Direction B1.

### iv. Group litigation / class actions

The Civil Procedure Rules create a basis for group litigation claims. The most traditional method is for multiple parties to bring a joint claim if these can be 'conveniently' disposed of in the same action.[333] With permission, parties can also be added to or substituted in proceedings,[334] or the court can make an order for parties to be removed, added or substituted.[335]

A Group Litigation Order ('GLO') means an order made under rule 19.11 to provide for the case management of claims which give rise to common or related issues of fact or law (the 'GLO issues').[336] GLOs are still fairly unusual, but not difficult to get *if* circumstances are right and group disposal proves to be the most efficient way of managing multiple cases; it might be a rare case that satisfies these criteria however. These can be sought in circumstances where resolving a single issue is likely to dispose of all group cases. The court can also order a GLO on its own initiative.[337]

It is also possible to bring a representative action under rule 19.6. Under this rule, where more than one person has the same interest in a claim, it can be begun or continued by or against others who have the same interest as representatives. There is recent guidance from the courts as to when a representative action will be suitable in environmental and / or mass tort claims. In *Jalla v Shell*,[338] the court determined that representative actions were appropriate where there is a 'congruity of interest', which can be determined by common sense. The Court of Appeal in *Jalla* found that this particular action was unsuitable for a representative action because there was a need for individual determination for each claimant, although, it did find that in general representative actions might be suitable in environmental actions where an injunction was sought.[339] Note however that subsequently the Supreme Court in *Lloyd v Google* determined that damages may be claimed in a representative action if they can be calculated on a common basis, or if the liability issues can be decided in a representative action which can then form the basis for individual compensation claims.[340]

What are called 'opt out' claims can also be brought in the Competition Appeals Tribunal. These are brought on behalf of an identifiable group of persons, raise

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[333] CPR 7.3.
[334] CPR 19.4.
[335] CPR 19.4(11).
[336] CPR 19.11.
[337] CPR Practice Direction 19B.
[338] *Jalla and others v Shell International Trading and Shipping Company* [2021] EWCA Civ 1389
[339] *Jalla* (n 338). In Jalla, the individualisation was relevant for limitation, not proof of damage.
[340] *Lloyd v Google llc* [2021] UKSC 50, [80] – [83].

common issues and have to be suitable to be brought in collective proceedings.[341] The action would need to arise from a breach of competition law, so this might involve pointing to unfair terms or higher prices. This may seem out of the realms of climate litigation, as the climate point may be quite obscure, but this is mentioned for completeness.

### v. Apportionment

Provision is made for joint and several liability. In the Civil Procedure Rules these are defined as follows: 'Parties who are jointly liable share a single liability and each party can be held liable for the whole of it. A person who is severally liable with others may remain liable for the whole claim even where judgment has been obtained against the others.'[342]

Where some causal tests are used based on multiple causes, there has been controversy over the apportionment of damages. This issue arises in both cumulative causation and contribution to risk situations, where, in some circumstances, defendants who have contributed to the harm are required to compensate all the claimant's loss, even though another cause(s) may be identified. This approach appears to some extent to be context specific.[343]

### vi. Disclosure [344]

Earlier in this report I discuss the provisions relating to disclosure of climate change decision-making processes. I deal with this under company and financial laws. Although this has a procedural aspect, I have dealt with this as part of the substantive law. This section refers to the provisions that require disclosure to be made as part of any proposed or ongoing civil litigation, to support the claimant's particularisation and argument of the case. The documents and evidence obtained would, for instance, provide insight into how decisions are made and what procedures are or were followed, and by whom, and what documentation was available, including risk assessments and reports. The implications of a disclosure order against a corporate defendant can be profound. Defendants would not want to release, for instance, board minutes and strategy documents.

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[341] Competition Appeals Tribunal Rules 79(1).

[342] Glossary, CPR.

[343] For instance any defendant who has contributed to the claimant's loss can be found liable for all of it in mesothelioma cases, under the Compensation Act 2006, but not in cases concerned with other kinds of illness – see *Barker v Corus (UK) plc* [2006] UKHL 20.

[344] Section added at the suggestion of the UK IEG – questions of scientific evidence are dealt with in D below.

The Civil Procedure Rules make provision for disclosure and inspection in Part 31.[345] The Rule requires parties to make standard disclosure, which includes the documents on which a party relies to prove their own case,[346] as well as those which adversely affect their own or someone else's case, or support the case of another party.[347] Subsequent orders for specific disclosure of identified documentation can also be made.[348] It is also open to parties to seek an order for pre-action disclosure rather than waiting for documents to be made available after the case is pleaded out.[349] There are provisions for withholding inspection or disclosure of documents that are somehow privileged,[350] or where disclosure would be disproportionate[351] or harm the public interest[352].

### vii. Costs and Funding [353]

Litigation in the UK is adversarial, time-intensive and expensive; the basic rule is that the costs follow the event, which means that the loser bears the costs of litigation. A perhaps less well-appreciated consequence of this, is that if a claimant succeeds on some but not on all grounds, they might only recover costs proportionate to the successful grounds. Of course, in corporate climate litigation, defendants are frequently well-resourced which is material both in terms of the extent of the risk taken on by claimants, but also in terms of how aggressive and strategic they can stand to be in litigation. In comparable contexts corporations can adopt a 'scorched earth' approach, dragging out the preliminary stages by appealing every point, to run down the claimant's resources.[354] As such, it is necessary to consider both the relevant rules about cost outlay and risks, as well as how cases are funded.

