On behalf of: Applicant
W A Hooker
First
Exhibit WAH1
8 February 2023

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

Claim No.: [XXX]

BETWEEN:

CLIENTEARTH **(on behaf of SHELL PLC)**	**Claimant**
-and-	
(1) SHELL PLC **(2) –(12) THE DIRECTORS OF SHELL PLC** **(as named in Part 1 of the Schedule to the Particulars of Claim)**	**Proposed Respondents**

FIRST WITNESS STATEMENT OF WILLIAM ALEXANDER HOOKER

I, William Alexander Hooker, of Pallas Partners LLP, 1 King William Street, EC4N 7AF, **STATE** as follows:

A. INTRODUCTION AND OVERVIEW

1. I am a partner in the firm of Pallas Partners LLP (**"Pallas"**) of the above address. Pallas acts for the Applicant, ClientEarth ("**ClientEarth**") in these proceedings. I have day-to-day conduct of the litigation and I am duly authorised to make this statement on behalf of ClientEarth.

2. I make this witness statement in support of ClientEarth's applications made under Civil Procedure Rule ("**CPR**") Part 23 (a) for an order under s. 261 of the Companies Act 2006 (the **"Act"**) granting permission to continue its derivative claim (the "**Derivative Claim**") in respect of the Respondent ("**Shell**", or the "**company**") (the "**Application**"),

and (b) for an order under CPR 19.9E directing Shell to indemnify ClientEarth for its own costs and any adverse costs incurred in the Application and in the Derivative Claim, as further described below (the "**Costs Indemnity Application**").

3. The facts and matters set out in this statement are within my own knowledge unless otherwise stated, and I believe them to be true. Where I refer to information supplied by others, the source of the information is identified; facts and matters derived from other sources are true to the best of my knowledge and belief.

4. There is now produced and shown to me a paginated bundle of true copy documents marked "WAH1". All references to documents in this statement are to Exhibit WAH1 unless otherwise stated. References to case law and commentary in the form "**[Authorities Bundle / tab / page number]**" are references to the bundle of authorities filed with this Application.

Overview

5. ClientEarth is a non-profit environmental law organisation, and a UK registered charity with charity number 1053988. It is a current member of Shell, holding 27 ordinary shares and has been since 6 September 2016. Confirmation of ClientEarth's shareholding in the company is exhibited at **[WAH1/pages 0004 - 9]**.

6. Shell is a public limited company headquartered in the UK which operates an international oil and gas business through its network of subsidiaries. The company's shares are traded on the London Stock Exchange, with secondary listings on the New York Stock Exchange and on Euronext Amsterdam.

7. On behalf of the company, ClientEarth is seeking relief in respect of breaches of the duties owed by the current directors of Shell (the "**Board**") under ss. 172 and 174 of the Act **[Authorities Bundle / 4 / 22-26]**, arising out of the Board's acts and omissions relating to (a) the company's climate change risk management strategy as set out, *inter alia,* in Shell's *Energy Transition Strategy* **[WAH1/pages 171 - 206]** and *Our Climate Target* **[WAH1/pages 426 - 429]** published in April 2021 and October 2021 respectively, and in the *Energy Transition Progress Report 2021* published in April 2022 (the "**Energy Transition Strategy**") **[WAH1/pages 207 - 245]** and (b) its response to the order of the Hague District Court dated 26 May 2021 in *Milieudefensie et al v Royal Dutch Shell plc* (the "**Dutch Order**") **[WAH1/pages 10 - 57].** The impact of the Dutch Order, and the obligations it creates for the Board under Dutch law with respect to Shell's Energy Transition Strategy, is addressed in the letter sent to my firm from

Professor Antonius Ignatius van Mierlo of Dutch Law firm Habraken Rutten dated 7 February 2023, which is exhibited at **[WAH1/pages 58 - 70]** (the "**Habraken Rutten Letter**").

8. ClientEarth seeks relief in the following terms or in such terms as the Court may think fit:

    a. a declaration that the Board have breached their duties in the manner described in paragraphs 51 to 63 of the Particulars of Claim; and

    b. an order requiring the Directors:

        i. to adopt a strategy to manage climate change risk in compliance with their duties under ss. 172 an 174 of the Act; and

        ii. to comply immediately with the Dutch Order.

9. The factual basis on which ClientEarth seeks permission to pursue the Derivative Claim, and the facts which form the basis of ClientEarth's case that there is a breach of duty, is set out in the First Witness Statement of Paul William Mark Benson ("**Benson 1**") a Senior Lawyer at ClientEarth with day-to-day conduct of the litigation.

