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Climate Change Litigation: I fought the law, when I might have fought the lawmakers

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The Earth's climate has been changing at an alarming rate, with the IPCC confirming earlier this year the scale of the problem. The 26th UN Climate Change Conference of Parties recently concluded in Glasgow, with a draft text which has proved divisive on the issues of fossil fuels, equity, loss and damage. Rightly, the eyes of a world suffering from an increasingly unstable climate are on its leaders for steadfast and ambitious leadership.

Recently, political lobbying and mass protest have also been combined with strategic litigation to enhance a movement for climate justice that is entirely necessary. The successes of cases like Urgenda in the Supreme Court of the Netherlands and Neubauer in the German Federal Constitutional Court have encouraged similar litigation on a global scale. This post sounds a note of caution on this increased appetite for climate change litigation by looking at two judgments: *R (Friends of the Earth and others) v Heathrow Airport Ltd* [2020] UKSC 52 (from December 2020) and *Smith v Fonterra* [2021] NZCA 552 (judgment handed down on 21 October 2021). Although these judgments are divided by geography and subject, they share some important characteristics that illustrate the limits of judicial capacity in the complex area of climate change.

Friends of the Earth

Friends of the Earth concerned (among other things) a relatively simple question: did the planned third runway at Heathrow Airport have proper regard to the UK's commitments to reduce greenhouse gas emissions under the Paris Agreement? The High Court had answered 'yes' while the Court of Appeal had answered 'no'. The argument from those objecting to the runway development was that it would add significant greenhouse gas emissions and thus clearly breach the requirements of the Paris Agreement. The Court of Appeal found for the claimants, holding (among other things) that the Secretary of State's

decision to notify the third runway plan under the Planning Act 2008 failed to take into account Government policy around climate change adaptation (section 5(8)) and failed to have regard to sustainable development requirements (section 10).

The Supreme Court's reasoning in allowing the appeal lay in statutory interpretation. In particular, the court looked at the meaning of 'policy' within section 5(8) and decision-making in relation to section 10. There is a great deal in the court's reasoning about principles of public law, the proper boundaries of constitutional functioning between the judiciary and the executive and the status of the Paris Agreement as an international agreement which is not per se incorporated into domestic law – a status which has important consequences in the UK constitutional framework. However, the court's reasoning is at its most impactful when looking at the implications of the reasoning for policies around mitigating and adapting to the impact of climate change.

When the Supreme Court interpreted 'policy' as 'established policy' ([106]), it made an important distinction between Government statements made in Parliament and policies which the Government implements. Statements can be mere words used to express intent or aspiration; they cannot by themselves give rise to obligations of implementation. What is perhaps most significant is the Supreme Court's insistence that 'policy' under section 5(8) could only be policy if it could give rise to legitimate expectations enforceable by courts as 'the absolute minimum' ([106]). One consequence of this aspect of the Supreme Court's judgment is to point to the Government's responsibility to make policy around climate change, by which it intends to be bound in law. Anything short of that would be utterly useless in the face of roaring wildfires sweeping across much of the world.

The court's reasoning under section 10 was equally forceful. In this context, the court was concerned, not with whether the Secretary of State had taken account of the Paris Agreement, but how far he had to take account of it. It is important to remember that the Paris Agreement obliges parties to submit and achieve nationally determined contributions (NDCs), being headline reduction percentages. At the time of the third runway decision, the UK had not submitted its most recent NDCs, nor had it amended the Climate Change Act 2008 (CCA) to incorporate the net-zero target. The ambition contained in the Paris Agreement is not binding as a matter of international or domestic law as regards the UK.

Thus, the Secretary of State determined that the third runway, while increasing greenhouse gas emissions, would not impact 'the ability of the Government to meet its carbon reduction targets, including carbon budgets' ([87]), in line with any UK NDCs. One may dispute this statement, but the statement is not the crucial point; it is the legal obligation binding the Government. It is worth remembering that the CCA predated the Paris Agreement by 7 years. When enacted, it had set a global landmark. However, it is worthwhile to focus energies on how to strengthen its provisions and create ways in which public authorities at every level contribute to the reduction of greenhouse gas emissions (as the recently amended Irish climate change statute provides).

In setting out how far the law required the Secretary of State to consider the Paris Agreement, the Supreme Court did not shut the door on the law being amended by Parliament to go further. This is an important point. Section 10(3)(a) simply requires that the Secretary of State 'have regard to the desirability of mitigating, and adapting to, climate change'. The provision says nothing further, including how the Secretary of State may or ought to have such regard. Parachuting the Paris Agreement into this provision (aside from being constitutionally impermissible) would seriously impact on the certainty in the way section 10 operates. This is because in the context of the third runway, the correlation between increased air traffic and increased greenhouse gas emissions is obvious. Thus, it is relatively easy to point to the runway as being a significant future enabler of increased emissions which may breach the UK NDCs. Such an easy correlation is not always possible, because it is not always so obvious.

As a result, while interpreting the operation of a statutory provision, a court must always have as holistic a perspective as possible, preferring an interpretation which would work consistently in most (if not all) circumstances. What may work for the third runway may prove disastrous for something else, which is why such legal reform is best left to a forum which lends itself to transparent debate such as Parliament. A haphazardly applied judicial sticking-plaster is not the answer to a rapidly deteriorating situation.

