Climate Change and the Courts

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Climate change is the pressing issue of our times. We must act urgently to reduce our greenhouse gas emissions in order to minimise significant and irreversible disruption to the planet's climate system. Equally, we must prepare for and adapt to rising sea levels and more frequent and extreme weather events, as some climate change is already locked into the system.

But the necessary response to climate change by central and local governments, as well as major greenhouse gas emitters, has so far been too slow. The sluggish pace of action has led many concerned citizens to turn to the courts to seek environmental justice. This article reviews three recent court decisions on climate change issues and draws together some themes that emerge from these cases.

SMITH V FONTERRA CO-OPERATIVE GROUP LTD [2020] NZHC 419, [2020] 2 NZLR 394

Mr Smith has filed a claim against Fonterra and six other defendants who are involved in industries that emit greenhouse gases or supply products that release greenhouse gases. He alleges that the emitters are acting negligently or committing the tort of public nuisance in relation to their fossil fuel activities, and that those activities are causing damage to sites of cultural significance near Mahinepua in which he has a cultural and tikanga interest. Mr Smith also seeks relief on the basis of a novel tort arising from an inchoate duty owed by fossil fuel emitters to cease contributing to the damage to the climate system.

The Court's decision addresses the defendants' application to strike out the claims. The defendants' application was successful in part: The Court struck out the claims in negligence and public nuisance. Justice Wylie considered that orthodox tort law principles created a number of hurdles to these causes of action, including that:

- Mr Smith could not demonstrate that the damage he would suffer was particular and direct, which is a requirement of the tort of public nuisance. The Court considered that the damage Mr Smith would suffer was no different in scale to that suffered by the public generally.
- It was not reasonably foreseeable that the emissions of any of the individual defendants would cause damage to Mr Smith. The Court reasoned that if the defendants stopped emitting greenhouse gases, then the same damage would nonetheless eventuate. The emissions attributable to the defendants were miniscule in the context of global greenhouse gas emissions.
- To impose a duty of care would result in indeterminate liability, because each defendant could potentially be liable to anyone for damage associated with climate

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change. There would potentially be an open-ended class of defendants liable to an equally broad class of plaintiffs.

- Policy factors weighed against a duty of care. The duty could be inconsistent with Parliament's regulation of emissions through the New Zealand Emissions Trading Scheme and New Zealand's net zero target for 2050 in the Climate Change Response Act 2002.

However, the Court refused to strike out Mr Smith's novel tort based on an inchoate duty. Justice Wylie recognised that the common law allows for the injection of new ideas and the creation of new responses in relation to social issues. His Honour was reluctant to conclude that the development of a new tort in relation to climate change was untenable. He said there were issues for evidence at trial that would assist the Court in deciding whether and how the common law might evolve.

The complex issues raised by *Smith v Fonterra* will be considered further next year, when the Court of Appeal is scheduled to hear an appeal by Mr Smith and cross-appeals by Fonterra and the other defendants.

HAURAKI COROMANDEL CLIMATE ACTION V THAMES-COROMANDEL DISTRICT COUNCIL [2020] NZHC 444

The background to this decision was the Local Government Leaders' Climate Change Declaration 2017, which had been promulgated by Local Government New Zealand for mayors and chairs of city, and district and regional councils to sign. The Declaration indicated that councils acknowledged the importance of addressing climate change, and that they would be committed to developing and implementing ambitious plans to reduce greenhouse gas emissions and support resilience within communities. The commitments by councils would include promotion of walking, cycling, public transport and low carbon transport options, improvements in resource efficiency and health of homes, business and infrastructure, and support for the use of renewable energy and uptake of electric vehicles.

The Declaration generated some angst in Thames-Coromandel District Council when it was presented for signature. The mayor was concerned about signing a document that she considered would be binding with unknown financial consequences. The Council agreed with the mayor's suggestion that the Council would merely resolve to acknowledge the Declaration and continue with its current action programme on climate change.

Hauraki Coromandel Climate Action Inc has applied for judicial review of the Council's decision not to sign the Declaration. Its arguments will be that the Council failed to take account of the scientific consensus on the predicted impacts of climate change and acted unreasonably. However, the Council applied to strike out the claim, or alternatively for the applicant to pay security for costs. The Court's decision deals with those applications.

In support of its strike out application, the Council argued that its decision not to sign the Declaration was not amenable to judicial review because the Declaration was an aspirational and non-binding document with no legal significance.