10. ClientEarth seeks the Court's permission to continue the Derivative Claim on behalf of the company. For completeness, I confirm:

    a. In accordance with CPR 19.9A(3) and CPR 19.9A(4) **[Authorities Bundle / 01 / 11-12]**, Shell has not been made a respondent to this Application, and will be notified of the Derivative Claim and the Application.

    b. Pursuant to the CPR's Practice Direction on Pre-Action Conduct, in advance of commencing proceedings, my firm engaged with Shell's legal representatives in pre-action correspondence. On 14 March 2022 my firm sent a Letter Before Action to Shell setting out ClientEarth's case **[WAH1/pages 71 - 129]** and on 20 May 2022 Slaughter and May acting on behalf of Shell and the Board set out their position in a substantive response ("**the Response**"). I refer to copies of this correspondence at **[WAH1/pages 130 - 152].** I would respectfully request that the Court read the entirety of the LBA and the Response when considering the Application.

11. The Derivative Claim itself is particularised in the Particulars of Claim a copy of which

is included in the Application bundle.

12. I will address the Response in more detail below, but the central point made by the Board is that the Derivative Claim is an attempt to "*misuse the derivative claim procedure to impose [ClientEarth's] views, in the place of those of the Board, on questions of judgment as to how Shell should respond to the challenge of climate change*" (para 1.2) **[WAH1/page 130].** ClientEarth agrees that this would be an impermissible use of the derivative claim procedure, however it is an entirely inaccurate characterisation of the Derivative Claim. ClientEarth is not proposing any specific strategy which it requires the Board to adopt. Instead, for the reasons developed in Benson 1, it alleges that the Board's current approach falls outside the range of reasonable responses to climate change risk and causes or will cause harm to the company's members.

13. I understand that the Court will perform an 'initial sift' of the Application pursuant to s. 263(2) of the Act (referred to below as "**the Initial Stage**") **[Authorities Bundle / 8 / 34]**. That 'initial sift' generally takes place on an *ex parte* basis. I have therefore been mindful of the duties of full and frank disclosure and fair presentation throughout this statement, notwithstanding that the full hearing of the Application will take place on an *inter partes* basis.

14. At the trial of the Derivative Claim, it is likely that the Court will be assisted by expert evidence given the technical nature of some of the underlying concepts. For the reasons set out in paragraph 8c of Benson 1, ClientEarth has not adduced such evidence at the 'initial sift' stage, however assuming that the Application passes the 'initial sift' stage, the parties may potentially need to seek further directions from the Court in relation to whether such expert evidence is necessary, on what issues and in relation to timing.

15. The remainder of my statement is structured as follows:

    a. Part B addresses the Application; and

    b. Part C addresses the Costs Indemnity Application.

B. THE APPLICATION FOR PERMISSION

Part 11 of the Companies Act 2006

16. Pursuant to Part 11 of the Act, the Derivative Claim may only continue with the

permission of the Court. The provisions relevant to this application are ss. 261 and 263 of the Act. Excerpts of those provisions are at **[Authorities Bundle / 6 / 28-29]** and **[Authorities Bundle / 8 / 34-35]**.

17. There are two stages in an application for permission to proceed with a derivative action:

    a. The **Initial Stage**: The Court must be satisfied that the application and evidence filed discloses "*a prima facie case for giving permission*": s. 261(2). If the Court is satisfied, it may give directions as to the evidence to be provided by the company, and may adjourn the proceedings to enable the evidence to be obtained: s. 261(3).

    b. The **Permission Stage** : s. 263 is concerned with the Court's exercise of discretion as to whether to give permission to continue a derivative claim. ss. 263(2)-(4) set out the non-exhaustive factors to be considered.

18. I summarise below certain matters which are relevant to the Court's assessment under: (1) the Initial Stage under s. 261(2) of the Act; and (2) the Permission Stage under s. 263(2)-(4).

The Initial Stage

19. I note that the editors of Hollington, Shareholders' Rights. 9th Ed. describe the Initial Stage as one where the Court "*filters out clearly undeserving cases*" (para 6.14). **[Authorities Bundle / 13 / 151]**. I believe that ClientEarth has articulated a *prima facie* case satisfying the Initial Stage threshold. In making that assessment, the Court will wish to have regard to:

    a. The factual basis for the Derivative Claim as set out in Benson 1.

    b. The matters addressed in the following section of this witness statement in respect of the Permission Stage.

    c. The Particulars of Claim.

    d. The Response **[WAH1/pages 130 - 152].**

20. If the Application passes the Initial Stage, the Court may give directions as to the evidence to be provided by the company: s. 261(3) of the Act **[Authorities Bundle / 6 / 28]**. The directions proposed by ClientEarth are contained in a draft order which will

be included in the application bundle. This draft order[1] contains directions for service of the Application on Shell and the Board and then for a short directions hearing to take place. ClientEarth respectfully suggests that in a case of this size, complexity and importance, the Court is likely to be assisted by submissions from the parties in respect of case management.

