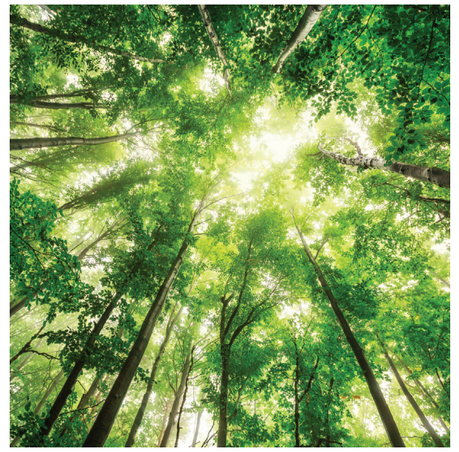
"BIG OIL'S TERRIBLE, HORRIBLE, NO GOOD, VERY BAD DAY":[1] CLIMATE CHANGE LIABILITIES FOR THE OIL AND GAS AND MINING INDUSTRIES

By Sean Wilken QC



On 26 May 2021, three things happened which may signal a significant change in direction for those involved in the oil and gas and mining.[2] The first was the appointment of two new directors at ExxonMobil. This might seem not to be significant save for the fact that these two new directors came from a slate prepared by Engine No 1 "a hedge fund that has waged a proxy campaign since December, saying the oil and gas group's focus on fossil fuels had put it at "existential risk""".[3] Second, a large majority of Chevron's shareholders voted for a resolution calling for Chevron to reduce substantially its scope 3[4] emissions or those from the products it produces.[5] Third, the Hague District Court handed down judgment in *Milieudefensie v Royal Dutch Shell Plc ("RDS")*.[6] RDS in turn followed *Urgenda v State of the Netherlands ("Urgenda")*.[7] In *Urgenda*, the Court ordered the Dutch State to reduce its Greenhouse Gas Emissions ("GHG") by 25% stating that Articles 2 and 8 of the ECHR were in play. In *RDS*, the point was expanded to order Royal Dutch Shell to reduce its emissions across the board by 45% by 2030. Needless to say, although many companies had already been addressing GHGs, RDS has led to a seismic shock wave amongst those involved in the extraction, production and supply of hydrocarbons in whatever form.

This article considers what *Urgenda* and *RDS* decided, their impact on the oil and gas and mining industries from the perspective of both international arbitration and the law of England and Wales – recognising both that *RDS* will be appealed and that some but, it is important to note, not all of the reasoning in both cases is based on Dutch law. This article will then go on to consider the difficulties with such environmental class actions before the Courts of England and Wales. The article will conclude with a consideration of the practical ramifications of *Urgenda* and *RDS*.

The Decisions

Urgenda was a decision of the Supreme Court where the claim was directed at the State invoking the European Convention on Human Rights ("ECHR"). To an English lawyer, invocation of the ECHR against the State is not problematic. After all, the Human Rights Act 1998 ("HRA") bites on *public* bodies.[8] Further, the decision that anthropomorphic climate change exists and is dangerous,[9] whilst politically toxic to some, is not scientifically surprising. Similarly, that Article 2 imposes on a state a positive obligation to do something – as opposed to avoiding doing something – is not surprising. The Article itself provides "Everybody's right to life shall be protected by law" and the gradual creation of overall positive obligations on States has been a feature of the ECHR since the Belgian *Linguistics* case.[10]

There were, however, four striking features about *Urgenda*. First, the use of a legal challenge as an avowed element of an overall activist strategy on climate change. Second, the application of Article 2 to the population in general against a worldwide threat.[11] Third, an acknowledgement that, although climate change was a world-wide problem, each state bore an obligation to seek to address it (the so called "do its part" concept).[12] Fourth, the Court's reasoning as to why it was, according to the government, engaging in a political debate. The Court held that, whilst the debate was political, it was for the Court to determine when a political decision fell outwith the acceptable parameters and then order the public body to remedy the situation by means that the public body felt to be appropriate.[13]

RDS represents a stage further. In RDS, what was at issue was the Court's ability to impose climate change obligations on a private company at the suit of campaigners. The Court's route in was RDS' standard of care[14] to Dutch residents and inhabitants of the Wadden region in the Netherlands.[15] In considering that standard of care, the Court took into account 14 factors – including RDS's ability to set policy; the applicable human rights and international law elements; proportionality and onerousness of any obligation imposed on *RDS*.

