

## ClientEarth v Shell Plc: Review and Lessons for Future Climate Litigation



**01 September, 2023**

This article explores the recent High Court decision of Mr Justice Trower to refuse permission for ClientEarth to proceed with an application against Shell for alleged breaches of directors' duties relating to climate change ([ClientEarth v Shell Plc](#) [2023] EWHC 1897 (Ch)). It looks at the background to the claim and the judgment itself, before considering the lessons for future climate litigation.

References to [X] are to paragraphs in the judgment.

### **The Background to the Claim**

ClientEarth owns a small number of shares (27) in Shell and is therefore a member of Shell. It brought a claim against Shell's Directors alleging breaches of duty arising from acts or omissions relating to Shell's climate change risk management strategy and its response to [an order made by the Hague District Court](#) ("the Dutch Order"). ClientEarth sought a declaration that the Directors had breached their duties and a mandatory injunction requiring them to (a) adopt and implement a strategy to manage climate risk in compliance with their statutory duties and (b) immediately comply with the Dutch Order.

This was a derivative claim within the meaning of s260(1) of the Companies Act 2006 ("the CA 2006") and was determined in accordance with the procedure set out in Part 11 Chapter 1 of the CA 2006. Permission is required to continue the claim (s261(1)) and the court is required to dismiss the application if it appears that it does not disclose a prima facie case for granting permission (s261(2)). This is known as the prima facie stage, which provides an initial filter to exclude unmeritorious or clearly undeserving cases. There is therefore a two stage process to obtain permission. The question for the court at the first stage was whether, on the face of the case advanced by ClientEarth, and in the absence of an answer by Shell, ClientEarth would obtain the permission it sought [13], taking the evidence at its "reasonable highest" [14].

Trower J refused permission on the papers in a [decision](#) dated 12 May 2023. This judgment dated 24 July 2023 followed an oral hearing on 12 July 2023 requested by ClientEarth to reconsider the application.

## **The Test for the Substantive Application**

The substantive application for permission would proceed to be heard if a *prima facie* case was made out. The test for the court on the substantive application at the second stage, on which a *prima facie* case must be established at the first stage, is set out in s263 of the CA 2006. An application must be refused if the court is satisfied that a person acting in accordance with their duty to promote the success of the company would not seek to continue the claim (s263(2)(a)) or that any act or omission from which the cause of action arises has been authorised or ratified by the company (s263(2)(b) and (c)). There are also a number of discretionary factors that the court must take into account, including whether the member concerned is acting in good faith in seeking to continue the claim (s263(3)(a)). The court is also required to have regard to any evidence as to the views of members of the company who have no personal interest, direct or indirect, in the matter (s263(4)).

Trower J held that the court should not treat the *prima facie* stage as distinct from the substantive application when having regard to the relevance of the permission criteria set out in ss263(3) and 263(4) [16]. The criteria were therefore factors the court must take into account when assessing whether there was a *prima facie* case.

## **The Duties Relied on by ClientEarth**

ClientEarth relied on two of the general statutory duties owed by directors pursuant to s170 of the CA 2006: s172 which requires a director to act in a way in which they consider in good faith would be most likely to promote the success of the company for the benefit of its members as a whole; and s174 which requires a director to exercise reasonable care, skill and diligence [20].

ClientEarth also sought to argue that there were six “necessary incidents of the statutory duties” that specifically related to considering climate risk [22]. Trower J rejected this argument. He found that the purported incidental duties were “inconsistent with the well-established principle that it is for directors themselves to determine (acting in good faith) how best to promote the success of a company for the benefit of its members as a whole” [28].

In addition, in relation to the Dutch Order, ClientEarth relied on a further duty arising under the CA 2006 that a director who is aware of a court order is under a duty to take reasonable steps to ensure it is obeyed [34]. Trower J agreed with Shell that the nature and extent of the Directors’ duties was governed by English law and that the only question was whether the response to the Dutch Order rendered them in breach of an English law duty [36].

Accordingly, Trower J considered that “ClientEarth’s approach to the formulation of the incidental duties and further obligations... has insufficient regard to the way in which the legislature has formulated the general duties” [37].

## **The Alleged Breaches of Duties and ClientEarth’s Evidence**

Trower J grouped the alleged breaches into three categories: (1) a failure to set an appropriate emissions target; (2) the management of climate risk not establishing a reasonable basis for achieving the net zero target and not being aligned to the global temperature objective of 1.5°C; and (3) a failure to comply with the Dutch Order [39].

In support of its case, ClientEarth adduced “voluminous” evidence including two witness statements and a letter from a Dutch lawyer addressing the Dutch Order [40].

