HFW LITIGATION

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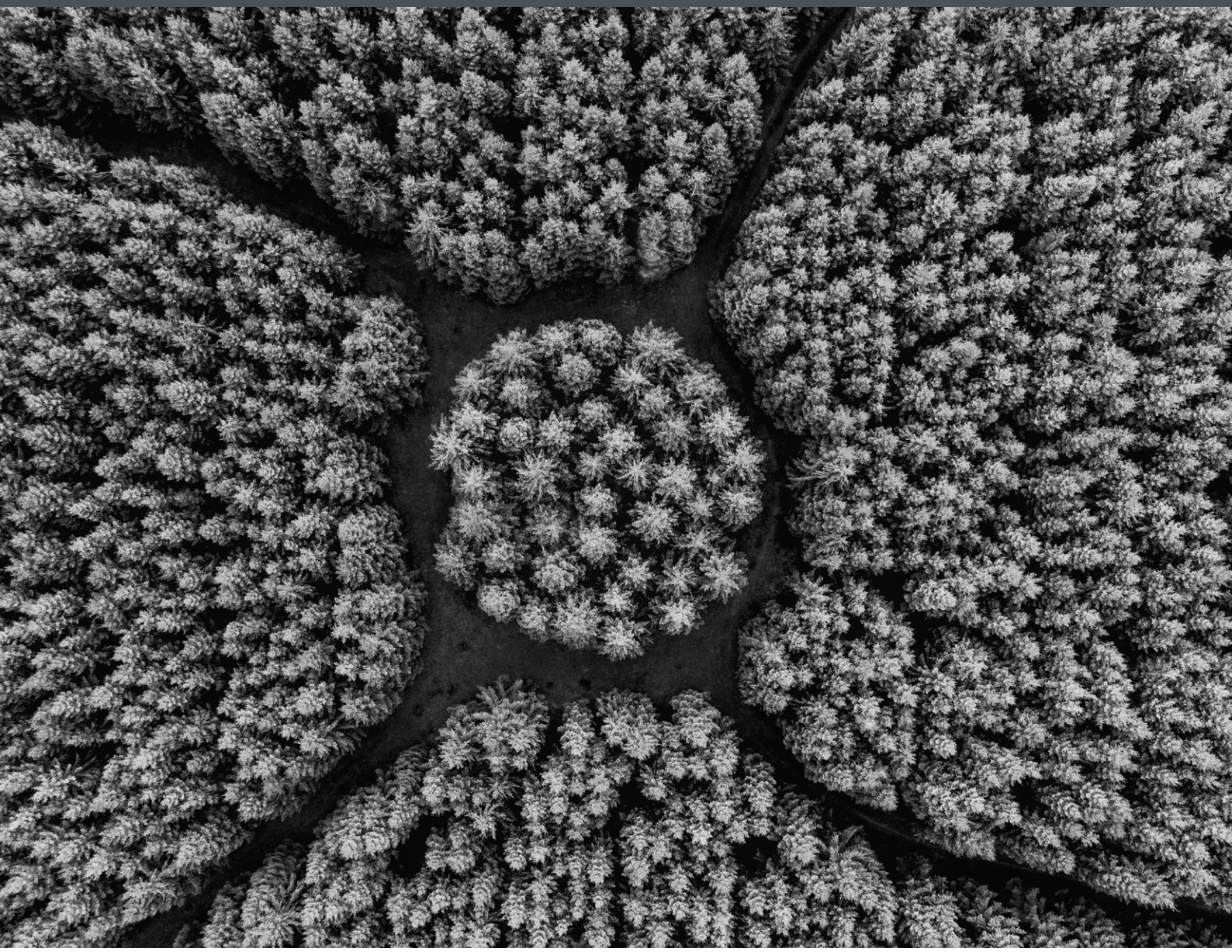

UPDATE ON KEY CLIMATE LITIGATION AGAINST GOVERNMENTS

Global climate litigation continues apace, in its various different forms. Businesses will be concerned about the potential for litigation, regulatory, or other actions being brought directly against them or their directors and officers. However, governments and authorities should also be aware of the risks posed to them by the large and still growing numbers of claims challenging their climate ambitions, targets, or integration of climate considerations into decisions.

