Claim No. BL-2023-000215

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

B E T W E E N:

CLIENTEARTH

Applicant

and

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

Proposed Respondents

CLAIMANT'S SKELETON ARGUMENT FOR ORAL HEARING ON 12.07.2023

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*References in the form of **[H/tab/page number]** are to the hearing bundle*
*References in the form of **[A/tab/page number]** are to the bundle of authorities filed with this skeleton.*

1. ClientEarth applies under CPR 19.15(10) for reconsideration of the Court's dismissal of its application for permission to continue its derivative claim (the "**Application**"). The Judgment of Trower J refusing permission was handed down on 12.05.2023 (the "**Judgment**") **[H/1/3-20]**.

2. The application discloses substantially more than a *prima facie* case for permission. The order of 12.05.2023 dismissing the Application **[H/2/21-22]** should be set aside and an order should be made joining Shell to the Application.

3. The structure of this skeleton is as follows:

   3.1. Section I summarises ClientEarth's case;

   3.2. Section II outlines the approach to the evidence at this *prima facie* stage; and

3.3. Section III outlines those aspects of the Judgment which fall to be reconsidered and why the Court should reach a different view to that which it has expressed in the Judgment.

I. THE SUBSTANCE OF THE APPLICATION

4. 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: **[A/1/3-5]** and **[A/2/6-8]**. The Application was supported by witness statements from Paul Benson ("**Benson 1**") **[H/7/83-154]** and William Hooker ("**Hooker 1**") **[H/6/61-82]**.

5. As the Court has identified, ClientEarth alleges three overarching breaches, arising from: (1) the setting of inadequate targets (PoC ¶¶51-52) **[H/5/46-47]**; (2) the means adopted to meet Shell's climate goals (PoC ¶53) **[H/5/47-48]**; and (3) non-compliance with obligations under the Dutch Order (PoC ¶63) **[H/5/51]**.

6. The substance of the claim is summarised at Judgment ¶¶ 13-17, 21-22, 27-45, 49-53 **[H/1/6-8, 8-9, 10-15, 16-17]**. 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*": ¶25 **[H/1/9]**. That, however, is not ClientEarth's case; if it were, it would plainly be contrary to well-established principle.

7. Rather, the premise of ClientEarth's case is that Shell's directors have <u>already identified</u> that climate change risk is a material factor that impacts on their duties to promote the commercial success of the company. The parties <u>both</u> consider that the long-term success of the company requires an effective and workable climate change strategy. Having so recognised, ClientEarth's claim arises from the fact that, *prima facie*, the strategies adopted by the directors constitute a breach of their duties as they apply in context.

8. Specifically:

8.1. The directors have set a 'NZ Target' to transition Shell into a 'net-zero' business by 2050 by reducing absolute emissions to net zero; and

8.2. The directors have committed Shell to be 'Paris-aligned', meaning that Shell will transition its business to align with the global temperature objective ("**GTO**") of 1.5^{o}c in the Paris Agreement.

(together, the "**Climate Strategy**")

9. The Court is not being asked to review the decision to adopt the Climate Strategy; to do so would be akin to asking the Court (as put by Lord Wilberforce in *Howard Smith v Ampol* [1974] AC 821 **[A/7/24]**) "*to act as a kind of supervisory board*": Judgment ¶25 **[H/1/9]**.

10. Rather, having determined that achieving the Climate Strategy would be in the best interests of the company as the directors have, ClientEarth's case is that the plans adopted by the directors to achieve the Strategy are irrational and amount to a breach of duty. They fall outside the range of reasonable decisions open to the directors because they do not put Shell on any reasonable pathway to meet the outcomes which the Board accepts are required to promote the success of the company.

11. The claim in relation to the Dutch Order is brought on a similar basis. 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 "*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".* Although it is true that Shell has "*freedom*" on how best to comply, the plans which the directors have put in place are irrational, because they do not put Shell in any position to achieve the reductions required by 2030.

12. Unpacking the above in more detail: the key constituent elements of the claim are as follows.

13. 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: Judgment ¶33 **[H/5/12]**. It follows from that proposition that a director acting in accordance with their statutory duties is required to consider and manage climate change risks. So far as ClientEarth is aware, that is not in dispute.

