Appeal Ref…….

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
INSOLVENCY AND COMPANIES LIST (Ch. D)
DERIVATIVE CLAIM
The Honourable Mr Justice Trower
B E T W E E N:

CLIENTEARTH

Claimant/Applicant

and

(1) SHELL PLC
(2)-(12) THE DIRECTORS OF SHELL PLC

Proposed Defendants/Respondents

CLAIMANT'S SKELETON ARGUMENT FOR PERMISSION TO APPEAL

References to documents are to the Appellant's Core Bundle and take the form [tab/page]

Introduction

1. Appeal time estimate: 2 days.

2. The Claimant ("**ClientEarth**") applies for PTA against the following two orders of Trower J:

   2.1. An order dated 24 July 2023 **[3/23]** following Judgment with citation [2023] EWHC 1897 (Ch) **[4/26]** refusing ClientEarth permission to continue its derivative claim against the directors of Shell PLC ("**Shell**"), at the *prima facie* stage, and dismissing ClientEarth's claim (the "**Substantive Decision**"); and

   2.2. An order dated 31 August 2023 **[5/51]** following Judgment with citation [2023] EWHC 2182 (Ch) **[6/53]** that ClientEarth pay Shell's standard costs of and incidental to the proceedings, notwithstanding that the usual rule is that, at the

prima facie stage, a company which participates voluntarily in the proceedings shall not be entitled to its costs (the "**Costs Decision**").[1]

3. This is a first appeal. It arises in the context of a claim with significant importance for the members of Shell. A number of institutional investor members of Shell support this claim. ClientEarth respectfully submits that the grounds of appeal enumerated below, individually and cumulatively, satisfy both limbs of CPR r. 52.6(1): they have a real prospect of success, and raise significant issues of wider legal and public importance, such that ClientEarth ought to be granted permission.

4. The structure of this permission skeleton is as follows:

   4.1. Section I summarises the substance of ClientEarth's case on the underlying application (dismissed by the Judge);

   4.2. Section II outlines the correct approach to the application at this *prima facie* stage; and

   4.3. Section III sets out the six grounds on which the lower Court arguably erred.[2]

I. THE SUBSTANCE OF THE UNDERLYING APPLICATION

5. ClientEarth is a shareholder in Shell. It seeks permission to continue a derivative claim against Shell's directors for breaches of duty under ss. 172 and 174 of the Companies Act 2006, in connection with the directors' failure to manage the risks to the company posed by climate change ("**climate risk**"). ClientEarth's application is supported by witness statements from Paul Benson ("**Benson 1**") **[11/118]** and William Hooker ("**Hooker 1**") **[10/96]**.

6. Shell's business is heavily exposed to climate risk (PoC ¶¶7-8 **[9/67-68]**; Benson 1 ¶¶21-23, 44-75 **[11/126-127 and 136-146]**), and it is common ground that it is incumbent on the directors to adopt and implement an effective climate risk strategy for the benefit of the company.

[1] [redacted]

[2] A greater number of grounds of appeal were put before the Judge when permission was sought from, and refused by, him. These have been consolidated herein although without changing the substance or scope of the application for permission.

7. ClientEarth alleges three overarching breaches of duty by Shell's directors in respect of their management of climate risk, arising from:

   7.1. the setting of inadequate targets (PoC ¶¶51-52)**[9/81-82]**;

   7.2. the means adopted to achieve the objectives of the Directors' Strategy (PoC ¶53) **[9/82-83]**; and

   7.3. non-compliance with obligations pursuant to an order of the Hague District Court (the "**Dutch Order**") (PoC ¶63) **[9/86]**.

8. The Judgment characterises ClientEarth's case as an invitation to the Court 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*": ¶37 **[4/36]**. That, however, was not and is not ClientEarth's case; if it were, it would plainly be contrary to well-established principle.

9. Rather, the premise of ClientEarth's case is that Shell's directors have already identified that climate risk is a material factor that impacts on their duties to promote the commercial success of the company. ClientEarth and the directors all consider that the long-term success of the company requires an effective and workable climate risk strategy which aligns Shell's business with global climate goals.

10. Specifically:

    10.1. The directors have set a target to transition Shell into a 'net-zero' business by 2050 by reducing its net greenhouse gas emissions to zero ("**NZ Target**"); and

    10.2. The directors have committed Shell to be 'Paris-aligned', meaning that Shell will transition its business to align with the global temperature objective ("**GTO**") set out in the Paris Agreement to limit warming to 1.5°C above pre-industrial levels,

    (together, the "**Directors' Strategy**").[3]

11. The directors are collectively responsible for the Directors' Strategy and so are the proper respondents. Although the Court (at ¶62 **[4/42]**) described ClientEarth's claim as

[3] Shell's decision to align with the GTO, which ClientEarth supports, is also the objective of the UK Government and the 194 ratifying parties of the Paris Agreement and reaffirmed by the Glasgow climate pact in 2021.

"*attack[ing] eleven individuals*", the claim in fact challenges the collective corporate decisions taken as a board.

12. Having determined that achieving the Directors' Strategy would be in the best interests of the company, ClientEarth's case is that the plans adopted by the directors to achieve the Directors' Strategy amount to a breach of duty. They 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.

13. These are not allegations made in a vacuum. A number of Shell's institutional members have expressed similar concerns at previous AGMs and support this claim (Benson 1, ¶¶165-171 **[11/176-178]**; Hooker 1, ¶¶58-62 **[10/112-113]**).

