

# Environmental Litigation:

themes, risks and how to evolve  
in the era of global boiling

By Angela Monaghan



# Environmental Litigation: themes, risks and how to evolve in the era of global boiling

The UK B Corp finance and investment group recently got together to discuss the rise of environmental litigation and the threat it poses to financial institutions and corporations. The panel included Alice Garton (The LenaLaine Project), Katrina Walter (WWF UK), Amy Clarke (Tribe Impact Capital) and Leticia Jennings (Bates Wells). This article shares some of the insights raised at the event.



Angela Monaghan  
Purpose & Impact Manager  
Bates Wells

## Introduction

Climate cases have direct and indirect impacts on decision making at board, policy, judicial and government level. The fallout from this litigation can result in shifts in approach and financial and reputational damage even when cases are unsuccessful. More cases are being filed against corporate actors, litigation about investment decisions are increasing and there has been a growth in 'climate-washing' cases according to the [Grantham Research Institute on Climate Change and the Environment, Global trends in climate change litigation: 2023 snapshot](#), with litigants challenging the responsibilities and actions of those failing to mitigate climate risks through their operational and funding decisions.

The 2015 Paris Climate Agreement went a long way in setting the agenda for action on climate change but failed to put in place actions or accountability frameworks on the harm caused by climate heating and biodiversity loss. More recently, the [Secretariat of the UN Convention on Biological Diversity \(CBD\)](#) has developed 21 targets and ten milestones to help us live in harmony with nature by 2050. This is critical given that one million plants and animals are now threatened with extinction and that wildlife populations decreased by on average 69% between 1970 and 2018.

The lack of accountability set out in the 2015 Agreement has resulted in increased numbers of environmental litigation cases being brought around the world. With the UN Secretary General announcing that we are living in the era of global boiling, this increase couldn't be timelier.

**The Secretariat of the UN Convention on Biological Diversity (CBD) has developed 21 targets and ten milestones to help us live in harmony with nature by 2050. This is critical given that one million plants and animals are now threatened with extinction and that wildlife populations decreased by on average 69% between 1970 and 2018.**



## Themes

The principle that a company can be liable for climate-related damages caused by its greenhouse gas emissions is being tested by a court in **Germany** and recent advances in 'attribution science' now allow causal relationships to be established between emissions and climate-related events.

Meanwhile a landmark ruling in the **US state of Montana** has concluded that the state government is contributing to the climate crisis and that its actions are affecting the claimants' rights to a healthy environment. In August, the United Nations issued a warning to **Saudi Aramco** and its banks over the company's contribution to the climate crisis after ClientEarth filed a legal complaint accusing them of committing the largest ever climate-related breach of human rights laws by a business. These cases are highly likely to increase the growth and success of environmental litigation seeking to make companies and governments responsible for their role in the climate crisis and biodiversity loss and could lead to them being required to provide compensation for affected communities and jurisdictions.

While **ClientEarth** is appealing its failed challenge that Shell's board directors had breached their duties under UK company law to manage the climate risks to the business, their argument that a failure to transition in line with the Paris Agreement jeopardises the long-term financial viability of the company is gaining traction. Within the wider environmental litigation community future challenges of this kind are expected to be successful. And should a change in government result in the passing of the **Better Business Act** in the UK, director's duties will be directly linked to their impact on the planet and the communities that they serve. This will mean that those companies failing to address their negative impacts on the planet will have to very quickly work out how their business model can be shifted to comply with the new requirements.

Meanwhile public interest lawyers are scrutinising the net-zero commitments made by companies that might potentially mislead investors and consumers. If public commitments made are not met or untrue, companies may be in breach of laws and regulations including disclosure requirements, consumer rights legislation and advertising standards. In the UK, consumer protections against greenwashing from the likes of the **Advertising Standards Authority (ASA)** and **Competition and Markets Authority** are being strengthened while opportunities for collaboration to combat climate change by competitors is being reviewed. Up to now most actions on greenwashing have been against corporates, but cases against financial institutions are starting to be successful, for example the **ASA's ruling** from October 2022 that two posters for HSBC were misleading about the bank's contribution to greenhouse gas emissions.



