PTA Template 269C1 - First Appeal

IN THE COURT OF APPEAL, CIVIL DIVISION

REF: **CA-2023-001866**

CLIENTEARTH –v– SHELL PLC & ORS

ORDER made by the Rt. Hon. Lord Justice Newey

On consideration of the appellant's notice and accompanying documents, but without an oral hearing, in respect of an application for permission to appeal

Decision:

Permission to appeal refused

Reasons

The appeal would have no real prospect of success and there is no other compelling reason for this Court to hear it.

Grounds 1 and 2

The "Statutory Duties" pleaded in the particulars of claim comprise the duties for which sections 172 and 174 of the Companies Act 2006 provide together with what are said to be "necessary incidents" of those duties. However:

- As the Judge pointed out, the test for breach of section 172 is subjective: it has to be shown that the director in question has not acted in the way that he subjectively believed was in the company's best interests. As the Judge also pointed out, irrationality can, at most, provide *evidence* of breach. On top of that, the particulars of claim do not appear to include an allegation that the directors have acted contrary to what they perceived to be Shell's interests. The appellant has not, therefore, advanced a viable case in respect of section 172.
- The only other relevant statutory duty is that imposed by section 174: to exercise reasonable care, skill and diligence. The Judge was plainly correct that the duties alleged as "necessary incidents" do not exist as such. The matters to which those alleged duties refer can, at most, be taken to be matters to which the directors have unreasonably failed to have regard, in breach of the overriding duty of care. Rather, for example, than there being "A duty to accord appropriate weight to climate risk", the question must be whether the directors unreasonably failed to accord appropriate weight to climate risk, so failing to exercise reasonable care, skill and diligence.

The overall result is, as the Judge said, that the appellant needed to show a prima facie case that there is no basis on which the directors could reasonably have come to the conclusion that the actions they have taken have been in the interests of Shell. The Judge concluded on the evidence that that had not been made out. He was justified in doing so. The Judge accepted that there was a prima facie case that Shell faces risks as a result of climate change, but, as the Judge explained, "the management of a business of the size and complexity of that of Shell will require the Directors to take into account a range of competing considerations, the proper balancing of which is a classic management decision with which the court is ill-equipped to interfere", Overall, as the Judge said, the evidence "falls some way short of establishing a prima facie case that the way in which Shell's business is being managed by the Directors could not properly be regarded by them as in the best interests of Shell's members as a whole". Further, the Judge was entitled to consider that "the current evidence, unsupported by any expert analysis of why all the Directors got the balancing exercise they are required to carry out so wrong as to be actionable, does not support a prima facie case in relation to breach of the s.174 duty of care".

The appellant argues that the Judge wrongly "impos[ed] a procedural barrier (an apparent obligations to obtain expert evidence)". However, the Judge did not suggest that expert evidence would be required in every case. Rather, he took the view that expert evidence would have been needed on the facts of this particular case as a "reflection of the very serious nature of the case [the appellant] seeks to advance and the attendant difficulties which its pursuit entails". The Judge was justified in taking that view.

Ground 3

The Judge concluded, distinguishing *Attorney-General for Tuvalu v Philatelic Distribution Corpn* [1990] 1 WLR 926, that there is no recognised duty owed by directors to ensure compliance with an order of a foreign Court. The Judge further attached significance to a passage from the Dutch Judgment to the effect that Shell "has total freedom to comply with its reduction obligation as it sees fit, and to shape the corporate policy of the Shell group at its own discretion".

The appellant argues that the Judge was wrong to distinguish the *Tuvalu* case and in his approach to the meaning and effect of the Dutch Order, reading the Dutch Judgment "of his own accord" rather than taking the Dutch

lawyer's evidence "at its reasonable highest". However, the Judge detailed the weaknesses in the Dutch lawyer's evidence, and the appellant does not provide solid grounds for considering the Judge's approach to either the *Tuvalu* case or the Dutch Judgment to have been mistaken.

Ground 4

The Judge considered that the mandatory orders sought by the appellant fall foul of the principle that a Court will not grant mandatory injunctive relief if constant supervision is required and that "it is difficult to see how the court could be satisfied that the disruptive impact which disputes over compliance would have on the conduct of Shell's business would not of itself have the serious impact on the success of Shell for the benefit of its members as a whole, which [the appellant] contends that these proceedings are designed to avoid". The Judge further doubted what legitimate purpose the grant of a declaration would fulfil".

Contrary to the appellant's submissions, the Judge's comments make good sense.

Section 263(2)(a)

The Court is required by section 263(2)(a) of the 2006 Act to refuse permission if satisfied that "a person acting in accordance with section 172 … would not seek to continue the claim". The Judge concluded that "such a person would not do anything other than decline to continue the claim" and, hence, that it "can now be seen on the basis of the existing evidence that the court would be bound to refuse [the appellant] permission to do so come what may". The Judge was amply justified in taking this view, and that provided a sufficient basis for dismissing the claim.

Ground 5

The Judge was also justified in concluding that the appellant had not adduced sufficient evidence to counter the inference of collateral motive. There is every reason to think that the appellant has brought the claim to advance its policy agenda rather than to enhance or protect the value of its very small shareholding. In fact, given the appellant's objects, it is hard to imagine that it holds its 27 shares for investment purposes at all.

Ground 6

This Court is slow to interfere with discretionary decisions as to costs. There is no likelihood of its doing so in the present case. The Judge gave cogent reasons for the order he made. The quantum of costs is a matter for assessment or agreement. The Judge did not attempt to quantify the costs, nor order a payment on account.

Signed: BY THE COURT
Date: 14 November 2023

Notes

(1) Rule 52.6(1) provides that permission to appeal may be given only where –
   a) the Court considers that the appeal would have a real prospect of success; or
   b) there is some other compelling reason why the appeal should be heard.

(2) Where permission to appeal has been refused on the papers, that decision is final and cannot be further reviewed or appealed. See rule 52.5 and section 54(4) of the Access to Justice Act 1999.

(3) Where permission to appeal has been granted you must serve the proposed bundle index on every respondent within 14 days of the date of the Listing Window Notification letter and seek to agree the bundle within 49 days of the date of the Listing Window Notification letter (see paragraph 21 of CPR PD 52C).

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