14. The Hague District Court, too, has found against Shell as regards its legal obligations to reduce its emissions in line with global climate goals, and it is this Dutch Order which is the subject of the third breach alleged by ClientEarth in these proceedings. The effect of the Dutch Order is explained by a legal opinion from Professor Antonius van Mierlo ("**van Mierlo 1**"). It requires Shell to reduce its emissions by "*at least net 45% at end 2030, relative to 2019 levels*". As regards Scope 1 emissions, the obligation is one of "*result*"; as regards Scope 2 and 3 emissions, the obligation is one of "*best efforts*" (Benson 1 explains the concept of Scopes 1-3 emissions at ¶34 **[11/133]**). Although it is true that Shell has "*freedom*" on how best to comply, Shell does not have freedom whether to comply. The plans which the directors have put in place amount to a breach of duty, because they do not put Shell in any position to achieve the goals of the Strategy or to comply with the Dutch Order.

15. Unpacking the above in more detail, the key constituent elements of the claim are as follows.

16. First, as the Judgment acknowledges, it is or should be common ground that Shell faces material and foreseeable risks as a result of climate change, which could have a material commercial and financial effect on its business. As put at ¶45 **[4/38]**:

> *"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."

17. It follows that Shell's directors, acting in accordance with their statutory duties, are required to consider and manage climate risk so as to safeguard the best interests of the company.

18. Second, by the Directors' Strategy, the directors have (1) set the NZ Target; and (2) declared alignment with the GTO. These decisions are not the subject matter of this claim. The directors have already determined that fulfilling the Strategy is necessary to protect medium and long-term shareholder value, and ClientEarth agrees: PoC ¶¶26, 27, 30-32 **[9/74-75]**. The starting point of the claim is not whether fulfilling the Strategy is necessary – that question has been decided, by the directors, in the affirmative. The claim proceeds from the basis that the targets and means adopted will not achieve the objectives which the directors have determined are necessary.

19. Third, the goals of the Directors' Strategy are objectively measurable. Climate science is a complex but well-established field. Benson 1 ¶11 **[11/121-123]** summarises the primary sources to which he refers,[4] which include studies by intergovernmental organisations, non-governmental organisations (both UN-supported and otherwise), private sector-led organisations, thinktanks, and other research organisations. There is significant scientific consensus in this area, both on the risks posed to companies by climate change and on the scientific 'pathway' models used to assess alignment with the GTO (Benson 1 ¶26) **[11/128-130]**.

20. It is therefore possible to scrutinise oil and gas companies' disclosures and business strategies by reference to stated climate objectives. The picture is alarming when one considers what the directors are seeking to achieve. For example:

    20.1. Benson 1 ¶¶104-105 (together with ¶11) cite research from four different organisations that have all independently concluded that Shell's existing plans are

[4] As developed further below, the purpose of Benson 1 was not to proffer expert opinion, but to consolidate the available research in one place and provide a full and fair explanation of the scientific consensus. Although the Judge described Benson 1 at ¶61 as "*a witness statement which collects together a miscellany of views expressed by others"* **[4/42]** Shell did not assert that the evidence was not full and fair and did not reflect the consensus.

not aligned with the GTO and will not meet the NZ Target **[11/121-123, 155-156]**.

20.2. One organisation found that the International Energy Agency's 'Net Zero Emissions by 2050' scenario ("**NZE 2050**")[5] would require a 36% reduction in Shell's absolute emissions by 2030 as compared with 2019, but on Shell's current trajectory its absolute emissions are forecast to increase by 3%: Benson 1 ¶105 **[11/155-156]**. That illustrates how dramatically short Shell's current plans fall: they take the company in the opposite direction to what the Directors' Strategy requires.

21. Fourth, the Court is not being asked to evaluate Shell's approach to climate risk as a whole. It is being asked to consider the specific breaches pleaded by reference to the Directors' Strategy. The breaches pleaded at PoC ¶¶51-52 relate to target-setting **[9/81-82]**, and the breaches pleaded at PoC ¶63 (in respect of non-compliance with the Dutch Order) also partially relate to target-setting **[9/86]**. In respect of those breaches, in stages:

21.1. In line with its NZ Target, the directors have set a target to reduce all emissions (that is, Scopes 1, 2, and 3) to net zero by 2050. Separately, the Dutch Order requires Shell to reduce all CO_2 emissions by net 45% by 2030, relative to 2019 levels.

21.2. Over 90% of Shell's emissions are Scope 3 emissions (Benson 1, ¶91 **[11/151]**. However, the directors have no absolute emissions targets for its Scope 3 emissions before 2050 (absolute emissions are a company's total greenhouse gas emissions).

21.3. The directors have opted, instead, to set 'carbon intensity' targets (i.e. the amount of greenhouse gas emissions per unit of energy produced by Shell).

21.4. The scientific consensus is that intensity targets are not a substitute for absolute emissions targets because there is no necessary correlation between the two. Benson 1 ¶41 cites research from five different organisations (including the UN's High Level Expert Group) on that issue **[11/135-136]**.

[5] NZE 2050 is a normative scenario developed by the International Energy Agency that shows a pathway for the global energy sector to achieve net zero carbon emissions by 2050. See Benson 1 ¶¶29-30 **[11/130-131].**

21.5 ClientEarth's case is that the directors' decision not to set absolute emissions targets between now and 2050 in respect of Scope 3 emissions, and to otherwise fail to set targets in line with the GTO, is in breach of duty. The directors have committed to the NZ Target, requiring a 100% reduction in net absolute emissions by 2050, and committed to the GTO. The achievement of that strategy requires the company to bring about a substantial change to its operations which requires interim targets.

22. The question is whether there is any basis on which the directors can reasonably conclude that the refusal to set any absolute emissions targets before 2050 for Scope 3 emissions (which account for over 90% of the company's emissions) is in Shell's interest, bearing in mind the need to meet the objectives of the Directors' Strategy and comply with the Dutch Order. The argument is concerned with the rationality or reasonableness of a measure by reference to the stated objectives the measure is supposed to achieve. There is no reason in principle why the Court could not assess that question.

