ClientEarth

January 2024

ClientEarth v Board of Directors of Shell plc

Legal Briefing

Introduction

1. This briefing note provides an overview of our claim against the Board of Directors of Shell plc ("***Shell***").

2. The claim sought to hold Shell's directors personally liable for failing to properly manage the material and foreseeable risks posed to the company by climate change. It was the first ever claim worldwide to seek to hold company directors liable for climate risk mismanagement.

3. This briefing may be read alongside our core documents in the claim.[1] These are available here, and are referred to in this briefing. Paragraphs are denoted by the symbol "¶".

Context

Climate change as a material financial risk to companies

4. Climate change has long since evolved from being understood as 'only' an ethical or environmental issue. There is consensus in financial markets that climate change presents material commercial risks to companies, and to the entire global economy. These risks are commonly categorised as physical risks, transition risks and litigation risks (together, "***climate risk***"). Climate risk is already materialising and will compound going forward.

5. The fossil fuel sector is particularly exposed to climate risk. Shell's Board ("***the Board***") recognises much of this risk in its Annual Reports to shareholders. For example, it says:

   "*Rising concerns about climate change and effects of the energy transition could continue to lead to a fall in demand and potentially lower prices for fossil fuels. Climate change could also have a physical impact on our assets and supply chains. This risk may also lead to additional legal and/or*

[1] Limited redactions to these documents have been made for reasons of confidentiality or data protection. We are unable to publish Shell's submissions for copyright reasons, and would encourage those interested in viewing Shell's documents to contact the company directly.

regulatory measures, resulting in project delays or cancellations, potential additional litigation, operational restrictions and additional compliance obligations."[2]

6. Lower demand and margins for oil and gas products, i.e. the value erosion or destruction of the company's fossil fuel business, is the principal climate-related financial risk for Shell. In this regard, the Board states:

   "*The transition to a low-carbon economy may lead to lower sales volumes and/or margins due to a general reduction or elimination of demand for oil and gas products, possibly resulting in under-utilised or stranded oil and gas assets and a failure to secure new opportunities*".[3]

7. It is important not to underestimate the scale of this risk for high-emitting companies: every energy transition scenario published by the International Energy Agency now forecasts a decline in demand for fossil fuels. Indeed, the energy transition has been described as an "*existential risk*" for the oil and gas sector's major players.[4]

8. The energy transition also presents companies with commercial opportunities. Companies that continue to pursue carbon-intensive, business-as-usual strategies not only expose themselves to seismic risk; they are also likely to miss out on the significant opportunities presented by the transition to a low-carbon economy.

9. Further information on climate risk, and the way in which this is already materialising and will continue to materialise for Shell, is set out in our claim at ¶¶6-16 and 23-24 of the Particulars of Claim ("***PoC***") and ¶¶18-24 and 44-75 of the First Witness Statement of Paul Benson ("***Benson 1***").

Investor unrest

10. Acknowledging the scale of climate risk to the companies in which they are invested – and therefore to the value of their portfolios – many institutional investors consider that the best way for companies to manage climate risk is for them to align their business with the 1.5°C global temperature objective ("***GTO***") of the Paris Agreement (i.e. to become "***Paris-aligned***"). Further information on the Paris Agreement and the concept of Paris-alignment is set out at PoC ¶¶9-13 and Benson 1 ¶¶16-17 and 42-43.

11. In recent years, Shell's Board has faced significant investor frustration and in some cases open revolt at Annual General Meetings ("***AGMs***") of the company, over its management of climate risk.

12. By way of example, in 2021, over 30% of shareholders of the company voted (against the Board's recommendation) in support of a resolution filed by an NGO called 'Follow This', which requested that the company (among other things) "*set and publish targets that are consistent with the goal of the Paris Climate Agreement*".[5]

13. That resolution was tabled again by Follow This in 2022 and 2023, and received the support of over 20% of Shell's shareholders (again, against the Board's recommendation). In 2023, 20% of Shell's shareholders also voted against the Board's own resolution asking for advisory approval of its progress

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2 Shell, "2022 Annual Report", page 16, accessible here.
3 Shell, "2021 Annual Report", page 80, accessible here.
4 See further Benson 1, ¶23.
5 Shell, "Notice of Annual General Meeting 2021", item 21, accessible here.

towards the energy transition. To put these votes into context, the UK Corporate Governance Code provides that a vote of 20% against the Board requires the company to take various steps to consult with shareholders to understand the result.[6]

14. A number of large shareholders have now divested from the company over concerns about the Board's climate risk management, in some cases following years of engagement with the company.[7]

15. Further information on the results of relevant shareholder resolutions is set out in our claim at ¶¶168-171 of Benson 1, and ¶¶33-43 of the First Witness Statement of William Hooker ("***Hooker 1***").