The Permission Stage

21. At the Permission Stage, the Court must refuse permission if the conditions in s.262(2) of the Act are fulfilled **[Authorities Bundle / 7 / 31-32].** If those conditions are not fulfilled, the Court then has a wide discretion as to whether or not to grant permission, which includes (but is not limited to) consideration of the factors identified in s. 263(3) of the Act **[Authorities Bundle / 8 / 34-35]**. I set out a (non-exhaustive) summary of ClientEarth's case below.

Grounds for mandatory refusal under s. 263(2) do not arise

22. S. 263(2) of the Act specifies circumstances in which the Court must refuse permission to pursue a derivative claim **[Authorities Bundle / 8 / 34].** It provides as follows:

> *"(2) Permission (or leave) must be refused if the court is satisfied—*
>
> *(a) that a person acting in accordance with section 172 (duty to promote the success of the company) would not seek to continue the claim, or*
>
> *(b) where the cause of action arises from an act or omission that is yet to occur, that the act or omission has been authorised by the company, or*
>
> *I where the cause of action arises from an act or omission that has already occurred, that the act or omission—*
>
> *(i) was authorised by the company before it occurred, or*
>
> *(ii) has been ratified by the company since it occurred*."

23. There are two threshold questions under s.263(2): (1) an assessment under s. 172 of the Act; and (2) the question of authorisation or ratification. I address these in turn.

[1] The Application bundle will also contain a draft order for the Permission Stage, however the Court need not consider that order at the Initial Stage.

Assessment under s. 172 of the Act

24. Starting with the first question, the test as summarised by Simon Barker QC (sitting as a judge of the High Court) in *Montgold Capital LLP v Ilska* [2018] EWHC 2982 at [20] **[Authorities Bundle / 9 / 42]** is:

> "*Is it the case that no director intent upon fulfilling the duty to promote the company would seek to continue the claim? As Lewison J (as he then was) observed in Iesini v Westrip Holdings Ltd [2011] 1 BCLC 498 at [85], this first question is essentially a commercial decision. It involves weighing a wide range of factors including, (1) the size of the claim, (2) the strength of the claim, (3) the cost of the proceedings, (4) the company's ability to fund the proceedings, (5) the ability of potential defendants to satisfy a judgment, (6) the impact on the company if it lost the claim and had to pay not only its own costs but also the defendants' costs as well, (7) any disruption to the comp'ny's activities while the claim is pursued, (8) whether prosecution of the claim would damage the company in other ways, and (9) and so on. Further, and as Lewison J also observed, the court is not well-equipped to make commercial judgments except in a clear case.*
>
> *Additional guidance has been given by Norris J in McCaskill v Fulton & Ors, the transcript of which is dated 31 October 2014. This judgment included a reminder that the court is not to embark on a mini-trial and the observation that the question under section 263(2) is whether the case advanced is the sort of case which a properly advised and governed company would lay out money on in pursuit of its own interests. I take that figuratively rather than literally, and as a reminder that there must be something more than a prima facie case and something worth litigating about."*

25. The editors of Hollington, Shareholders' Rights. 9th Ed. express the view that "*in all but clear cases…in practice this threshold criterion will be overcome by the applicant*" (para 6.17) **[Authorities Bundle / 13 / 156]**.

26. The claim advanced by ClientEarth is a substantive dispute concerning the rationality of the company's Energy Transition Strategy and the attendant financial harm to Shell and its shareholders that the Strategy is causing.

27. There is clearly "*something worth litigating about*". At the heart of the Derivative Claim is a serious allegation that the Energy Transition Strategy which the Board has adopted

is fundamentally unreasonable and/or irrational, and is being adopted/pursued in breach of the Board's duties under s. 172 and 174 of the Act.

28. It is also a central tenet of the Derivative Claim that by failing to take steps to adjust the Energy Transition Strategy to facilitate a net reduction in the Shell group's aggregate annual CO2 emissions (including in respect of Scope 3 emissions), the company is in clear breach of the Dutch Order which in turn constitutes a further breach of the Board's duties under ss. 172 and 174 of the Act and/or its common law duty to take reasonable steps to ensure that the Dutch Order is obeyed: e.g. *Attorney-General for Tuvalu v Philatelic Distribution Corporation Ltd* [1990] 1 WLR 92 **[Authorities Bundle / 12 / 124 – 137]**. As set out at paragraphs 14 to 15 of the Habraken Rutten Letter **[WAH1/page 61],** the Hague District Court expressly declared the Dutch Order to be "*provisionally enforceable",* meaning that Shell is required to comply with the Dutch Order forthwith, notwithstanding the existence of a pending appeal.