23. Fifth, as to the breaches pleaded at PoC ¶53 **[9/82-83]** (in respect of the means adopted to meet the goals of the strategy, and – by reference to PoC ¶63 – the means adopted to comply with the Dutch Order) **[9/86]**, again the Court is not being asked to assess Shell's general business approach. ClientEarth's case is that there is no basis on which the directors could reasonably conclude that the specific decisions alleged to be breaches fall within a reasonable range of decisions open to the directors, given the company's commitment to the strategy and the need to comply with the Dutch Order.

24. Resolving the breaches alleged will involve factual analysis. However, that is not unusual and is not a reason why the Court should not address the issue – indeed many disputes in complex commercial matters require the Court to embark on a detailed review of factual (or technical) matters at trial.

25. Moreover, there was more than sufficient material before the Court that demonstrated a *prima facie* case for permission. For example, the breach pleaded at PoC ¶53.1 is that, despite the Directors' Strategy requiring a decline in fossil fuel production, Shell continues to invest heavily in fossil fuel projects, many of which have a development and operational timeline spanning decades **[9/82-83]**. The scientific consensus is explained at Benson 1 ¶¶126-136 **[11/162-165]**. The International Energy Agency is clear that there is already enough supply to meet fossil fuel demand in an NZE 2050 scenario without

further development of new supply, meaning that development of new supply is incompatible with the GTO. In the face of that consensus, there is no basis on which a director could reasonably conclude that significant further investment in fossil fuel projects is in the interests of Shell. At the very least, the material already available discloses a *prima facie* case that the directors are adopting an irrational and unreasonable approach.

26. Sixth, it is public knowledge that Shell itself has significant doubts as to whether its current policies will meet the Director's Strategy. For example:

    26.1. Hooker 1 ¶29 refers to a number of comments by Shell's former CEO, including a statement that the company has no plans to change its strategy following the Dutch Order **[10/103-105]**. The Judgment at ¶78 appears to dismiss that evidence ("*does not come close to establishing a* prima facie *case that the Directors have no genuine intention of procuring Shell to comply*") but gives no elaboration **[4/45-46]**.

    26.2. Benson 1 ¶101 refers to Shell's former CEO's comments at the 2021 AGM, stating that he could not say what the company's absolute emissions would be in 2030 even if it met its intensity targets **[11/154]**. That is akin to an admission that the directors' decision to set intensity targets for Shell is inadequate, because those targets do not translate into absolute emissions reductions (or the directors have no idea whether they do or not), which is the ultimate aim. The Judgment does not refer to this evidence.

    26.3. Benson 1 ¶101 cites further material, including public disclosures Shell has made stating that its "*% change anticipated in absolute Scope 3 emissions*" for 2022, 2023, 2030 and 2035 are in fact "*0*" **[11/154]**. That is akin to an admission that its current strategies are not fit for purpose. The Judgment also does not mention this evidence.

II. THE APPROACH TO THE APPLICATION

27. The evidential position below was that (1) ClientEarth had adduced a significant volume of material for the purpose of explaining the technical picture and satisfying the Court that its case, on the merits, reaches the relevant threshold; and (2) Shell voluntarily made

submissions in response (but without serving any Defence or evidence, given the nature of the first permission stage).

28. The starting point is that the derivative action procedure was introduced by the Companies Act 2006, as an accessible mechanism for shareholders to hold directors to account for breach of duty. Parliamentary intention was summarised by the Solicitor-General as follows:

> *"A breach of a director's general duties to the company is a serious matter. Indeed, it may be extremely serious for the company, whose very existence may be put in jeopardy by the breach or threatened breach of duty. The general duties set out in chapter 2 of part 10 do not constitute guidance or a wish list. They are statutory duties, and every director must comply with them.* ***It is therefore important that there be 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 of those duties****."* (Emphasis added).

29. The statutory procedure therefore deliberately departed from the restrictive common law regime and its origins in relation to shareholder protection against fraud (*Foss v Harbottle* (1843) 2 Hare 461; *Prudential Assurance Co Ltd v Newman Industries Ltd (No 2)* [1982] Ch 204). Parliament's intention was to establish a clear and accessible mechanism for any shareholder claim "*arising from an actual or proposed act or omission involving negligence, default, breach of duty or breach of trust by a director of the company*." (s. 260(3)). The reference to wider causes of action beyond fraud (and including, for example, "*default*") illustrates the breadth of the jurisdiction.

30. The approach to be taken to the applicant's evidence is central to the application. As noted 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]:

> *"I interpret the phrase "prima facie" case to require me to consider whether the evidence is such as would entitle Mr Haider to the relief he claims if it were uncontradicted and if it were considered from his point of view, that is to say, taking it at its reasonable highest. I do not interpret it to mean that I should go further, and myself decide, at this first stage, whether or not it should be taken at its highest: that is a matter for the second stage."*

31. Further, at [49]:

> *"(1) It seems unlikely, as a matter of common sense, that the draftsman intended that a court, at the first stage and on an ex parte basis, should have to assess*

> *anything more than what is required by the test I have suggested. Such applications can involve considerable amounts of material both on whether it is appropriate to allow the shareholder to bring a claim at all, and (as in this case) on the merits of the proposed claims.*
>
> *(2) To go further would be undesirable. First, if the application was not dismissed, the company and any defendant at the second stage would understandably have the impression that the judge had already formed a concluded view on the overall strength of the evidence against it; and second, it would likely mean in practice not just that the company had the option of putting in evidence in response (which is what s.261, 262 and 264 provide), but that it would have to do so."*