Dutch Court Order

16. Further necessary context to understand our claim arises from litigation pursued against Shell in the Netherlands.[8] Following a claim brought by a group of NGOs and over 17,000 individuals, on 26 May 2021, the Hague District Court ordered Shell to reduce its group-wide emissions of carbon dioxide by net 45% by the end of 2030, relative to 2019 levels (the "***Dutch Court Order***").

17. The Dutch Court Order contained an obligation of result in respect of the Shell group's 'Scope 1' emissions (meaning that it must be achieved), and a "*significant best-efforts obligation*" in respect of the group's 'Scope 2 and 3' emissions. Scopes 1 and 2 emissions are Shell's direct and indirect operational emissions; Scope 3 are emissions from the products Shell sells. Over 90% of Shell's emissions are Scope 3 emissions (see further on Scopes 1-3 emissions at Benson 1 ¶34-35, 91; PoC ¶¶18-19).

18. Shell is appealing the Dutch Court Order. However, importantly, that Order is explicitly not stayed pending appeal, meaning that Shell is required to comply with it immediately.

19. Further information on the Dutch Court Order, and the Board's response to it, is set out in our claim at PoC ¶¶54-62; Hooker 1 ¶¶28-29.

Pre-action correspondence

20. This is the collective context in which we wrote to the Board in March 2022, formally notifying it of our intention to commence legal action. In that letter, we set out in some detail our allegations that the Board was failing to properly manage climate risk, in breach of its legal duties. In particular, we identified and explained a number of significant flaws in the Board's Energy Transition Strategy. In response, the Board maintained a generic and sweeping rejection of the claim, without (in our view) addressing the substantive defects in its strategy that we had identified.

21. Pre-action correspondence came to an end in October 2022. On 8 February 2023, we filed our claim against the Board in the High Court of England and Wales.

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6 UK Corporate Governance Code (Section 1, paragraph 4), accessible here.

7 For example, see Bloomberg, "Shell Dumped by Church of England Pensions Due to Oil Risk" (22 June 2023), accessible here.

8 *Milieudefensie et al. v. Royal Dutch Shell plc* (ECLI:NL:RBDHA:2021:5337). Judgment accessible here.

The claim

22. The claim was pursued in our capacity as a shareholder of the company. ClientEarth owns 27 shares in Shell, and has been a shareholder since 2016 (PoC ¶5; Hooker 1 ¶5). In that capacity, we have attended AGMs of the company, asked questions of the Board at those AGMs, and have separately written to the company to express concern regarding alleged greenwashing. These efforts to engage were ultimately futile given the Board's failure, in our view, to adopt a reasonable and proportionate climate risk management strategy (Hooker 1 ¶¶49-51).

23. The type of claim pursued was a 'derivative action'. In other words, our ability to bring the claim as a shareholder 'derived' from the right of the company to pursue its Board of Directors for alleged wrongdoing. In effect, we were seeking to 'step into the shoes' of the company. Because of this, we were required to apply for permission from the Court to continue the claim on behalf of the company.

24. The claim principally alleged breaches of duty by the Board under sections 172 and 174 of the Companies Act 2006. Sections 172 and 174 provide, respectively and in summary, that:

    a. A director of a company must act in the way he considers, in good faith, would be most likely to promote the success of a company for the benefit of its members as a whole. In doing so, the director must have regard (amongst other matters) to the likely consequences of their decisions in the long term; and

    b. A director must exercise reasonable care, skill and diligence.

25. Our central allegation was that by adopting and pursuing an inadequate energy transition strategy, the Board was mismanaging the material and foreseeable risks that climate change presents to the company, in breach of its legal duties to the company: Benson 1 ¶8a.

<u>The Directors' Strategy</u>

26. To manage climate risk, in April 2021, the Board set an 'Energy Transition Strategy' ("the ***Directors' Strategy***"[9], and see further Benson 1 ¶¶78-85).