29. It is possible that Shell will contend that it is taking active steps to comply with the Dutch Order. If raised, ClientEarth will dispute that position:

    a. The Board initially indicated its view that complying with the Dutch Order (even on an interim basis) was fundamentally incompatible with Shell's business. As set out at paragraph 4.115 of the LBA:

        i. in its Q2 2021 results call, the former CEO stated that the company had no plans to change its strategy following the Order, calling it "*unreasonable*" **[WAH1/pages 110 - 111].**[2] When asked directly by Bank of America Merrill Lynch about the Order (and to what extent the emissions reduction target could be met by disposals) the former CEO responded that Scope 1 and Scope 2 emissions can be reduced by disposals, but:

            > "*If you talk about accelerating the Scope 3 emissions reductions, disposals don't work, yeah? Or certainly not of assets. The only thing you can dispose of is customers, which is obviously not a meaningful strategy. That's again why we are appeal […]*".

        ii. when the company's former CEO was asked in an interview on 20

[2] Shell, '*Shell's second quarter 2021 results Q&A webcast for analysts* | *Investor Relations*' (29 July 2021), particularly at 21mins 45sec to 24mins 50sec, accessible at : https://www.youtube.com/watch?v=4F7VMmmGV44

January 2022 about Shell's statement that it will "*rise to the challenge*" of the Dutch Order to reduce its worldwide net carbon emissions by 45% by 2020 and what progress towards that objective would look like, his response was:

> "*The court ruling also applies, on a significant best efforts basis, to our scope 3 emissions. These are the emissions produced when our customers use our products. Here, we are working with our customers to cut emissions. We are focussing on decarbonising different sectors […]*
>
> *But no matter how hard we work on reducing the emissions of our customers when they use our products, our progress will remain dependent on society's progress with the energy transition. We cannot go faster than all our customers or we would have no customers to buy our products*" **[WAH1/pages 111 - 112].**[3]

b. In its Response, Shell asserts that it has taken steps to comply with the Dutch Order, but the particulars cited in the Response as examples of compliance do not withstand scrutiny. In particular, the Board points to its adoption of a target to cut absolute emissions from Shell's operations and those from the use of energy products sold by Shell by 50% by 2030, compared with 2016 levels on a net basis (the "**50% Emissions Reduction Target**") which is said to build on the company's short and medium term climate targets **[WAH1/page 217].** However, (as detailed further by Mr Benson in his evidence) the 50% Emissions Reduction Target crucially does not include the group's Scope 3 emissions and the Board has otherwise failed to adopt any absolute emissions reduction target in respect of the group's Scope 3 emissions (which represent over 90% of the company's emissions) (see Benson 1, paragraphs 81 to 89).

c. The company has previously stated that its ability to achieve its own emissions reduction targets is necessarily limited by the speed with which society as a whole transitions towards a low carbon economy **[WAH1/page 101].**[4] In the Response, the Board appears to move away from that caveat, but advances a variety of justifications for its failure to set absolute targets for the reduction of

[3] https://www.shell.com/inside-energy/go-faster-be-bolder.html

[4] Note that this statement has been removed by the company from its website and so the original source is unavailable.

its Scope 3 emissions, including that the company is necessarily reliant "*not only on various supply-side initiatives implemented by Shell but also on working with customers to reduce their emissions and, amongst other things, through advocacy with governments and other third parties*" **[WAH1/pages 145 - 146)].**

Authorisation or ratification

30. If the Court finds that there is a *prima facie* case that the Board has acted in breach of its duties (at the Initial Stage under s. 261(2)), then a person acting in accordance with their duties under s. 172 of the Act ought to decide to continue the claim.

31. Further, taking the factors to be weighed in turn:

    a. As to size of the claim (1), there is no claim for damages, but the Derivative Claim goes to the heart of the company's business model and future direction of its operations. It is therefore extremely significant in financial terms.

    b. As to the strength of the claim (2), the starting point is that the Court is not to embark on a "*mini-trial*" and may in appropriate cases proceed on the assumption that the pleaded allegations are correct. In any event, the matters identified in Mr Benson's evidence disclose a strong case. There is clearly a question that a properly advised company would "*lay out money on*" to investigate.

    c. As to costs (3), ability to fund (4), and impact on the company (6), Shell is a highly resourced multinational corporate group, with its unaudited financial statements for the fourth quarter of 2022 reporting annual profit across its global operations of nearly US$40 billion. I refer to the 2022 4th Quarter and Full Year Unaudited Results Report at **[WAH1/pages 162 - 169].** I accept that the costs of the proceedings may turn out to be significant (depending on the bases on which they are defended). However, in the circumstances, it is unlikely that a hypothetical director would be deterred by the cost of proceedings in the Derivative Claim or the company's ability to fund the proceedings.

    d. As for Shell and its directors' ability to satisfy a judgment (5), the Derivative Claim does not seek monetary relief. If ClientEarth prevails and Shell is ordered to take corrective action, then any relief ordered by the Court will be on the premise that the relief is necessary and in the best interests of the company.

