Judicial review of climate change decisions: key themes from recent key cases

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Judicial review claims are becoming increasingly common in New Zealand as a way of testing government decision-making on climate change, reflecting similar trends overseas.

Some recent cases highlight the potential for judicial review to drive outcomes in the climate space. For example, a group of NGOs has successfully challenged the UK Government's Net Zero Strategy, with the result that it now needs to be revised by March 2023.[2] Even where a claim is unsuccessful or does not proceed to trial, the fact or threat of a judicial review proceeding can contribute to a change of direction by a decision-maker and may ultimately contribute to changes to emissions pathways.[3]

It is also clear, however, that judicial review is not a silver bullet where a party is unhappy with the direction of travel on climate change, and this is also reflected in recent cases.

Key themes emerging from recent cases include:

- The need for parties to judicial review proceedings to carefully scrutinise the relevant legislative scheme to identify any potential errors in the decision-making approach. Such errors can not only lead to public decisions being overturned on review, and a finding that a decision-maker has failed to correctly apply the statutory scheme, but also in practice can result in a different substantive outcome (such as in the challenge to the UK Government's Net Zero Strategy).

- That where the legislative purpose does not relate to climate change, and climate change considerations are not referred to in the legislation, it is likely to be more difficult to establish that a decision-maker erred by not having regard to climate change matters.

- While arguments in relation to the principles of the Treaty of Waitangi and tikanga have not to date led to climate change cases succeeding, we see considerable scope for such arguments to influence judicial decision-making in future cases.

- The fact that a decision involves a "polycentric" issue such as climate change does not insulate the decision from judicial review, but the court's role will be limited to applying the law and the court will not substitute itself for the executive branch of government in making policy decisions. Relatedly, an initial judicial indication that climate change warrants "heightened scrutiny" by the courts in the judicial review context has not been followed in subsequent decisions.

- While not observed in New Zealand to date, we anticipate that in time we will see "just transition" cases emerging in New Zealand consistent with developments overseas. For example, cases could arise challenging any regulatory action that impacts the ability for land returned under Treaty of Waitangi settlements to be used to its economic potential.

Further detail of recent cases and exploration of the key themes is set out below.

Summary of recent cases

Below, we summarise three key recent cases before going on to explore some key themes emerging from the decisions.

*Challenge to the UK Government's Net Zero Strategy (the "UK **NZS** Case")*

In the UK, a group of NGOs successfully challenged aspects of the UK Government's Net Zero Strategy ("**NZS**") to the High Court of England and Wales.[4]

The UK, like New Zealand, has a "net zero by 2050" target, which is enshrined in domestic legislation, the Climate Change Act 2008 ("**CCA**"). Amongst other things, the CCA requires the Secretary of State for Business, Energy and Industrial Strategy to:

- set a series of 5-year carbon budgets, out to 2052;
- prepare policies and proposals that would enable the carbon budgets to be met (s 13); and
- to report to Parliament following the setting of a carbon budget on proposals and policies for meeting the carbon budgets up to and including the new carbon budget (s 14).

The NZS was intended to meet the requirements of ss 13 and 14 of the CCA. However, the High Court found that the NZS did not comply with those requirements in relation to the sixth carbon budget (which is for the period 2033-2037). Specifically:

- The briefing materials to the Secretary of State did not set out the contribution that each quantifiable proposal or policy in the NZS would make to meeting the sixth carbon budget (although this work had been undertaken by officials). In addition, while the NZS included quantifiable policies that were expected to meet 95% of the sixth carbon budget, the briefing materials did not identify the proposals and policies that would ensure that the remaining 5% would be met. Holgate J found that those considerations needed to be taken into account by the Secretary of State to comply with his duty under s 13 of the CCA to prepare proposals and policies necessary to enable carbon budgets to be met – without that information, the Secretary of State was not able to decide for himself the risk of statutory targets not being met.
- The reporting on the NZS to Parliament was similarly deficient because it did not include quantitative assessments of the contribution of individual policies to the targets or explain the 5% shortfall. Holgate J considered that these deficiencies were material to satisfying the Secretary of State's duty in section 14 of the CCA to report to Parliament on proposals and policies for meeting carbon budgets.

