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Case No: BL-2023-000215

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
INSOLVENCY AND COMPANIES LIST (ChD)

DERIVATIVE CLAIM

Royal Courts of Justice, Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 24th July 2023

Before :

THE HONOURABLE MR JUSTICE TROWER

- -

Between :

ClientEarth

Claimant

- and -

(1) Shell Plc
(2) Sir Andrew Stewart Mackenzie
(3) Wael Sawan
(4) Euleen Yiu Kiang Goh
(5) Sinead Gorman
(6) Arie Dirk (Dick) Boer
(7) Neil Andrew Patrick Carson OBE
(8) Ann Frances Godbehere
(9) Catherine Jeanne Hughes
(10) Jane Holl Lute
(11) Martina Therese Sophie Hund-Mejean
(12) Abraham (Bram) Schot

Defendants

Edward Brown KC, **Daniel Saoul KC**, **Sam Goodman** and **Judy Fu** (instructed by **Pallas Partners LLP**) for the **Claimant**
Edward Davies KC, Robert Howe KC, **Shaheed Fatima KC** and **Jack Rivett** (instructed by **Slaughter and May**) for the **First Defendant**

Hearing date: 12 July 2023

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Approved Judgment

This judgment was handed down remotely at 10.30am on 24 July 2023 by circulation to the parties or their representatives by e-mail

Mr Justice Trower

Introduction

1. On 12 May 2023, I made an order under s.261(2)(a) of the Companies Act 2006 ("CA 2006") dismissing ClientEarth's application for permission to continue this claim (the "May Order"). I did so without a hearing in accordance with the procedure contemplated by CPR 19.15. ClientEarth has exercised its right to ask the court to reconsider that decision at an oral hearing.

2. This judgment explains the decision I have reached as a result of that oral hearing. It consolidates, and therefore repeats to a significant extent, the judgment I handed down at the time the court dismissed the application on the papers: [2023] EWHC 1137 (Ch) (the "May Judgment"). It records in a single judgment my concluded view as a result of both my initial consideration of the matter and its reconsideration at and after the oral hearing.

3. ClientEarth is a private company limited by guarantee, a non-profit environmental law organisation and a UK registered charity. It also holds a small number of shares (currently 27) in Shell Plc, formerly Royal Dutch Shell Plc ("Shell"), and is therefore a member of Shell. It seeks to bring a claim against Shell's directors (the "Directors") in respect of a cause of action it accepts is vested in Shell seeking relief on behalf of Shell. These proceedings therefore qualify as a derivative claim within the meaning of s.260(1) of CA 2006.

4. ClientEarth is only entitled to bring a derivative claim under Part 11 Chapter 1 of CA 2006 in respect of a cause of action arising from an actual or proposed act or omission involving negligence, default, breach of duty or breach of trust by one or more of the Directors (s.260(3)) and it requires the court's permission to continue the claim (s.261(1)). The breaches alleged in ClientEarth's claim are said to arise out of the Directors' acts and omissions relating to Shell's climate change risk management strategy as described in corporate documentation published in April 2021, October 2021 and April 2022. It also alleges breaches relating to the Directors' response to an order (the "Dutch Order") made by the Hague District Court (the "Dutch Court") on 26 May 2021 in *Milieudefensie v Royal Dutch Shell plc* ECLI:NL:RBDHA:2021:5339 ("*Milieudefensie*").

5. The reason the legislation imposes an obligation on a shareholder to obtain permission to bring a derivative claim is that such a claim is an exception to one of the most basic principles of company law: it is a matter for a company, acting through its proper constitutional organs, not any one or more of its shareholders, to determine whether or not to pursue a cause of action that may be available to it. ClientEarth must therefore show that the limited and restricted circumstances in which it is appropriate for the court to authorise it, as a shareholder of Shell, to continue a derivative action against the Directors for breach of duty are present.

6. Part 11 Chapter 1 of CA 2006 and the applicable procedural rules were designed to provide a clear and accessible mechanism by which shareholders can if necessary bring an action in the name of the company against a director for breach of one or more of the general duties set out in Part 10 Chapter 2 of CA 2006. This legislative intent was summarised in that manner by the Solicitor-General when introducing the legislation.

However, there is nothing in the legislation to indicate that Parliament intended the procedure to be employed in anything other than restricted circumstances. The purpose of the new scheme was not to encourage litigation against directors. It was to ensure that, when the circumstances justified permitting a shareholder to pursue the company's cause of action against its directors, the procedural requirements were both easily accessible and clearly set out.

7. This judgment is concerned with the first question which arises in all such cases, which is whether ClientEarth is entitled to proceed with its substantive application for permission to continue the claim. The court is required by s.261(2)(a) of CA 2006 to dismiss the application if it appears to the court that the application itself and the evidence filed in support of it, do not disclose a *prima facie* case for giving permission.

The *prima facie* stage

8. The purpose of this stage of the process has been said to provide a filter for "unmeritorious" or "clearly undeserving" cases (Hollington on Shareholder Rights (9th edn) at 6-03 and 6-14). In some respects, this is a useful shorthand, but the court must not lose sight of the fact that the obligation on the applicant to ensure that its application establishes a *prima facie* case before a substantive hearing is held imposes an evidential burden on the applicant which arises at the outset. Even though the test has been said to be "not a high one" (per Leech J in *McGaughey v Universities Superannuation Scheme Ltd* [2022] EWHC 565 (Ch) at [12]), if it is not satisfied, the application must be dismissed. Although there have been disputes in which the parties have accepted that the application for permission can proceed without a *prima facie* case first being established (e.g., *Franbar Holdings Ltd v Patel* [2008] BCC 885 at [24]), this hurdle is required by the statute and, in the absence of consent, should not be dispensed with (*Re Seven Holdings Ltd* [2011] EWHC 1893 (Ch) at [62]).

9. CPR 19.15 (the renumbered rule 19.9A as amended by rule 12(16) of the Civil Procedure (Amendment) Rules 2023 (SI 2023/105)) makes provision for the procedure to be adopted when the court is considering the question of whether a *prima facie* case has been established. Shell is not to be made a respondent at this stage (CPR 19.15(3)) and the court will consider the matter on the papers in the first instance. PD19A para 2 contemplates that a company may wish to make submissions of its own volition in which event it will not normally be entitled to its costs of doing so. In the present case, Shell put in a lengthy written submission at the paper stage, which I took into account when preparing the May Judgment.

10. If the court concludes that a *prima facie* case for giving permission has not been established, the application must be dismissed, hence in the present case the May Order. ClientEarth was entitled to ask for an oral hearing to reconsider the decision so long as it made a request in writing within 7 days (CPR 19.15(10)), a right which it exercised. This judgment is delivered in the light of that reconsideration. If the court were to conclude (either at the paper stage or after this oral hearing) that a *prima facie* case for giving permission has been established, Shell and the Directors would then be made respondents to the permission application and directions would then be given for a substantive hearing of that application (CPR 19.15(12)).

11. In *Iesini v Westrip Holdings Limited* [2010] BCC 420 ("*Iesini*") at [78], Lewison J explained the procedure as follows:

> "At the first stage, the applicant is required to make a *prima facie* case for permission to continue a derivative claim, and the court considers the question on the basis of the evidence filed by the applicant only, without requiring evidence from the defendant or the company. The court must dismiss the application if the applicant cannot establish a *prima facie* case. The *prima facie* case to which s.261(1) refers is a *prima facie* case "for giving permission". This necessarily entails a decision that there is a *prima facie* case both that the company has a good cause of action and that the cause of action arises out of a directors' default, breach of duty (etc.). This is precisely the decision that the Court of Appeal required in *Prudential*."