32. Turning to the second question under s 263(2)(b), the conduct of the Board that is the

subject of the Application has not been authorised or ratified by the company. I note at the outset that one of the main points taken by the Board in the Response is that Shell's shareholders have "*indicated their support*" for the Board's strategy.

33. At the AGM held on 18 May 2021, the Board placed the company's Energy Transition Strategy before shareholders for an advisory vote. The Chair's message to shareholders stated that **[WAH1/page 173]:**

> "*The vote is purely advisory and will not be binding on shareholders. We are not asking the shareholders to take responsibility for formally approving or objecting to Shell's energy transition strategy. That legal responsibility lies with the Board and the Executive Committee*."
>
> "*This advisory vote.. does not shield or abdicate the Board's or management's legal obligations under the UK Companies Act."*

34. This message was reinforced by a statement from the CEO **[WAH1/page 175**].

> "*This vote does not replace the responsibility of our Directors in setting the company's strategy*."

35. The Energy Transition Strategy received 88.74% of the votes cast at the 2021 AGM **[WAH1/pages 246 - 247]**.

36. At the AGM held on 24 May 2022, the Board invited a further advisory vote as to the progress of the implementation of the Energy Transition Strategy. The notice of the 2022 AGM stated that **[WAH1/page 252]**:

> *"[t]he vote on Shell's progress towards its targets and plans is purely advisory and will not be binding on its shareholders. The legal responsibility for Shell's strategy lies with the Board and Executive Committee*."

37. At the 2022 AGM, the level of support fell and the Progress Report received 80% of the votes **[WAH1/pages 272 - 273]**.

38. Shareholder views relevant to the Board's management of climate risk can also be evidenced by the support for a special resolution tabled at the 2021 AGM by a shareholder, 'Follow This'. That resolution provided that **[WAH1/page 281]**:

> "*Shareholders support the company to set and publish targets that are consistent with the goal of the Paris Climate Agreement: to limit global*

warming to well below 2°C above pre-industrial levels and to pursue efforts to limit the temperature increase to 1.5°C.

These quantitative targets should cover the short-, medium-, and long-term greenhouse gas (GHG) emissions of the company's operations and the use of its energy products (Scope 1, 2, and 3).

Shareholders request that the company report on the strategy and underlying policies for reaching these targets and on the progress made, at least on an annual basis, at reasonable cost and omitting proprietary information.

Nothing in this resolution shall limit the company's powers to set and vary their strategy or take any action which they believe in good faith would best contribute to reaching these targets."

39. The Board recommended that shareholders vote against the resolution, on the basis that it was redundant in light of the advisory vote on the Energy Transition Strategy. **[WAH1/page 280**]. At the AGM, support for the Follow This resolution – which was intended to be binding and not merely advisory – gained 30.47% of votes in favour **[WAH1/page 247]**. This triggered an obligation under provision 4 under 'Board Leadership and Company Purpose' of the Corporate Governance Code for the company to set out what actions it intends to take to consult shareholders to understand the result **[WAH1/page 437].**

40. In advance of the 2022 AGM, Follow This proposed a similar shareholder resolution in the following terms **[WAH1/page 253].**

"*Shareholders support the company to set and publish targets that are consistent with the goal of the Paris Climate Agreement: to limit global warming to well below 2°C above pre-industrial levels and to pursue efforts to limit the temperature increase to 1.5°C.*

These quantitative targets should cover the short-, medium-, and long-term greenhouse gas (GHG) emissions of the company's operations and the use of its energy products (Scope 1, 2, and 3).

Shareholders request that the company report on the strategy and underlying policies for reaching these targets and on the progress made, at least on an annual basis, at reasonable cost and omitting proprietary information."

41. Again, the Board recommended that shareholders vote against the resolution, on the basis that "*if adopted,* [the resolution] *could result in unrealistic interim targets that are harmful to the Company's energy transition strategy and against good governance*" **[WAH1/page 252)]** .

42. At the AGM, the resolution received 20.29% votes in favour **[WAH1/page 273].**

43. It is clear that a significant group of minority shareholders, as expressed in the 2021 and 2022 AGM votes tabled by Follow This, consider that it would be consistent with Shell's objective to become aligned with the Paris Agreement for the Board to adopt short, medium and long-term quantitative emissions reduction targets which lead to absolute emissions reductions. More particularly, I note that the proposed adoption of such quantitative emissions reduction targets, in particular in respect of the company's Scope 3 emissions, may assist to discharge the obligations imposed on Shell by the Dutch Order 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 reduced by at least net 45% at end 2030, relative to 2019 levels* **[WAH1/ page 53**].

