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

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1 FT Energy Source 26 May 2021

2 A short version of this article was published at the end of May 2021. This is the expanded and updated version

On 26 May 2021, three things happened which appear to have signalled a significant change in direction for those involved in the oil and gas and mining industries.[3] 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 2020, saying the oil and gas group's focus on fossil fuels had put it at "existential risk"".[4] Second, a large majority of Chevron's shareholders voted for a resolution calling for Chevron to substantially reduce its scope 3[5] emissions or those from the products it produces.[6] Third, the Hague District Court handed down judgment in *Milieudefensie v Royal Dutch Shell Plc* ("RDS").[7] RDS in turn followed *Urgenda v State of the Netherlands* ("Urgenda").[8] 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 European Convention on Human Rights ("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. Although many companies had already been addressing GHGs, RDS sent a seismic shock wave through those involved in the extraction, production and supply of hydrocarbons in whatever form.

This article considers what Urgenda and RDS decided recognising both that RDS is being 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 subsequent developments since RDS and the potential impact on the oil and gas and mining industries from the perspective of both international arbitration and the law of England and Wales. The article will conclude with a consideration of the practical ramifications of Urgenda and RDS as things currently stand.

The decisions

Urgenda was a decision of the Supreme Court where the claim was directed at the State invoking the ECHR. The argument was that anthropomorphic climate change represented a threat to life (Article 2) and to private life (Article 8) to the citizens of the Netherlands and that the State had to respond to those threats. 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.[9] Further, the decision that anthropomorphic climate change exists and is dangerous,[10] 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.[11]

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.[12] 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).[13] Fourth, the Court's reasoning as to why it was, according to the government, engaging in a political debate was new. The Court held that, whilst the debate was political, it was for the Court to determine when a political decision fell out with the acceptable parameters and then order the public body to remedy the situation by means that the public body felt to be appropriate.[14]

RDS represents a stage further. In RDS, the 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 Royal Dutch Shell's' standard of care[15] to Dutch residents and inhabitants of the Wadden region in the Netherlands.[16] In considering that standard of care, the Court took into account 14 factors – including Royal Dutch Shell's ability to set policy; the applicable human rights and international law elements; and proportionality and onerousness of any obligation imposed on Royal Dutch Shell.

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 Royal Dutch Shell,[17] 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, the "do its part" theorem was again deployed – this time against a private company to implement the non-binding Paris Agreement[18], and despite the agreed fact that tackling climate change was not within the sole gift of that private company but was a global multi-factorial problem.[19] Second, whilst causation (that is the difficulty of ascertaining that this emission by Royal Dutch Shell 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.[20] Third, the need to supply energy was no answer – supply had to be within the confines of the need to regulate GHGs.[21] Fourth, cap and trade would absolve Royal Dutch Shell of its obligations where the particular emissions were caught by the

3 That Total's shareholders voted in a similar fashion on 28 May 2021 suggests there may be a consensus on this issue

4 https://www.ft.com/content/da6dec6a-6c58-427f-a012-9c1efb71fddf

5 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

6 https://www.ft.com/content/fa9946b9-371b-46ff-b127-05849a1de2da

7 C/09/571932 / HA ZA 19-379.English language version is at: https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:RBDHA:2021:5339

8 19/00135. English language version is at: https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:HR:2019:2007

9 See section 6(1)

10 Paras 4.1 – 4.8

11 Belgian Linguistic (No 2) (1968) 1 EHRR 252 para 7

12 See paras 5.2.1 – 5.5.3

13 See paras 5.6.1 – 5.8 and 6.1 – 7.3.6

14 See para 8.2.6

15 See paras 3.2; 4.4.1

16 See paras 4.4.1 – 4.4.3

17 See para 4.4.9

18 See paras 4.4.26 – 4.4.27

19 See paras 4.4.33; 4.4.51

20 See paras 4.4.37 – 8

21 See paras 4.4.42 – 43

cap and trade system.[22] Fifth, the threat posed by climate change was sufficiently serious to render even onerous obligations on Shell proportionate.[23]

Subsequent developments

On 17 June 2021, a Belgian Court handed down judgment in *VZW Klimaatzaak v. Kingdom of Belgium* ("VZW").[24] The Court followed *Urgenda*[25] in its application of Articles 2 and 8 of the ECHR, in the direct impact climate change would have on the Claimants, in the analysis of the global threat posed by anthropomorphic climate change and the individual responses to that and in the imposition of a duty of care on the State in relation to climate change and GHGs.[26]