12. Lewison J's reference to *Prudential* was to the decision of the Court of Appeal in *Prudential Assurance Co Ltd v Newman Industries Ltd (No 2)* [1982] Ch 204 at 222A, in which it was laid down that, before being permitted to continue with a derivative action at common law, it is necessary for the claimant to establish a *prima facie* case both that the company is entitled to the relief claimed and that the action falls within the proper boundaries of the exception to the rule in *Foss v Harbottle* (1843) 2 Hare 461. In the context of a double derivative action governed by the common law rules rather than the provisions of CA 2006, David Richards J explained in a passage from his judgment in *Abouraya v Sigmund* [2015] BCC 503 ("*Abouraya*") at [53], which was also cited with approval by Morgan J in *Bhullar v Bhullar* [2016] 1 BCLC 106 ("*Bhullar*") at [21], that:

> "A *prima facie* case is a higher test than a seriously arguable case and I take it to mean a case that, in the absence of an answer by the defendant, would entitle the claimant to judgment. In considering whether the claimant has shown a *prima facie* case, the court will have regard to the totality of the evidence placed before it on the application."

13. As Lewison J went on to explain in *Iesini* at [79], there is a difference between the procedural position at common law and the procedural position where permission is sought to continue a derivative action governed by the statutory rules. In the latter case, but not the former, there is a two stage process which commences with the filter required by s.261(2). However, the approach to what amounts to a *prima facie* case will be similar, although affected by the fact that the company and its directors will not have put in any evidence, a point which was also made by Peter Knox KC, sitting as a Deputy High Court Judge in *Haider v Delma Engineering Projects Company LLC* [2023] EWHC 218 (Ch) at [48]. The question for the court at this reconsideration stage (as it was at the paper stage) is whether, on the face of the case advanced by the ClientEarth, and in the absence of an answer by Shell, ClientEarth will obtain the permission it seeks.

14. In my view it would be wrong to suggest that the court must at this stage take the claimant's evidence "at its highest" without more, a test which implies that the court should not adopt a critical approach to its evaluation. On this point, I agree with the submission made by Shell that the test of *prima facie* case requires the court to take the evidence adduced by ClientEarth at its "*reasonable* highest" (the phrase used by Mr Knox KC in *Haider* and which ClientEarth agrees is appropriate). This does not mean

that the court is bound to assume that the facts alleged by the applicant shareholder are true: per Morgan J in *Bhullar* at [20]. The evidence must be sufficiently substantial without more to justify the court in granting the relief sought (i.e., the permission to continue). Like *Abouraya*, *Bhullar* was a double derivative claim to which the *prima facie* test was required to be applied at common law, but in my view the approach is the same for the statutory test, most particularly when considering the merits of Shell's entitlement to relief against the Directors, being the claim which ClientEarth seeks permission to bring on its behalf.

The substantive application for permission

15. As to the substantive application for permission, being the application for which a *prima facie* case must be established, the test the court must apply is set out in s.263 of CA 2006, as to which:

    i) s.263(2) provides that an application for permission must be refused if the court is satisfied (a) that a person acting in accordance with his duty to promote the success of the company would not seek to continue the claim or (b) / (c) that any act or omission from which the cause of action arises has been authorised or ratified by the company before or since it occurred;

    ii) s.263(3) makes provision for a number of discretionary factors which the court must take into account in reaching its decision - they are (a) whether the member concerned is acting in good faith in seeking to continue the claim, (b) the importance which a person acting in accordance with his duty to promote the success of the company would attach to continuing it, (c) / (d) whether any act or omission from which the cause of action arises would be likely to be authorised or ratified by the company, (e) whether the company has decided not to pursue the claim and (f) whether the act or omission in respect of which the claim is brought gives rise to a cause of action that the member could pursue in his own right rather than on behalf of the company; and

    iii) the court is also required by s.263(4) of CA 2006 to have particular regard to any evidence before it as to the views of members of the company who have no personal interest, direct or indirect, in the matter.

16. In my view, ClientEarth is wrong to suggest, as it appeared to do in paragraph 28 of its written submission for this hearing, that the court can treat the *prima facie* stage as distinct from the substantive application for permission when having regard to the relevance of the permission criteria set out in ss.263(3) and 263(4) of CA 2006. As the court is required to take those criteria into account when deciding whether or not to grant permission, it seems to me that they must also be taken into account when assessing whether the evidence adduced by the claimant at this stage establishes a *prima facie* case.

17. Any conclusion on the merits of the claim reached by the court at this stage of the proceedings does not mean that, at the time of any substantive application for permission, it will be satisfied that, all other considerations being equal, those merits are sufficiently strong to justify the grant of permission. As is made clear in *Iesini* at

[79], the court will have to form its own view on the strength of the claim at that stage in order to ensure that the requirements of s.263(2) and s.263(3)(b) are met.

18. The claim which ClientEarth wishes to continue on behalf of Shell is pleaded in particulars of claim settled by counsel and verified by a statement of truth signed on behalf of ClientEarth by Mr William Hooker, a partner in Pallas Partners LLP ("Pallas"). He has also made a witness statement in support of the application for permission, as has a senior lawyer employed by ClientEarth, Mr Paul Benson. At the paper stage, Shell lodged written submissions and both parties had also lodged short supplementary submission letters from their solicitors. They have both now put in more detailed skeleton arguments and at the oral hearing were represented by teams of leading and junior counsel.

19. The relief sought is for a declaration that the Directors have breached their duties in the manner described in the particulars of claim and a mandatory injunction requiring the Directors (a) to adopt and implement a strategy to manage climate risk in compliance with their statutory duties and (b) to comply immediately with the Dutch Order, with which it is said that Shell has failed to comply.

The duties relied on by ClientEarth

20. The duties relied on by ClientEarth include two of the statutory general duties owed by the Directors to Shell pursuant to s.170 of CA 2006: the duty to promote the success of Shell (s.172 of CA 2006) and the duty to exercise reasonable care, skill and diligence (s.174 of CA 2006). As to those general duties:

    i) s.172 imposes a duty to act in the way the director concerned considers in good faith would be most likely to promote the success of Shell for the benefit of its members as a whole, having regard, amongst other matters, to an identified list of considerations, such as the likely consequences of any decision in the long term and the impact of the company's operations on the community and the environment; and

    ii) s.174 requires a director to exercise the care skill and diligence that would be exercised by a reasonably diligent person with the general knowledge skill and experience that may reasonably be expected of a person carrying out the functions they carry out, and the general skill and experience that director actually has. This therefore includes both subjective and objective elements.

21. In principle, each of the Directors owes those duties to Shell for the duration of their time as a director. The evidence establishes a *prima facie* case that each of the Directors was under such duties for at least part of the time in which the acts and omissions complained of occurred. I understand that the constitution of Shell's board has changed since these proceedings were issued. In light of the relief sought it is not said that the identity of the individuals affects the questions which I have to decide.

22. The duties owed by the Directors are also said to include what are pleaded as six necessary incidents of the statutory duties "when considering climate risk for a company such as Shell". These are said to be:

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

ii) a duty to accord appropriate weight to climate risk;

iii) a duty to implement reasonable measures to mitigate the risks to the long-term financial profitability and resilience of Shell in the transition to a global energy system and economy aligned with the global temperature objective of 1.5°c ("GTO") under the Paris Agreement on Climate Change 2015 (the "Paris Agreement");

iv) a duty to adopt strategies which are reasonably likely to meet Shell's targets to mitigate climate risk;

v) a duty to ensure that the strategies adopted to manage climate risk are reasonably in the control of both existing and future directors; and

vi) a duty to ensure that Shell takes reasonable steps to comply with applicable legal obligations.

