

# LMA Committee Circular

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Committee **Environment & Climate Litigation Committee**

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The Environment and Climate Litigation Committee reconvened on 27 November 2024 to discuss recent legal cases and developments particularly in the context of climate litigation, emerging regulations, and other climate related market developments. The committee also discussed the potential impact of these climate related developments on insurers.

## **Recent Cases**

Mr Hall and Mr Reeves provided the committee with a summary of the cases below.

### **a) Milieudefensie et al. v. Royal Dutch Shell. [Link](#)**

The environmental group Milieudefensie/Friends of the Earth Netherlands and others filed a claim against Shell in 2019. Milieudefensie/Friends of the Earth Netherlands alleged that Shell violated their duty to take adequate action to reduce their greenhouse gas emissions and contributions to climate change, unlawfully endangering Dutch citizens.

In 2021, in a landmark decision, the Hague District Court ordered Shell to reduce their global carbon emissions by 45% by 2030, including Scope 3 emissions (which are those linked to use of its products by consumers).

Shell successfully appealed the decision by the Hague District Court in 2021 and the judgment was reversed by the Appeal Court in 2024. The Appeal Court agreed with the District Court that Shell should reduce its greenhouse gas emissions but did not agree with the District Court's decision to specify a percentage for the reduction. It held that there was insufficient scientific evidence as well as a lack of climate related legislation and regulation to require individual companies to limit their greenhouse gas emissions by a specific percentage and in a specific way (for example, by inhibiting or reducing the sale of oil and gas products). Mr Reeves agreed with the Appeal Court's decision and stated that although the court has the right to police corporate conduct, the District Court's decision to specify a percentage was without legislative basis.

The Appeal Court also recognised that compelling Shell to reduce their Scope 3 emissions will not solve the wider issue in relation to the demand of oil and gas products by consumers. It stated that if Shell was compelled to reduce their Scope 3 emission by reducing the sale of oil and gas products, consumers will purchase these products from other companies. Mr Reeves reiterated that companies reflect the demands of the economy in terms of the products and services they offer.

Mr Reeves highlighted that most of the climate litigation cases currently are not directly against policyholders but there could, potentially, be a shift in these trends in the coming years. Mr Reeves also mentioned that specific exclusions in policies for defence costs related to climate litigation were not yet common.

**b) Aloha Petroleum, Ltd. v. National Union Fire Insurance Company (AIG) – Coverage issue. [Link](#)**

Aloha Petroleum Ltd. was sued by the City and County of Honolulu and the County of Maui for allegedly being responsible for the harmful effects of climate change caused by the release of greenhouse gas emissions. Aloha Petroleum Ltd. believed that coverage for climate change related litigation claims was available under their commercial general liability (“CGL”) policies with their insurers. Therefore, Aloha Petroleum Ltd. attempted to claim their defence costs for these lawsuits, but their insurers refused to settle these claims under the terms of the CGL policies which included a pollution exclusion clause.

Aloha Petroleum Ltd. then filed a lawsuit against AIG for breaching their duty to defend and refusing indemnity. This lawsuit was initially brought before the US District Court of Hawaii. Due to the complex nature of this case, the US District Court judge then referred two questions to the Supreme Court of Hawaii which were:

- (1) For an insurance policy defining a covered “occurrence” in part as an “accident,” can an “accident” include recklessness?; and
- (2) For an “occurrence” insurance policy excluding coverage of “pollution” damages, are greenhouse gases “pollutants”?

The Supreme Court of Hawaii determined that an "accident", part of the definition of "occurrence" in the policies, encompasses reckless conduct by the insured. This decision could have possibly triggered coverage under these policies. However, the Court also held that greenhouse gases are pollutants which falls within the pollution exclusion clause resulting in no coverage under the CGL policies. The decision by the Court on whether greenhouse gases are pollutants aligned broadly with decisions in other US jurisdictions.

Mr Hall stated that the decision by the Supreme Court is positive for insurers, but the impact of this precedent may be limited in terms of its applicability for future cases. He also mentioned that future decisions by the courts will be based on specific policy wordings and facts.

Mr Reeves mentioned that although the courts in the United States are split on what constitutes an “accident”, the decision by the Supreme Court in Hawaii corresponds with New York Law in relation to this matter. Mr Reeves also stated that in order to determine what an accident is, it is important to consider the intention and state of knowledge of the policyholders.

Mr Reeves also stated that where product liability is written back into policies, often that coverage does not include a pollution exclusion, and therefore, where this was the case, the question as to whether greenhouse gases are correctly classified as pollutants is irrelevant for the purposes of determining coverage.

Mr Hall highlighted that case law in relation to climate change litigation cases across the jurisdictions in the US is unpredictable. Mr Reeves mentioned that insurers should adopt clear language and explicit wording particularly with regard to climate change and pollution exclusions in their policies.

**U.S. Climate Litigation: The State vs. Federal Balance**

The committee discussed if there is an expectation that there will be a shift in federal policy under the new administration in the US, as US federal courts have previously deferred climate litigation cases to state courts.

Mr Reeves stated that he does not believe that there will be any immediate change. He highlighted that there could be more activist attorneys trying to litigate against large oil companies as a reaction to the new administration.

The committee discussed that climate change litigation cases heard in state courts will continue to be a key issue for insurers in the foreseeable future. Mr Reeves pointed out that plaintiffs generally prefer that climate litigation cases are heard in state courts whereas defendants prefer these cases are heard in federal courts. He reiterated that litigation outcomes will vary by jurisdiction due to the nuances with state legislations.

The committee highlighted that it is important that insurers continue to review policy wordings to manage their exposure to climate related liabilities.

### **Litigation Funding update** [Link](#)

Mr Koh referred to the Civil Justice Council's consultation in relation to litigation funding in the UK and whether litigation funders should be regulated. He said that the LMA was going to submit a response and asked that if anyone had any views, they should contact him or Ms Ramage.

### **Biodiversity Net Gain** [Link](#)

Mr Sheehan gave an update for awareness on Biodiversity Net Gain (BNG) in the UK. BNG aims to make sure in scope development has a measurably positive impact ('net gain') on biodiversity, compared to what was there before development. This gain must be at least 10% and must be in place for at least 30 years.

BNG has been mandatory for in scope developments from 12 February 2024 and will be mandatory for nationally significant infrastructure projects from late November 2025 per Schedule 7A of the Town and Country Planning Act 1990.

There are 3 ways a developer can achieve BNG.

- They can create biodiversity on-site (within the red line boundary of a development site).
- If developers cannot achieve all of their BNG on-site, they can deliver through a mixture of on-site and off-site. Developers can either make off-site biodiversity gains on their own land outside the development site, or buy off-site biodiversity units on the market.
- If developers cannot achieve on-site or off-site BNG, they must buy statutory biodiversity credits from the government. This should be a last resort. The government will use the revenue to invest in habitat creation in England.

BNG is enforced through the planning permission regime. Local planning authorities are responsible for taking whatever enforcement action may be necessary, this ultimately includes fines if other options have not worked.

### **Future topics**

If you would like to contribute your insights or discussions on climate litigation, please contact the secretary of the committee, John Levett.