32. Thus, as Peter Knox KC noted, in *Abouraya v Sigmund* [2015] BCC 503, David Richards J assessed the "*totality of the evidence placed before [him]*" [53], but only "*looked at exclusively from the point of view of [the applicant]*" [54] and "*viewed solely from the point of view of [the applicant]*" [55]. See further *Bhullar v Bhullar* [2016] BCC 134 at [25]:

> *"It will not be unusual to find that the claimant can establish a prima facie case, if one ignores the evidence relied upon by the defendant, yet the claimant would fail at trial if the defendant's evidence were to be accepted. In such a case, I consider that it is still open to the court to hold that the claimant has made out a prima facie case because it would be wrong to assume that the defendant's evidence will be accepted at the trial and it may simply not be possible to predict with any degree of confidence whether the defendant's evidence will be so accepted."*

33. The correct approach at this stage is to take ClientEarth's evidence at its reasonable highest. In this regard, Benson 1 ¶8(c) **[11/120]** and Hooker 1 ¶14 **[10/99]** both explained why expert evidence was not filed at the *prima facie* stage (in short, because there was not yet permission, and it was not possible to know which issues would be in dispute). This was a logical and reasonable approach.

III. GROUNDS OF APPEAL

34. ClientEarth advances six grounds of appeal. Grounds 1 to 5 concern the Substantive Decision. Ground 6 concerns the Costs Decision.

Ground 1: Evidential approach at the *prima facie* stage

35. The Court erred in setting the evidential bar too high. The Court imposed inappropriate evidential expectations creating unfair and unworkable barriers to the applicable jurisdiction.

36. The Court's principal criticism was directed towards Benson 1 (whose evidence has not in fact been disputed by Shell). The Court said:

    36.1. The "*starting point*" is that the Court could place "*very little weight on the opinions expressed by Mr Benson*" (¶59) **[4/41]**. This was because: (1) the evidence did not establish "*a case that the Directors are managing Shell's business risks in a manner that is not open to a board of directors acting reasonably*" and (2) he cannot give "*expert evidence on which the court can properly rely*".

    36.2. At ¶60 **[4/41-42]**: "*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*."

    36.3. At ¶61 **[4/42]**: "*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*."

37. The Court was correct that the evidence of the "*consensus*" underpins ClientEarth's case. However, the Court erred in adopting the (apparently pejorative) view that "*opinions of others*" could not establish a *prima facie* case for granting permission.

38. ClientEarth's underlying claim is that the directors' approach is so far from the consensus that it is irrational or unreasonable. If Shell disputes the evidence, it will have the opportunity to explain why and in what respects and directions can be made in light of the extent of any dispute. However, it did not do so below.

39. The Court erred in the following material respects:

39.1. First, the Court at ¶62 concluded that the claim could only be established at the *prima facie* stage with "*properly admissible expert evidence*" and no other approach was permissible **[4/42]**. Whilst that may possibly be so at trial, it cannot be right that this was a pre-requisite at this very early, *ex parte* stage. Moreover, Benson 1 ¶8(c) **[11/120]** and Hooker 1 ¶14 **[10/99]** make clear that ClientEarth's intention was to file expert evidence in due course upon obtaining permission to do so under CPR r. 35.4(1), and once the directors' position was understood and issues in dispute known. It is wrong to approach (and criticise) Benson 1 as a substitute for the expert evidence which will be adduced in due course, and which Benson 1 does not purport to be. The procedure does not require ClientEarth to adduce detailed expert evidence on these issues at the *prima facie* stage, still less where there was no actual dispute as to Benson 1 that would justify such expenditure. Directions for expert evidence, if any matters were in dispute, could have been given either in advance of the *inter partes* permission hearing, or at a later stage after permission had been granted. To require expert evidence now (which would have had to be prepared even prior to the claim being issued) is to impose too heavy a burden on an applicant at this stage, not least when a substantial amount of well-marshalled relevant material was available in Benson 1.

39.2. Second, (and relatedly) the Court erred at ¶63 in stating that the reason for striking out the claim without expert evidence was because Shell's directors have a status "*similar to*" that of professionals **[4/42]**. The comparison with professional negligence cases was inapt, given that there is no professional standard or recognised field of expertise applicable to company directors. It was also directly contrary to *Whessoe Oil & Gas Ltd v Dale* [2012] PNLR 33 at [29ff] per Akenhead J (cited by the Judge at ¶63 **[4/42]** but not analysed), which reached the opposite conclusion, namely that expert evidence is not required in respect of a claim alleging breach of statutory duties under the 2006 Act (and see also *Re One Blackfriars Ltd* [2018] EWHC 901 (Ch), per William Trower QC as he then was). The approach in *Whessoe* in turn reflects *ACD (Landscape Architects) Ltd v Overall* [2012] PNLR 19 at [16] holding *inter alia* that: (a) there is no "*immutable rule of practice"* requiring expert evidence in support of any claim; (b) the statement of truth serves an important function in regulating the claim and

allegations; and (c) where there are explanations as to why expert evidence has not yet been served, such as by reference to proportionality, the court can consider those explanations. The Court's approach was accordingly contrary to (highly persuasive) High Court authority and wrong in principle.

39.3. Third, Benson 1 was not opinion evidence. It consolidated and presented the available research to the Court and in light of ClientEarth's duty of full and frank disclosure, to explain the context in which the claim arises. It was evidence of fact. Benson 1 ¶10 states **[11/121]**:

> *"The factual matters I set out below are not intended to be controversial. In citing research that I consider to reflect the consensus, I have chosen materials that I understand to be widely accepted and endorsed by governments worldwide and/or financial markets. Where I am aware that a differing, reasonable view exists on a material issue, I have noted this."*

39.4. Fourth, the only 'opinions' noted in the Judgment relate to Section C of Benson 1, which Judgment ¶48 states "*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*" **[4/39]**. But Section C was not a statement of Mr Benson's opinion. It is a summary of ClientEarth's case as to what the scientific consensus demonstrates, and what ClientEarth will allege.