#### Costs

The UK is a member of the Aarhus Convention, Article 9(4) of which includes the requirement that the costs of bringing environmental cases must not be 'prohibitively expensive'.[355] From 2017, amendments were enacted to the Civil Procedure Rules to

[345] Disclosure is simply a statement to the effect that a document exists or has existed – CPR31.2 – this would normally then give rise to inspection.
[346] CPR31.6(a).
[347] CPR31.6(b).
[348] CPR31.12.
[349] CPR31.16 – including against a non-party, see CPR31.17.
[350] CPR31.10(4)(a).
[351] CPR31.3(2).
[352] CPR31.19(1).
[353] Section added at the suggestion of the UK IEG and Core Team.
[354] Susan Dunn and Felix Curtis, 'Litigation Funding: Practical Aspects' in Richard Meeran and Jahan Meeran (eds), *Human Rights Litigation against Multinationals in Practice* (Oxford University Press 2021), 327.
[355] UNECE Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, adopted on 25th June 1998 at Aarhus.

comply with its provisions, introducing costs capping. This limits exposure for claimants in environmental judicial and statutory review cases, to £5,000 where the claimant is claiming only as an individual,[356] and to £10,000 in 'other cases' (e.g. NGOs).[357] Conversely, defendants are subject to a £35,000 costs cap liability,[358] which means that successful claimants would end up bearing some of their own costs if they exceeded the extent of the cap. Any party can apply to vary these limits or have them removed altogether at any stage during the proceedings,[359] as long as doing so does not make the proceedings 'prohibitively expensive' for the claimant.[360] This includes the requirement that the claimant make available details of his (or of those 'who stand behind him') financial resources. The High Court has confirmed that any challenge to the cap must be brought in the early stages other than if there is some suggestion of dishonesty or if the claimant's circumstances change.[361] Also any hearing into the claimant's finances must be in private.[362] These provisions, however, do not appear to help claimants predict risk and, in general, shift the balance of power away from the claimant. They were predicted to have a chilling effect on environmental judicial review claims,[363] and (with other factors) it appears that they have.[364]

These protections also only apply to a narrow band of cases. They do not appear to apply to judicial or statutory review cases that fall outwith the scope of the Aarhus Convention.[365] For instance, the recent ClientEarth *Ithaca* action was deemed not to be an Aarhus claim, as it was brought under financial laws and regulations,[366] despite it clearly being brought in relation to environmental issues. This sets a potentially dangerous precedent for other strategic climate cases against corporates using financial or company laws and regulations. There is no protection for costs in private law

[356] CPR 45.43(2)(a).
[357] CPR 45.43(2)(b). These amounts can be varied by a court according to CPR45.44.
[358] CPR 45.43(c).
[359] CPR 45.44(1) and (2).
[360] CPR 45.44(2). The question of whether a claim is 'prohibitively expensive' for a claimant has to be considered taking into account the claimant's own costs liability in addition to any adverse costs liability - *RSPB, Friends of the Earth & ClientEarth v Secretary of State for Justice* [2017] EWHC 2309 (Admin)
[361] *RSPB, Friends of the Earth & ClientEarth v Secretary of State for Justice* [2017] EWHC 2309 (Admin). For a discussion of the concerns about the new costs regime and the reason why these proceedings were brought, see Gillian Lobo, 'Access to Justice: Cold Freeze Ahead for Environmental Claims' *elaw* May/June 2017.
[362] Ibid.
[363] Lobo (n 361).
[364] Stephen Tromans KC (ed), 'A Pillar of Justice II' (RSPB, ELF, FOE 2023) <https://elflaw.org/wp-content/uploads/2023/06/A-Pillar-of-Justice_Report.pdf>.
[365] This may also be challenged by the defendant – see CPR 45.45. There does, however, not appear to be any record of a defendant successfully doing so – see ibid, 5.
[366] *R (oao ClientEarth) v Financial Conduct Authority* (n 210), [30] - [47].

claims,[367] despite this seemingly being required by Article 9(3). This means that in private law environmental cases – which will be many of the cases considered herein – the claimants bear full costs risk.

It does also appear that courts will make a full costs order, or in some cases, grant orders for adverse costs if in the view of the Judge the claimants have abused a process. For instance, there was an adverse costs order given against ClientEarth in the *Shell* litigation.[368] This does appear to have been intended to punish the claimant. As discussed above, the court did take some exception to the framing of the claimant's case and, and in particular, the questions it raised about the defendant's board members' professional judgement. This deviates from the norm in derivative proceedings, where the defendant company will not normally be allowed to recover its costs if it participates voluntarily, as Shell did.[369]

Various aspects of the UK's implementation of the Aarhus Convention continue to be the subject of communications by NGOs and members of the public to the Aarhus Convention Compliance Committee.[370] At the seventh session of the Meeting of the Parties to the Aarhus Convention in 2021,[371] the UK was requested to submit a plan of action to the Compliance Committee outlining how it intended to bring itself into compliance with article 9(4).[372] The UK's Plan of Action was prepared without adequate consultation,[373] contains no tangible proposals,[374] and will need to be improved before the deadline for compliance on 1 October 2024. In short, the regime on costs protection in environmental cases *should* change if the UK wishes to comply with its international commitments; whether or not it will is another question.

