

HIGH COURT REJECTS CLIMATE ACTIVIST ATTEMPT TO LAUNCH CLAIM FOR SHELL AGAINST ITS DIRECTORS

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Legal Briefings

The ruling provides comfort for boards wrestling with the impact of climate change on their business

In a significant decision for boards grappling with how to respond to the impact of climate change on their business, the High Court has refused permission for ClientEarth, a minority shareholder in Shell plc, to continue a derivative action on behalf of the company against its directors (the Directors) under s.261(1) of the Companies Act 2006 (CA 2006): [ClientEarth v Shell plc & Ors \[2023\] EWHC 1137 \(Ch\)](#).

The underlying claim brought by ClientEarth alleged the Directors breached their statutory duties owed to Shell as a result of acts and omissions relating to:

- Shell's Energy Transition Strategy (ETS) published and updated between April 2021-2022; and
- the Directors' response to an order made by the Hague District Court (Dutch Order) on 26 May 2021 in [Milieudefensie v Royal Dutch Shell plc CLI:NL:RBDHA:2021:5339](#).

As a shareholder seeking to bring a derivative claim in the name of the company, ClientEarth was required to apply for permission to proceed with the action. However, the court ruled ClientEarth failed to meet the initial threshold of establishing a *prima facie* case for granting permission, and so dismissed the application in accordance with s.261(2)(a) CA 2006.

The judgment provides comfort to boards. In particular, it shows the court will be slow to allow shareholders with small or *de minimis* shareholdings to use the derivative claim procedure under CA 2006 to challenge strategic or long-term decisions made in good faith in relation to addressing risks posed by climate change. The main takeaways from the decision are below:

- 1. The court is extremely reluctant to interfere in company management decisions:** The decision suggests it will be difficult for environmental or other campaign groups to challenge directors' strategy and decision-making via a derivative action. This is because the court will generally take the approach that it is for the directors themselves to determine how best to promote the success of the company. This underlying principle is woven into numerous aspects of the reasoning in this decision, including the stringent test for permission to bring a derivative action, which the court will only grant in "limited and restricted" circumstances. The court noted that the management of a business of the size and complexity of Shell will require the Directors to consider a range of competing considerations, the proper balancing of which is a directors' management decision, which the court is ill-equipped to interfere with. In the court's view, the proper forum for ClientEarth to voice its concerns as to the Directors' conduct, is by vote of the members in general meeting. However, it is important to remember that a technical breach of statutory duty by a director could satisfy the *prima facie* case threshold on other facts (for example, where a directive shareholder-requisitioned resolution has been passed, a breach of any part of that resolution could amount to a technical breach of directors' duties).
- 2. The court rejected attempts to formulate new and absolute duties in respect of climate change:** The court was critical of the way in which ClientEarth put its case, by seeking to impose new and absolute duties on the Directors. These alleged new duties cut across the Directors' general statutory duties under s.172 CA 2006, which require directors to have regard to many competing considerations in determining how best to promote the success of the company for the benefit of its members as a whole. The law does not superimpose on the general statutory duties more specific obligations as to what is and is not reasonable in every circumstance, and the question is whether the decision falls outside the range of decisions reasonably available to the Directors at the time (as per [Sharp v Blank & Ors \[2019\] EWHC 3096 \(Ch\)](#)).
- 3. Relevance of a shareholder's motivation, good faith and the views of other shareholders:** Although the court was considering whether a *prima facie* case for granting permission had been made out, it nevertheless reflected on the test to be applied at a substantive hearing of an application for permission to bring a derivative action. One of the discretionary factors that the court must consider under s.263(3)(a) CA 2006, is whether the shareholder is acting in good faith in seeking to continue the claims. In considering this factor, the decision suggests the court will look at the motivation behind the action and will be unlikely to grant permission if it takes the view there is an ulterior motive and/or the derivative mechanism is being used for a collateral

purpose, such as to publicise and advance the shareholder's own policy agenda, rather than to secure the directors' compliance with their duties for the benefit of members as a whole. The test for the substantive application for permission also requires the court to consider the views of other members of the company with no personal interest in the matter (s.263(4) CA 2006, a provision which was incorporated into the legislation during the parliamentary drafting process, as a result of efforts led by Herbert Smith Freehills and other concerned parties. Interestingly, the court quoted support for the ETS in votes cast by members at Shell's AGMs in 2021 (88.4%) and 2022 (80%) as evidence of the strength of the members' support of the Directors' strategic approach to climate change risk.

- 4. The court is unlikely to grant mandatory injunctive relief in such cases (even if the claim is successful):** It is trite law that the court will not grant mandatory injunctive relief if constant supervision is required to enforce the relevant order. In the court's judgment, the mandatory orders sought by ClientEarth in this case were too imprecise and would require constant court supervision and adjudication on whether the business was being run in accordance with their terms. This is likely to be a sticking point for any campaign group seeking to compel a company to adopt a different strategy.

It is important to note that the present judgment may not bring an immediate end to these proceedings. The application was considered on the papers, and ClientEarth is entitled to ask for an oral hearing to reconsider the decision, provided that it makes a request in writing within seven days of the judgment.

For a more in-depth summary of the ruling and its significance, read our original litigation blog post [here](#).

KEY CONTACTS

If you have any questions, or would like to know how this might affect your business, phone, or email these key contacts.



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