23. The view I expressed in the May Judgment on this aspect of the case is the first of the specific points on which ClientEarth sought reconsideration at the oral hearing. ClientEarth submitted that it does not need to establish these special incidental duties in order to succeed on its claim. Nevertheless it is appropriate for me to say something about the way this part of the case is both pleaded and was argued at the oral hearing, because that casts some light on what might be thought to be an underlying misapprehension of what Shell would have to prove (and what ClientEarth therefore seeks to prove on its behalf) if the claim were to proceed.

24. It is also important to understand the impact of what is now said, because, as Shell submitted at the oral hearing, there has been a subtle but important shift in the emphasis of ClientEarth's case. The way the case is pleaded alleges that directors of companies "such as Shell" will necessarily be subject to these incidental duties. The way the case was put in oral argument is different. It was said that what are described as these incidents of duties arise as a matter of logic once it is appreciated that the Directors have already identified that its climate strategy is a commercial objective which is most likely to promote the success of Shell. The way that the Directors did so was by adopting an energy transition strategy ("ETS") which set an overall target for Shell to become a net zero ("NZ") energy business by 2050. It is said that they have thereby determined that this target is, amongst other measures, necessary to protect medium- and long-term shareholder value. This target is also said to be aligned with the GTO adopted by the Paris Agreement.

25. Shell contends that the allegation that the Directors were subject to these incidental duties is misconceived for three reasons. The first is that they are inherently vague and incapable of constituting enforceable personal legal duties. The second is that they cut across the basic principle of company law that it is for the directors themselves to determine the weight to be attached to the non-exhaustive list of factors referred to in s.172 to which each director must have regard in the performance of their duty to promote the success of the company. The third is that they are incompatible with the

subjective nature of the duty under s.172 and amount to an unnecessary and inappropriate elaboration of the statutory duty of care referred to in s.174.

26. Shell also criticised the way the duties are said to flow from the decision to adopt the ETS. The essence of ClientEarth's case is that, even if it would be wrong for the court to intervene in the Directors' commercial decision to adopt the ETS, there is no reason why the court should not intervene to give directions on the way in which that strategy is to be implemented now that it has been adopted. Shell submitted that the manner in which the case is now put is illogical – if the court should not interfere with the commercial question of the strategy to be adopted, the same principle of restraint should be applied to the means by which that strategy is to be implemented.

27. I agree with Shell's submissions on this aspect of the case. Although ClientEarth has said in its skeleton argument for the oral hearing that this part of the pleading is intended to articulate what the statutory duties are likely to mean in practice, the formulation of these incidental duties makes plain that they seek to impose specific obligations on the Directors as to how the management of Shell's business and affairs should be conducted.

28. Although it is now said that these specific duties flow from what is said to be the logical consequence of the Board's acceptance that climate risk is a serious risk to Shell's business, rather than being a duty to which all directors of companies such as Shell are subject, I still think that their formulation is 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. This duty continues on an ongoing basis throughout the period of time for which directors hold office and has always been the law (e.g., *Re Smith & Fawcett Limited* [1942] Ch 304, 306 per Lord Greene MR). It is unaffected by the codification of the duty in s.172. It is an important principle because, as Lewison J observed in *Iesini* at [85]:

> "The weighing of all these considerations [as set out in s.172] is essentially a commercial decision, which the court is ill-equipped to take, except in a clear case."

29. It is well established that the test for breach of s.172 is a subjective one (e.g., *Regentcrest Plc v Cohen* [2001] 2 BCLC 80 at [120] per Jonathan Parker J) and requires proof of conduct other than in good faith. As Jonathan Parker J explained, there will be cases in which an absence of good faith can be inferred from the irrational nature of the conduct in issue, but it remains the case that the state of mind of the director concerned is what matters. For these purposes, good faith, not irrationality, is the cornerstone and an honest but unreasonable and mistaken belief that a particular course of action is in the company's best interests is not sufficient to amount to a breach of s.172.

30. In my view, a number of ClientEarth's submissions conflated irrationality and good faith, treating them as interchangeable concepts. One such example was the citation of Mortimore on Company Directors (3rd edn) at para 12.17 as authority for the proposition that "If we can prove irrationality, we can establish breach; that is how we put the case", but I do not think that is correct. So far as s.172 is concerned, irrationality is part of the mix when the court is assessing the evidential question of whether or not the directors acted in good faith, but it cannot stand as a ground of breach on its own. There is no clear authority that it does and, anyway in the context of commercial

decision-making, cuts across the well-established principle explained by Lord Wilberforce in *Howard Smith Ltd v Ampol Ltd* [1974] AC 821 at 832E/F that:

> "There is no appeal on merits from management decisions to courts of law: nor will courts of law assume to act as a kind of supervisory board over decisions within the powers of management honestly arrived at."

31. Furthermore, in complying with their duty to Shell under s.174 CA 2006, each of the Directors is required to display the care, skill and diligence that would be exercised by a reasonably diligent person with both (a) the general knowledge, skill and experience that may reasonably be expected of a person carrying out the functions carried out by the Director in relation to that company and (b) the general knowledge, skill and experience that the Director has. Not only does the law not superimpose on that duty more specific obligations as to what is and is not reasonable in every circumstance, it also requires the Directors to continue to manage Shell's business with an open mind and to continue to have regard to a range of competing considerations.

32. This is one of the principal reasons why the court is ill-equipped to intervene with its own assessment of how best to proceed save in a clear case. As Shell submitted, the question is whether the decision falls outside the range of decisions reasonably available to the Directors at the time (see e.g. *Sharp v Blank and others* [2019] EWHC 3096 (Ch) per Sir Alastair Norris at [631], applying this principle in a case to which the duties codified in CA 2006 apply). I agree with Shell's submission that ClientEarth's formulation of these incidental duties proceeds on the basis that the management of climate risk has an overriding status. The basis of this is said to be the adoption of a climate strategy, but in my view that cannot change the nature of the underlying duties.

33. On one level it seems that ClientEarth accepts that this is the correct approach, because it says through Mr Hooker that "ClientEarth is not proposing any specific strategy which it requires the Board to adopt. Instead, … it alleges that the Board's current approach falls outside the range of reasonable responses to climate change risk". However, I do not think that the duties pleaded as necessarily incidental to the statutory general duties are reconcilable with the true nature of the duty to exercise reasonable care, skill and diligence to which the Directors are subject under s.174.

34. ClientEarth also pleaded two additional duties which are referred to as the further obligations. They have now been reformulated at the oral hearing into a single duty arising under CA 2006 that a director who is aware of a court order is under a duty to take reasonable steps to ensure that the order is obeyed. This is pleaded as a precursor to ClientEarth's allegation that Shell has failed to comply with the Dutch Order. Shell said that there is no recognised duty owed by directors to a company in which they hold office to ensure that they comply with the orders of a foreign court.

35. I also agree with Shell's submission on this point. Initially, ClientEarth said that the proposition that a director of a company is under a legal obligation to take reasonable steps to ensure that an order made by an English court is obeyed, is established by *Attorney-General for Tuvalu v Philatelic Distribution Corpn* [1990] 1 WLR 926 at 936E-F. However, I expressed the view in the May Judgment that there is no such duty owed to a company by its directors, which is separate or distinct from the duties they owe to the company as codified in Part 10 Chapter 2 of CA 2006. The discussion in the *Tuvalu* case was concerned with the circumstances in which directors might be

liable for contempt of court if they failed to take reasonable care in this regard; it was not concerned with the nature or extent of any duty owed to the company, in this case Shell, in respect of whose cause of action ClientEarth wishes to sue.