## **Trower J’s Decision**

### ***Appropriate emissions target and management of climate risk***

Trower J cited a number of “fundamental reasons” as to why ClientEarth had failed to establish a *prima facie* case for the first two categories of alleged breaches [58–68].

First, very little weight could be placed on the witness evidence, because it did “not establish a case that the Directors are managing Shell’s business risks in a manner which is not open to a board of directors acting reasonably”, and neither the witness nor ClientEarth was able to “give expert evidence on which the court can properly rely” [59]. Trower J considered that it was not unreasonable to expect ClientEarth to adduce expert evidence at the *prima facie* stage [62].

Secondly, the evidence did not support a *prima facie* case “that there is a universally accepted methodology as to the means by which Shell might be able to achieve the target reductions” in its energy transition strategy. In the absence of admissible expert evidence, it was difficult to treat ClientEarth’s evidence as “providing a proper evidential basis for alleging that no reasonable board of directors could properly conclude that the pathway to achievement is the one they have adopted”. Furthermore, “the law respects the autonomy of the decision making of the Directors on commercial issues and their judgments as to how best to achieve results which are in the best interests of their members as a whole”. As such, the evidence fell “some way short of establishing a *prima facie* case that the way in which Shell’s business is being managed by the Directors could not properly be regarded by them as in the best interests of Shell’s members as a whole” [64].

Thirdly, there was a “fundamental defect” in ClientEarth’s argument, as it had failed to grapple with how the Directors had “gone so wrong in their balancing and weighing of many factors which should go into their consideration of how to deal with climate risk, amongst the many other risks to which Shell’s business will inevitably be exposed” [66]. ClientEarth’s case that Shell had policies and procedures to achieve net zero, but that they were unreasonable and did not include adequate pathways, was “inconsistent” with any suggestion that the Directors had not considered what was in the best interests of Shell “when addressing the most appropriate manner in which to deal with climate risk” [65]. The fact that ClientEarth was “unable to provide any explanation of how the Directors have gone so wrong in the balance of those competing considerations” was “a clear illustration of why it has not established a *prima facie* case” [68].

### ***The Dutch Order***

Notwithstanding the fact that the letter from a Dutch lawyer did not comply with CPR PD35 [74], Trower J considered the letter. The Judge rejected ClientEarth’s argument that he should not have looked at Hague District Court’s judgment but relied only on the contents of the letter. The court was not “bound to adopt a passive and uncritical approach to the evidence with which it is faced” at the *prima facie* stage [76]. Furthermore, it was clear from the judgment that the court “accepted that Shell is not currently acting in an unlawful manner and recognised that it is a matter for Shell as to how it exercises its discretion to comply with reduction obligations imposed by Dutch law” [72].

### ***Relief***

Trower J agreed with Shell that one issue for the court to consider was the nature of the relief sought and the prospects of it being granted. He considered it would be “most unlikely” for the court to grant a mandatory injunction of the type sought because it was “too imprecise to be suitable for enforcement” [81]. Whilst the declaratory relief did not suffer from this problem, it was “difficult to see what legitimate purpose” granting it would fulfil and it was “not the court’s function to express views as to the Directors’ conduct which have no substantive effect and which fulfil no legally relevant purpose”. The “proper forum

for generating those types of views” was a “vote of the members in general meeting” [83].

### ***How would a director consider the claim?***

Trower J considered that “a useful question for the court to ask itself” was how an independent director, acting in accordance with their duties under s172 of the CA 2006, would view the claim and whether they would consider it appropriate. He considered such a director would “not do anything other than decline to continue the claim”. Accordingly, applying s263(2), he concluded there was no prima facie case for granting permission because the court would be “bound to refuse” permission [84].

### ***Discretionary factors***

The question of whether ClientEarth was acting in “good faith” (s263(3)(a)) required consideration of whether it had an honest belief that the claim was in the best long-term interests of Shell as well as an assessment of whether it was bringing the proceedings for an ulterior purpose, a point that “arises in particularly acute form given the de minimis extent of ClientEarth’s shareholder interest in Shell” [89].

There was a “very clear inference” that ClientEarth’s “real interest” was “not in how best to promote the success of Shell for the benefit of its members as a whole” and there was “substance in Shell’s submission that ClientEarth’s motivation is driven by something quite different from a balanced consideration as to how best to enforce the multifarious factors which the Directors are bound to take into account when assessing what is in the best interests of Shell” [93].