The financial system is responsible for influencing which activities are financed and insured, the price at which such activities are economically viable and the extent to which legacy activities (for example, oil and gas exploration) are able to continue. There is therefore increasing recognition of the critical importance of reorientating capital flows in the finance sector away from activities with a detrimental impact on climate and biodiversity and towards those which are 'net zero' and 'nature positive'. The financial regulators are getting on top of this, and under the Financial Services and Markets Act 2023, four environmental regulators have a new regulatory principle on climate and nature to consider. Public interest lawyers will no doubt be carefully scrutinising decisions made by the financial regulators in this space going forward and we could see increasing numbers of legal challenges such as the ClientEarth application to judicially review the Financial Conduct Authority's approval of Ithaca Energy plc's IPO prospectus.

The EU due diligence directive on supply chains puts an emphasis on all businesses operating and trading with the EU to identify, bring an end to, prevent, and mitigate against negative human rights and environmental impacts in a company's operations and value chains. This will make it increasingly possible to bring supply chain action against companies based in the EU and the UK. This adds a further target for litigation against those failing to take account of the impacts of their organisation on the wider planet and community.

**In the UK, consumer protections against greenwashing from the likes of the Advertising Standards Authority (ASA) and Competition and Markets Authority are being strengthened while opportunities for collaboration to combat climate change by competitors is being reviewed.**



## Motivations

Today we face the double, interlinked emergencies of human-induced climate change and the loss of biodiversity threatening the well-being of current and future generations. We have seen dramatic increases in catastrophic weather patterns and wildfires over the last few years, destroying homes, increasing droughts and jeopardising food supplies. Meanwhile, biodiversity loss threatens the resilience of ecosystem services to shocks, including climate change. Such ecosystem services (which provide food, water, climate regulation, pathogen control and flood protection) are irreplaceable and essential for human wellbeing and survival as well as providing significant economic value. This demonstrates at a human level the urgency to avert, minimise and address the loss and damage from climate change and nature loss, particularly in developing countries most affected and least culpable for the increases in global heating. If meaningful mechanisms aren't put in place to address the risks these communities face, they may have no choice but to look to the courts to protect themselves and their livelihoods. The advances in attribution science are likely to support any such claims. And while a decision was taken at COP27 to set up a loss and damage fund, action and mitigation is time critical for those people living on the front line of the crisis.

There is no doubt that the need to reduce emissions and halt and reverse the loss of nature is urgent and that action to drive change needs to happen now. It needs to be effective for us to have any chance of limiting warming to 1.5°C. Legislative, regulatory and reporting standards have a role to play in the transition, but litigation can have a strategic impact that drives systems change at the pace necessary to prevent the worst potential impacts of climate change and nature loss and be of the greatest benefit to people and the planet. Litigation is being used strategically to hold organisations and individuals to account for damage (past, present and potential) and to force a reduction in our emissions.

**The discovery or 'fact-finding phase'** of civil litigation provides lawyers with access to documents as well as current and former employees of big polluters and other information that would not normally be in the public domain. This material is likely to create a further level of accountability and support more legal challenges. Publicity around cases and evidence obtained through it are expected to make it harder for environmentally damaging behaviours to go unnoticed and is increasingly expected to lead to a public opinion and, potentially, shareholder backlash. All the research carried out about attitudes to climate heating show that much of the UK public backs action to limit damage and younger people are more likely make investment decisions that take values into account.



## Risks

The bottom-line for corporates is that continuing business-as-usual without addressing impacts on climate change and nature loss is likely to leave them open to claims, litigation, regulatory action and a public opinion backlash that will harm their opportunities, increase risks and potential future financial performance. **A recent study** has provided the first robust evidence to link climate change litigation to financial risk. The authors found a causal link between climate litigation and falling stock prices with the largest stock market responses observed for cases filed against the largest polluters (oil and gas majors, natural resource extraction etc). The findings suggest that lenders, financial regulators and governments are likely to consider climate litigation risk as a relevant financial consideration in a warmer future.