39.5. There was no "*analysis*" contained in Section C of Benson 1 which was not tied to Shell's own disclosures or third-party research reflecting the scientific consensus. For example:

39.5.1. As to C(1) ("*emission reduction targets*"), Benson 1 ¶¶101-105 cited research demonstrating that the Board's current targets are not aligned with the GTO or NZE 2050 **[11/154-156]**.

39.5.2. As to C(2) ("*new projects*"), ¶¶108-128 **[11/156-162]** and 132-135 **[11/163-165]** cited the research underlying the consensus that the development of new oil and gas assets is incompatible with the GTO, and explaining the scale of Shell's oil and gas pipeline and its heavy exposure to stranded asset risk.

39.5.3. As to C(3) ("*capital expenditure*"), ¶147(d) **[11/169]** cited the World Benchmarking Alliance's conclusion that Shell's investment in non-fossil fuel products is "*not changing at the rate required*" to deliver GTO alignment.

39.5.4. As to C(4) ("*Carbon capture and storage/nature-based solutions*"), ¶¶156-161 **[11/172-175]** cited the research underlying the consensus that there are well-recognised difficulties with both technologies.

39.6. Fifth, and most fundamentally, as explained above the correct approach was to take Benson 1 "*at its reasonable highest*". That is, if all of the scientific research cited were unrefuted by Shell, the question is whether a case for breach would be made out. The answer to that is 'yes'. The materials cited in Benson 1 make clear there is consensus that the directors' current plans do not put the company in a position to meet the strategy to which it has committed, or to comply with the Dutch Order. As put at Benson 1 ¶13(c), the Board's management of climate change risk is "*fundamentally unreasonable, by reference to independent third-party research and assessments*" **[11/123]**. If accepted, a director acting reasonably would take note and adjust the targets and means adopted to put the company in a position to achieve the goals of the Directors' Strategy.

40. Accordingly, the Court erred in imposing a procedural barrier (an apparent obligation to obtain expert evidence) which was unnecessary and inappropriate given the stage at which the claim was at. The Judgment has the potential to require all (and certainly many) applicants for permission to pursue a derivative claim to adduce expert evidence at the *prima facie* stage – even without permission for expert evidence and before the proceedings become *inter partes* such that issues in dispute can even be identified. That was not the intention of Parliament when it sought to create an accessible mechanism for pursuing shareholder claims against directors.

Ground 2: Misunderstanding the case and/or incorrect legal conclusions

41. The Judge reached a number of conclusions in relation to the legal architecture of ClientEarth's case which are unsustainable and involve either a misunderstanding or mischaracterisation of ClientEarth's submission, or errors of law.

42. First, the Judge rejected the "incidental duties" which ClientEarth pleaded, and in so doing appeared to take the view that this rejection was fatal to ClientEarth's case.

43. This was wrong. Shell's directors accept that climate change presents a material risk to the company and have already identified the Directors' Strategy as a commercial objective which is most likely to promote the success of the company. That is the starting point for ClientEarth's case, and is the context in which the decisions of Shell's directors fall to be assessed against the applicable statutory duties.

44. Once that is understood, the incidents of duty pleaded and extracted at Judgment ¶22 arise as a matter of logic:

    44.1. The duties to "*make judgments*" about and "*accord appropriate weight*" to climate risk necessarily arise from the fact that climate risk is accepted as a serious risk to the business;

    44.2. The duty to make the aforesaid judgments "*upon a reasonable consensus of scientific opinion*" arises logically from the duty to exercise reasonable care, skill and diligence under s. 174;

    44.3. The 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* [*GTO*]" has in substance already been accepted by Shell. That is the very purpose of the Directors' Strategy;

    44.4. The duties to "*adopt strategies which are reasonably likely to meet Shell's targets*", and to do so using strategies "*reasonably in the control of both existing and future directors*" follow logically from the above. Having determined its strategy, it would be irrational for the directors to then fail to put in place plans which put the company in a likely position to meet it; and

    44.5. A duty to ensure the company "*takes reasonable steps to comply with applicable legal obligations*" should be uncontroversial. Were the directors unreasonably to cause Shell to act unlawfully or flout its obligations, that would likely be an actionable breach.

45. In any case in which the legal duty is framed in general terms, it is important to consider how that duty falls to be applied in the particular context arising. These pleaded incidental

duties were not (and were not intended to be) additional duties over and above the usual directors' duties, but rather manifestations of how those general duties apply in this case.

46. Second, the Judge failed to approach the obligations on Shell's directors correctly, in circumstances where those directors have already decided upon the Directors' Strategy – which includes an intention to achieve net zero by 2050 and to be compatible with the GTO. That is relevant to the approach to be taken. Shell has not suggested that in fact it has decided to abandon that strategy, or that the directors have relegated it to competing considerations (cf. Judgment ¶¶37, 66-68, **[4/36, 43-44]**). Nor has Shell offered any explanation of how the steps it is taking at the directors' direction are consistent with the strategy they have set. The Judgment failed to consider this. Where a board of directors has already taken a decision about what is in the company's best interests (and has not suggested a change of course), shareholders – and the Court – are entitled to assess the directors' conduct by reference to that earlier decision.

47. Third, the Judge was wrong to conclude that irrationality cannot stand as a means of establishing breach of duty. Contrary to ¶30 of the Judgment, ClientEarth does not "*conflate*" irrationality and good faith **[4/34-35]**. There is clear authority in support of irrationality as a basis for supervisory review by the Court.