27. The Directors' Strategy is:

    a. For Shell to become a 'net zero' energy business by 2050, by reducing absolute emissions to net zero ("the ***NZ Target***"); and

    b. Committed to be "*aligned with the more ambitious goal of the Paris Agreement, to limit the increase in the average global temperature to 1.5 degrees Celsius above pre-industrial levels*",[10] i.e. to be Paris-aligned.

28. In our claim, we agreed with the Board that a strategy which is properly Paris-aligned is the only reasonably available strategic objective for Shell (PoC ¶32).

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9 Shell, "Energy Transition Strategy", accessible <u>here</u>.
10 Shell, "Energy Transition Strategy", page 1, accessible <u>here</u>.

29. However, we alleged three overarching breaches of duty in respect of the Directors' Strategy, arising from:

    a. A **failure to set appropriate targets**, specifically a "*failure to adopt, disclose and implement a proportionate Scope 3 absolute emissions reduction target, or carbon intensity targets which credibly result in demonstrable absolute emission reductions in line with the GTO*" (see further PoC ¶¶26-29, 51-52; Benson 1 ¶¶33-43, 77-107);

    b. The **means adopted** to achieve the objectives of the Directors' Strategy, specifically:

        i. significant new investment in the exploration, development and extraction of fossil fuel projects (PoC ¶¶42-43, 53; Benson 1 ¶¶108-136);

        ii. a misconceived and unreasonable reliance on carbon capture and storage and nature-based solutions, which we say do not mitigate a company's transition risk, particularly given the uncertainty around the technological and commercial viability of these concepts at the level contemplated by the Directors (PoC ¶¶44-46, 53; Benson 1, ¶¶150-164);[11] and

        iii. limited proposed capital expenditure in respect of renewable energy which – although this could potentially mitigate, or at least partly mitigate, climate risk – is nowhere near sufficient to do so at the scale proposed by Shell (PoC ¶¶47-50; Benson 1, ¶¶137-149); and

    c. **Non-compliance with the Dutch Court Order**, specifically with the "*best efforts*" obligation in respect of the Shell group's Scope 3 CO2 emissions (PoC ¶63).

30. Fundamentally, we argued that neither the targets nor means adopted by the Board establish any reasonable basis for achieving the NZ Target, nor are they aligned with the GTO (PoC ¶¶52-53), nor do they put the company in a position to fully comply with the Dutch Court Order (PoC ¶63).

31. In other words, the targets and means adopted by the Board to achieve its own strategy "*are irrational and fall outside the range of reasonable decisions open to the directors, because they do not put Shell on any pathway likely to meet the outcomes which the board recognises are necessary to promote the success of the company*": Appeal Skeleton ¶12.

32. The evidence for this proposition is set out in Benson 1 ¶¶76-164.

33. In formulating our case, we pleaded various "*necessary incidents*" of sections 172 and 174, when considering climate risk for a company such as Shell (PoC ¶35). These were:

    a. A duty to make judgments regarding climate risk that are based upon a reasonable consensus of scientific opinion;

    b. A duty to accord appropriate weight to climate risk;

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[11] Shell now appears to be resiling from these: Reuters, "*Shell has given up specific targets for carbon offsets – CEO*" (17 October 2023), accessible here.

c. A duty to implement reasonable measures to mitigate the risks to the long-term financial profitability and resilience of the company in the transition to a global energy system and economy aligned with the GTO;

d. A duty to adopt strategies which are reasonably likely to meet the company's targets to mitigate climate risk;

e. A duty to ensure that the strategies adopted to manage climate risk are reasonably in the control of both existing and future directors; and

f. A duty to ensure that the company takes reasonable steps to comply with applicable legal obligations.

34. In respect of the Dutch Court Order, we alleged that, by failing to put the company in a position to comply, the Board had not only breached its duties under sections 172 and 174 of the Companies Act, but had also breached its duty to take reasonable steps to ensure that a court order of which it is aware is obeyed. This, we said, was a duty which arose under the common law of England and Wales, as well as under Dutch law: PoC ¶¶37-38, 63.

35. Evidence on the effect of the Dutch Court Order was submitted to the Court in the form of a letter from an eminent Dutch law professor, practising at Dutch law firm Habraken Rutten (Hooker 1 ¶¶7, 28).