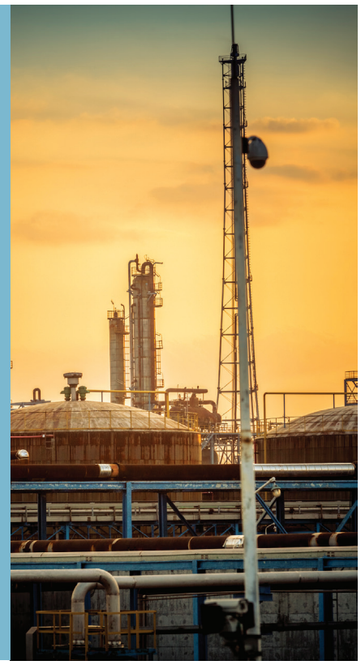
Parts of the *RDS* decision would not be surprising to a lawyer before the Courts of England and Wales. The Court accepted that the Claimants could not directly invoke the ECHR against RDS,[16] instead the ECHR contextualised the analysis of a standard of care which embraced both the ECHR and public international law. This standard of care most closely resembled a tortious responsibility under English law.

Again, however, there are striking features to *RDS*. First, again the "do its part" theorem was deployed – this time against a private company to implement the non-binding Paris Agreement[17] and despite the agreed fact that tackling climate change was not within the sole gift of RDS but was a global multi-factorial problem.[18] Second, whilst causation (that is the difficulty of ascertaining that this emission by RDS was the cause of harm to the Claimants) was in issue, the Court sought to resolve this by contending that all players responsible for major GHG emissions had to play their part.[19] Third, the need to supply energy was no answer – that supply had to be within the confines of the need to regulate GHGs.[20] Fourth, cap and trade would absolve RDS of its obligations where the particular emissions were caught by the cap and trade system.[21] Fifth, the threat posed by climate change was sufficiently serious to render even onerous obligations on Shell proportionate.[22]

The Legal Impact

Turning to the impact of these decisions, as far as international arbitration is concerned, *Urgenda* and *RDS* may not be ground-breaking. The ability of Claimants to explore environmental concerns in international arbitration has already been considered on several occasions leading to a relatively substantial body of case law.[23] Thus, as far as international arbitration is

1 FT Energy Source 26 May 2021
2 That Total's shareholders voted in a similar fashion on 28 May 2021 suggests there may be a consensus on this issue
3 https://www.ft.com/content/da6dec6a-6c58-427f-a012-9c1efb71fddf
4 Scope 3 emissions are those so defined in the Greenhouse Gas (GHG) Protocol. These are all the indirect GHG emissions (other than purchased electricity, heat and steam) created by a company
5 https://www.ft.com/content/fa9946b9-371b-46ff-b127-05849a1de2da
6 C/09/571932 / HA ZA 19-379.English language version is at: https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:RBDHA:2021:5339
7 19/00135. English language version is at: https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:HR:2019:2007
8 See section 6(1)
9 Paras 4.1 – 4.8
10 *Belgian Linguistic (No 2)* (1968) 1 EHRR 252 para 7
11 See paras 5.2.1 – 5.5.3
12 See paras 5.6.1 – 5.8 and 6.1 – 7.3.6
13 See para 8.2.6
14 See paras 3.2; 4.4.1
15 See paras 4.4.1 – 4.4.3
16 See para 4.4.9
17 See paras 4.4.26 – 4.4.27
18 See paras 4.4.33; 4.4.51
19 See paras 4.4.37 – 8
20 See paras 4.4.42 – 43
21 See paras 4.4.44 ff
22 See paras 4.4.53 – 55
23 This is set out in Wilken & McMillan *"Stranger Things: New Obligations in International Investment Treaties and Arbitrations"* https://www.keatingchambers.com/wp-content/uploads/2020/12/KC-Legal-Update-Winter-2020-Stranger-Things.pdf



"It is not only the companies actually involved in extraction that are exposed, it is all those that work with them: shipping; ship building; rig and FSPO manufacture; supply and maintenance; subsurface engineering and construction and so on."

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concerned, the justiciability (albeit not the ultimate success) of an RDS type argument is not new. What is obviously new but not unthinkable in international arbitration is the imposition of positive obligations in relation to a generalised threat.[24]

Under English law, however, there are significant obstacles to an RDS-type claim – both substantively and procedurally. As set out above, it would be exceptionally difficult to invoke the ECHR/HRA against a private company. Further, as English law tritely adopts a dualist approach to public international law (that is that there can be no direct claim under a public international law instrument unless the instrument is incorporated into domestic law)[25] any direct claim under the international instruments would be very difficult to maintain. As far as a duty of care is concerned, a duty will only ever be owed to a specific class of Claimants in respect of whom an obligation to ensure that they do not suffer a particular harm has been assumed – as has been the case since *Donoghue v Stevenson*.[26] The test of whether there is such a class, in a novel case, involves the parameters of proximity, foreseeability and public policy as incrementally developed.