36. I also agree that the nature and extent of the Directors' duties to Shell are governed by English law as the law of Shell's incorporation, as to which the underlying point is the same. There is no established English law duty separate or distinct from the general duties owed by the Directors to Shell under CA 2006, which requires them to take reasonable steps to ensure that the order of a foreign court is obeyed, let alone to ensure compliance with that order. It follows that, even if as a matter of Dutch law, the Directors were to owe duties to Shell to take reasonable steps to ensure that the Dutch Order is obeyed, that would be irrelevant to the claims sought to be made in these proceedings, governed as they are by English law. So far as Shell's potential claims against the Directors are concerned, the only question is whether their response to the Dutch Order rendered them in breach of an English law duty.

37. I therefore remain of the view that ClientEarth's approach to the formulation of the incidental duties and further obligations alleged to be owed by the Directors to Shell has insufficient regard to the way in which the legislature has formulated the general duties. The way in which ClientEarth puts its case seeks to impose absolute duties on the Directors which cut across their general duty to have regard to the many competing considerations as to how best to promote the success of Shell for the benefit of its members as a whole. The impact of Shell's operations on the community and the environment is a matter which the Directors are required to weigh in the balance in that context (s.172(1)(d)), but their responses to the business risks for Shell associated with climate change, whether they be the adoption of a strategy or its implementation, are part of the decision making process by which the Directors manage Shell's business.

The breaches alleged by ClientEarth

38. As I have already mentioned, ClientEarth recognises that it needs to establish a *prima facie* case that the Directors' current approach falls outside the range of reasonable responses to climate change risk and will cause harm to Shell's members. However, it is important not to lose sight of what that means. It is not simply that "the general principle of subjectivity is subject to several qualifications, including … the test of reasonableness" (as Pallas said in their 24 April 2023 letter). That formulation is apt to mislead. The case on which they relied (*TMO Renewables v Yeo* and others [2021] EWHC 2033 (Ch) at [391]) supports a more rigorous principle with which I agree, viz. that ClientEarth must show a *prima facie* case that there is no basis on which the Directors could reasonably have come to the conclusion that the actions they have taken have been in the interests of Shell.

39. In the particulars of claim, the specific breaches alleged against the Directors fall into three categories:

    i) The first, pleaded in paragraphs 51 and 52 of the particulars of claim, relate to a failure to set an appropriate emissions target. It is said that an absolute emissions target to be met before 2050 with respect to Shell's Scope 3 emissions is required and that the Directors' decision to set certain Carbon Intensity Targets

is inadequate. In particular it is said that they have failed to ensure that Shell has adequate interim targets for its Scope 3 emissions or a measurable and realistic pathway to meeting the NZ target so as to align with what are set to be future expected market conditions consistent with the GTO.

ii) The second, pleaded in paragraph 53 of the particulars of claim, is that the Directors' strategy as regards the management of climate risk does not establish a reasonable basis for achieving the NZ target and is not aligned with the GTO. In particular ClientEarth criticises (a) the Directors' proposals to make significant new investments in fossil fuel projects, (b) their reliance on carbon capture and storage and nature based solutions which will not mitigate the economic risks to Shell's underlying business model, (c) the proposed capital expenditure on renewable energy expenditure which is said to be opaque and insufficient and (d) the absence of measures sufficient to respond rapidly to changes to the legal, regulatory and financial conditions so as to ensure that their strategy is sufficiently robust.

iii) The third, pleaded in paragraph 63 of the particulars of claim, is that the Directors have failed to comply with the Dutch Order. It is said that, although the Dutch Order determined that Dutch law imposed a 45% emissions reduction obligation on Shell to be achieved by 2030, the Directors have not prepared a plan to ensure timely compliance.

40. The evidence adduced by ClientEarth in support of its first two categories of alleged breach is voluminous. In large part it is marshalled in Mr Benson's witness statement and is all said to be directed at what he explains is ClientEarth's central allegation that by adopting and pursuing an inadequate ETS, the Directors are mismanaging the material and foreseeable risk that climate change presents to Shell. The third alleged breach relating to compliance with the Dutch Order is dealt with in Mr Hooker's witness statement to which he annexes a letter from a Dutch lawyer, Antonius van Mierlo, who is a professor of law and partner in Habruken Rutten.

41. Sections A and B of Mr Benson's witness statement concentrate on setting the scene. Section A is concerned with explaining the cause of climate change and its impact on rising global temperature levels. It outlines that climate change presents material financial risks to companies, particular to those such as Shell which operate in the fossil fuel sector. Both Mr Benson's witness statement and ClientEarth's particulars of claim identify climate risk as a financial risk comprised of physical risks, economic transition risk, litigation risk and productivity losses all flowing from climate change. Mr Benson then explains in some detail how, in order to achieve the GTO, there must be a global energy transition to move from what will occur on current policy settings to NZ emissions by 2050. He also gives a broad description of international standards on corporate transition plans, the widely accepted practice of dividing a company's greenhouse gas emissions into three Scopes in accordance with a methodology established by the Greenhouse Gas Protocol, the differences between absolute emission reduction targets and carbon intensity targets and the way in which they should be set. He concludes this section of his witness statement by stating that many institutional investors consider that the best way to manage climate risk is for a company to align their business with the GTO, although he accepts that there is no single universally accepted methodology for assessing whether a company's targets and strategy are Paris Agreement-aligned.

42. In the light of the way ClientEarth puts its case, I should explain what it means by Scope 1, Scope 2 and Scope 3 emissions. Scope 1 are direct emissions from (e.g. in the case of Shell) its production of oil and gas. Scope 2 are indirect emissions from the generation of energy used to carry out its operations (e.g. the refining of oil). Scope 3 are the indirect emissions which arise when Shell's products are used by its customers. Mr Benson says that international standards on corporate transition plans generally require a company's targets to include a reduction in Scope 3 emissions and that the vast majority of an oil and gas company's emissions will be Scope 3 emissions.

43. Section B of Mr Benson's witness statement is concerned with the specific risks faced by Shell in relation to energy transition. They are explained in Shell's 2021 Annual Report as commercial risk, regulatory risk, societal risk and physical risk, of which Mr Benson referred to more detailed evidence on the impact for Shell of the first two categories:

    i) As to commercial risk, Mr Benson explains that the Directors have identified lower demand and lower margins for oil and gas products as Shell's principal climate-related financial risk together with access to and the cost of capital.

    ii) As to regulatory risk, there is a detailed explanation of how the states which are parties to the Paris Agreement have set NZ targets for 2050, together with interim targets over the intervening period, and that the Directors have recognised that there is an ever-increasing threat that governments worldwide will set regulatory frameworks to restrict further exploration, production and use of hydrocarbons and their products. Examples are given of ClientEarth's case as to how this is more than a threat, with a global regulatory focus on carbon pricing, low carbon buildings, clean industry, clean power and zero emission vehicles.

44. Mr Benson also explained that Shell is exposed to what he called stranded asset risk, by which he means assets which have already been acquired but which become unviable or less profitable as a result of climate risk materialising. He asserts that the extent of this risk depends on the way in which the energy transition unfolds. He also accepts that Shell's auditors consider that, because of the depreciation of its current Upstream and Integrated Gas property plant and equipment and the recoverability of its remaining reserves, the risk that the assets in respect of which there may be a higher risk of the reserves not ultimately being produced is low.

45. The upshot of Sections A and B of Mr Benson's witness statement is that ClientEarth submits that it is or should be common ground that Shell faces material and foreseeable risks as a result of climate change which have or could have a material effect on it. For present purposes, it has established a *prima facie* case to that effect. Indeed, Shell does not disagree with that proposition in broad terms, although it does not accept the way in which some of the risks have been explained and characterised in the evidence.

46. That does not, however, demonstrate a *prima facie* case for the grant of permission, because the more important question is the nature of Shell's response to those risks and the extent to which ClientEarth has demonstrated a *prima facie* case of actionable breach of duty by the Directors in their management of those risks.