### Funding

So much for the regime on costs, but consideration also needs to be given as to how these cases are funded, particularly given that they are so expensive. Claimants have to front the costs of bringing proceedings (which includes the fees of their legal representatives, but also court fees, and disbursements including experts costs), but also take on the risks of adverse costs orders as soon as they issue proceedings.[375] The

[367] CPR 45.41, *Morgan and Baker v Hinton Organics* [2009] EWCA Civ 107, *Austin v Miller Argent* [2014] EWCA Civ 1012. There is also no plan to change this despite it clearly not being Aarhus compliant – see Tromans KC (ed) (n 364), 9.
[368] *ClientEarth v Shell plc and others* [2023] EWHC 2182 (Ch).
[369] Aristova and Nichols (n 231), quoting Civil Procedure Rules Practice Directions 19 A para 2.
[370] https://unece.org/environment-policy/public-participation/aarhus-convention/compliance-committee.
[371] https://unece.org/environmental-policy/events/Aarhus_Convention_MoP7.
[372] See Áine Ryall, 'A Brave New World: The Aarhus Convention in Tempestuous Times' (2023) 35 Journal of Environmental Law 161, for an explanation as to how this process works.
[373] Tromans KC (ed) (n 364), 8-9.
[374] https://unece.org/sites/default/files/2022-07/frPartyVII.8s_01.07.2022_plan_action.pdf.
[375] Dunn and Curtis (n 354), 326.

majority of individuals could not afford to pay litigation costs without some form of assistance, which could come from legal aid, before-the-event (BTE) insurance (for instance, provided through an insurance policy or trade union membership), or some kind of risk-sharing arrangement. Legal aid eligibility is very restricted both in terms of means and causes of action – for instance, funding for environmental judicial review is rarely available;[376] and the scope of cover of a BTE insurance policy might not apply to environmental cases.[377] NGOs or other bodies such as the OEP (which can intervene in environmental cases, see above) would fund litigation from their own budgeted costs or through a litigation funding arrangement. Notably, the cost of interventing in proceedings is a lot cheaper than being a party to proceedings.[378]

In the UK, risk-sharing arrangements are also available; in that the lawyers would only recover their fees in the event of success.[379] Conditional fee agreements (CFA) can be used, and the prospect of recovery of inter-partes costs – including risk-based success fees of up to 100% in most cases – can provide enough incentive for claimant lawyers to accept instructions, in more 'risky' cases. It is not clear how this recovery is affected where cost capping is in place. There is also scope for damages based agreements (DBA) or contingency fee arrangements, in terms of which the lawyers conduct litigation for a share of the damages.[380] Finally, to be prudent, risk-sharing agreements would need to be combined with after-the-event (ATE) litigation insurance which would also be subject to policy and risks restrictions.[381]

Corporates or NGOs presumably fund litigation from their own budgeted resources, [382] or through other kinds of litigation funding agreements. There is some turmoil in the litigation funding market in the UK at the moment following the surprise *PACCAR* decision from the Supreme Court in July 2023.[383] The decision found that a litigation funding agreement was a DBA, but as it had not been entered into with the conditions for DBAs satisfied, it was unenforceable. This threw the enforceability of other litigation funding arrangements into question. At the time of writing, it would seem to be in

[376] Bell and others (n 41), 339.
[377] This may vary, but for instance, the author's own BTE insurance policy (legal insurance connected to householder insurance, which is fairly typical) does not provide cover for environmental claims.
[378] Most of these claims are based on my extensive experience of legal practice and the knowledge and guidance of the UK IEG.
[379] Dunn and Curtis (n 354), 332 - 3.
[380] ibid, 332.
[381] Most of these points are based on the author's experience of legal practice.
[382] The sources of NGO funding can be surprising. For instance, ClientEarth, very much a usual suspect in UK climate litigation, receives funding from Coldplay. See https://www.clientearth.org/coldplay/.
[383] *R (on the application of PACCAR Inc and others) v Competition Appeal Tribunal* [2023] UKSC 28

dispute whether proposed legislation that purports to ameliorate the impacts of the decision goes far enough.[384]

Crowd-funding has been used to fund several high-profile cases, including the *McGaughey* litigation discussed above.[385] This is also a strategy frequently used by the Good Law Project. This does raise questions about how potential costs hurdles might be crossed, with multiple small funders; it also raises questions about the costs liability of the individual small funders should the action be unsuccessful.