The Court rejected that argument. It said that the interpretation of the Declaration, and its legal consequences, were matters that could not be determined on a strike out application. It acknowledged that it was at least arguable that the Declaration was a legally binding document or at least that some legal consequences will be generated if it is signed.

The Court also considered that the applicant had arguable grounds for judicial review. Justice Gault indicated that the Council's decision could be unlawful if it had failed to take account of or properly appreciate the scientific consensus on the predicted impacts of climate change, as has been detailed in the Intergovernmental Panel on Climate Change's reports.

The Council argued in the alternative that the applicant should be required to pay security for costs before its claim was heard, because the applicant would not be able to meet an adverse costs award if its claim was unsuccessful. The Court rejected this and decided that security should not be required. The case raised a matter of genuine public interest, and therefore the applicant may not be subject to the usual rule that costs follow the event. The Court was also concerned that requiring security would likely prevent the claim from being heard.

R (PLAN B EARTH) V SECRETARY OF STATE FOR TRANSPORT [2020] EWCA CIV 214

Finally, the Court of Appeal of England and Wales has also considered climate change issues in the context of a judicial review of decisions to progress planning and consenting for a third runway at Heathrow Airport.

The background was that the Secretary of State for Transport had created an Airports National Policy Statement for new runway capacity and infrastructure. This planning document set out a preference to construct a third runway at Heathrow Airport to increase aviation capacity and provided the policy framework in which an application for consent for the runway was to be assessed.

Several claimants sought judicial review of the lawfulness of the policy statement. Plan B Earth argued that the Secretary of State had erred in failing to consider the United Kingdom's commitments under the Paris Agreement.

The United Kingdom planning legislation requires the Secretary to take into account "government policy" in making policy statements. In making his decision, the Secretary had decided to disregard the Paris Agreement on the basis it was an international treaty and not part of "government policy". The Secretary accordingly only considered the United Kingdom's domestic climate change legislation and targets.

The Court said that approach was legally incorrect. The Paris Agreement was clearly part of government policy because it was a treaty that the Government had committed the United Kingdom to. The Secretary was required to take it into account and had not done so. The Court also said that the Paris Agreement was obviously material to the runway policy statement, and so it was irrational for it to have been disregarded.

The Secretary of State has been directed to review the policy statement. It may be the case that, after taking into account the Paris Agreement, the Secretary reaches a different outcome. At the time the Airports National Policy Statement was issued the United Kingdom's domestic climate change targets were consistent with a goal of limiting global temperature increases to 2°C. But the Paris Agreement is more ambitious: it enshrines a commitment to restricting the increase in global temperatures to well below 2°C and for parties to pursue efforts to limit the increase to 1.5 °C. A 1.5 °C outcome is very different to a 2°C outcome, and if that is taken into account, it may result in a different approach to the Airports National Policy Statement.

THE BIG PICTURE

Courts will always provide a forum for adjudicating on the legal aspects of the major issues of the day and will carefully consider issues raised by citizens who are concerned about climate change. It is encouraging that there has been a degree of success to date by litigants who seek to encourage a more ambitious climate response through court action. In my view, there are three significant themes that emerge from the recent court decisions on climate change legal issues.

First, the courts are the appropriate body to decide whether and how formal commitments and declarations have a legally binding character. These commitments, usually by local and central government bodies, may come in many different forms. In *Plan B Earth*, the Court found that the Paris Agreement, a significant international treaty, was a mandatory relevant consideration for the purposes of the United Kingdom's domestic planning law. At the other end of the spectrum, the Court suggested in *Hauraki Coromandel* that a Declaration signed by a local authority could constitute a binding commitment. In the last few years, a number of local authorities in New Zealand, as well as central and provincial governments abroad, have made declarations of climate emergency. These solemn declarations on a pressing community issue are likely to also be construed by the courts as having some legally binding character and significance.

Secondly, the courts are astute to recognise their role in ensuring access to justice (including environmental justice). In *Hauraki Coromandel*, the Court noted that the claim raised a matter of public interest and thought that it should not be stifled by a requirement for security for costs. This goes some way towards addressing a dilemma that community 'watchdog' groups may sometimes face, where they are able to obtain pro-bono legal representation to initiate a meritorious public interest claim but are put off from doing so by the risk of an adverse costs award.

Thirdly, an effective response to climate change will require initiative and creativity by everybody, including the courts. *Smith v Fonterra* demonstrates that courts will have opportunities to develop the common law, and that orthodox and settled principles may be adjusted in response to the pressing social issues. Litigants who are concerned about inadequate action on climate change should not be afraid to take the initiative of challenging established principles in order to seek environmental justice and an effective response to climate change.