The challenge to the NZS resonates with similar litigation in New Zealand. Specifically, earlier this year, the High Court heard a challenge by Lawyers for Climate Action New Zealand to advice given by the Climate Change Commission in relation to New Zealand's emissions budgets and nationally determined contribution, and the subsequent decision by the Minister for Climate Change to amend the nationally determined contribution. A decision in relation to that claim is awaited.

*Challenge to decision to grant petroleum exploration permits in Taranaki (the "**Petroleum Exploration Case**")*

In New Zealand, a group of students challenged decisions by the Minister of Energy to grant petroleum exploration permits under the Crown Minerals Act 1991 ("**CMA**") to two companies.[5] The applicants argued that the relevant decision-maker improperly failed to consider the climate change implications, which the applicants said were "mandatory considerations" (i.e. the decision-maker was required to take them into account). The applicant also argued that the decisions were "unreasonable" (in the judicial review sense of the word) and did not have proper regard to the principles of the Treaty of Waitangi.

The Court found that the purpose of the statutory scheme under the CMA was to promote mining, and that this meant that climate change matters were not mandatory considerations and indeed were irrelevant considerations in deciding whether to issue the permits. The conflict between the promotion of mining for fossil fuels and the need to curtail such activities in the interests of climate change needed to be dealt with at the policy level.

The arguments in relation to "unreasonableness" and the Treaty of Waitangi did not alter the Court's view:

- In relation to "unreasonableness", Cooke J described this ground of judicial review as "residual" and noted that the more precise grounds of challenge (e.g. "mandatory considerations") provided a more accurate framework for addressing the arguments advanced.

- In relation to the Treaty of Waitangi, His Honour acknowledged that if the principles of the Treaty engaged climate change issues then they would become relevant considerations because the CMA required the decision-maker to have regard to Treaty principles. However, the Court ultimately found that the impacts on Māori of both climate change and the steps taken to mitigate it involved a balancing of considerations that had been addressed through other processes.

Finally, the Court considered the application of s 5ZN of the Climate Change Response Act 2002 ("**CCRA**"), which specifies that the 2050 emissions reduction target and associated budgets and reduction plans are permissible considerations for all public decision-makers if they think fit. Cooke J found that this provision was inconsistent with the specific intention of Parliament expressed in the Crown Minerals Act 1991 and therefore did not change the conclusion that climate change matters were irrelevant to the decision-making power in question.

*Challenge to the Auckland Regional Land Transport Plan (the "**RLTP Case**")*

In July of this year, the New Zealand High Court issued its decision in relation to a challenge by a coalition of climate and transport advocacy groups to decisions made in relation to Auckland's Regional Land Transport Plan 2021 ("**RLTP**").

The claimant coalition challenged several decisions in relation to the promulgation and endorsement of the RLTP by the Regional Transport Committee for Auckland ("**RTC**"), Auckland Transport ("**AT**") and Auckland Council ("**AC**"). Each of those parties were involved in decision-making in relation to the RLTP – the RTC recommended that the RLTP be submitted to AC and AT for approval, the Planning Committee of AC endorsed the RLTP, and the AT Board ultimately approved the RLTP.

While the decision focussed on the decision-making process in relation to the development and approval of the RLTP, in substance the claimants' objection to the RLTP was that it did not set out policies that would sufficiently reduce Auckland's land transport emissions. For example, under the RLTP, emissions from Auckland's land transport sector were set to increase by 6% by 2032 as against 2016 levels, or to reduce by only 1% once government interventions (Clean Car Standards and biofuels improvements) were taken into account. By contrast, Te Tāruke- ā-Tāwhiri (Auckland's Climate Plan) ("**TTT**") requires transport emissions to reduce by 64% by 2030.