Another significant development in the climate litigation sphere in recent years has been the growth of philanthropic climate litigation funders, for instance, the Foundation for International Law and the Environment (FILE), or the Children's Climate Investment Fund.[386] Climate litigation funders are having a huge impact; for instance, FILE alone funded 250 cases in the last year.[387] To some extent, the scale of the flow of money into climate litigation may mean that concerns about opportunity cost and the need to carefully predict prospects in order to manage scarce resources are less of a constraint than they were only a few years ago.

Another significant factor is the introduction of new players into the market. This includes professional litigation funders, 'backed by investors ranging from pension funds to family offices.'[388] Interestingly, the attraction of litigation funding as an investment arises from the possibility of this being classified as 'sustainable investment' and also, because the prospects of litigation are not correlated to broader financial markets.[389] These parties are also interested in private law claims.[390] Concerns about priorities and the transparency of these arrangements could be raised, however, particularly given the often divergent interests between funders and claimants.[391] This can be concerning because of the power litigation funders will have to control strategy and litigation priorities.

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[384] This is being done by the introduction of an amendment to the Digital Markets, Competition and Consumers Bill; however, this has been criticised as not really addressing the problem, as it relates only to competition cases, whereas the *PACCAR* decision has affected the entire litigation funding market – see Michael Cross, 'Amendment to undo *PACCAR* judgment "does not work"', Law Society Gazette, 16 November 2023 and Rachel Rothwell, 'Time to end the post-*PACCAR* chaos', Law Society Gazette, 8 December 2023.

[385] https://www.crowdjustice.com/case/save-pensions-and-planet/.

[386] Camilla Hodgson 'The money behind the coming wave of climate litigation' Financial Times, 5 June 2023.

[387] This claim is based on the knowledge of the UK IEG.

[388] Hodgson (n 386).

[389] Hodgson (n 386).

[390] This claim is based on the knowledge of the UK IEG.

[391] Hodgson (n 386).

## C. Most Effective Arguments and Defences, and Court Responses

This is very difficult to predict at present, given that most cases have not proceeded to a hearing on the merits. I have not made a sharp distinction between denials and defences, specifically, doctrinal defences (e.g. of contributory negligence) and arguments that might be made to defeat the claimant's actions (e.g. that the claimant has not established that a person exercised their discretion in a way that was unlawful), as these might be employed in different ways, so I have focused on the substance of possible denials or defences.[392]

In extant corporate cases, defendants have successfully established that the claimants lack standing to bring the kinds of actions they seek to bring. See *McGaughey* and *ClientEarth v Shell* discussed above. In general, this (and other arguments that the claim is not admissible for other reasons) can be expected to continue as defendants will also use procedural delay as a tactic.

Other broad arguments could include that the claim is not justiciable, frequently relying explicitly or implicitly on the doctrine of separation of powers, to argue that this is a matter best left to the legislature or to be determined politically. This succeeded in older cases in other jurisdictions.[393] In *Milieudefensie v Shell* in the Netherlands, the defendant asserted that because the energy transition needed to be a 'concerted effort of society as a whole' this was best left to the legislature.[394] This was given fairly short shrift – the District Court clearly thought that whatever was happening politically did not preclude them from determining what was required of the defendant in order to meet the unwritten standard of care.[395] In the UK, although this kind of argument is presented in different ways in public law proceedings, and untested in private law proceedings against corporates, in general, the decision making of the UK courts reflects an 'underlying judicial philosophy which insists upon the primacy of political accountability in relation to climate change.'[396] The strongest statement of this appears in the decision of Mr Justice Bourne in the second round of 'systemic' Plan B litigation,[397]

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[392] Space does not permit an evaluation of every single doctrinal defence available under each of the actions above, so here the focus on a few approaches or arguments that have been attempted or have been successful.
[393] See for instance, the early US 'holy grail' cases where the defendants succeeded at preliminary stages on the basis that climate change was a political question – e.g. *Native Villiage of Kivalina v Exxonmobil Corp* (n 164). However, by 2015 in non-corporate cases the Dutch courts were willing to find that they could make an order for emissions reductions that exceeded legislated targets – notably in *Urgenda Foundation v the Kingdom of the Netherlands (I)* (n 121). See the discussion in Marjan Peeters, 'Urgenda Foundation and 886 Individuals v. The State of the Netherlands: The Dilemma of More Ambitious Greenhouse Gas Reduction Action by EU Member States' (2016) 25 Review of European, Comparative & International Environmental Law 123.
[394] This argument was run in *Milieudefensive v Shell* (n 119), 4.2.1.
[395] *ibid,* 4.1.3 - 4.1.4.
[396] Kimblin (n 273), 107. See Chapter One.
[397] *R (oao Plan B and others) v The Prime Minister and others* (n 20).

in finding that the claims were not arguable. In his judgment, he states that 'these claims invite the Court to venture beyond its sphere of competence',[398] and that the framework of the CCA should be allowed to run with debate about how to achieve its aims taking place in a political context.[399] As Kimblin states, 'Climate accountability is ultimately political and judges will not adopt progressive legal positions in order to further litigants' desires for additional ... scrutiny. Nor will they trespass upon Parliament's legislative competence.'[400]