47. The Directors' management of climate risk, said by ClientEarth to give rise to the breaches of duty alleged in paragraphs 51 to 53 of the particulars of claim, is addressed in Section C of Mr Benson's witness statement. The first part of Section C starts by describing the emissions reduction targets Shell has adopted. He summarises the public statements made by Shell in relation to its climate risk management and emission reduction targets culminating in the ETS published in April 2021. This contains what ClientEarth says is Shell's current strategy for dealing with these risks. The progress Shell has made in implementing the ETS is recorded in an energy transition progress report dated April 2022, which explains how it proposes to reduce emissions by a mixture of increasing the ratio of gas to oil in its sales portfolio, by growing its electricity sales, by increasing low-carbon fuel sales and by increasing the use of 'carbon capture and storage' and 'nature-based solutions' involving carbon offsetting. The April 2022 report also records Shell's short, medium and long-term emissions targets based on its analysis of its Scope 1, 2 and 3 emissions.

48. However, unlike Sections A and B of the witness statement, Section C does not only contain a factual description of the steps which the Directors have taken. It also contains an analysis of what are said to be the inadequacies and deficiencies in the Directors' management of climate change risk and what is said to be the basis on which those inadequacies and deficiencies give rise to breaches of duty.

49. ClientEarth's first criticism of the Directors is that they have always stated that the targets Shell has set are consistent with the GTO, but that it does not disclose the extent to which its pathway to their achievement is reliant on carbon capture or nature-based solutions. It also says that shareholders have not been told whether the targets the Directors have set would lead to an absolute reduction in emissions, although it says that this lack of transparency does not affect its case because "the problems with the Board's case are apparent from the disclosure that has been made".

50. The core of the criticism on which the allegations of breach of duty made in paragraphs 51 and 52 of the particulars of claim is based is what is said to be the inadequacy of the targets for Shell's Scope 1, 2 and 3 emissions as disclosed in the April 2022 report. All three have a 100% target for 2050, but ClientEarth relies on the fact that there is no pathway for the Scope 3 absolute emissions and that the pathway for the Scope 1 and 2 targets relating to absolute emissions is 50% by 2030 and 20% for the carbon intensity of the products it sells.

51. Mr Benson also goes on to explain that the reason it can be seen that there is no target at all to reduce Scope 3 absolute emissions in the period up to the ultimate goal of 100% by 2050 is that none is given for absolute net emissions, while the use of a carbon intensity metric leading to 20% reduction by 2030 (and indeed a 45% reduction by 2045) has no necessary correlation to a reduction in its Scope 3 emissions. Mr Benson then gives some examples of statements by Shell that it did not know where it would be on its absolute emissions by 2030. He concludes that:

> "In light of the above, ClientEarth alleges that the Board's current targets do not materially mitigate the climate risk facing the company, and are not proportionate to the scale of that risk. In the circumstances, its 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, is manifestly unreasonable and in breach of duty.

> In circumstances where the Board has set a net zero target by 2050 and stated its strategy to be Paris Agreement-aligned, ClientEarth further alleges that the failure to set any or any proper interim targets to actually meet those objectives is unreasonable and a breach of duty."

52. The second criticism made by ClientEarth is reflected in the breach pleaded in paragraph 53(a) of the particulars of claim. It is said that Shell intends only a modest decline in its oil production and an active growth in its gas business, in the case of liquified natural gas by creating new markets and embracing new customers. Details are given of 27 projects which are described as significant oil and gas assets under construction, said to hold 2.48 billion barrels of oil and which are said to be estimated to be producing oil and gas for decades to come. Details are also given of discovered assets which may or may not be developed, said together to hold just under 6.1 billion barrels of oil. Mr Benson bases his evidence on reports produced by Rystad Energy UCube which provides tables on the extent to which these assets are estimated still to be in production at the beginning of each decade through to 2050. He also gives details of the published material from which the extent of Shell's plans on exploration for new reserves can be ascertained.

53. The conclusions which Mr Benson draws from the timeframes relating to these projects is that they run directly contrary to the Directors' assertions that Shell is preparing for the transition to a Paris Agreement-aligned economy and its own NZ target. He refers to evidence in the form of recent documentation produced by the International Energy Authority that there is enough supply in conventional fields already producing or under construction to satisfy Paris Agreement-aligned oil and gas demand and from the International Institute for Sustainable Development that there is a large consensus that developing new oil and gas fields is incompatible with the GTO. He then extrapolates from this an allegation that, given the Board's strategy is to minimise the risks of energy transition while enhancing Shell's ability to lead as the world transitions to a Paris Agreement-aligned energy system, the size and scale of its project pipeline makes no sense and indeed appears materially to increase those risks.

54. There is then an explanation, based on reports from a financial think-tank, Carbon Tracker, as to why Shell has a high proportion of unsanctioned capital expenditure in assets which are unviable even on a pathway to 2.5°c. It is said to be the owner of a number of pre-final investment decision assets and projects which are incompatible with a Paris Agreement-aligned scenario and therefore it is heavily exposed to stranded asset risk. This is said to mean that the Board's approach to new projects is manifestly unreasonable and contrary to Shell's long-term success.

55. The next breach alleged by ClientEarth relates to the Directors' approach to mitigating Shell's exposure to climate risk by diversifying into low-carbon alternatives, an approach which Shell's 2021 Annual Report describes as a way of addressing the resilience of its portfolio. The Directors have published their expectations as to how this capital expenditure will evolve over time, but it is said to be difficult to make sense of this information because, amongst other things, the figures are intermingled with marketing which means that the true figures for capital expenditure on low and zero carbon energy going forward cannot easily be established. It also points out that capital expenditure actually made on what are called Renewables and Energy Solutions has varied between 12% and 14% for 2021, 2022 and 2023 (the latter of which is a projected figure). Mr Benson reiterates that ClientEarth's case is that, while carbon intensity

targets are capable of mitigating climate risk, Shell's do not do so even partially. Its case is that the primary driver of climate risk is the anticipated value destruction of Shell's fossil fuel business and that risk is only properly mitigated by reducing the size of that business.

56. Mr Benson's evidence also gives further details of Shell's carbon capture and storage and nature-based solutions to climate change risk, but says that there a number of difficulties in relying on both of them. ClientEarth's allegation (paragraph 53(b) of the particulars of claim) is that they will not mitigate the economic risks to Shell's underlying business model. As to carbon capture and storage, the reason for this, according to Mr Benson, is that the technology can only address Scope 1 emissions, that its use is nascent or underdeveloped and that it is expensive. As to nature-based solutions involving the use of carbon credits, Mr Benson says that international standards on corporate transition strategies provide that carbon credits should not be counted as emissions reductions for the purposes of short- or medium-term targets, that carbon credit offsetting is not specifically regulated, that emissions reductions from overseas carbon credits are overstated and that serious concerns have been identified regarding their feasibility and proposed scale. He says that one reason for this is that Shell's carbon credit target appears unrealistic, given the economy-wide demand for them.

57. In summary, Mr Benson alleges that the Directors' reliance on carbon capture and storage is unreasonable because it is ineffective. He also says that their assumptions relating to nature-based solutions offsetting, and their reliance on it as an effective mitigation for Shell's transition risk is also unreasonable. He says that neither does anything to mitigate that risk and in fact they both add to the costs for Shell of maintaining or growing its fossil fuel business. Nature-based solutions in particular are said to present a serious risk to Shell achieving its emissions targets. However, more fundamentally, it is said that:

> "[nature-based solutions offsetting] simply does not address the key climate risk to [Shell]: the value destruction of its fossil fuel business. It is in those circumstances that ClientEarth principally alleges that the Board's reliance on it is unreasonable."