What the Court then did, however, was to decide that what was required was a process of putting into place mitigation measures. What the Court did not require was a specific outcome (in terms of a level of reduced GHG emissions). Thus, VZW did not go as far as either Urgenda or RDS. Further the Court held that the nature of the mitigation measures was a question for the State to decide not the Court (at least at this stage). This had an important consequence for the application of Articles 2 and 8 of the ECHR. It meant that any decision by the State fell within the State's "margin of appreciation". The margin of appreciation is the scope within which the State may exercise its judgment and reach decisions without infringing the ECHR and is a concept that exists throughout the ECHR[27] as a form of judicial deference to individual State's practices. The margin of appreciation therefore places an important brake on the Court's ability to intervene as if the decision falls within the margin of appreciation, then Articles 2 and 8 of the ECHR would not be infringed.[28] By the end of the summer of 2021, it was clear that both RDS and VDW would be appealed and the outcomes of those appeals are awaited.

In November 2021, COP 26 occurred in Glasgow. Although little in terms of actual relevant law was passed in relation to oil and gas extraction,[29] COP was marked by a series of statements that the successful Claimants in RDS would be actively campaigning to bring about climate change litigation, even issuing a "how to" manual to that effect.[30] These sentiments have been echoed by their legal team.[31] At the same time, this legal pressure was and is being apparently matched with or complemented by investor pressure.[32]

Finally, on 21 December 2021, the English Administrative Court handed down a decision on a renewed application for permission[33] in *R (Plan B Earth) v The PM & Ors* ("Plan B").[34] There were numerous procedural difficulties facing the Claimants, acting in person, on the application,[35] but the Claimants did argue and the Court did consider arguments based on *Urgenda*, the ECHR and the Paris Agreement and said as follows:

> 25. *Unincorporated treaties such as the Paris Agreement do not form part of domestic law, and domestic courts cannot determine whether the UK has violated its obligations under an international treaty: R (SC) v SSWP [2021] UKSC 26, [2021] 3 WLR 428 per Lord Reed at [77], [84] and [91].*
>
> 50. *Moreover, the [climate change] framework consists of high level economic and social measures involving complex and difficult judgments. As Lord Reed recently explained in R (SC) v Work and Pensions Secretary [2021] UKSC 26, [2021] 3 WLR 428 at [158], the State enjoys a wide margin of appreciation in matters of that kind. Whilst all the circumstances must be taken into account, it remains the position that the judgment of the executive or legislature in such areas "will generally be respected unless it is manifestly without reasonable foundation".*
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> 51. *That approach respects the constitutional separation between the Courts, Parliament and the executive. It also reflects the fact that the Court is not well equipped to form its own views on the matters in question. I am being invited to adopt the views expressed in selective quotations from the work of the CCC and others. When I refer to selective quotation I am not questioning the good faith of any of the parties. Rather I am pointing out that the Court does not have and cannot acquire expertise in this complex area, and will always be dependent on competing extracts from a global debate. Even if I could overcome the problem of selective quotation, I would not be equipped to assess the correctness of what is being quoted.*
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> 52. *In that regard a further problem arises from the Claimants' reliance on the Paris Agreement. Mr Crosland has explained that he is not trying to enforce an unincorporated international treaty in this Court. To do so would fall foul of the Supreme Court's ruling in SC to which I refer at [25] above. Rather he relies on the Paris Agreement as evidence of fact, to show that a failure to limit the temperature increase to 1.5°C above pre-industrial levels poses the threat to life on which the claims are based, and that there is an international consensus to that effect.*
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> 53. *The problem is that the Claimants are using compliance with the Paris Temperature Limit as a test for compliance with Article 2 (and Article 8). The effect is that the Court is being asked to enforce the Paris Agreement, contrary to the guidance in SC.*
>
> 54. *Whether or not that is so, these claims invite the Court to venture beyond its sphere of competence. In my judgment the framework established by the 2008 Act should be allowed to operate. It contains provision for debate, and that debate occurs in a political context with democratic, rather than litigious, consequences.*
>
> 55. *Mr Crosland suggested that the Courts in some other countries have been willing to decide issues of this kind. He drew my attention to the decision of the Dutch Supreme Court in Urgenda v The Netherlands, ruling that the Dutch State was obliged to reduce greenhouse gases in the Netherlands by at least 25% by the end of 2020 compared to 1990. I have not been given any comparison of the constitutional laws in play and between the powers of the Dutch and English courts in such matters. However, I note that the challenge in Urgenda was not to a framework of laws, but rather to a change in the State's reduction target. Previously the State pursued a 30% reduction by 2020 but this was lowered to 20% in 2011. According to the Supreme Court:*

22 See paras 4.4.44 ff

23 See paras 4.4.53 – 55

24 Tribunal de première instance francophone de Bruxelles, Section Civile-2015/4585/A. The English version (informal translation) can be found at http://climatecasechart.com/climate-change-litigation/wp-content/uploads/sites/16/non-us-case-documents/2021/20210617_2660_judgment-2.pdf