One line of argument that has not been successful in other jurisdictions relates to the question of responsibility for the problem. This appears (or potentially appears) directly in relation to questions about causation or attribution, for instance, in relation to questions of whether the defendant's emissions have caused the claimants harm. This has not come up directly in UK courts as yet, and so has not been tested, but it should be noted that the science both connecting corporations to climate change, and connecting specific emissions to certain events, is established,[401] but also developing very fast.[402] This should give defendants using delay as a means of wearing down the claimant pause for thought. A less explicit responsibility point arises with argument that the defendant's emissions are negligible given the scale of global climate change. Again, this argument was run in *Milieudefensie v Shell* and given fairly short shrift.[403]

Similar logic appears in what has been called the 'market substitution' argument.[404] The essential gist of this argument is that the market for fossil fuels is stable, and that if a challenged project does not go ahead, an alternative source of fossil fuel energy will be created somewhere else. This has been raised in litigation worldwide and is sometimes accepted, sometimes rejected, or sometimes both e.g. accepted in fact or

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[398] *ibid,* [54].
[399] ibid.
[400] Kimblin (n 273), [60].
[401] Wentz and others (n 97); Sophie Marjanac and Lindene Patton, 'Extreme Weather Event Attribution Science and Climate Change Litigation: An Essential Step in the Causal Chain?' (2018) 36 Journal of Energy & Natural Resources Law 265; Richard Heede, 'Tracing Anthropogenic Carbon Dioxide and Methane Emissions to Fossil Fuel and Cement Producers, 1854–2010' (2014) 122 Climatic Change 229.
[402] For instance, in some ongoing litigation the protracted nature of the legal proceedings has meant that the claimant achieves access to better scientific evidence, see Noah Walker-Crawford 'A Peruvian farmer is trying to hold energy giant RWE responsible for climate change – the inside story of his groundbreaking court case' The Conversation, 27 November 2023, available at https://theconversation.com/a-peruvian-farmer-is-trying-to-hold-energy-giant-rwe-responsible-for-climate-change-the-inside-story-of-his-groundbreaking-court-case-218408.
[403] *Milieudefensive v Shell* (n 119), 4.3.5: 'The underlying thought is that every contribution towards a reduction of CO2 emissions may be of importance. The court is of the opinion that these distinctive aspects of responsibility for environmental damage and imminent environmental damage must be included in the answer to the question what in this case should be understood as 'event giving rise to the damage' ... '
[404] See e.g. Guy Dwyer, '"Market Substitution" in the Context of Climate Litigation' (2022) 12 Climate Law 1.

rejected as a matter of law.[405] The logical flaws in this kind of argument arise from the fact that a contribution to climate change made by a specific development project, does 'not become acceptable because a hypothetical and uncertain alternative development might also cause the same ... impact.'[406] While not raised as a defence per se, arguments based on market substitution have been accepted by the UK courts, including regarding the question of whether an assessment of Scope 3 emissions should have been included in a climate change assessment.[407]

Similar logic can be seen in relation to claimants' arguments that it must be clear how authorised emissions fit within existing and future carbon budgets; the counter-argument made in response would be that the decision maker took all relevant considerations into account and that the decision was lawful. In the UK, this counter-argument tends to succeed even where there is no evidence that a decision maker has considered how a development is compatible with future carbon budgets in a quantitative way. For instance, in the *Drax* litigation (discussed above),[408] the Court of Appeal (in determining whether the Secretary of State correctly interpreted the relevant policy in relation to the approach that should be taken to greenhouse gases) did not accept that it was necessary to assess individual applications in terms of carbon emissions against carbon budgets.[409] In a judicial review brought by the Transport Action Network,[410] the claimant argued (amongst other things) that the road investment strategy set by the Secretary of State did not have due regard to the fourth and fifth carbon budgets, and that these can only have been properly taken into account with a quantitative, numerical assessment of the greenhouse gases likely to be generated by the project and how these would fit within the carbon budgets.[411] However, it was concluded that as such an assessment was not required by Parliament this did not need to be taken into account.[412] Of course, the two examples given are judicial review applications about specific policies / projects and the decisions reached are specific both to the nature of the proceedings and the law and policy framework within which the decision was made; however, there is an identifiable reluctance by the courts quantitatively to assess high-emitting projects against the carbon budgets.

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[405] *ibid*, 4. See also *Milieudefensive v Shell* (n 119), 4.4.49, where it was rejected. .

[406] *Gloucester Resources Limited v. Minister for Planning* [2019] NSWLEC 7, at paragraph 545. For an overview of the criticisms of this argument see Daria Shapovalova, 'Arctic Petroleum and the 2°C Goal: A Case for Accountability for Fossil-Fuel Supply' (2020) 10 Climate Law 282, 292 - 8.

[407] See *R (oao FOE) v SoS for UKEF and Chancellor of the Exchequer* (n 279).

[408] *R (on the application of ClientEarth) v Secretary of State for Business, Energy and Industrial Strategy and Drax Power Limited* (n 275).

[409] *ibid,* [88], [91].

[410] *R (Transport Action Network Limited) v Secretary of State for Transport* [2021] EWHC 2095 (Admin).

[411] These are set under the CCA, as discussed above.

[412] *R (Transport Action Network Limited) v Secretary of State for Transport* (n 410), [121].