48. See for example Harman J in *ex p Glossop* [1988] 1 WLR 1068:

> *"It is, in my judgment, vital to remember that actions of boards of directors cannot simply be justified by invoking the incantation "a decision taken bona fide in the interests of the company." The decision of the Privy Council in Howard Smith Ltd. v. Ampol Petroleum Ltd. [1974] A.C. 821 clearly establishes that a decision can be attacked in the courts and upset notwithstanding (a) that directors were not influenced by any "corrupt" motive, by which I mean any motive of personal gain as by obtaining increased remuneration or retaining office, and (b) that directors honestly believed that their decision was in the best interests of the company as they saw its interests. Lord Wilberforce's observations delivering the advice of the board at p. 831E acquits the directors of corrupt motive; at p. 832 he asserts the primacy of the board's judgment; but he goes on, at p. 835, to assert that there remains a test, applicable to all exercises of power given for fiduciary purposes, that the power was not to be exercised for any "bye-motives."*
>
> *If it were to be proved that directors resolved to exercise their powers to recommend dividends to a general meeting, and thereby prevent the company in general meeting declaring any dividend greater than recommended, with intent to keep moneys in the company so as to build a larger company in the future and without regard to the right*

of members to have profits distributed so far as was commercially possible, I am of opinion that the directors' decision would be open to challenge. This is an application, in a sense, of the principle affirmed in so many local government cases and usually called "the Wednesbury principle:" Associated Provincial Picture Houses Ltd. v. Wednesbury Corporation [1948] 1 K.B. 223."

49. In *TMO Renewables v Yeo and ors* [2021] EWHC 2033 (Ch) this was described as one of the five exceptions to the general principle of subjectivity (derived from *Regentcrest v Cohen*) namely that: "*If there is no basis on which a director could reasonably have come to the conclusion that the action taken was in the interests of the company, a court is likely to find the director in breach of duty*." The Court at ¶38 stated that it accepted this formulation of the test **[4/36]**.

50. The editors of *Mortimore on Company Directors* (3rd edn) at §12.21, under the sub-heading "*perverse or irrational decisions*" state that:

> "*It is suggested that where a director acts perversely or irrationally in considering what step would be most likely to promote the success of the company he will also be in breach of his duties under s 172 (and perhaps also under s 171(b), or 174). This is consistent with a growing tendency on the part of the court to intervene in corporate or contractual decision making to prevent abuse by applying principles familiar in public or administrative law."*

51. The Court accordingly erred in summarily rejecting the existence of this principle (Judgment ¶30 **[4/34-35]**). At least for the purpose of the Judge's decision whether to grant ClientEarth permission to proceed with its claim at the *prima facie* stage, that should have been taken to be arguably correct. It is wrong, as the Court appears to have concluded, that a director can act irrationally and yet be considered to be complying with their statutory or common law duties without any further scrutiny. If this were so, it would involve a severe restriction on the scope of the 2006 Act, as a shareholder would have no remedy by way of a derivative action even if the entire board were acting irrationally.

Ground 3: Error in approach to the Dutch Order

52. The Judge was wrong to dismiss the limb of ClientEarth's claim relating to Shell's failure to comply with the Dutch Order. The essential conclusion in van Mierlo 1 was that Shell "*is immediately obliged to take certain measures…to effect a reduction of its Scopes 1, 2, and 3 CO2 emission levels*" **[14/203-206]**.

53. First, the Judge was wrong to reject the duty pleaded at ¶37.1 of the PoC **[9/77]**, namely that directors are under a duty to ensure reasonable steps are taken by a company to ensure a Court order is obeyed. The Court of Appeal in *Attorney-General for Tuvalu v Philatelic Distribution Corpn* [1990] 1 WLR 926 at 936E-F found that "*where a company is ordered not to do certain acts or gives an undertaking to like effect and a director of that company is aware of the order or undertaking he is under a duty to take reasonable steps to ensure that the order or undertaking is obeyed*". The Court was wrong to distinguish that principle solely on the basis that *Tuvalu* was concerned with a contempt application (and certainly wrong to do so at the *prima facie* stage without hearing full argument).

54. Second, the Judge was wrong in his treatment of ClientEarth's evidence as to the meaning and effect of the Dutch Order, which evidence took the form of an opinion letter from a Dutch lawyer **[14/200]**. Rather than taking that evidence "*at its reasonable highest*" as he should have done, the Judge read the underlying Dutch Judgment of his own accord and rejected the foreign lawyer's evidence summarily, without that foreign lawyer (or ClientEarth) having an opportunity to explain his opinion (as would have been possible had directions been set in due course). ClientEarth's evidence disclosed a *prima facie* case, and the matter should have been allowed to go forward, with any further interrogation being a matter for a later stage, including cross-examination and submissions at trial.

Ground 4: approach to relief

55. The Court erred in its approach to relief:

    55.1. As to declaratory relief, it was said that "*[i]t 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*": Judgment ¶83 **[4/46-47]**. That cuts across CPR r. 40.20 (which permits the Court to give declaratory relief irrespective of whether any other remedy is claimed) and the associated guidance in the case law: e.g. *Day v Bryant* [2018] EWHC 158 (QB) at [32-34]. More substantively, declarations would plainly serve a useful purpose – the directors could be expected to heed them and take appropriate action to ensure they were acting lawfully going forward. It is for this reason that declaratory relief is the conventional remedy following a finding of irrationality or unreasonableness. The

response to that finding is itself a matter for the directors. In addition, in stating that a declaration would "*have no substantive effect*", the Court made an erroneous assumption as to what the effect of a declaration would be on Shell or its directors.

55.2. As to injunctive relief, it was said that permission should be refused "*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*": Judgment ¶82 **[4/46]**. This was wrong, because the terms of the injunction granted will necessarily depend on the breach found. For example, ClientEarth alleges that the directors' approach is irrational or unreasonable because they have set inadequate intensity targets as opposed to relevant absolute emissions targets. If that case is accepted, then injunctive relief could require the directors to set absolute emissions targets accordingly; that is neither imprecise nor requires undue supervision.