The High Court (Venning J) dismissed the claim. At a high level, key reasons for dismissing the claim included the following:

- While the RTC was required to be satisfied that the RLTP contributed to the purposes of the Land Transport Management Act 2003 ("**LTMA**"), those purposes were "to contribute to an effective, efficient and safe land transport system in the public interest". These purposes did not expressly refer to environmental sustainability or climate change.

- The RTC needed to be satisfied that the RLTP was consistent with the Government Policy Statement on Land Transport 2021 ("**GPS**"). However, climate change was just one of four strategic priorities in the GPS and did not have pre-eminence over the other three.

- The RTC directed itself to the issue of whether the RLTP was consistent with GPS 2021 and considered climate change issues. While the claimant coalition disagreed with the analysis on which the RTC relied (such as in relation to the impact of transport investments, roading projects and lane reallocation on emissions), it was open for the RTC to be satisfied that, taken overall, the RLTP was consistent with the GPS. For example, the GPS did not establish a specific emissions reduction target for the RLTP.

- There was no legal requirement for the RLTP to be consistent with commitments made by AC (including but not limited to TTT). The Planning Committee of AC had no formal role in relation to the RLTP, and it had no ability to require changes to the RLTP.

The claimant coalition has launched an appeal against the decision.

Discussion of key themes

Below, we elaborate on the key themes set out in the introduction to this paper.

Application of the statutory scheme

First, the case law demonstrates that a critical component of preparing for a climate change judicial review (whether as applicant or respondent) will be undertaking a careful analysis of the relevant legislative scheme. Specifically:

- As a general rule, a decision that fails to comply with an express or implied requirement of the statutory decision-making power is very likely to be overturned on review. For example, in the UK NZS Case, the Court found in effect that ss 13 and 14 of the Climate Change Act 2008 required the Secretary of State to identify the impact of individual policies on the UK's plans to meet sixth carbon budget, and that the briefing materials and report to Parliament did not comply with these requirements.

- In analysing the statutory scheme, careful consideration should be given to any provisions which explicitly list considerations that must, may or may not be taken into account by the relevant decision-maker. A decision-maker who fails to accurately apply those considerations will leave the decision in question obviously exposed to judicial review. Where legislation has an explicit purpose which does not relate to tackling climate change (such as in the Petroleum Exploration Case), it is likely to be more difficult to establish that climate change matters ought to have been taken into account. This is despite s 5ZN of the CCRA, which specifies that climate change is a permissible consideration for public decision-makers.

- Further, a claim that succeeds because the decision-maker has not complied with a substantive requirement of the legislative scheme is more likely to lead to a change in the outcome of the decision than a judicial review challenge based on a purely procedural ground of review (such as a failure to consult or a breach of natural justice principles). The remedy in a judicial review claim will typically be that the decision is set aside, and the decision-maker may then need to make the decision again. A claimant that has demonstrated in court that the legislative scheme requires a particular decision to be made (or at least that certain matters must or must not be taken into account) will typically have better prospects of a more favourable outcome in future decision-making.[6]

Application of the Treaty of Waitangi and tikanga

Second, while the Treaty of Waitangi did not assist the claimants in the Petroleum Exploration Case, there remains scope for arguments based on the principles of the Treaty and tikanga to impact the outcome of cases involving climate change, particularly where the empowering legislation specifically refers to such considerations. The relevance of tikanga to climate change issues is being considered by the Supreme Court outside of the judicial review context in the Smith v Fonterra litigation and any guidance in the judgment (which is awaited) may well have broader relevance to climate change judicial review (see here for our recent analysis of the relevance of tikanga to New Zealand law more generally).

Climate change as a matter of public policy

Third, there has been discussion in recent cases about the extent to which the courts should intervene by way of judicial review in decisions involving a high policy content, or whether such problems should sit within the sphere of the executive such that the court should not intervene on a merits basis. For example:

- In the RLTP Case, Venning J accepted a submission that the claimant's challenge involved the evaluation of political, social and economic choices which the legislation had vested in the statutory decision-maker. Ultimately, Venning J concluded that the RLTP complied with the statutory requirements and accordingly was not willing to intervene further in the decisions made by the relevant bodies.