Another argument that defendants could explore to resist liability is that they have complied with relevant legislation or regulations. For example although potentially useful in climate litigation in some respects as highlighted earlier, mandatory due diligence laws could also be used by defendants to argue that they have complied with regulatory requirements.[413] This is a particular risk in the UK context because, as is well documented by the CCC, the UK government has not amended laws and policies to give effect to its purported climate ambitions – as such there is a gap between the headline goals and the minutiae of regulation needed to get there.[414] In other contexts, the English courts have not considered themselves bound to regulatory standards in determining standards of reasonable behaviour, but will rather determine what a reasonable person would have done given the known risks.[415] This does not mean they would necessarily do the same in relation to climate harms though, for the reasons explored above.

## D. Relevant sources of evidence and tests of causation

In general, the approach taken to causation in English law is the 'but for' test, which simply asks whether, but for the defendant's wrongful conduct, the claimant would have suffered harm.[416] Quite famously the UK courts have found creative ways to get around evidentiary difficulties in the face of pressing socio-political problems, specifically in relation to illness caused by exposure to asbestos.[417] English law has two approaches to causal evidence in situations where the 'but for' test is not met but where the defendant's conduct clearly contributed in some way to the claimant's harm. These include tests for cumulative causation and contribution to risk.[418] Simply put, a defendant can be found jointly and severally liable in circumstances where he made a material contribution to the claimant's harm,[419] including usually where the other causes are not actionable.[420] Again, simply put, this test is used where the harm is cumulative, and is likely to get worse the more (in industrial disease cases) the exposure occurs. The more controversial material contribution to risk test is used in circumstances

[413] Rajavuori, Savaresi and van Asselt (n 68), Section 5.
[414] CCC (n 19).
[415] See Maria Lee, 'Safety, Regulation and Tort: Fault in Context' (2011) 74 The Modern Law Review 555.
[416] *Barnett v Chelsea and Kensington HMC* [1969] 1 QB 428.
[417] *Fairchild v Glenhaven Funeral Services Ltd* [2002] UKHL 22 but see comments in *Sienkiewicz v Grief (UK) Ltd* [2009] EWCA Civ 1159 and Lord Hoffmann, 'Fairchild and After' in Andrew Burrows, David Johnston QC and Reinhard Zimmermann (eds), *Judge and Jurist: Essays in Memory of Lord Rodger of Earlsferry* (Oxford University Press 2013).
[418] The principle from *Fairchild v Glenhaven Funeral Services Ltd* (n 417).
[419] *Bonnington v Wardlaw* [1956] AC 613.
[420] *Bailey v Ministry of Defence* [2008] EWCA Civ 883.

where the defendant contributed to the *likelihood* that the claimant would suffer harm.[421]

It cannot be assumed that this would be replicated in climate tort cases. The courts sought to constrain the 'special' material contribution to risk test developed in *Fairchild* almost immediately, and it was pressure from trade unions that brought about a legislative resolution of this.[422] It does raise questions as to which test is applicable however. Some authors suggest contribution to risk, seemingly in relation to the likelihood that climate change causes some kind of event.[423] Others suggest a cumulative approach on the basis that an accumulation of greenhouse gases in the atmosphere causes warming.[424]

There is a documented evidence gap in climate litigation.[425] In general, claimants have relied on the IPCC reports but also the assessments by the CCC. The CCC is highly valued but has been criticised for compromising academic rigour for the purposes of political expediency in relation to the progress taken towards net zero.[426] Notably in the net zero litigation the CCC had approved the Net Zero Strategy that was therein (rightly) impugned,[427] although noting that more transparency and quantification was required.[428] The extent of the deficit in quantification was only made clear through questioning by the claimants both in pre-action correspondence,[429] and written witness evidence provided on behalf of the Secretary of State in defending the claim.[430] This does raise questions about the value of independent evidence in litigation, rather than agreed or institutional sources.

The decisions in the recent *ClientEarth v Shell* litigation resulted in guidance from the High Court regarding the use of scientific evidence. Therein, the evidence provided by

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[421] *Fairchild v Glenhaven Funeral Services Ltd* (n 417).
[422] *Barker v Corus (UK) plc* (n 343) and the Compensation Act 2006. I make this claim based on my experience of being involved with the trade union campaign at the time, as a claimant asbestos lawyer.
[423] Kaminskaite-Salters (n 84).
[424] Kumar and Frank (n 114).
[425] Rupert F Stuart-Smith and others, 'Filling the Evidentiary Gap in Climate Litigation' (2021) 11 Nature Climate Change 651.
[426] Andrew Simms 'Turning delusion into climate action - Prof Kevin Anderson, an interview', *Responsible Science Journal*, 9 June 2020, available at https://www.sgr.org.uk/resources/turning-delusion-climate-action-prof-kevin-anderson-interview.
[427] *R (on the application of Friends of the Earth Ltd and others) v Secretary of State for the Business, Energy and Industrial Strategy (the net zero litigation)* (n 22), [150]. This refers to the Climate Change Committee, Independent Assessment: The UK's Net Zero Strategy, 26 October 2021, available at: https://www.theccc.org.uk/publication/independent-assessment-the-uks-net-zero-strategy/.
[428] CCC (n 149), 27.
[429] *R (on the application of Friends of the Earth Ltd and others) v Secretary of State for the Business, Energy and Industrial Strategy (the net zero litigation)* (n 22), [153] - [154].
[430] ibid, [139].