58. In my judgment, there are a number of fundamental reasons why ClientEarth's allegations in relation to the breaches of duty pleaded in paragraphs 51 to 53 of the particulars of claim do not establish a *prima facie* case.

59. The starting point is that the court can place very little weight on the opinions expressed by Mr Benson. My conclusion to this effect in the May Judgment was the second of the specific points on which ClientEarth sought reconsideration at the oral hearing. I accept that the criticisms Mr Benson makes of the Directors' approach reflect ClientEarth's opinions which are genuinely held, but that is plainly insufficient. This is not just because on a proper analysis Mr Benson's evidence does 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, but also because, even if that were to be his opinion, neither he nor ClientEarth is able to give expert evidence on which the court can properly rely.

60. In my view the right way to characterise Mr Benson's evidence is that it amounts to what he considers to be an accurate reflection of a consensus of opinions relating to

what on any view is a very complex series of topics. Indeed, he appears to accept as much himself by explaining his position as follows:

> "My role at ClientEarth focuses on law and policy relating to climate change. I have previously specialised in emissions-related litigation and generally worked in and around environmental regulation and disputes for over 10 years. I do not have expertise in climate science, macro-economics, oil and gas price forecasting, accounting, carbon pricing, carbon markets or related fields, and no part of this statement purports to articulate any expert opinion. Rather, it seeks to set out the statements of fact which underpin ClientEarth's claim, and the assertions which ClientEarth make as part of its claim.

61. This is therefore a summary of ClientEarth's case, albeit one which takes the form of a witness statement which collects together a miscellany of views expressed by others. But merely because Mr Benson says that those views are not intended to be controversial, and merely because he understands them to be widely accepted and endorsed by governments and financial markets worldwide, does not mean that those opinions can be presented as fact. They are the opinions of others presented as a necessary building block to ClientEarth's case that the Directors' approach to implementing the ETS is so irrational or unreasonable as to be a breach of ss.172 or 174.

62. ClientEarth submits that it is unreasonable to require or expect it to adduce expert evidence at the *prima facie* stage. I disagree. The case it has chosen to advance relies on a breach of s.174 and attacks eleven individuals on the basis that they acted irrationally or so unreasonably that the decision making of all of them falls outside the range of decisions reasonably available to the Directors at the time. If it is not possible for ClientEarth to establish a *prima facie* case to the effect that the Directors' approach to climate risk falls outside the range of reasonable responses open to the board of a company such as Shell without properly admissible expert evidence, that is simply a reflection of the very serious nature of the case it wishes to advance and the attendant difficulties which its pursuit entails. It is no reason to conclude that the normal rules on the admissibility of opinion evidence should not apply.

63. Furthermore, although there are differences, the status of these individuals as directors of Shell is similar to (although not the same as) that of a professional. In that context, there will be circumstances in which the court will strike out proceedings alleging breach of duty unless expert evidence is adduced (see, e.g., the discussion of *Pantelli Associates Ltd v Corporate City Developments Number Two Ltd* [2011] PNLR 12 in *Whessoe Oil & Gas Ltd v Dale* [2012] PNLR 33 at [29ff]). With that in mind, and whatever the position may be in relation to a strike out, I consider that the current evidence, unsupported by any expert analysis of why all of the Directors got the balancing exercise they are required to carry out so wrong as to be actionable, does not support a *prima facie* case in relation to breach of the s.174 duty of care.

64. Secondly, although it is said that the goals set out in the ETS are objectively measurable, the evidence does 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 targeted reductions referred to in it. The views which I expressed on this point in the May Judgment were the third specific issue on which ClientEarth sought reconsideration at the oral hearing. I remain of the opinion that, in circumstances in which there is no

admissible expert evidence, it is very difficult to treat what is said 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. While it is plain that there are fundamental disagreements between ClientEarth and the Directors as to the right way to achieve the NZ 2050 targets that Shell has set itself, 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. The evidence falls 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.

65. The third reason is that it is now at the core of ClientEarth's own case that the Directors do in fact have policies and targets to achieve NZ by 2050, but it is just that they are manifestly unreasonable and do not include an adequate pathway to achieve their goals. This is inconsistent with any suggestion that the Directors have not in fact considered what is in the best interests of Shell and its members as a whole when addressing the most appropriate manner in which to deal with climate risk – to that extent there can be no sustainable breach of s.172(1)(d). This is a further specific point on which ClientEarth sought reconsideration at the oral hearing.

66. However, the evidence does not engage with the issue of how the Directors are said to have gone so wrong in their balancing and weighing of the 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, that no reasonable director could properly have adopted the approach that they have. This is a fundamental defect in ClientEarth's case because it ignores the fact that 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 a classic management decision with which the court is ill-equipped to interfere.

67. In its argument for the oral hearing, ClientEarth submitted that this conclusion, which I had expressed in the May Judgment, did not address its case that the material set out and referred to in Mr Benson's evidence demonstrated that the Directors had not evinced a realistic approach to achieving the ETS. However, even if I had considered it appropriate to place any real weight on Mr Benson's evidence, this criticism misses the fundamental point that the general duties to which the Directors are subject require them to take into account a whole range of considerations in the management of Shell's business towards promoting its success for the benefit of its members as a whole, and not just their response to the risks posed by climate change. ClientEarth does not explain how the Directors went so wrong in that regard as to have acted contrary to their duties under ss.172 or 174, because it only concentrates on one aspect of their decision-making. There is no recognition of the Directors' obligation to balance the significance of that feature against the many other competing commercial considerations with which the law permits and indeed requires them to be concerned.

68. In my judgment, the fact that ClientEarth is unable to provide any explanation of how the Directors have gone so wrong in the balancing of those competing considerations (and indeed gives no substantial recognition to the fact that they also must be taken into account) is a clear illustration of why it has not established a *prima facie* case.

69. As to the alleged breach relating to compliance with the Dutch Order, the evidence is that the Dutch Court has ordered Shell:

> "both directly and via the companies and legal entities it commonly includes in its consolidated annual accounts and with which it jointly forms the Shell group, to limit or cause to be limited the aggregate annual volume of all CO2 emissions into the atmosphere (Scope 1, 2 and 3) due to the business operations and sold energy-carrying products of the Shell group to such an extent that this volume will have been reduced by at least net 45% at end 2030, relative to 2019 levels."

70. The Dutch Court has also directed that the Dutch Order is provisionally enforceable, which means, as I read Professor van Mierlo's opinion letter, that there is no stay on its enforceability pending appeal. The appellate court has the power to suspend provisional enforceability, but the evidence is that Shell has not sought such relief and is therefore obliged as a matter of Dutch law to take steps to comply with the Dutch Order. It is also said that the Dutch Order takes effect immediately after the decision has been made, which means that Shell is required to take steps to comply with it immediately.

71. Professor van Mierlo says that what this means in practice is that:

> "[Shell] is immediately obliged to take certain measures … to effect a reduction of its Scopes 1, 2 and 3 CO2 emissions levels. If *Milieudefensie* considers that [Shell] is failing to comply with that obligation, it may demand compliance with the Judgment by means of the formal Court process set out in Article 430 (3) CCP and require that [Shell] take steps to effect the Judgment within a reasonable period of time.
>
> "When considering whether or not [Shell] is in breach of its obligations under the Judgment, it is essential that it is offered a reasonable period of time to take steps to implement measures to achieve the required emissions reductions (i.e. to develop a robust group policy aimed at emissions reduction). However, given the nature of the obligation imposed on [Shell] by the Judgment and the relatively short timeframe within which the Judgment requires it to be achieved, Milieudefensie would certainly be able to argue that [Shell] is required to initiate the necessary measures to achieve a reduction of CO2 emissions in relatively short order."