44. There is likely to be a dispute in due course about the effect of all these votes and the Board may say they amount to authorisation/ratification of any breach of duty. However, there is (at the lowest) an arguable case that these votes do not amount to ratification/authorisation, including because:

    a. The votes in favour of the Energy Transition Strategy were "*advisory*" and "*non-binding*". Shareholders were expressly told that the votes would not be used to "*shield*" the Board's legal obligations under the Act.

    b. The votes in favour of the Energy Transition Strategy could only ever authorise or ratify a breach of duty if the shareholders were aware (1) that they were being asked to authorise or ratify such a breach (which they were not) and (2) of all the relevant circumstances, i.e. the matters addressed in Benson 1 (which they were not).

45. In any event, for the reasons stated at paragraphs 28 and 29 above, the scope of the Derivative Claim goes beyond the confines of the resolution on the Energy Transition Strategy and its progress and additionally focuses on the failure by the Board to comply with the Dutch Order. The nature of Shell's breach of the Dutch Order is explored in

detail at paragraphs 59 to 63 of the Particulars of Claim.

Factors relevant to the Court's discretion under s. 263(3)

46. If it concludes that the mandatory prohibitions under s. 263(2) do not apply, the Court has a residual discretion as to whether to give permission to continue the claim. The factors relevant to exercise of this discretion are listed in s. 263(3) **[Authorities Bundle / 8 / 34-35]**:

> *"(3) In considering whether to give permission (or leave) the court must take into account, in particular—*
>
> *(a) whether the member is acting in good faith in seeking to continue the claim;*
>
> *(b) the importance that a person acting in accordance with section 172 (duty to promote the success of the company) would attach to continuing it;*
>
> *(c) where the cause of action results from an act or omission that is yet to occur, whether the act or omission could be, and in the circumstances would be likely to be—*
>
> *(i) authorised by the company before it occurs, or*
>
> *(ii) ratified by the company after it occurs;*
>
> *(d) where the cause of action arises from an act or omission that has already occurred, whether the act or omission could be, and in the circumstances would be likely to be, ratified by the company;*
>
> *(e) whether the company has decided not to pursue the claim;*
>
> *(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*."

47. I address these factors in turn.

48. **First**, as to good faith (s. 263(3)(a)), ClientEarth is a non-profit organisation that is genuinely motivated to ensure Shell pursues a rational and effective climate change risk management strategy. It brings these proceedings in good faith for the benefit of the members as a whole, and with the aim of protecting the long-term value of the

company.

49. In this regard, and as stated above, ClientEarth has held shares in Shell since 2016. **[WAH1/pages 4 - 9]** . Since that time, as a member, ClientEarth has taken an active interest in the activities of the company, particularly in respect of Shell's proposed response to climate change risks. For example:

    a. ClientEarth, represented by a current employee Rose Orlik, attended the company's Meeting held on 25 May 2017 in London, one day after the AGM was held in The Hague. Whilst Ms Orlick held a share in the company in her own name, I understand that her interest was acquired on ClientEarth's behalf and has since been transferred to ClientEarth. At that Meeting, Ms Orlik asked a question concerning Shell's actions to avoid the foreseeable risks of climate change, including human rights impacts. An informal transcription of the question and answer has been prepared by my firm and is included at **[WAH1/page 366]**.

    b. ClientEarth, represented by current employee Sophie Marjanac as ClientEarth's proxy, attended the company's AGM on 25 May 2022 and raised a question concerning the company's goal to become a net zero energy business by 2050. An informal transcription of the question and answer has been prepared by my firm and is included at **[WAH1/page 367]**.

50. In addition, I understand that ClientEarth has routinely liaised with other members of Shell with respect to the Board's response to climate change risks, including providing support for the "Aiming for A" coalition of over 150 shareholders, whose proposed special resolution was supported by the Board and ultimately gained overwhelming support from the members at the company's 2015 AGM.[5]

51. In 2021 ClientEarth also engaged with representatives of Shell with regards to ClientEarth's concern that the company's stated climate strategy was inconsistent with its public claims about that strategy. On 30 March 2021, ClientEarth wrote to the company, indicating that it had undertaken research into the company's net zero target and accompanying climate plan and proposed to include the analysis in a project called "The Greenwashing Files" to be shortly published on ClientEarth's website. ClientEarth provided the company with analysis and criticisms of the disconnect between its climate strategy and public claims about that strategy and provided it with an opportunity to

[5] https://www.reuters.com/article/climatechange-investor-shell-idUSL1N0V82IE20150129.

respond. Sally Donaldson from Shell's Media Relations team responded on behalf of the company on 1 April 2021, setting out particular points in response. In a further email on 15 April 2021, ClientEarth's representative thanked Ms Donaldson for her response and noted that "*we have considered the points your response raised and have taken them into account in finalizing our report, which we will proceed to publish*." I refer to the relevant email correspondence at **[WAH1/pages 378 - 383].**

52. Further, as explained at paragraphs 59 to 61 below, ClientEarth has secured the support of a variety of other members of the company in respect of the Derivative Claim.