ClientEarth was a lengthy witness statement from a senior member of staff who had reviewed existing scientific and policy knowledge regarding climate change, as well as the defendant's own documents, and used this to support ClientEarth's claim that the strategy employed by Shell was not one that a reasonable director complying with the relevant duties could have developed. The court was critical of this saying that independent expert evidence was required, particularly given that there was no 'universally accepted methodology',[431] and given the seriousness of the claims made.[432] This was no less the case given that the proceedings were only in a preliminary stage.[433] This decision shows clearly that claimants will need to produce independent expert evidence to support their claims. This is particularly the case where the claimants are seeking to establish that a professional person has discharged their functions in such a way as to be unlawful.[434] One of the crucial issues in that regard was a lack of expert evidence on how the directors should have balanced competing priorities; as such, evidence simply of the effect of climate change on a business was insufficient.

## E. Limitation Periods

Limitation periods depend on the cause of action. The time limit for contract or tort claims is six years,[435] unless the claimant seeks damages for personal injury in relation to the latter, in which case it is three years with discretion to extend.[436] There are special time limits for negligence not involving personal injury, including where facts relevant to the cause of action are not known. The overriding time limit in such cases is 15 years.[437]

Judicial review has a short limitation period and must be brought '(a) promptly and (b) in any event not later than 3 months after the grounds to make the claim first arose.'[438] In planning law the time limit is even shorter; the application must generally be made within 6 weeks of the date of the decision.[439] The six-week limit also applies to statutory appeals of planning permission.[440] Some actions have limitation periods imposed by their empowering statute, e.g. 1 year under the HRA,[441] and 3 months under the

[431] *Clientearth v Shell and others (July)* (n 215), [64].
[432] ibid, [59] - [61]; also see discussion in Honey KC (n 223).
[433] *ClientEarth v Shell and others (July)* (n 215), [62].
[434] See Honey KC (n 223).
[435] Sections 5 and 2 of the Limitation Act 1980.
[436] Section 11 of the Limitation Act 1980.
[437] Sections 14A and 14B of the Limitation Act 1980.
[438] CPR 54.5(1).
[439] CPR 54.5(5).
[440] S. 288 of the Town and Country Planning Act 1990.
[441] Section 7.

Equality Act 2010.[442] The short deadlines can create additional challenges, especially for claimants who do not have funding in place.

Where harm is continuing in tort or other kinds of civil law, there is a continuing cause of action for each day that the wrongful conduct continues. This must arise from new tortious events; where one event gives rise to the damage that has not been remediated, case limitation runs from the date of damage, even if the consequences of the nuisance persist. So, a nuisance can be continuing in the sense that every fresh continuance may give rise to a fresh cause of action in the tort of private nuisance.[443] The viability of the concept of 'continuing harm' in nuisance has recently been considered by the Supreme Court in *Jalla v Shell*.[444] The claimants' case was that the harm (an oil spill) was continuing because it had not been remediated. The question at issue was whether there was a continuing private nuisance and hence a continuing cause of action; this was relevant for limitation. In a unanimous decision, Lord Burrows confirmed that a continuing nuisance relates to 'repeated activity by the defendant' or 'an ongoing state of affairs for which the defendant is responsible.'[445] The claimants lost in *Jalla*, but this does not mean that the continuing harm argument cannot be made, provided that the relevant circumstances genuinely relate to an ongoing state of affairs and not a 'one off' event. Normal limitation rules still apply and damages at common law for a continuing nuisance cannot be recovered for causes of action (ie for past occurrences of the continuing nuisance) that accrued outwith the relevant period of limitation.[446]

Unhelpfully, similar terminology is used in circumstances where the defendants do not create the nuisance but do nothing to rectify it – thereby 'continuing' or 'adopting' it.[447] This is not a 'continuing nuisance'.[448]

[442] Section 123(a).
[443] *Battishill v Reed* (1856) 18 CB 696.
[444] From *Jalla v Shell* [2021] EWCA Civ 63.
[445] *Jalla v Shell* [2023] UKSC 16, [26].
[446] Ibid, [32].
[447] In such cases the courts apply a 'measured duty of care', only finding the defendant liable where they are somehow at fault in failing to correct the nuisance – see *Sedleigh-Denfield v O'Callaghan* [1940] AC 880.
[448] *Jalla v Shell* (n 445), [33]. Lord Burrows discusses other forms of linguistic confusion at [22] and [24].

# 3. Remedies

There have to date not been any successful cases against corporates in the UK, so there are not any particularly successful remedies to comment on. However, I set out below what is notionally possible using the causes of action discussed above.