In this article we discuss two key decisions where claims have been upheld against two States for breaching their responsibilities in relation to climate change:

1. ***Verein KlimaSeniorinnen Schweiz and Others v. Switzerland***[1], decision of the European Court of Human Rights (**ECtHR**) in which it looks at the interplay between the European Convention on Human Rights (**ECHR**) and climate change; and
2. ***Friends of the Earth v SoS for Energy, Security and Net Zero***, a decision of the English court showing the court's willingness to review and enforce government compliance with their climate change obligations.

1. *Verein KlimaSeniorinnen Schweiz and Others v. Switzerland*

Three combined cases were heard before the ECtHR, and whilst two were held to be inadmissible, one was successful, and represents a significant development in the ECtHR determining that climate change in action by States may breach the ECHR.

In the successful case of *Verein KlimaSeniorinnen Schweiz and Others v. Switzerland*, a Swiss NGO established to fight for climate change rights on behalf of elderly women in Switzerland, and separately four women of a similar age, all with heat-related health issues, took action against Switzerland alleging it failed to put in place adequate climate protection measures. Following rejection of the complaint by the Swiss authorities, the case was heard by the Swiss Federal Supreme Court, before whom it was alleged that Switzerland had violated the claimants' rights under Articles 2 and 8 of the ECHR. The case was rejected and was then taken to the ECtHR.

Before the ECtHR, the Association argued that the failure of the Swiss authorities to mitigate climate change adversely affected its members' lives, living conditions and health, breaching their rights under Article 2 (protection of life) and Article 8 (respect for private and family life) of the ECHR.

In its judgment on 9 April 2024, the ECtHR found that, as a matter of scientific fact, climate change exists, poses a current and future threat to human rights, and that global mitigation efforts are not sufficient to meet the 1.5 degree limit on temperature rise. It held that Article 8 encompasses an individual's right to effective protection by the State from the serious adverse effects of climate change, and in this context the State's duties are to adopt and apply regulations and measures to mitigate existing and future effects of climate change.

The ECtHR held that the usual "but for" causation test was not applicable to climate related litigation. Instead, it held that it was satisfied that the Association had shown a sufficiently close relationship between the effects of climate change and increased morbidity amongst its members, and that this was enough to show causation.

The ECHR requires States to undertake greenhouse gas emission reduction measures, aiming to reach net neutrality in principle within three decades. The ECtHR held that in Switzerland, there were critical gaps in the process of putting in place domestic regulations, including a failure to quantify, through a carbon budget or otherwise, national GHG emissions; in breach of Article 8. Further, the Swiss court's rejection of the Association's complaint without examining the merits amounted to interference with Article 6 (right to a fair trial), and the key role of domestic courts in climate change litigation was emphasised. However, the ECtHR could not be prescriptive as to the measures that the Swiss Confederation should implement; this was left to national discretion.

Commentary

Switzerland is required to provide an action plan/report setting out the measures taken or intended to be taken by 9 October 2024. However, it has been reported that the Swiss Parliament has voted to reject the ruling, on the basis that Switzerland already has a climate strategy that it views as effective in meeting the human rights requirements in the judgment.

It is therefore not clear where this now leaves the judgment in terms of Switzerland. However, more widely, other ECHR member states will wish to review and take the judgment into account, including in England where the ECHR is imbedded in the Human Rights Act 1998.

The judgment is a milestone in determining that climate change engages human rights under the ECHR, and specifically says that States have a positive obligation to put in place a legislative and administrative framework to protect human health and life. It is also noteworthy that the ECtHR was willing to find that an Association of interested individuals did have status to bring the claim – to do so, it is necessary to be a "victim" in the sense of being directly affect by the measures in question[2] – and the reason another case was rejected.

The judgment has not been without its controversies, with some pointing to the dissenting opinion of Judge Eicke, who felt the majority had stepped outside of the ECtHR's role and beyond the limits of interpretation as a matter of international law. However, as a result of the judgment, it may be that we will see similar climate related claims against national public authorities alleging failures in government measures, targets or timescales before national courts. Where such claims are successful, they may lead to policy and regulatory changes across many diverse sectors, as attempts are made to get closer to net zero targets.