It is safe to say, however, that suggesting that there is a general duty of care to the public at large in respect of GHG's would be very problematic under English law. Further difficulties would be created by the need to establish causation. The Dutch court assumed that the output of GHG's by Shell were in part responsible for increased temperatures in the Netherlands. It is likely, however, that the English Courts will require a greater level of proof and granularity than that. There could be particular difficulty in showing that, where there were multiple causes of GHG emissions, it was the emissions from one particular Defendant that were the cause of the increase in temperature. There would be further difficulties in showing that the increase in temperature also caused the harms complained of. Nor would framing the case in nuisance necessarily assist. Although allowing noxious fumes to pass onto the property of another may amount to nuisance,[27] as will transmitting heat,[28] it would require a considerable extension for nuisance to extend to GHG emissions[29] in, potentially, another country and that is without taking into account that any supposed nuisance would have to reach a sufficient degree of interference.[30]

Procedurally, *RDS* was a class action – and elements of that class action ran into difficulties in the Netherlands. Experience in England and Wales suggests that there would be significant difficulties in bringing a class action effectively to judgment. *Município De Mariana & Ors v BHP Group Plc*[31] ("MDM") is a recent example of the difficulties that could be encountered. MDM concerned the collapse of a dam allowing the release of iron ore mining tailings into the Doce River, Brazil. The results were "catastrophic" including death, destruction of property and contamination of land. The claims were, however, all struck out as an abuse of process. This was due both to the fact that other claims were on foot in Brazil (a fact not uncommon in global litigation) and the difficulties of controlling the class action before the Courts. It must be borne in mind that the links between damage and the allegedly wrongful act were far closer in proximity than *MDM* and the cohort of Claimants in *MDM*, whilst very large, was controllable – those directly impacted by the one event. Neither would apply in a GHG case.

The Practical Impact

In terms therefore of immediate litigation risks, it would seem that Claimants have much to be concerned about and Defendants have little to fear about actions under English law. It may well also be that the procedural issues are sufficient to discourage forum shopping.[32] Therefore, outside of international arbitration, to what extent, if at all, does *RDS* matter?

There are, in my view, a number of answers to that.

First, those working in oil and gas and mining are involved on a global scale. Although the litigation risks in England and Wales are such as to discourage claims, that does not preclude claims elsewhere in more favourable jurisdictions. Subject to enforcement and/or conflicts of law, those claims can be repatriated.

Second, there will undoubtedly be a degree of interaction between the *RDS*-type liability and corporate social responsibility. Whilst corporate social responsibility does not have an impact on litigation (at least not as a matter of hard law), it does have an impact on share prices and credit lines (as well as shareholder views). It is reasonable to expect that RDS-type liability will have an impact on the underlying economics of the industry. Many companies have already voluntarily been exploring this – there is now, however, the added dimension of legal compulsion.

Third and allied to that, companies whose profitability is linked to release of GHG's are going to have to reconsider that asset base in the long term – diversifying into renewables and green energy. Similarly, it would be reasonable to expect that costly, long-term deep-water exploration for hydrocarbons will become less attractive. This will ultimately mean fewer of those projects and less investment in the associated technology, engineering and hull and asset provision industries.

Fourth, the main target of *RDS* was scope 3 emissions. As set out above, these are indirect emissions from and by the supply and value chain. Thus, it is not only the companies actually involved in extraction that are exposed, it is all those that work with them: shipping; ship building; rig and FSPO manufacture; supply and maintenance; subsurface engineering and construction and so on. Each of these industries, whilst not a direct target of an RDS-type of challenge, will have to consider both how it can fit into a limited scope 3 emission model and how it can, in its own supply and value chain, also make scope 3 emission gains.

24 The cases involving water rights in international arbitration (see Wilken & McMillan *op cit*) already envisage the possibility of positive obligations in relation to a generalised threat.

25 See most recently *Heathrow Airport v HMT* [2021] EWCA Civ 783 at [135 ff] for a discussion of the principles in the context of the WTO/GATT.

26 [1932] AC 562 at 580. The case's anniversary is also 26 May.

27 *Crump v Lambert* (1867) L.R. 3 Eq. 409; St Helens Smelting Co v Tipping (1865) 11 H.L.C. 642; *Salvin v North Brancepeth Coal Co* (1874) L.R. 9 Ch. 705; *Manchester Corp v Farnworth* [1930] A.C. 171

28 *Sanders-Clark v Grosvenor Mansions Co* [1900] 2 Ch. 373; *Reinhardt v Mentasti* (1889) 42 Ch. D. 685

29 GHG emissions might well also be viewed in the same way as television signals were in *Hunter v Canary Wharf* [1997] AC 655 at 727.

30 See *Barr v Biffa Waste Services* [2012] EWCA Civ 312 at [36]

31 [2020] EWHC 2930 (TCC)

32 The position on forum shopping will obviously be impacted by the conflicts of law impacts of Brexit including, for example, the current impasse over the Lugano Convention. Such issues lie outwith the scope of this article.