14. Second, as noted above, the directors have (1) set the NZ Target; and (2) declared alignment with the GTO. The directors have already determined that fulfilling the Climate Strategy is necessary to protect medium and long-term shareholder value: PoC ¶¶26, 27, 30-32 **[H/5/39-40]**.

15. Third, the goals set out in the Climate Strategy are not empty epithet; they are important and objectively measurable. Moreover, transitioning from its current business to meet the Climate Strategy requires dramatic changes to Shell's existing business model. To illustrate the scale of change required, Benson 1 ¶¶30-31 **[H/7/96-97]** refers to the following two figures:

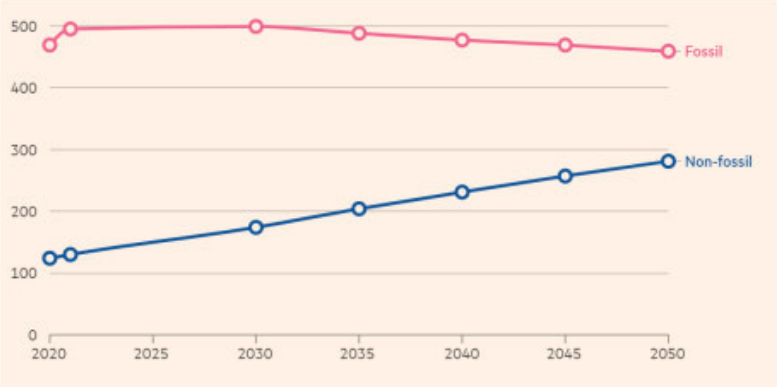

Figure 2 - The trajectory of fossil fuel and non-fossil fuel supply under STEPS (in exajoules) (2022)[69]

Figure 1 - The trajectory of fossil fuel and non-fossil fuel supply under NZE 2050 (in exajoules) (2022)[68]

16. The top figure projects the global balance between fossil and non-fossil fuel supplies in a STEPS scenario, meaning it reflects current policies in place. The bottom figure

projects the balance that would be required in an NZE 2050[1] scenario. These projections reflect global forecasts, but they illustrate the shift away from fossil fuel supplies required in the immediate term on a global scale, in order gradually to phase out these energy sources.

17. Fourth, climate science is a complex but well-established field. Benson 1 ¶11 **[H/7/86-87]** summarised the primary sources to which he refers,[2] 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, both on the threats posed by climate change and on pathway models – that is, the modelling of projections to analyse whether particular strategies are aligned with the GTO.

18. Fifth, research organisations can and do scrutinise oil and gas companies' disclosures and business strategies by reference to stated climate objectives. Benson 1 refers to some of the available research. The picture is alarming when one considers what the directors are seeking to achieve. For example:

    18.1. Benson 1 ¶¶104-105 cite research from four different organisations that have all independently concluded that Shell's existing strategy is not aligned with the GTO and will not meet the NZ Target **[H/7/120-121]**.

    18.2. In particular, one organisation has noted that NZE 2050 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 **[H/7/120-121]**. That illustrates how dramatically short Shell's current plans fall.

19. Sixth, the Court is not being asked to evaluate Shell's approach to climate change risk as a whole. It is being asked to consider the specific breaches pleaded by reference to the Board's stated Climate Strategy.

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1 NZE 2050 is a normative scenario developed by the International Energy Agency ("**IEA**") that shows a pathway for the global energy sector to achieve net zero carbon emissions by 2050.

2 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 explain the scientific consensus.

20. The breaches pleaded at PoC ¶¶51-52 and 63 are similar in that both relate to target setting **[H/5/46-47, 51]**. In stages:

    20.1. In line with its NZ Target, Shell has a target of a 100% reduction for all emissions (that is, Scopes 1, 2, and 3) by 2050. Separately, the Dutch Order requires Shell to reduce all emissions by net 45% by 2030, relative to 2019 levels.

    20.2. Over 90% of Shell's emissions are Scope 3 emissions. However, Shell has no absolute emissions targets for its Scope 3 emissions before 2050.

    20.3. Shell has opted, instead, to set intensity targets. 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 **[H/7/100-101]**.

    20.4. ClientEarth's case is that the directors' decision to avoid absolute emissions targets in respect of Scope 3 emissions falls outside the range of reasonable decisions by a director acting in the best interests of the company.