72. It appears from the wording of the Dutch Judgment that, although the Dutch Order is in some respects results-based, the Dutch 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. This is clear from the following passage, which encapsulates a refusal by the Dutch Court to interfere with the means by which the Directors may choose to ensure that Shell complies with its obligations:

> "[Shell] has total freedom to comply with its reduction obligation as it sees fit, and to shape the corporate policy of the Shell group at its own discretion."

73. This passage is not referred to by Professor van Mierlo, and seems to me cut across the suggestion that the Dutch Court regards the Directors as being under any duty to Shell to take steps towards compliance with the Dutch Order in any manner other than

through compliance with their duties to do that which they consider in good faith would be most likely to promote the success of Shell for the benefit of its members as a whole in accordance with s.172 of CA 2006.

74. I should add that although Professor van Mierlo's letter expresses his opinion, it does not comply with CPR PD35 because it is addressed to ClientEarth's solicitors not the court, it does not exhibit his instructions, it does not contain the statement identified in PD35 para 3.2(9) and it is not verified by the statement of truth required by PD35 para 3.3. That does not mean that I discounted the opinion letter in the May Judgment, as ClientEarth suggested that I had. It simply means that I took into account this non-compliance with the rules, as well as the fact that it did not deal with the totality of the Dutch Judgment, when assessing the weight which it was appropriate to afford to the views he had expressed.

75. ClientEarth also said that the views I expressed in the May Judgment about the quality and admissibility of Professor van Mierlo's opinion is incorrect because I did not appreciate that it is open to the court to take a pragmatic and reasonable approach, and that I should have taken the evidence at its reasonable highest. It was also said that I should not have looked at the judgment of the Dutch Court from which I extracted the passage cited above because it was necessary to take what Professor van Mierlo said about that judgment at face value and in effect without further enquiry. That too was said to be a consequence of the principle that I should take the evidence adduced by ClientEarth at its reasonable highest.

76. I disagree with this analysis. The Dutch Judgment was referred to in Professor van Mierlo's opinion and it was appropriate to consider the judgment itself in conjunction with what was said about it. This approach is consistent with the guidance given by Lord Leggatt JSC in *FS Cairo (Nile Plaza) LLC v Lady Brownlie* [2021] UKSC 45 at [148]. As I have explained, I do not consider that the court at the *prima facie* stage is bound to adopt a passive and uncritical approach to the evidence with which it is faced, more particularly where there is a passage in the judgment which seems to cut across ClientEarth's case as directly as this one does. It is a point on which, in the absence of further explanation, the court would be unlikely to accept the expert evidence at a substantive hearing, even if the opinion letter had complied with CPR PD35.

77. It is now clear that the way in which ClientEarth approaches this breach is by reference to s.172(1)(e) of CA 2006, which requires a director to have regard to the desirability of the company maintaining a reputation for high standards of business conduct. It is said that this is a duty which is apt to require directors to ensure that their company complies with the terms of an order made by a foreign court.

78. Of equal importance, I agree with Shell's submission that ClientEarth's reliance (in Mr Hooker's witness statement) on what has been said by Shell's former CEO does not come close to establishing a *prima facie* case that the Directors have no genuine intention of procuring Shell to comply with its best efforts obligations under the Dutch Order in respect of its Scope 3 emissions. ClientEarth said that Shell is trying to adduce its own evidence on this point which is not something which the court should permit at this stage of the process. I disagree with this description of this part of Shell's submission. In substance, it does not do anything more than explain why the material on which Mr Hooker relies does not disclose a *prima facie* case in relation to this

category of breach, having regard (per David Richards J in *Abouraya*) to the totality of the evidence which ClientEarth has placed before the court on the application.

79. I also agree with Shell's submission that one of the issues the court must consider at this stage of the process is the precise nature of the relief sought and the prospects of the court granting it if proceedings were to be continued. The nature of the relief sought is as much a factor in the company's entitlement to obtain that relief as is the nature of the breaches on which ClientEarth relies. My conclusions on this part of the case were another aspect of the May Judgment which ClientEarth said requires reconsideration.

80. As to the injunction, there is no doubt that a court will not grant mandatory injunctive relief if constant supervision is required, which will be particularly acute as a factor if the relief sought is insufficiently precise. This would be the case if the order sought necessarily contemplated that the court may be required to adjudicate on disputes over whether or not a business is being run in accordance with its terms (*Cooperative Insurance Society Ltd v Argyll Stores (Holdings) Ltd* [1998] 1 AC 1 at 12G-H). As Lord Hoffmann went on to say (at 14A-B):

> "The fact that the terms of a contractual obligation are sufficiently definite ... to found a claim for damages ... does not necessarily mean that they will be sufficiently precise to be capable of being specifically enforced."

81. In my view the mandatory orders currently sought by ClientEarth fall foul of that basic principle. A mandatory injunction that Shell (a) adopt and implement a strategy to manage climate risk in compliance with its statutory duties and (b) comply immediately with the Dutch Order is too imprecise to be suitable for enforcement, and for that reason alone is an order which a court would be most unlikely to make. Indeed, it is difficult to see how the court could be satisfied that the disruptive impact which disputes over compliance would have on the conduct of Shell's business would not of itself have the serious adverse impact on the success of Shell for the benefit of its members as a whole, which ClientEarth contends that these proceedings are designed to avoid.

82. ClientEarth submitted at the oral hearing that the court can fashion the appropriate injunctive relief at the conclusion of the trial depending on the nature and extent of the breaches found. In my view, that is no answer to the point. It seems to me that, 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. In a case such as the present, that exercise may also serve to illustrate the extent to which the relief sought cuts across the court's normal reluctance to interfere with *bona fide* business decision-making by the company's board, viz., the Directors.

83. Although the declaratory relief sought does not suffer from the same problems, it is difficult to see what legitimate purpose the grant of a declaration would fulfil. ClientEarth submitted that, if the court is satisfied that the Directors have breached their duties, Shell's position that the court should do nothing about it is very unattractive. I do not think that is the right approach. In any proceedings, the court is concerned with the utility of the substantive relief sought. It is 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 view as to the Directors' conduct is by vote of the members in general meeting, a remedy which ClientEarth is entitled to take steps to procure in its capacity as a shareholder.

84. In these circumstances, I do not consider that ClientEarth has made out a *prima facie* case that the Directors are in breach of their duties in the respects alleged. Shell also submitted that, standing back from the detail, it is far-fetched to think that an independent director, acting in accordance with their duties under s.172 of CA 2006, would consider it appropriate to launch the kind of litigation contemplated in the present case against the entire board of Shell. I think that this is a useful question for the court to ask itself. In my view the application and the evidence adduced in support of it admit of only one answer: such a director would not do anything other than decline to continue the claim. It follows that there is no *prima facie* case for giving permission, because it can now be seen on the basis of the existing evidence that the court would be bound to refuse ClientEarth permission to do so come what may (s.263(2)(a)).

85. On this issue, I also think it is appropriate to have regard to the way in which the evidence so far adduced by ClientEarth bears on the discretionary factors referred to in s.263(3) and s.263(4) of CA 2006, which the court must take into account if there were to be a substantive hearing of a permission application. This is both because they are confirmatory of the fact that a person acting in accordance with s.172 would not seek to continue the claim and because they bear on the issue that, even if the court were not bound to refuse permission because of s.263(2)(a), ClientEarth has not established a *prima facie* case that it would do so.

86. The first discretionary consideration which the court is required to take into account at any substantive hearing for permission is whether ClientEarth would be acting in good faith in seeking to continue the claim: s.263(3)(a) CA 2006. If the court cannot be satisfied at the *prima facie* stage that such parts of the applicant's own evidence as relate to a possible want of good faith have not been satisfactorily answered, that of itself will be a material consideration against a conclusion that a *prima facie* case for permission to continue the claim has been made out.