36. As a result of the various breaches of duty we identified, we argued that the Board is exposing Shell to climate risk to a materially greater extent than would be the case had they adopted a reasonable and effective strategy to manage that risk. We said that the longer the Board delays in adopting such a strategy, the more likely it is that it will require measures which significantly disrupt Shell's existing operations and business. Accordingly, we said that the breaches of duty set out above will or are likely to have a serious adverse effect on Shell's financial performance (PoC ¶¶64-67).

<u>Remedy</u>

37. We sought two forms of relief from the Court in our claim (PoC ¶72):

a. A declaration from the Court that the Board has breached its duties in the manner described (this is called 'declaratory relief'); and

b. An order requiring the Board to adopt and implement a strategy to manage climate risk in compliance with sections 172 and 174, and to immediately comply with the Dutch Court Order (this is called 'injunctive relief').

38. In accordance with the general principles of company law which afford directors relatively wide discretion, we did not seek to impose any specific strategy on the Board (beyond one which is genuinely Paris-aligned). Instead, we alleged that the Board's current approach falls outside the range of reasonable responses to climate risk, and causes or will cause harm to the company's shareholders as a result: Hooker 1 ¶12.

Investor support

39. The claim attracted the unprecedented support of institutional investors. Investors holding more than 12 million shares in Shell (approximately 0.17% of the company), and more than half a trillion US dollars in total assets under management ("***AUM***"), explicitly supported our claim. This included asset managers and pension funds from across Europe, including the UK's National Employment Savings Trust (Nest), the largest workplace pension scheme in the UK.

40. We received further letters of support from shareholders who, while not expressing support for the claim itself, stated that their position was aligned with the arguments that we made. Those shareholders held a further 12.5 million shares in the company (approximately 0.18% of the company), with total AUM of approximately USD 250 billion.

41. We received still further letters of support for the claim, or the concerns raised by it, from investors who had divested from Shell as a result of their concerns with the Board's climate risk management. Those investors had total AUM of approximately USD 40 billion. In those cases, the position of the relevant investors was broadly that, were the Board to adopt and implement a credible Paris-aligned strategy, Shell would become eligible for reinvestment.

42. Further information on investor support for the claim is set out at Benson 1 ¶¶165-167; and Hooker 1 ¶¶58-61.

The judgment

43. The first-instance judge, Mr Justice Trower of the High Court, refused to grant us permission to continue the claim, and dismissed it on two occasions: first on the papers on 12 May 2023, and then again on 24 July 2023 following an oral reconsideration hearing which took place on 12 July 2023. The Court of Appeal refused permission to appeal that decision.

44. The substance of the Court's reasoning is set out in Mr Justice Trower's judgment of 24 July 2023 (which repeats to a large extent his earlier judgment on the papers of 12 May 2023). In refusing permission to appeal, the decision of Lord Justice Newey of the Court of Appeal adds relatively little of substance, either agreeing at a high level with Mr Justice Trower's judgment, or holding that he was entitled to take the view that he did.

45. In summary, the Court found:

    a. That the 'incidental' duties described above at paragraph 33 were inconsistent with the well-established principle that it is for directors themselves to determine how best to promote the success of a company: Judgment ¶¶27-28;

    b. That ClientEarth was successful in establishing a '*prima facie*' case (meaning a case 'on the face of it') that Shell faces material and foreseeable risks as a result of climate change which have or could have a material effect on it: Judgment ¶45;

    c. But that ClientEarth had not made out a *prima facie* case that Shell's Board was mismanaging that risk, because:

i. The evidence submitted by ClientEarth in this regard was not submitted in the appropriate form (being a factual witness statement which drew together the strands of a number of independent published analyses on the deficiencies in Shell's Energy Transition Strategy, as opposed to formal expert evidence), and so was not evidence on which the Court could properly rely: Judgment ¶¶59-63;

ii. "[The] *management of a business of the size and complexity of that of Shell will require the Directors to take into account a range of competing considerations, the proper balancing of which is classic management decision with which the court is ill-equipped to interfere*": Judgment ¶¶66-68;

iii. The evidence did not support a case that there is a universally accepted methodology as to the means by which Shell might be able to achieve the targeted emissions reductions in its energy transition strategy (meaning that it was "*very difficult*" for us to establish that the Board's response fell outside the range of reasonable responses): Judgment ¶64; and

iv. A director acting perversely or irrationally can only be <u>evidence</u> that the directors have not discharged their legal duty, not a separate ground of breach: Judgment ¶¶29-30.