21. Put another way: the directors (1) have already determined that achievement of the Climate Strategy is in the company's best interests; and (2) that Shell is required to comply with the Dutch Order. The question is whether there is any basis on which the directors can reasonably conclude that the refusal to set any short or medium term emissions targets for Scope 3 emissions would be in Shell's interest, bearing in mind the need to meet the objectives of the Climate Strategy and comply with the Dutch Order. The argument is concerned with the rationality 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.

22. Seventh, the breach pleaded at PoC ¶53 **[H/5/47-48]** is more fact-intensive than those at ¶¶51-52 and ¶63, because it requires more detailed understanding of Shell's business. However, 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 Climate Strategy.

23. Resolving the breaches alleged will be factually intensive, but the cornerstone of the assessment is irrationality and the Court is able to make that evaluation. The fact that it may involve some detailed factual consideration in due course 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 matters at trial.

24. Moreover, there is more than sufficient material presently before the Court that allows the Court comfortably to reach the conclusion that there is a *prima facie* case for permission here. For example, the breach pleaded at PoC ¶53.1 **[H/5/48]** is that, despite Shell's Climate Strategy requiring a decline in fossil fuel production, Shell continues to invest heavily in fossil fuel projects. The scientific consensus is explained at Benson 1 ¶¶126-136 **[H/7/127-130]**. The IEA 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. The question is: is there any basis on which a director could reasonably conclude that further investment in fossil fuel projects would be in the interests of Shell, bearing in mind its Climate Strategy (which has been set to manage the company's commercial and financial risks)? There is no reason why the Court could not make that assessment, and the material already available discloses at least an arguable case that the directors are adopting an unreasonable approach.

25. Eighth, it is public knowledge that Shell itself has significant doubts as to whether its current policies will meet its stated Climate Strategy. For example:

    25.1. 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 **[H/6/68-70]**. The Judgment at ¶54 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*") **[H/1/17]** but gives no elaboration. Moreover, the question is not whether the directors are or are not genuine – but rather whether there is any basis on which the directors could reasonably have adopted their approach.

    25.2. Benson 1 ¶101 refers to Shell's former CEO's comments at the 2021 AGM, stating that he could not say whether the company would meet its emissions

targets even if it met its intensity targets **[H/7/119]**. That is akin to an admission that the directors' decision to set intensity targets for Shell is seriously problematic, because – as the scientific consensus confirms, as described above – such intensity targets are not necessarily correlated with absolute emissions targets. The Judgment does not refer to this evidence.

25.3. 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*" **[H/7/119]**. 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 EVIDENCE

26. The Court is in an unusual position, in that (1) ClientEarth has 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 has made submissions in response (but without serving any evidence, given the nature of this first stage). ClientEarth can only emphasise that all that is required at this first stage is to establish a *prima facie* case for permission to continue the claim.

27. The starting point is that the derivative procedure mechanism 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." **[A/20/375]**

28. The *prima facie* stage under s. 261 **[A/3/9-11]** is distinct from the exercise of discretion by reference to the factors under ss. 263(3) and 263(4) **[A/5/15-17]**. The evidentiary

picture will emerge only later – to a limited extent at the second stage under ss. 263(3) and 263(4) and to a full extent at trial.

29. That being the case, as stated by Leech J in *McGaughey & anor v University Superannuation Scheme Ltd & ors* [2022] EWHC 565 at [12] **[A/8/36-37]**: "*the test at the first threshold stage is not a high one*".

30. *McGaughey* was concerned with (among a number of other things) a claim that the directors of a company "*ought not have continued to invest in fossil fuels without any or any proper plan for investment*": [6] **[A/8/35]**. Permission was initially refused on the papers at the *prima facie* stage but granted after oral argument. Such was the applicable threshold at the *prima facie* stage, that Leech J refrained from any detailed engagement with the merits of the arguments presented, lest the Court wrongly prejudge the issues before hearing full argument:

> "It seems to me that at this stage I should go no further than recording the submissions which [counsel] has made to me without expressing any views about their merits. If the USS or the Directors themselves wish to challenge those submissions or the application of the derivative claim procedure in the present case, then I will hear detailed argument at the *inter partes* stage." [17] **[A/8/37]**

31. That has an important practical impact on the treatment to be given to the applicant's evidence. 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] **[A/9/51]**:

> "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."