53. I note that ClientEarth is a registered charity which has certain environmental objectives in the public interest **[WAH1/page 301].** In furtherance of those objectives, ClientEarth has engaged in an advocacy agenda in order to mitigate the impacts of climate change, which I anticipate would be furthered by a successful outcome in the Derivative Claim. However, that does not detract from the fact that the Derivative Claim has been brought in good faith: see e.g., **Iesini v Westrip Holdings Ltd** [2010] BCC 420 at [121] **[Authorities Bundle / 10 / 82]**. It is likely that, at the hearing of the Permission Application, the Board will contend that ClientEarth is only bringing these proceedings to further its environmental agenda. However, as explained in Benson 1 at paragraph 8(e), ClientEarth genuinely believes that the Derivative Claim is in the long-term best interests of the company and all its members.

54. **Second,** the Court will also have regard to the importance that a person acting in accordance with s. 172 would attach to continuing the claim in accordance with s. 263(3)(b). Many of the considerations dealt with at the mandatory condition in s. 263(2)(a) above would be again relevant to this limb. I repeat the points I have made at paragraphs 24 to 31 above.

55. **Third**, the Court will consider whether it is likely that the Board's conduct will likely be authorised or ratified under ss. 263(3)(c)-(d). I understand that the Board plans to hold an advisory vote each year as to the progress of the Energy Transition Strategy's implementation **[WAH1/page 173].** While not inconceivable that the Board may change tack from that course (moving from "*purely advisory*" shareholder participation to formal authorisation or ratification), I am not aware of any indication by the Board that it intends to put the matters subject to the Derivative Claim to a formal vote for authorisation or ratification by the company. I refer the Court to Shell and the Board's pre-action correspondence at **[WAH1/pages 130 - 152]** which does not suggest that is the Board's intention.

56. **Fourth**, and pursuant to s. 263(3)(e), whilst it is true that the company has decided not to pursue the claim itself (see para 8.1B of the Response) that decision was taken by the same Board whose conduct is impugned in the Derivative Claim.

57. **Fifth**, it is relevant whether the Board's conduct gives rise to a cause of action that ClientEarth could pursue in its own right under s. 263(3)(f). That is not this case: ClientEarth's claims are in breach of directors' duties, which duties are owed to the company and not to ClientEarth as member.

Views of other members of the company

58. Finally, under s. 263(4), the Court shall 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 **[Authorities Bundle / 8 / 35]**.

59. The Derivative Claim, or the issues raised by the claim, is supported by a variety of disinterested members of the company who collectively hold approximately 24.7 million shares in Shell, as follows:

    a. UK pension fund, Nest (the National Employment Savings Trust);

    b. UK Local Government Pension Scheme, London CIV;

    c. UK Local Government Pension Scheme, Brunel Pension Partnership Limited;

    d. [redacted]

    e. Swedish National Pension Fund, AP3 (Tredje AP-fonden / Third Swedish National Pension Fund);

    f. [redacted]

    g. [redacted]

    h. French asset manager, Sanso Investment Solutions;

    i. Belgian asset manager, Degroof Petercam Asset Management;

    j. Nordic asset manager, Danske Bank Asset Management and pension fund Danica Pension;

    k. [redacted]; and

l. Danish pension fund, AP Pension.

60. These members have expressed their support for the Derivative Action, or the issues raised by the claim, in the form of letters sent to ClientEarth **[WAH1/pages 384 - 418].** It is my understanding that none of these shareholders have a personal financial interest in the outcome of the claim (beyond their interest, *qua* shareholders, in ensuring that the company is managed properly in its own interests). The figure of 24.7 million shares is not a significant percentage of the overall shareholding in Shell (approximately 0.35%), however as is apparent from the above, it includes a number of well-established institutional investors.

61. ClientEarth has also received letters of support for the Derivative Claim, and the concerns raised by it, from investors who divested from Shell as a result of their concerns with the Board's approach to climate risk management. These investors are Danish pension fund AkademikerPension and Dutch asset manager ACTIAM, part of the Cardano Group **[WAH1/pages 419 - 425].**

62. It is likely that, at the hearing of the Application, Shell will contend that the AGM votes described at paragraphs 33 to 37 above indicate that the majority of members do not support the Derivative Claim. However, as I explained at paragraph 44(b) above, there were significant limitations on those votes and they do not provide a proper indication of how members would vote with: (1) full knowledge of the relevant circumstances (i.e the matters addressed in Benson 1); and (2) on the hypothesis that the Board's proposed strategy amounted to a serious breach of director's duty.