25 RDS did not feature in the judgment.

26 See p 61

27 And the HRA

28 See pp 62 and 82

29 COP 26 did, however, see the agreement of the Glasgow Climate Pact phasing down coal usage.

30 See https://en.milieudefensie.nl/news/friends-of-the-earth-netherlands-launches-its-manual-for-the-climate-case-at-the-climate-summit-in-glasgow

31 See FT 17/12/21 "Lawyer who defeated Shell predicts an "avalanche" of climate cases" at https://www.ft.com/content/53dbf079-9d84-4088-926d-1325d7a2d0ef

32 See FT 20/12/21 "Oil majors under pressure as activists circle" at https://www.ft.com/content/0e5a0373-ee69-438a-9026-4588338f6ee4

33 Applications for permission are based on arguability and do not have status of precedent. They are, however, a useful indicator of the English Court's approach to the issues

34 [2021] EWHC 3469

35 See [6] which set out the grounds on which the application was refused on paper

"The State has not explained, however, that – and why – a reduction of just 20% in 2020 is conserved responsible in an EU context, in contrast to the 25-40% reduction in 2020, which is internationally broadly supported and is considered necessary."

I need not and do not decide whether a similar challenge could have been viable in this jurisdiction.

The legal impact

Turning to the impact of these decisions, as far as international arbitration is concerned, Urgenda, RDS and VZW 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.[36] Thus, as far as international arbitration is 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.[37]

Under English law, however, there are significant obstacles to an RDS type claim – both substantively and procedurally. As can be seen, Plan B encountered most of them.

First, as set out above, it would be exceptionally difficult to invoke the ECHR/HRA against a private company. The HRA is targeted at public bodies[38] and private companies are usually not "public bodies"[39] and therefore the HRA simply does not apply. A claim against a private company would therefore fall at this first and fundamental hurdle.

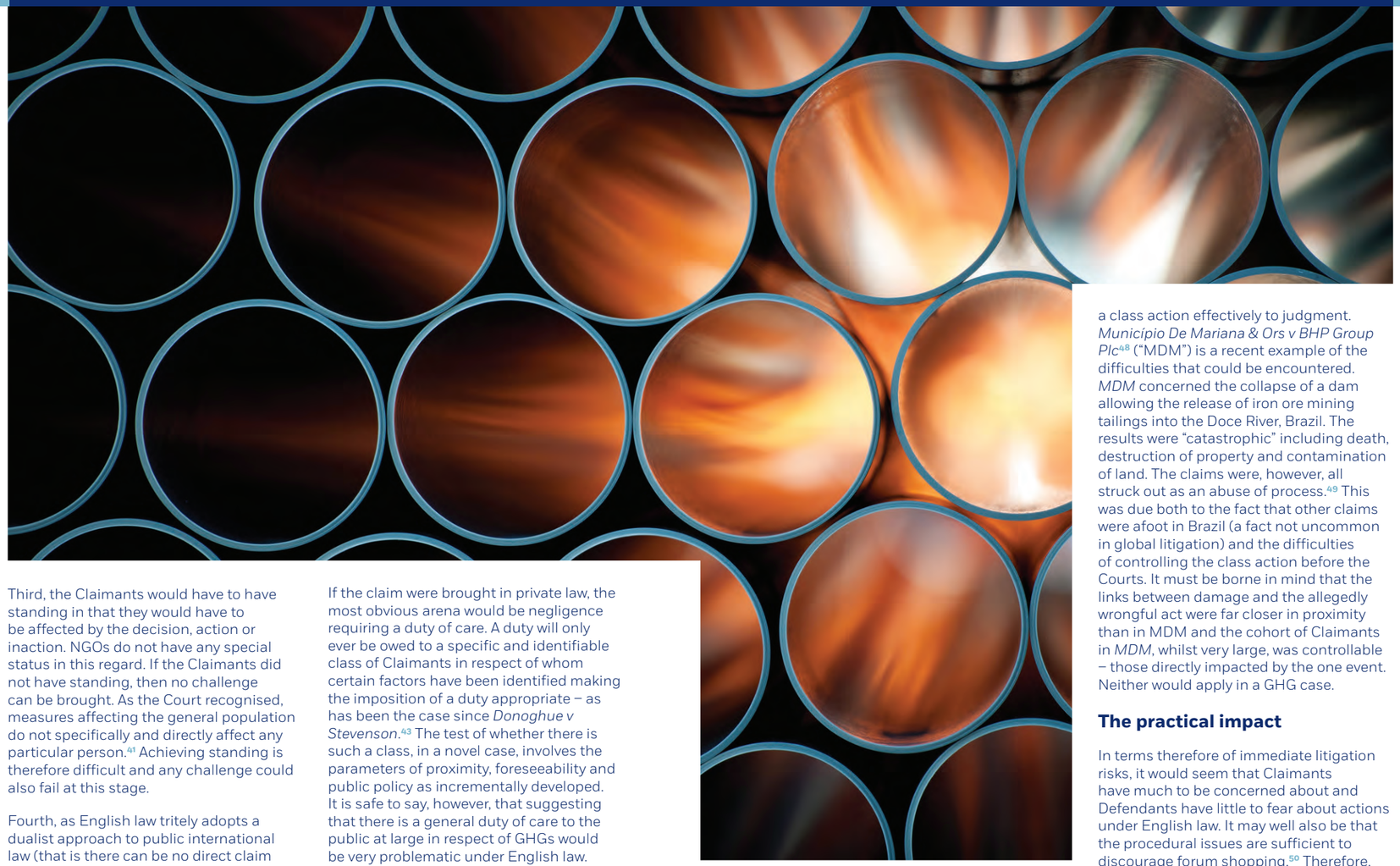
Second, even if the claim were made against the State, the State would still possess a significant margin of appreciation – as VWZ recognised. Further, it is well established in English public law that, in complex questions of fact and policy, the Courts will allow the State a considerable degree of latitude and a considerably greater degree of latitude where the State's decisions would involve questions of political, economic and scientific judgment.[40]