56. More generally, it cannot be right that the Court would stand and watch impassively as a company is mismanaged, refusing to grant declaratory or injunctive relief where a claim has been made out, and thereby leaving shareholders to wait until the long-term consequences of that mismanagement are felt in the form of the company losing value, at which point the shareholder(s) can bring a derivative claim for damages (with no doubt very difficult questions of loss arising). In such a case, the better approach for the company and its shareholders is for the Court to intervene at an earlier stage, thereby avoiding the destruction of shareholder value and addressing the complaint of the company's members.

57. The consequences of Grounds 1 to 4 are of real significance for Shell. It follows that the Court was also wrong to conclude that a person acting in accordance with s 172 of the 2006 Act would not seek to continue the claim, such that the Court was bound to refuse permission. Indeed, the directors do not suggest that there is any such reason.

Ground 5: good faith

58. The Judge erred in his assessment of whether ClientEarth was acting in good faith in seeking to continue the claim, applying an incorrect legal test.

59. The statutory jurisdiction does not establish any threshold as to the size of the economic interest that is threatened by the matters giving rise to the claim. ClientEarth owns shares

and has standing to bring the claim. The only relevant criteria is whether ClientEarth genuinely believes, on reasonable grounds, that the economic value of its shares will be impaired. The evidence is that ClientEarth does genuinely hold that belief (as indeed do a significant number of institutional shareholders who support ClientEarth's claim), and that it does so on reasonable grounds. Indeed, the Court's approach was wholly counter-intuitive as ClientEarth entirely supports the directors' desire to achieve the NZ and GTO targets that underpin the Directors' Strategy. Its single motivation in bringing this claim is to ensure that the company achieves those objectives, which the directors have already determined would be in Shell's commercial interest.

60. As to the legal test, the Court applied a 'but for' test asking whether, but for an alleged collateral purpose (ClientEarth's so-called policy agenda), the claim would have been brought: Judgment ¶91 **[4/48]**. This was wrong in principle. The 'but for' test is not found in the legislation and cannot be universally applied: if an application for permission is made for multiple reasons, one of which aims to further the best interests of the company, then so long as the other motivations are not inconsistent with this, there is no absence of good faith. That approach is sensible, particularly given that investors in listed companies will invariably pursue derivative claims for a multitude of reasons.

61. As to the authorities on this point:

    61.1. The 'but for' test is not found in the wording of the statute. The test emerges from the judgment of Lewison J (as he then was) in *Iesini v Westrip Holdings* [2010] BCC 420. However (1) it is not clear that in *Iesini* the Court was intending to set down a hard-edged rule applicable to all applications for permission to continue derivative actions, and consistent with this (2) it has not been universally adopted. In *Montgold Capital LLP v Ilsk* [2018] EWHC 2982 (Ch), HHJ Simon Barker QC as he then was (sitting as a Judge of the High Court) did not apply the test when concluding that, provided the applicant had a "*genuine motive of restoring the company to its former position*", it did not matter that they also had some "*collateral purpose*": at [41].

    61.2. Further, the 'but-for' language which Lewison J used was taken from the abuse of process line of case law (in particular the judgment of Bridge LJ in *Goldsmith v Sperrings Ltd* [1977] 1 WLR 478): see *Iesini* at [119]. In *Goldsmith*, the Court of Appeal held that where a party commences proceedings to obtain a collateral

advantage "*unrelated to the subject matter of the litigation*", if, but for that collateral advantage, the claimant would not have commenced proceedings at all, the proceedings are an abuse of process. The Court of Appeal was also clear that there would be no abuse of process where the collateral advantage to the claimant was "*reasonably related to the provision of some form of redress*" sought in the proceedings: see *Iesini* at [119]. This suggests that Lewison J was not intending to set down some sweeping or indiscriminate rule, given the fact-sensitive nature of these assessments. There is no abuse of process (and therefore no lack of good faith) if a claimant commences proceedings seeking to achieve a collateral purpose which is "*reasonably related to the provision of some form of redress*" in the proceedings (even if that collateral purpose might satisfy the 'but for' test). Indeed, the question of a party's good (or bad) faith cannot in every case be reduced to a rigid or simplistic enquiry as to whether 'but for' the other purpose, the application would have been made. The assessment of a party's motives, and the relationship between them, requires a nuanced approach.

62. In this regard, the Judge accepted ClientEarth's evidence that it honestly believes its claim to be in the long-term best interest of Shell: Judgment ¶89 **[4/47-48]**. Yet, the Judge went on to find "*a very clear inference that its real interest is not in how best to promote the success of Shell*", in essence because ClientEarth has a small shareholding (yet pursues a claim "*of very considerable size, complexity and importance [which] will be exceptionally expensive and time-consuming to pursue*") and is an organisation with a policy agenda: Judgment ¶¶92-93 **[4/48-49]**. That was wrong. ClientEarth's claim is brought because it considers that the directors' current approach will adversely impact its shareholding and that of shareholders generally (and that view is shared by a significant number of other members of the company). In any event, there is no inconsistency between whatever policy agenda the Judge considered ClientEarth to have, and what ClientEarth believes to be in Shell's best interests, particularly given the directors themselves have adopted a strategy which espouses a commitment to a transition to clean energy. The complaint in this case is that the board is manifestly failing to act in accordance with that strategy.

63. There is no tension in this case between ClientEarth's pursuit of the claim and its other interests. That is demonstrated by the fact that ClientEarth's case has support from other members of the company, comprising a broad range of pension funds and asset managers

with a total of £450 billion of assets under management: Benson 1 ¶165-167 **[11/176-177]**, Hooker 1 ¶59-61 **[10/112-113]**.