Smith

Where Friends of the Earth concerned judicial interpretation of statutory provisions, *Smith* looks at how the common law develops when faced with a novel area. Lawyers will be all too familiar with the maxim that the common law develops 'incrementally' (see e.g. Elgizouli v SSHD [2020] UKSC 10, [83]). As the New Zealand Court of Appeal set out in *Smith*, this incrementalism is vital to understanding how the common law is applied.

At its heart, *Smith* was a private law action founded on tort, with the appellant claiming against seven New Zealand companies for contributing to greenhouse gas emissions. The claim had been founded on two existing torts: public nuisance and negligence, and a proposed new tort of 'breach of duty'. The High Court had struck out the claim under the two existing torts, while refusing to strike out the breach of duty issue because Wylie J considered that a new tortious duty (however difficult to define with precision) was not untenable ([103]).

In the Court of Appeal, French J dismissed the appellant's appeal (so that the public nuisance and negligence strike-outs were upheld) and allowed the cross-appeal in relation to breach of duty (so that it was also struck out). It is here that the court's reasoning is crucial, both from a principled as well as a practical perspective. On the point of principle, breach of duty as claimed by the appellant was defined with no real precision (a problem which Wylie J had recognised in the High Court). On the practical side, French J looked at the effect of a vaguely defined tort.

First, greenhouse gas emissions are not limited to companies, but come from every individual, whether directly or indirectly, and to varying degrees. In this context, the court reasoned if the common law recognised a duty which mandated emissions reductions, it would catch too many actors within its ambit; in short, anyone who has not achieved a net-zero emissions footprint. As the court observed:

'If the courts were to accept the argument that the emitting activities of the defendants amount to a tort, it would follow that every entity (and individual) in New Zealand that is responsible for net emissions is committing the same tort. That is, all of those individuals and entities would be acting unlawfully, and could presumably be restrained from continuing to do so. That would be a surprising conclusion to say the least, with sweeping social and economic consequences.' ([19]).

Considering a net-zero emissions duty, the sweep of the consequences can be extreme. The pathway to net-zero, in jurisdictions which have enacted that duty, involves large-scale investment in resources, finance and infrastructure, from both the public and private sectors. The UK Climate Change Committee, in its Sixth Carbon Budget, for example, observed: 'investment must scale up to £50 billion each year to deliver Net Zero'. Where this investment does not exist, net-zero is correspondingly more difficult (if not impossible) to achieve.

However, jurisdictions where this investment does not exist (because it cannot exist) may also be more likely to suffer from the effects of runaway emissions to date, which points to a key issue that lies at the heart of global climate change mitigation efforts: equity. In short, richer areas of the world can decarbonise with greater ease than poorer areas, but richer areas have also been responsible for greater emissions than poorer areas (whether or not on a per capita basis). In these circumstances, a focus on

emissions without accounting for the ability to decarbonise would risk causing grave injustice.

Second, the scope of a duty requiring net-zero emissions is itself problematic. This is because emissions, by themselves, are unavoidable. No society has cracked the code to an *emissions-free* life. The appellant in *Smith* had argued for injunctive relief that requires net-zero emissions on the part of the respondents by 2030, crucially, to be supervised by the court ([20]). No court has a self-evident expertise in such supervision, because judges are experts in law and 'do not have the expertise to address the social, economic and distributional implications of different regulatory design choices' ([26]).

Any attempt by a court to engage in such supervision would necessitate reliance on external experts – at which point we get into the unavoidable debate of which experts are correct. A debate between experts brings us (and the court) no further forward on the scope of the necessary duty. This is a particular problem when looking at the context of climate change cases like *Urgenda* and *Neubauer*: the issue in both cases was not whether climate change was anthropogenic, but what could or should be done in response to climate change. This is where the scientific consensus may develop or change in response to climate change, following rules internal to that consensus (data, methodological rigour, peer review, and so on). These internal rules are not within the expertise of any court.

One of the reasons identified by the court – that of the judiciary getting drawn into indefinite litigation ([27]) if tort law were developed in the way the appellant had argued, is, however, less convincing. Courts being dragged into lengthy or even indefinite litigation does not necessarily arise in circumstances where the law is developed in novel ways. What matters, where courts are drawn into litigation of any kind, is that they are able to do justice to the issues before them. Imprecise development of the law is unlikely to result in justice; instead, courts are likely either to be unable to apply proper scrutiny (because of, for example, vagueness in the scope of a duty) or unable to grant appropriate relief (because of, for example, a lack of jurisdiction).

We therefore return to the focus on *legislative* reform. The point is simple but powerful: if we want the courts to scrutinise conduct that contributes to climate change, hold such conduct to account and provide relief that is focussed on decarbonisation, our legislatures must give the courts the explicit and clear ability to do so. Otherwise, there is a risk of one or both of two outcomes: frustration that the law appears to have ossified (which risks undermining systemic legitimacy) and/or an unprincipled and thus problematic development of the law (which risks creating legal uncertainty).

Conclusion

Climate litigation is a necessary element of ensuring climate justice and it has seen some notable successes in recent years. However, it is important that climate justice, as a concept, continues sustainably far into the future. Litigation which results in an approach to climate change that is piecemeal at best and incapable at worst, is the antithesis to sustainability. That is not to say that litigation should not be attempted – it is simply to recognise that successful litigation may only be possible with strong and clear legislative reform.

As the eyes of the world turn to its leaders for action following COP26, the demand for legislative change should occupy centre-stage.

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