46. The Court further found:

a. That there is no separate duty on directors under English law to take reasonable steps to ensure that the order of a foreign court is obeyed or complied with, and that any such duty under Dutch law would have been irrelevant to the claims made: Judgment ¶¶34-36;

b. That the Dutch Court's statement that Shell has "*total freedom*" to comply with the Dutch Court Order as it sees fit, cut across our evidence on the effect of that Order: Judgment ¶¶69-76;

c. That our request for injunctive relief was "*too imprecise to be suitable for enforcement*", and our further request for a declaration from the Court that the Board is in breach of its duties would "*have no substantive effect and fulfil no legally relevant purpose*": Judgment ¶¶79-83;

d. That, "*where the primary purpose of bringing the claim is an ulterior motive in the form of advancing ClientEarth's own policy agenda with the consequence that, but for that purpose, the claim would not have been brought at all, it will not have been brought in good faith* [in the legal sense of that term] – and that ClientEarth's very small shareholding gave rise to that inference: Judgment ¶¶85-93; and

e. That, because the Directors' Strategy has received majority support from shareholders at AGMs, this was "*confirmatory of the fact that a person acting* [to promote the success of the company] *would not seek to continue the claim*". The support which ClientEarth received for its claim was only a very small proportion of the total shareholder constituency: Judgment ¶¶85, 96-98.

Analysis

47. We are disappointed by the Judgment and consider it to be unsatisfactory for several reasons. In the interests of relative brevity, we do not present a full analysis of the Judgment in this document, nor do we discuss Mr Justice Trower's separate judgment on the matter of costs. We do, however, address each of the Court's core substantive findings in turn:

    a. Contrary to Shell's submissions, the 'incidental duties' explained at paragraph 33 of this briefing were not (and were never intended to be) additional duties over and above the duties contained in the Companies Act. In any case in which a legal duty is framed in general terms, one must consider what that duty means in the particular context. The Court was relatively quick to dismiss the incidental duties without carefully considering the practical implications of the construction of the duties; or (if it disagreed with our case here) to consider what sections 172 and 174 do mean in the context of climate risk (see further Appeal Skeleton ¶¶42-45);

    b. The Court took a highly restrictive approach to the question of evidence. It was common ground that the Court should take the available evidence 'at its reasonable highest' at this very early point in the proceedings. Nevertheless, it found that the claim could only possibly proceed at this point if expert evidence had already been submitted. We consider this approach to be untenable in circumstances where, to this day, we still have very little idea what the Board's position actually is on the flaws and discrepancies we had identified with the Directors' Strategy, and therefore what points would require analysis by way of formal expert evidence. Both Benson 1 ¶8(c) and Hooker 1 ¶14 made clear that our intention was to file expert evidence in due course upon obtaining permission to do so,[12] and – crucially – once the Board's position was understood and issues in dispute known. Far from being "*a miscellany of views expressed by others*",[13] the evidence we presented (at this early *ex parte* stage of the proceedings) consolidated and presented the available scientific research to the Court. It was open to Shell to dispute that evidence, but they did not do so. It is deeply disappointing that the Court refused to engage with it or seek to understand it, beyond paraphrasing what it said (Judgment ¶¶40-47). There is no legal authority,[14] or reason of policy or principle why, if the Court considered that expert evidence would be helpful, directions could not have been given to obtain it (Appeal Skeleton ¶¶35-40);[15]

    c. The Court held that, in our evidence, we had not grappled with the question of how the Board balances "*competing considerations*", and this was a "*clear illustration of why [we had] not established a prima facie case*". This was cited with approval by the Court of Appeal in its decision to refuse permission to appeal. However: (i) Shell had never suggested that it had relegated the Directors' Strategy to "*competing considerations*" (that is, it had never been Shell's case that the reason it was failing to meet the Directors' Strategy was because it had

12 Under Civil Procedure Rule 35.4(1).

13 Judgment ¶61.

14 Indeed, to the contrary – see here the authorities cited at Appeal Skeleton ¶39.2.

15 We also note the commentary that a requirement for expert evidence at this stage of the proceedings further increases "*the complexity and cost involved in bringing such claims*" and the related risk of "*deter[ring] future claimants […] from pursuing claims which may be meritorious*". See Lionel Nichols and Marie Claire O'Kane (barristers of 4 New Square Chambers), '*ClientEarth V Shell PLC: What lies ahead for the derivative claim procedure in ESG litigation?*' (December 2023), accessible here.