64. The Judge's conclusion, if left undisturbed, is liable to have a serious and undue chilling effect on the use of the derivative action procedure: it would in principle not be open to any shareholder (1) for whom the costs of a derivative claim might outweigh an expected commercial benefit; and (2) which has a so-called social or policy agenda (e.g. the Church of England). That would have dramatic policy implications. There is nothing in the legislation itself or the Hansard materials to suggest that this was the intention of Parliament.

Ground 6: costs

65. Ground 6 falls to be evaluated independently of the other grounds and is of obvious importance. In summary, the Judge was wrong to order that ClientEarth should pay Shell's costs of the proceedings [redacted]

66. ClientEarth makes the following preliminary points:

    66.1. First, the costs order was entirely without precedent. Neither Shell nor ClientEarth were able to identify any judgment in which such an order is recorded as having been made. The rule in CPR PD 19A paragraph 2 is that "*If without invitation from the court the company volunteers a submission or attendance, the company will not normally be allowed any costs of that submission or attendance*". It bears emphasis that there was no such invitation in this case – Shell participated entirely at its own initiative. Moreover, the Judge ordered payment of the entirety of Shell's costs, including pre-action costs, and not merely the costs of attendance.

    66.2. Second, the rule that a company will "*not normally be allowed any costs*" serves an important purpose. It signals to potential litigants that if they seek to uncover or pursue relief for wrongdoing by way of a derivative action then they will face only a very limited costs risk when seeking the Court's permission. The making of a costs order against ClientEarth will stifle future attempts to pursue directors

for breach of duty, who will deter prospective applicants with the threat of running up and then seeking to recover substantial legal costs.

66.3. Third, the normal rule applies where (as here) the company makes submissions and/or attends a hearing "*without invitation from the Court*". The Court never did so, and ClientEarth thus had no notice of the costs implications which might arise from Shell's participation. Also, it is open to a company to seek the Court's invitation in order to protect its position on costs, but Shell did not do so. If either the Court had made or Shell had sought and obtained such an invitation, ClientEarth would have had an opportunity to more actively manage the costs of the proceedings (e.g. with a costs capping order). However, that did not occur.

66.4. Fourth, on its terms, the normal rule applies where the Court has concluded that the application fails to disclose even a *prima facie* case, i.e. where the application has failed at the (very low) first hurdle. It follows that something more than an unfounded or misguided application will be required in order to displace the normal rule.

66.5. Fifth, in that regard, it is relevant to reiterate ClientEarth's track record of acting responsibly when bringing litigation before the Court. It has been described by the Administrative Court as "*an expert claimant...which has demonstrated both high level expertise, legal and technical, and a responsible attitude towards making a claim*": see *ClientEarth No. 3* [2018] EWHC 398 (Admin) at [16]. There can be no suggestion that it has acted frivolously or vexatiously, nor does the Court make any such suggestion.

67. The Court erred in the following respects.

67.1. At ¶3, the Court's starting point was the "*general rule…that the unsuccessful party will be ordered to pay the costs of the successful party*" **[6/55]**. This coloured the Court's entire approach to the issue of costs. This was the incorrect staring point, because at the *prima facie* stage the company is not a party, and there is a bespoke starting point in respect of costs set out in CPR PD 19A. Indeed, CPR r. 19.15(3) provides that a claimant "*must not make the company a respondent to the permission application*". It is for this reason that the usual rule in CPR PD 19A applies.

67.2. At ¶27, the Court considered that the case would "*garner publicity"* **[6/59]**. That was a factor of limited, if any, weight. Justice is done in public and the fact of publicity in respect of a case of widespread public importance is hardly surprising and not unusual. There cannot be one costs rule for small/medium companies without a public profile and one costs rule for large companies with a public profile.

67.3. At ¶28, the Court considered it relevant that the claim was made against the directors "*without distinction*" **[6/59-60]**. But that is inherent in the claim. The claim arises from a decision taken by Shell's board. The entire board are the appropriate respondents. There would be no rational basis for the "*distinction*" referred to by the Court.

67.4. Also at ¶28, the Court expressed the view that the claim attacked the company's "*business strategy looking to the future rather than specific acts of corporate wrongdoing causing measurable loss*" **[6/59-60]**. However: (1) it is not the law that decisions by directors fall outside the scope of the derivative action procedure if they concern (in whole or in part) the company's present and future conduct; (2) the claim itself concerned decisions by the board which had already been taken; (3) the Judge was wrong to conclude that ClientEarth's allegations lacked specificity: they were set out in the detailed and comprehensive PoC; and (4) the Judge was wrong to summarily dismiss ClientEarth's case on the commercial loss that could be suffered without hearing any argument or evidence on the point.

67.5. At ¶29, the suggestion that there was "*little if any*" support for the claim is factually wrong **[6/60]**. There was, and is, substantial support for the claim from institutional investors as Benson 1 (at Section D) explains **[11/176-178]**.

68. The Court's overall conclusion was a departure from the usual rule. The decision was wrong in this case and also wrongly stands to deter shareholders from bringing derivative claims pursued in good faith going forward.

69. The test is of course not whether the appeal court would have exercised the costs discretion differently, but rather whether the Judge's exercise of his discretion was flawed. ClientEarth contends that Judge's exercise was flawed as a result of: (i) the use

of CPR r. 44 as a starting point; and (ii) the factors which the Judge took account of when exercising his discretion to disapply the usual rule.

PTA

70. The Court of Appeal is invited to grant PTA on all six grounds.

DANIEL SAOUL K.C. **EDWARD BROWN K.C.**

SAM GOODMAN **JUDY FU**

26 September 2023