Other considerations

63. The Response contends that a derivative claim is a "*remedy of last resort*" and that ClientEarth is precluded from pursuing this route, until and unless it has exhausted all other legal and non-legal options available to it **[WAH1/page 130]** I believe this to be wrong as a proposition of law. I am not aware of any mandatory requirement for a member to exhaust other alternative remedies before permission can be granted to continue a derivative claim. As made clear by Lewison J in **Iesini** at [123] **[Authorities Bundle / 10 / 82]**:

> "*…under the new code the availability of an alternative remedy is not an absolute bar. If it were then it would have been a mandatory ground for refusing permission under section 263(2) rather than a discretionary consideration under section 263(3)(f*)."

64. It seems to me that this point goes nowhere for the Board, given that the Response denies all of ClientEarth's allegations. In any event (and as explained at paragraphs 49 and 51 above) ClientEarth has attempted to engage Shell using the normal channels available to shareholders in a public company, to no avail. I understand that ClientEarth remains open to engaging in constructive dialogue with the Board on the matters subject to the Derivative Claim.

C. THE APPLICATION FOR A COSTS INDEMNITY ORDER

65. In its Costs Indemnity Application, ClientEarth seeks a pre-emptive costs order directing Shell to indemnify ClientEarth for its own costs incurred, and any adverse costs order it may be ordered to pay, in pursuing the Application and the Derivative Claim, pursuant to CPR 19.9E **[Authorities Bundle / 2 / 13-14]**. It is appropriate that ClientEarth seeks protection for its financial exposure in these terms in pursuing the Derivative Claim on behalf of the company. This is particularly so where there is otherwise an imbalance between the financial resources available to ClientEarth and to the company.

66. CPR 19.9E provides:

> "*The court may order the company, body corporate or trade union for the benefit of which a derivative claim is brought to indemnify the claimant against liability for costs incurred in the permission application or in the derivative claim or both*."

67. This addition to the CPR codifies the position under common law, as described by Buckley LJ of the Court of Appeal in *Wallersteiner v Moir (No 2)* [1975] QB 373 at page 403 **[Authorities Bundle / 11 / 117]**:

> "*It seems to me that* ***in a minority shareholder's action, properly and reasonably brought and prosecuted, it would normally be right that the company should be ordered to pay the plaintiff's costs*** *so far as he does not recover them from any other party. In all the instances mentioned the right of the party seeking indemnity to be indemnified must depend on whether he has acted reasonably in bringing or defending the action, as the case may be: see, for example, as regards a trustee, In re Beddoe, Dowries v. Cottam [1893] 1 Ch. 557. It is true that this right of a trustee, as well as that of an agent, has been treated as founded in contract. It would, I think, be difficult to imply a contract of indemnity between a company and one of its members. Nevertheless,* ***where a shareholder has in good faith and on reasonable***

grounds sued as plaintiff in a minority shareholder's action, the benefit of which, if successful, will accrue to the company and only indirectly to the plaintiff as a member of the company, and which it would have been reasonable for an independent board of directors to bring in the company's name, it would, I think, clearly be a proper exercise of judicial discretion to order the company to pay the plaintiff's costs. This would extend to the plaintiff's costs down to judgment, if it would have been reasonable for an independent board exercising the standard of care which a prudent business man would exercise in his own affairs to continue the action to judgment*. If, however, an independent board exercising that standard of care would have discontinued the action at an earlier stage, it is probable that the plaintiff should only be awarded his costs against the company down to that stage*." (emphasis added).

68. Applying the above principles to this case:

    a. the Application is pursued by ClientEarth in good faith and on reasonable grounds,

    b. the benefit of any successful Derivative Claim will accrue directly to the company, and

    c. as explained in the context of ss. 263(2)(a) and 263(3)(b), an independent board of directors would consider in all the circumstances that the claim should be brought.

69. ClientEarth therefore seeks an indemnity in the terms contained in the Costs Indemnity Order or on such terms as the Court sees fit.

Statement of Truth

I believe that the facts stated in this witness statement are true. I understand that proceedings for contempt of court may be brought against anyone who makes, or causes to be made, a false statement in a document verified by a statement of truth without an honest belief in its truth.

Signed: ..[redacted].....

Name: William Hooker

Position: Partner

Date: 08 February 2023

On behalf of: Applicant
W A Hooker
First
Exhibit WAH1
8 February 2022

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

Claim No.: [XXX]

BETWEEN:

Applicant

ClientEarth

-and-

Shell Plc

Proposed Respondent

EXHIBIT WAH1