Third, the Claimants would have to have standing in that they would have to be affected by the decision, action or inaction. NGOs do not have any special status in this regard. If the Claimants did not have standing, then no challenge can be brought. As the Court recognised, measures affecting the general population do not specifically and directly affect any particular person.[41] Achieving standing is therefore difficult and any challenge could also fail at this stage.

Fourth, as English law tritely adopts a dualist approach to public international law (that is there can be no direct claim under a public international law instrument unless the instrument is incorporated into domestic law)[42] any direct claim under the international instruments would be very difficult, if not impossible, to maintain. As the Court in *Plan B* pointed out, agreements like the Paris Agreement (and presumably any reached after COP 26) are purely international agreements which are not incorporated into domestic law.

Thus, a claim under the public law and/or the ECHR/HRA before the Courts of England and Wales would be fraught with difficulty.

If the claim were brought in private law, the most obvious arena would be negligence requiring a duty of care. A duty will only ever be owed to a specific and identifiable class of Claimants in respect of whom certain factors have been identified making the imposition of a duty appropriate – as has been the case since *Donoghue v Stevenson*.[43] 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 GHGs 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 GHGs 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,[44] as will transmitting heat,[45] it would require a considerable extension for nuisance to extend to GHG emissions[46] in potentially another country and that is without taking into account that any supposed nuisance would have to reach a sufficient degree of interference.[47]

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*[48] ("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.[49] This was due both to the fact that other claims were afoot 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 in 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.[50] 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 GHGs 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. Scope 3 emissions are not confined to the oil and gas majors.

Fifth, as is apparent from the statements from *Milieudefensie*, it is reasonable to expect legal challenges to form part of an overall framework of climate change activitism – including targeting from investors and shareholders as well as from NGOs and pressure groups.

Thus, it is reasonable to expect that there will be an increasing level of risk in relation to climate change. This risk will not only affect the companies actually involved in extraction, but all those that work with them: shipping;[51] ship building; rig and FSPO manufacture; supply and maintenance; subsurface engineering and construction and so on. Each of these industries, whilst not an immediate and direct target of an RDS type of challenge, will have to consider its approach to GHGs, 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.

36 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

37 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.

38 See section 6

39 See eg RSPCA v Attorney General [2002] 1 WLKR 448 at [37] and R (West) v Lloyds of London [2–4] EWCA Civ 506 at [39]

40 See Fordham Judicial Review Handbook 7th Ed at section 13 for a review of the various forms that this judicial restraint or soft review may take, a detailed discussion of which lies outwith this article.

41 See Plan B at [21 – 22]. This is a narrower approach than adopted in the Netherlands or Belgium on this issue.

42 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.

43 [1932] AC 562 at 580. The case's anniversary is also 26 May.

44 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

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

46 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.

47 See Barr v Biffa Waste Services [2012] EWCA Civ 312 at [36]. The position is different in international law due to the so called Trail Smelter principle.

48 [2020] EWHC 2930 (TCC)

49 Judgment is awaited on the appeal from this decision

50 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 out with the scope of this article.

51 Just as this article was going to press, news broke that Eastern Pacific Shipping announced that it was implementing a No Coal Cargo Policy to reduce GHG emissions – see https://splash247.com/eastern-pacific-details-no-coal-cargo-policy/