The World Economic Forum has determined that as much as half of global GDP (\$44 trillion) is moderately or highly dependent on ecosystem services. A failure by businesses and governments to address impacts on nature could lead to massive global economic risks.

Campaigners and activists are seeing that a fear of liability is driving change at board level in light of successful climate litigation. Pre-litigation work and failed claims can be just as successful in bringing issues and risks to public and board level attention and can have positive results by creating the right conditions for operational change to limit risk and by association, negative environmental impacts. And as boardrooms diversify, businesses can expect their directors to increasingly ask questions about how they are addressing the worst impacts of their actions.

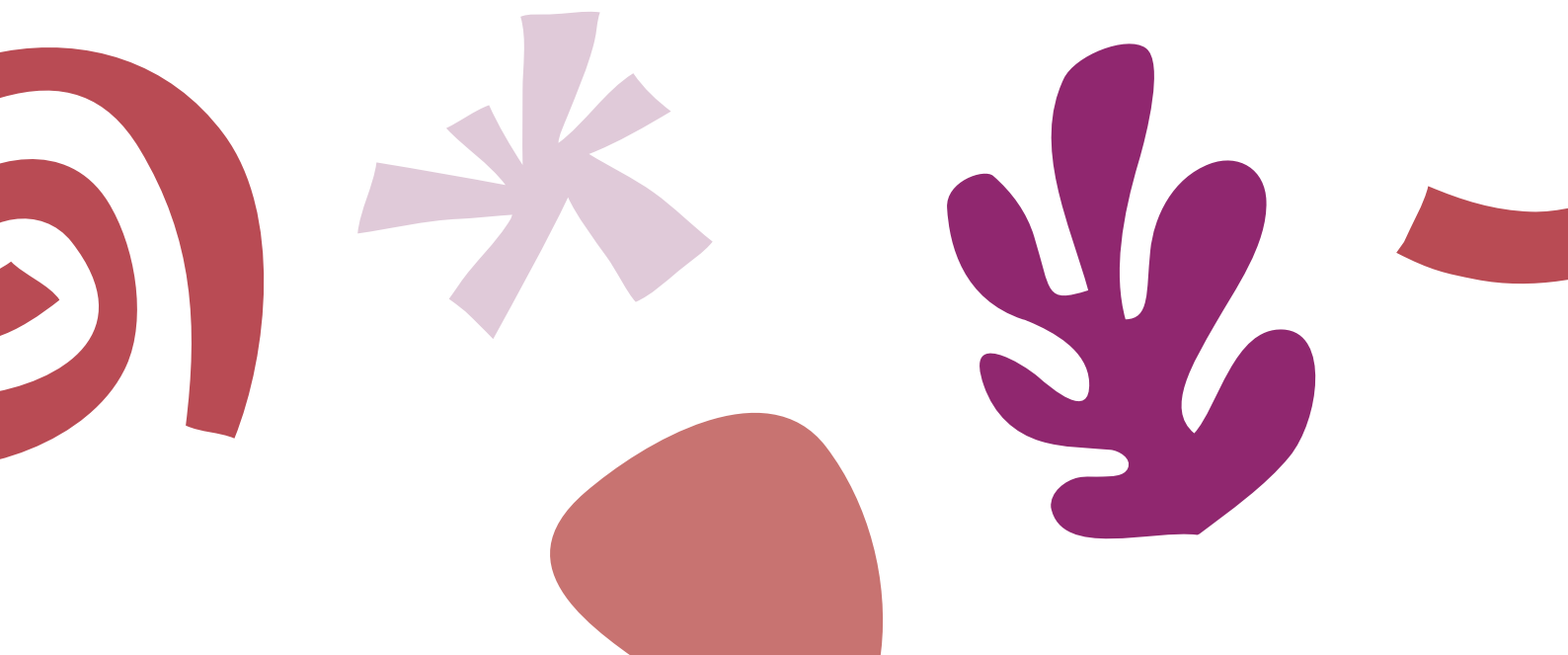
**The World Economic Forum has determined that as much as half of global GDP (\$44 trillion) is moderately or highly dependent on ecosystem services. A failure by businesses and governments to address impacts on nature could lead to massive global economic risks.**