other "*competing considerations*" to balance); and (ii) presumably the Board had already taken any such considerations into account when setting the strategy (Appeal Skeleton ¶46);

d. As to there being no "*universally accepted methodology*" as to the means by which Shell could achieve emissions reductions, this misses the point. Directors have a wide discretion as to how to manage the business of the company and the Board had multiple legitimate paths open to it to achieve the objectives of its own strategy. Our case was that the approach adopted (see paragraph 29) was plainly not one of the paths open to it to choose, given the Board's strategic objective for Shell to become a net zero energy business by 2050, reducing greenhouse gas emissions in line with the goals of the Paris Agreement. It is not the law that, because there is no single universally accepted way of achieving a particular goal, it is then impossible for the Court to assess whether the way that has been chosen falls outside the realm of rationality (Skeleton for Oral Hearing ¶¶43-44). The evidence before the Court clearly showed that despite Shell's assertion that its strategy is "*aligned with the more ambitious goal of the Paris Agreement*", not one independent third-party assessment by reputable scientific and academic institutions (including the World Benchmarking Alliance, the Transition Pathway Initiative, the CA100+ Net Zero Company Benchmark, Carbon Tracker or Global Climate Insights), verified or supported that assertion (Benson 1 ¶104); and

e. On the finding that a director acting perversely or irrationally can only be <u>evidence</u> that the directors have not discharged their legal duties, not a separate ground of breach: it cannot be right that a director can act irrationally and yet be considered to be complying with their legal duties without any further scrutiny. In respect of section 172, there is legal authority in support of our argument, and it should have been properly considered with the benefit of full argument at a later stage in the proceedings (Appeal Skeleton ¶¶47-51). In any event, while this finding on irrationality may have been fatal to a claim under section 172, it should have had no impact on our claim under section 174 (because a director acting irrationally is unlikely to be exercising reasonable care, skill and diligence).

48. As to the Court's further findings:

a. On the Dutch Court Order: in our opinion, the Judge approached this issue too narrowly. Our argument that directors are under a duty to ensure reasonable steps are taken by a company to ensure a court order is obeyed was, in effect, summarily dismissed, without full consideration. The Judge also dismissed our evidence on the effect of the Dutch Court Order out of hand, finding that the Dutch Court's statement that Shell has "*total freedom*" to comply with the Dutch Court Order as it sees fit, cut across the evidence of a Dutch law expert. However, that statement clearly means that Shell has freedom <u>how</u> to comply with the Dutch Court Order, not <u>whether</u> to comply. Otherwise, the Order would be meaningless (Appeal Skeleton ¶¶52-54).

b. On relief: one of the Court's criticisms was that our proposed remedy was too vague. However, the proposed remedy would necessarily be sensitive to what breaches the Court eventually found. It seems to us that any more specific formulation of that relief would doubtless have been criticised for impinging upon the otherwise wide discretion that directors, within limits, rightly enjoy. The logical premise of the Judgment is that, in a case such as this – even if directors are found to have breached their duties – there is very little that the Court can do about it. Respectfully, we do not think that can be right (Appeal Skeleton ¶¶55-57).

c. On good faith: in our view, the Court failed to appreciate the nuance here. The key is ¶87 of the Judgment, which states: "*If and to the extent that* [ClientEarth's policy agenda and the interests of Shell] *diverge, it can properly be said that an application motivated by the former will not have been brought in good faith*" (in the legal sense of that term). This misses the point: this was a case in which those two did not diverge; in other words, it was a case where the interests of Shell, its shareholders and ClientEarth's policy agenda were all aligned. The fact that our claim had support from an array of other large institutional investors, who do not share our charitable objectives, reinforced that point. Regrettably, that was not considered in the Court's discussion on good faith (Appeal Skeleton ¶¶58-64).

d. That support was also otherwise dismissed as being too small to be of consequence, and as being "*based on a detailed common template*" (although it is not clear why that was relevant). With respect, the Court here failed to appreciate the realities and practicalities of how investors engage with major public companies. The support we received for this claim was unprecedented. It included a number of large, reputable asset managers and pension funds from across Europe. The objectives of the claim (for the Board to put in place a genuinely Paris-aligned strategy) were fully aligned with a shareholder resolution which, in recent years, has (against the recommendation of the Board) attracted between 20-30% support. If this is insufficient, what would be a sufficient level of support? Is the implication that only derivative actions with majority shareholder support would pass the very first hurdle? We do not think this can be right. On any view, that would significantly limit the utility of the derivative claim procedure.[16]

49. We are fortunate in the jurisdiction of England and Wales to have an advanced legal system, with an intellectually rigorous and fair judiciary to apply the rule of law. However, we must also be prepared to recognise that Judges can get it wrong. In our opinion, this was such a case.