- In the Petroleum Exploration Case, Cooke J considered an argument by the respondents that there were constitutional constraints on judicial intervention in cases involving high policy content, including climate change, and that the Court should refrain from interfering on a merits basis. Cooke J rejected this submission, noting that whether or not the Court should intervene depends on whether the decision-maker has complied with the law, irrespective of whether there are "polycentric" issues involved.

While the judicial comments above appear at first blush to be inconsistent, in our view they are reconcilable on the basis that both judges appear to be emphasising that the constitutional role of the courts is to apply the law. The fact that a decision involves a "polycentric" issue such as climate change does not insulate the decision from judicial review, but the court's role will be limited to applying the law and the court will not substitute itself for the executive branch of government in making policy decisions. This is also consistent with the approach taken in the UK NZS Case. We expect that arguments around the court's role in advancing climate action will continue to feature in climate change litigation in New Zealand – for example, such arguments have been raised on both sides in the challenge to the Climate Change Commission's advice on the first three emissions budgets.

Intensity of review for climate change cases

Fourth, and related to the above, while arguments that public decisions in relation to climate change are of particular significance and therefore warrant "heightened scrutiny" in judicial review have gained traction in one earlier New Zealand decision,[7] this has been called into question in both the Petroleum Exploration Case and the RLTP case

For example, in the Petroleum Exploration Case, Cooke J did not find the concept of "heightened scrutiny" helpful but instead noted that the role of the Court in judicial review is to ensure that decisions are made lawfully, and that the level of discretion afforded to the decision-maker will vary depending on the legal controls operating on the decision-making power (e.g. the statutory scheme). Venning J made similar comments in the RLTP case.

Potential for "just transition" litigation

Finally, while New Zealand judicial review cases to date have focussed broadly on alleged failures by government to implement emissions reductions, it will be interesting to see whether a body of "just transition" cases emerges in New Zealand, following developments overseas. For example, forestry and Māori groups (who may have received forestry assets as part of a Treaty settlement) may well look to an administrative law solution should regulatory reform be progressed that impacts ETS revenue available for exotic forestry plantations.

Should you wish to discuss this update further, please get in touch with one of the key contacts below.

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FOOTNOTES

1. Special thanks to Annabel Shaw of Te Whakahaere for her review and helpful comments.
2. By contrast, private law claims in relation to climate change have tended to face challenges internationally. In New Zealand, the question of whether the first climate change tort claim can proceed to trial is currently being considered by the Supreme Court in the *Smith* litigation.
3. For example, in South Africa, a claimant group was successful in challenging the approval of a coal-fired power station on the basis that climate change considerations had not been taken into account: *Earthlife Africa Johannesburg v The Minister for Environmental Affairs and Others* [2017] 2 All SA 519 (GP). That particular coal-fired power station has ultimately not gone ahead following a subsequent agreement between the parties.
4. *The Queen (on the application of (1) Friends of the Earth Limited (2) ClientEarth (3) Good Law Project and Joanna Wheatley v Secretary of State for Business, Energy and Industrial Strategy* [2022] EWHC 1841. The UK government has decided not to appeal the decision.
5. *Students for Climate Solutions Incorporated v The Minister of Energy and Resources* [2022] NZHC 2116.
6. It is not, however, always the case that an adverse finding against a decision-maker will result in a decision being made differently in future. An example is the Australian *Sharma* litigation, where the Minister in question decided to approve the extension to the Vickery coal mine despite a finding at first instance that the Minister owed a novel duty of care to avoid causing personal injury to Australian children in relation to climate change. That first instance decision has now been overturned on appeal to the Full Federal Court (see our earlier update here).
7. *Hauraki Coromandel Climate Action Incorporated v Thames-Coromandel District Council* [2020] NZHC 3228.