Although there was no suggestion that the acts or omissions would have been authorised or ratified by Shell (s263(2)(b) and (c)), there was evidence as to the views of members who had no personal interest in the matter (s263(4)) in the form of the level of member support for the energy transition strategy at recent AGMs [96–98]. Trower J considered this “would count strongly against the grant of permission” [98].

### ***Conclusion***

For all of those reasons, Trower J concluded that “ClientEarth’s application and the evidence adduced in support of it do not disclose a prima facie case for giving permission to continue this claim” [99]. The application was therefore dismissed in accordance with s261(2)(a).

### **Lessons for Future Climate Litigation**

Whilst this was only a High Court decision to consider permission to continue with the claim, the judgment followed a fully argued oral hearing and will be closely studied to ascertain any lessons for future claims.

The decision demonstrates the difficulty that groups such as ClientEarth will face in bringing climate-focused derivative claims against companies in which they hold shares (often a very small number). From the judgment, a number of challenges can be identified that future claimants will need to consider when formulating their claims.

First, the judgment reinforces the strong emphasis that the courts place on directors having discretion to make decisions (acting in good faith) in the best interests of the company and the reluctance of the courts to interfere with that discretion in all but the most clear-cut cases. Claimants will need to articulate a compelling reason and have a strong evidential basis in order to persuade a court to cut across that discretion. The judgment illustrates the likely deference that courts will pay to directors’ judgements on complex matters.

Secondly, the judgment demonstrates the reluctance of the courts to impose additional 'incidental' duties on directors, as in this case related to climate change. As such, claimants will need to plead a breach of the general statutory duties, as indeed ClientEarth attempted to. The difficulty claimants will face, as ClientEarth did, is in grappling with how directors have breached those duties, and specifically in how they have erred in the balancing and weighing of the various factors they are required to consider in addition to climate change risk.

There is a degree of overlap with the first point here, as claimants will also need to explain how the directors' exercise of their discretion in undertaking a balancing and weighing exercise has tipped into something that is sufficiently unlawful to persuade the court to intervene.

Thirdly, claimants will need to adduce independent expert evidence to demonstrate why the means that a company has adopted to meet any objectives set out in an energy transition strategy are not reasonable. This will be important in light of Trower J's finding that there was no "universally accepted methodology" [64] and his specific comment that it is not unreasonable to expect expert evidence to be adduced at the *prima facie* stage [62]. Once again, this point overlaps with the first point, as claimants will need to provide a sufficient evidential basis to demonstrate how the actions of the directors have strayed beyond the autonomy they are afforded into something that is unlawful.

Fourthly, the judgment demonstrates the importance (and likely difficulty) of claimants being able to demonstrate they are acting in "good faith" and not from an ulterior motive. Trower J's adoption at [92] of the 'but for' test to determine good faith appears to present a particularly high hurdle for groups such as ClientEarth to overcome, as it is difficult to conceive of circumstances where the primary purpose will not be advancing such a group's policy agenda. This will be even more difficult when the shares the group holds in the company are proportionately very small, a factor that clearly influenced Trower J in this case [89] [93].

Claimants will also need to demonstrate that a director acting in accordance with their duty to promote the success of the company would seek to continue the claim, otherwise the application *must* be refused (s263(2)(a)).

This might be particularly challenging when considered in conjunction with the requirement of the court to have particular regard to any evidence as to the views of members (s263(4)), as it is likely (as in this case) that such matters would have been subject to a vote at an AGM.

As Trower J commented, "the strength of members' support for the Directors' strategic approach to climate change risk is a factor to which the court is bound to have particular regard if faced with a substantive application for permission" [96]. The Judge determined that, in this case, the level of member support counted "strongly against the grant of permission" [98]. Claimants who are unable to demonstrate they are not an isolated voice amongst members (and a small one at that) seem unlikely to succeed.

Fifthly, claimants will need to give careful thought to the relief they are seeking, in light of Trower J's comments about both injunctive and declaratory relief. Any injunction that requires the court's "constant supervision" would likely fall foul of the "basic principle" that it was not sufficiently precise to be specifically enforced [80-81]. A claimant would need to explain why a court, and not a general meeting, was the correct forum to express views on the conduct of directors, if those views have no substantive effect and fulfil no legally relevant purpose [83].

As Trower J commented, "where the purpose of the proceedings is directed towards relief requiring Shell to conduct its business in a manner which the Directors might not otherwise be minded to adopt, it would

be inappropriate for the court to countenance their continuation if the nature of the relief sought is not described in a form which is both precise and capable of supervision in the event of breach” [82]. As the nature of the relief sought and the prospects of it being granted are matters to be considered at the prima facie stage [79], a claim might fall at the first hurdle if the relief failed to meet those criteria.

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