50. Three overarching flaws in the Judgment can be identified:

a. It contains technical irregularities – namely, the Court appears to have wrongly conflated the first and second stages of permission, considering that discretionary factors (such as good faith) "*must be taken into account*" at the first, or *prima facie*, stage.[17]

b. It is substantively flawed, not only (in our opinion) for the specific reasons identified above, but also because the Judgment conflates the directors' duties under sections 172 and 174. A prime example of this is its finding on irrationality (see paragraph 47.e of this Briefing). That finding should properly leave a claim under section 174 untouched.

c. Most strikingly, it fails to engage with the claim on anything other than a superficial, procedural level, failing in particular to consider the substantive content of the evidence before the Court.

51. In those circumstances, and particularly given the important questions of law at stake (which have been followed attentively across the legal community), we are surprised that the Court of Appeal refused to grant permission to appeal.

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16 Particularly given that in the modern financial system company members include hundreds of thousands of globally distributed institutional shareholders, often holding shares on a beneficial basis.

17 The difficulties that this may pose more broadly are set out in Nichols and O'Kane, fn. 15.

52. We note that practitioner commentary has already emerged noting that "[T]*he court took a regrettably technical approach grounded in procedural objections to refuse permission*", that it is "*particularly difficult to understand why the court felt unable to consider the substantive content of the evidence*", and that the Judgment "*leaves open several legitimate questions* [including] *whether the courts are being too deferential on the question of breach*".[18]

53. We respectfully agree. Of course, it was always clear that directors have wide discretion, and rightly so. But that discretion has limits, and the law must allow for directors to be held to account when their actions fly in the face of reasonableness and scientific consensus. Although the decision is not a vindication of Shell's Board's strategy (because the Court never considered the substance of it), the effect of the Judgment is that Shell's Board has been given a 'free pass'.

54. One of the advantages of our common law system is its ability to be agile, flexible and to develop in response to the critical issues of our time. Courts cannot and must not avoid dealing with the important questions that climate change poses to traditional legal conventions; and it is imperative that Judges of all expertise get to grips with climate science, and what its realities mean for companies, the economy and society at large. This is not simply an environmental issue (cf. Judgment ¶37); it is an issue of seismic financial risk for high-emitting companies, and unprecedented systemic risk for the global economy.

55. In our view, this is a missed opportunity. It is a missed opportunity for our Courts, to grapple with the enormity of the climate crisis, and to interpret directors' legal duties in light of the significant risks that it presents to companies and shareholder value. It is a missed opportunity for Shell's shareholders – a significant number of whom supported this claim, to the tune of over half a trillion dollars in assets under management. And it is yet another missed opportunity for Shell's directors to change course and properly prepare the company for the energy transition and net zero landscape.

56. Given the scale of climate risk facing companies, and the Court's acknowledgment of the materiality of climate risk, directors should not be breathing a sigh of relief. Lord Sales, Justice of the Supreme Court, speaking extra-judicially in 2019, said that:

> "*As things stand, there is much force in the view that directors may and, increasingly, must take into account and accord significant weight to climate change in their decision-making […] Under certain circumstances, however, their companies' interests may be so implicated by climate change effects that their general fiduciary and due care obligations actually require them to cause their companies to take action to reduce their contribution to climate changing activity*".[19]

57. Those comments apply today just as they did in 2019 – if not more so.

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[18] Richard Hoyle (barrister of Essex Court), '*The fiduciary's divestment dilemma: ESG and the age of climate change*' in the Butterworths Journal of International Banking and Financial Law (October 2023), 612-615, accessible here.

[19] Lord Sales, Justice of the Supreme Court, '*Directors' duties and climate change: Keeping pace with environmental challenges*' (27 August 2019), accessible here.

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