## Bigger picture

In 2020 eight young people filed a class action to block a proposed new coal mine in Australia (**Sharma versus the Minister for Environment**). The decision in May 2021 did not stop the extension of the coal mine but it established that the responsible Minister had a duty to take reasonable care to avoid causing personal injury to the children when deciding whether or not to approve the extension. While the ruling was overturned a few months later, the primary findings of fact about the risk of harm of climate change to children remained true. But beyond this, the case galvanised the youth and parents of Australia and added to the growing momentum for governments to be held accountable for their actions on climate change, creating a movement of people invested in the decisions that their leaders make for their future. Since then, an independent senator has worked with the lead plaintiff in this case to **call for a change in law** that would impose a duty of care requirement on the Australian government to consider the impact of climate harm on young people in their decision making.

In the UK, householders are filing a class action against up to **six water companies** for their failure to address growing concerns about sewage spills and pollution flowing into rivers, seas and lakes by water utility companies. The claims could result in millions of pounds in compensation payments to customers and builds on increasing grass roots and consumer concerns about the actions of water companies over the last 5 years. If successful, it is expected that the action will result in improved water quality and limit the catastrophic effects of pollution on UK waterways. The case comes just days after **57 athletes fell ill after competing in sea swimming events at the World Triathlon Championship in Sunderland**.





## Next steps

Environmental litigation is about shining a spotlight on inaction or bad actions that affect people, livelihoods and where we need to be in the future. There is increasing momentum on environmental action – from citizens, within the professional world and from the courts. Companies failing to address their impacts are at serious risk both financially and reputationally and would be wise to start to act sooner on climate change and nature loss.

Boards need to focus on their core individual directors' duties and, particularly for larger corporates, disclosure requirements. The risk of personal liability for directors will set alarm bells off in many boardrooms and regulators are already stepping up to monitor and act on a failure to manage climate and nature risks. And with the new EU due diligence directive, this can only get more stringent in the coming months and years.

It can only help to start transitioning to climate and nature positive action to avoid potential financial and litigation risks for businesses and directors. Organisations should be looking to put the right professional advisors in place and to fill skills gaps around ESG at a board and operational level. Suppliers and advisors should be able to demonstrate their commitments to sustainability, how much fossil fuel enabling work they do and how are they transitioning their clients. The best advisors will already be actively and creatively finding solutions for their clients. It makes sense to draw on that expertise to mitigate risks and future proof operations while doing the right thing for the environment before it becomes too late for all of us to cope on a boiling planet.



Certified



Corporation

This company meets the highest standards of social and environmental impact



**Angela Monaghan**

**Purpose & Impact Manager**

T: 020 7551 7777

E: [a.monaghan@bateswells.co.uk](mailto:a.monaghan@bateswells.co.uk)



**Leticia Jennings**

**Partner**

T: 020 7551 7657

E: [l.jennings@bateswells.co.uk](mailto:l.jennings@bateswells.co.uk)

Making a profit is core to all businesses but our goal is to combine this with a real social purpose. Our values are pivotal to us, they shape our decisions and the way we live and work.

We focus on positive social impact as much as we focus on being a successful law firm. Our top tier legal advice is coupled with a real desire to drive change and we were the first UK law firm to achieve B Corp certification, awarded to businesses that balance purpose and profit.

Today, our clients are diverse – from corporate household names, to public bodies, to start-ups. We're also the firm of choice for thousands of charities and social enterprises. We continue to lead the market we helped to shape.

Bates Wells challenges what is possible in legal expertise delivery.

**Get in touch:**

+44(0)20 7551 7777

hello@bateswells.co.uk