## A. Pecuniary Remedies

In many of the above actions the claimant, if successful, could seek an order for damages. The detail of the rules as to how the various kinds of damages are quantified go beyond the scope of the report, but for instance, in cases of property damage the losses would probably be quantified as the reduction in value of the property, or the cost of repair,[449] within reason.[450]

If a tort or other kind of civil claim were to be successful, the claimant can usually seek compensatory damages, the aim of which is to restore the claimant to the position they would have been in had the wrongful conduct not occurred.[451] These encompass general damages (which are unquantified and meant to address the wrong to the claimant) and special damages, which are quantified. Not all causes of action are so restricted however. Remedies available under unjust enrichment are designed to reverse the enrichment. Restitutionary damages focus on the defendant's gain, and require them to give up some benefit – frequently an 'unjust enrichment' that they have gained at the claimant's expense.[452]

Contractual rights, however, are by their nature based on the promise of future performance, and as such in cases of breach the remedy seeks to restore the claimant to the position they would be in had the contract been properly performed.[453] As referenced above, there are a host of new contractual clauses being developed and released as open access by The Chancery Lane Project (TCLP); many of these create

[449] See e.g. Simon Deakin, Angus Johnston and Basil S Markesinis, *Markesinis and Deakin's Tort Law* (Clarendon Press 2013), 863.

[450] The claimant's damages must be fair and reasonable, and they are unlikely to be recovered in full if the costs of repair exceeds the loss: *Rowley v London and North Western Co* (1873) LR 8 Exch 221 at 231. I explore some of the difficulties of making full repair in relation to poor energy performance, a good example of a seemingly unexciting but very important area of climate mitigation policy, here: Bouwer, 'When Gist Is Mist: Mismatches in Small Scale Climate Change Litigation' (n 158).

[451] *Lim v Camden & Islington Area Health Authority* [1980]AC 174 at 187.

[452] Weinbaum (n 184), 452, ftn 144.

[453] *Robinson v Harman* (1848) 1 Exch 850, 855 ('The rule of the common law is, that where a party sustains a loss by reason of a breach of contract, he is, so far as money can do it, to be placed in the same situation with respect to damages, as if the contract had been performed.').

bespoke remedies for breach. To our knowledge, these clauses have not been tested in court, and it is not clear whether they are enforceable.

## B. Non-Pecuniary Remedies

It may be that the more powerful remedies are those that require a change in conduct, rather than damages payable to a claimant. Injunctions offer very specific preventative value in circumstances where the court may be persuaded to award them.[454] An order shutting down the fossil fuel industry or throttling emissions is not likely. But injunctions do not have to be all-or-nothing instruments and historically do not always inevitably lead to corporate closure.[455] In the recent *ClientEarth v Shell* litigation, the court commented that the terms of the proposed injunction – that Shell develop a new climate risk strategy and comply with the order of the Dutch court in *Milieudefensie* – were not sufficiently precise,[456] but also that they would be unworkable given the likely 'serious impact' on the defendant.[457] However, this does not mean that more targeted or specific injunctions would not be granted. A court could make some kind of order to suspend operations pending environmental restoration, the installation of carbon removal technologies,[458] or subject to requirements that other sorts of improvements – including innovation that can allow operations to continue while addressing the environmental impacts – be made if operations are to continue.[459]

Claimants in contract may be able to ask for an order of specific performance, whereby the defendant will be compelled to deliver on what they promised under the contract; as before, this, combined with expectation damages, is supposed to put the other party in the position they would have been in had the contract been performed. However, there is very limited scope for such order and, in general, the English courts will not make an order of specific performance in contracts for services. Some kinds of contracts

[454] John Murphy, 'Rethinking Injunctions in Tort Law' (2007) 27 Oxford Journal of Legal Studies 509. It should be noted that, certainly in nuisance cases, courts may award injunctions less readily following *Coventry and others v Lawrence and another* [2014] UKSC 46. It may no longer be accurate to say that injunctions are the default remedy in nuisance.

[455] Ben Pontin, 'The Common Law Clean Up of the "Workshop of the World": More Realism About Nuisance Law's Historic Environmental Achievements' (2013) 40 Journal of Law and Society 173.

[456] *ClientEarth v Shell and others (May)* (n 215), [57].

[457] *ClientEarth v Shell and others (July)* (n 215), [81]. Also see the discussion by Honey KC (n 223).

[458] See Shi-Ling Hsu, 'A Realistic Evaluation of Climate Change Litigation through the Lens of a Hypothetical Lawsuit' (2008) 79 University of Colorado Law Review 701, 14.

[459] Pontin (n 455), from 191.

also allow for a rectification process whereby defects can be resolved between the parties directly. [460]

In unjust enrichment cases, a claimant may be entitled to a proprietary restitutionary remedy, 'such as an order declaring that the claimant has a new ownership or security interest in the property held by the defendant'.[461] A claimant may also be able to seek remedies such as tracing into the defendant's assets or claiming a declaration that the defendant holds an identifiable asset on trust for the claimant, or asserting a lien (right to possession) over an asset.[462]

[460] For instance, most construction projects undergo a 'snagging' process during which period any defects or problems that have come to light are normally resolved – see Julian Bailey, *Construction Law* (Informa Law from Routledge 2011), 674 – 677.
[461] Mitchell (n 178), 3.20 - 3.21.
[462] ibid.

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