2. *Friends of the Earth and ors. v SoS for Energy, Security and Net Zero*[3]

In this case the claimants successfully challenged the UK government's published net zero strategy by way of judicial review in the English High Court.

1 https://hudoc.echr.coe.int/eng/?i=001-233206

2 Article 34

3 Friends of the Earth Ltd) anors. v Secretary of State for Energy Security and Net Zero [2024] EWHC 995 (Admin)

Under the Climate Change Act 2008 (**CCA 2008**), a framework was established to proceed to net zero, under which it is the responsibility of the Secretary of State (**SoS**) to ensure that the net UK carbon account for 2050 is at least 100% lower than the baseline. The SoS has a duty to set an amount for the net UK carbon account – the carbon budget, for successive 5-year periods, with a view to meeting the 2050 target[4] . In addition, the Act requires the SoS to:

1. ensure that the net UK carbon account does not exceed that budget[5];
2. to *"prepare such proposals and policies as the SoS considers will enable the carbon budgets that have been set under this Act to be met"*[6]; and
3. submit a report setting out the proposals and policies to Parliament for approval[7].

In 2021, the SoS published the proposals for meeting the sixth carbon budget (**CB6**). However, the claimants successfully challenged those proposals[8], the court finding (amongst other things), that the SoS had not considered the contributions individual proposals or policies were expected to make and how a 5% shortfall would be made up. As a result, the SoS was required to look at the proposals again. These were provided to Parliament as the Carbon Budget Delivery Plan (**CBDP**) in March 2023.

The judgment

In its judgment the court once again held in its second judgment on the CBDP that the claimant's challenge succeeded.

The court held that the information considered by the SoS to be inadequate for him to make the necessary assessment that the CBDP would enable the carbon budget to be met.

Furthermore, the information on which the SOS's decision was based indicated that the package of policies and proposals could meet 97% of CB6, but the quantification relied on the proposals and policies being delivered in full (although it said that level of ambition was reasonable). If the SoS made the decision on the assumption each proposal would be delivered in full, then this was a mistake as to the true position and meant that the decision was made on an incorrect assumption. If that was wrong and the SoS did not assume this, then the decision was flawed, as it was not possible to determine from the information which of the proposals and policies would not be delivered in full, or at all, or the overall quantification that each was likely to make.

The court also found that the SoS had applied the wrong legal test to section 13(3) CCA 2008 which states that *"the proposals and policies taken as a whole, must be such as to contribute to sustainable development"*. Sustainable development has been defined in previous planning case law as *"meeting the needs of the present without compromising the ability of future generations to meet their own needs"*. What was required to meet the section in the context of an evaluative assessment by the SoS was a degree of certainty that the outcome would occur. The information provided to him indicated that the proposals and policies were "likely" to meet that contribution, but this did not come near to the higher threshold of "must".

The application for judicial review was upheld, and the UK government was required to rewrite the plan for a third time, setting out how it intends to meet the 2015 Paris Agreement, which aims to keep temperature increases within 1.5 degrees Celsius of pre-industrial levels.

Effect of the judgment

There has been an election and change in government since the judgment in this case, which will no doubt impact on the UK's approach to net zero, and so it is not clear how the new government will respond in terms of re-drafting the CBDP, we will write further once this becomes clear.

Irrespective of whether a further CBDP is produced or a new approach used, this case makes it clear that the English courts will hold the UK government to account in terms of its climate policy and responsibilities.

It is noteworthy that the Climate Change Committee (a statutory body established under the Climate Change Act to advise on and report to Parliament) indicated in July 2024 that only a third of the emissions reductions required to achieve the country's 2030 target are covered by credible plans. This assessment coupled with claimants' willingness to continue challenging and enforcing legal obligations in relation to net zero suggest more far-reaching policy changes that have a knock-on effect for business may be round the corner.

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4 Section 4(1)(a) CCA 2008
5 Section 4(1)(b) CCA 2008
6 Section 13 CCA 2008
7 Section 14 CCA
8 *R (Friends of the Earth Ltd) v Secretary of State for Business, Energy and Industrial Strategy* [2023] 1 WLR 225

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