87. Shell contends that there is good reason to conclude that this application is an attempt by ClientEarth to publicise and advance its own policy agenda. If established, this would be a clear misuse of the derivative claim procedure because, even if this motive might occasionally step hand in hand with conduct directed at what is most likely to promote the success of Shell for the benefit of its members as a whole, they are two very different things. If and to the extent that they diverge, it can properly be said that an application motivated by the former will not have been brought in good faith.

88. This is disputed by ClientEarth. Both Mr Hooker and Mr Benson assert that ClientEarth is bringing these proceedings in good faith for the benefit of Shell's members as a whole and with the aim of protecting its long term value. It is Mr Benson's evidence that ClientEarth genuinely believes that its claim is in the long-term best interests of Shell, its shareholders and employees. ClientEarth submits that it would not be right for the court to disbelieve Mr Benson on this point, a submission which it has stressed in Pallas' 24 April 2023 letter to the court and its written argument for the oral hearing.

89. I do not think that ClientEarth's evidence is an answer to Shell's point, not least because I do not think it is right to characterise Shell's response as an invitation to the court to

disbelieve Mr Benson. For the purposes of the present exercise, there is no reason to doubt that the belief expressed by Mr Benson is genuinely held. However, the question of good faith does not just involve an examination of whether ClientEarth has an honest belief that the claim is in the long-term best interests of Shell. It may also require an assessment of whether ClientEarth is in fact bringing the proceedings for an ulterior purpose, a point which arises in particularly acute form given the *de minimis* extent of ClientEarth's shareholder interest in Shell. This test was applied in a pre-CA 2006 case (per Peter Gibson LJ in *Barrett v Duckett* [1995] BCC 362, 367H-368D) and was adopted in *Iesini* at [113] to [121] (albeit with the opposite result) in which Lewison J held that, because the dominant purpose of the claim was to benefit the company, it could not be said that, but for the collateral purpose, the claim would not have been brought at all. For that reason the claim in *Iesini* was brought in good faith. The 'but for' test was also cited with approval in *Robert Glew and Denton and Co Trustees Ltd v Matossian-Rogers* [2020] BCC 248 at [47].

90. It is said by ClientEarth that the 'but for' test referred to by Lewison J in *Iesini* is not to be applied in a rigid or simplistic manner. It submitted that the assessment of a party's motives and the relationship between them requires a more nuanced approach. It submitted that in *Montgold Capital LLP v Ilska* [2018] EWHC 2982 (Ch) the court did not apply that test. I do not think that this is right nor do I think that the reference to *Montgold* is apposite because the issue did not arise in that case. HH Judge Simon Barker QC simply said that the existence of a collateral motive as a factor in the claimant's consideration did not of itself vitiate the claimant's good faith. But that is a different point.

91. In my view, a 'but for' test is appropriate as a matter of principle. It has been applied in other analogous contexts, e.g., where process is sought to be pursued for an ulterior purpose (*Goldsmith v Sperrings Ltd* [1977] 1 WLR 478, 503, cited in *Iesini* at [119]) and has been discussed with approval where directors' powers are sought to be exercised in an impermissible manner (see the judgment of Lord Sumption with which Lord Hodge agreed in *Eclairs Group Ltd v JKX Oil & Gas Plc* [2015] UKSC 71 at [21] to [25], although the majority concluded that this particular point did not needed to be decided).

92. It therefore seems to me 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. The reason for this is that it will be clear to ClientEarth that it is using an exceptional procedure in the form of a derivative action, for a purpose other than the purpose for which the legislation has made it available. If, on the evidence adduced by the applicant, that remains an open and unanswered question irrespective of what Shell might say at the substantive hearing, the court cannot be satisfied that ClientEarth is acting in good faith, a situation which will count strongly against a conclusion that it has established a *prima facie* case for permission.

93. In my view, the fact that ClientEarth is the holder of only 27 shares in Shell, but is nonetheless proposing that it should be entitled to seek relief on behalf of Shell in a claim which on any view is of very considerable size, complexity and importance (and will be exceptionally expensive and time-consuming to pursue), gives rise to a very clear inference that its real interest is not in how best to promote the success of Shell for the benefit of its members as a whole. In short, there is 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. It seems to me that, rather than concentrating on how a director might be criticised for a bad faith refusal to balance those factors properly (as to which there is no evidence), ClientEarth has adopted a single-minded focus on the imposition of its views and those of its supporters as to the right strategy for dealing with climate change risk. This points strongly towards a conclusion that its motivation in bringing the claim is ulterior to the purpose for which a claim could properly be continued. In my view, ClientEarth has not adduced sufficient evidence to counter the inference of collateral motive which therefore arises.

94. There is nothing further to be said about the second discretion factor in s.263(3)(b) CA 2006. It follows from the conclusion I reached on s.263(2)(a) that, on the present state of the evidence, a person acting in accordance with s.172 would attach little if any importance to continuing the claim because ClientEarth has not established a *prima facie* case that Shell has a good cause of action arising out of the Directors' defaults or breaches of duty.

95. As to issues of authorisation and ratification, if the acts or omissions relied on by ClientEarth have been authorised or ratified by Shell, ss.263(2)(b) and (c) CA 2006 provide that permission to continue the claim must be refused and the likelihood of authorisation or ratification in the future is a discretionary factor under ss.263(3)(c) and (d). It is not said by Shell that authorisation or ratification has occurred and there is no direct evidence of the likelihood that it will be. But there is evidence as to the views of the members of Shell generally and, if they have no personal interest in the matter, that is evidence to which the court is required by s.263(4) to have particular regard.

96. At Shell's AGM held on 18 May 2021 the support for its ETS was 88.4% of the votes cast by members. This fell to 80% support at the AGM held on 24 May 2022, when a progress report on the ETS was under consideration, and I was told at the oral hearing that a similar level of support was given at its recent 2023 AGM. In my view, Shell is correct to say that the strength of the 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.

97. Set against this is the support which ClientEarth has received for its claim from members holding 12.2 million shares amounting to approximately 0.17% of Shell's shares, with letters from members holding another 12.5 million shares who have stated that their position is aligned with the arguments made by ClientEarth. With one exception, the members who sent letters which actually assert support for the claim, as opposed to expressing agreement with ClientEarth's aspiration to procure a change of direction by Shell, are members of the Climate Action 100+ (CA100+) engagement initiative. This is described as "a common agenda for engagement with high emitting companies to achieve commitments to cut emissions, improve governance and strengthen climate-related financial disclosures." With a single exception their letters of support all appear to be based on a detailed common template and do not disclose the number of shares they hold. But they are in any event a very small proportion of the total shareholder constituency, and it is that constituency as a whole whose views should carry very considerable weight when determining how Shell can best manage the climate change risk with which these proceedings are concerned.

98. I consider that the level of member support for the ETS and its progress would count strongly against the grant of permission, notwithstanding the support of 30.47% and 20.29% of votes cast in favour of resolutions proposed at the 2021 and 2022 AGMs by the activist shareholder group 'Follow This'. While the voting in favour of these resolutions demonstrated material minority support for more information to be provided by Shell to its shareholders on the ETS and underlying policies for reaching their targets, they would fall well short of demonstrating any member support for action of the type contemplated by this application.

99. For all of these reasons, it appears to me that ClientEarth's application and the evidence adduced in support of it do not disclose a *prima facie* case for giving permission to continue the claim. The court is therefore required to dismiss the application in accordance with s.261(2)(a) CA 2006. In the light of the fact that the matter has now been reconsidered at an oral hearing, I will also make an order dismissing the claim.