32. Further, at [49] **[A/9/52]**:

> "(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."

33. Thus, as Peter Knox KC noted, in *Abouraya v Sigmund* [2015] BCC 503 **[A/10/66-83],** David Richards J assessed the "*totality of the evidence 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] - **[A/10/80]**.

34. See further *Bhullar v Bhullar* [2016] BCC 134 at [25] **[A/11/92]** :

> "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."

35. The correct approach at this stage is to take ClientEarth's evidence at its highest (cf Judgment at ¶¶46, 53, 54 **[H/1/15, 17]**). In this regard, Benson 1 (¶8(c) **[H/7/85]**) and Hooker 1 (¶14 **[H/6/64]**) both explained why expert evidence was held back at the *prima facie* stage (in short, because there was not yet permission, which was a logical and reasonable approach).

III. POINTS FOR RECONSIDERATION

36. ClientEarth respectfully submits that the following points fall to be reconsidered.

'Incidents of the statutory duty'

37. At ¶¶19-21 **[H/1/8]** the Judgment criticises the "*incidents of the statutory duty*" pleaded in the PoC and summarised at Judgment ¶16 **[H/1/7]**. The Court said that the duties improperly "*seek to impose specific obligations on the Directors as to how the management of Shell's business and affairs should be conducted*" (¶19).

38. The pleading of the incidents does no more than set out what the statutory duties created by Parliament mean in the individual circumstances. They do not (and are not intended to) replace the statutory duties, but merely to articulate what they are likely to mean in practice. It may be that, at trial, the Court disagrees with ClientEarth as to the existence of some or all of the alleged incidents. However, that would not affect ClientEarth's case that the breaches it has identified are breaches of the statutory duties. In other words, even if the Court does not, at trial, agree with ClientEarth's formulation of the incidents, its case can still succeed.

39. Indeed, the principal point is that Shell's directors accept that climate change presents a material risk to the company and have already identified the Climate 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.

40. Once that is understood, the incidents of duty pleaded arise as a matter of logic:

    40.1. 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. Even if that were not the case, the duties would naturally arise from the language of s. 172 itself, which requires directors to "*have regard to…the impact of the company's operations on the community and the environment*" **[A/1/3]**;

    40.2. 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 **[A/2/6]**. A decision by a director which defied accepted science would be a potentially actionable breach;

40.3. The duty at (iii) has in substance already been accepted by Shell. It necessarily follows from the setting of the Climate Strategy. Had that Strategy not been considered by the directors to be in the best interests of the company, it would not have been set;

40.4. 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 Climate 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 them; and

40.5. 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.

Treatment of Benson 1

41. The Judgment criticises Benson 1 at ¶46 **[H/1/15]**, stating that "*the court can place very little weight on the opinions expressed by Mr Benson*". It goes on to say one of the "*fundamental reasons…the breaches of duty pleaded…do not establish a prima face case*" is that given Mr Benson's background as a lawyer "*neither he nor Client Earth is able to give expert evidence on which the court can properly rely*".

42. With respect, that approach was wrong:

42.1. First, as noted above, Benson 1 ¶8(c) **[H/7/85]** and Hooker 1 ¶14 **[H/6/64]** make clear that ClientEarth's intention is to adduce expert evidence at a later stage upon obtaining permission to do so under CPR r. 35.4(1). 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. Further, it is not reasonable to require or expect ClientEarth to adduce detailed expert evidence on these issues at the *prima facie* stage – that is to put an applicant in the impossible

position of having to decide whether to risk putting in (and bearing the cost of) CPR 35 compliant expert evidence without any permission to do so.

42.2. Second, Benson 1 was not opinion evidence. Its aim was to consolidate and present the available research to the Court, subject to ClientEarth's duty of full and frank disclosure. This is evidence of fact. Benson 1 ¶10 states:

> "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." **[H/7/86]**

42.3. Third, the only 'opinions' noted in the Judgment relate to Section C of Benson 1, which Judgment ¶36 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*" **[H/1/12]**. But Section C was not a statement of Mr Benson's opinion. It is a summary of ClientEarth's case and what ClientEarth will allege.

42.4. Fourth, there was no "*analysis*" contained in Section C which was not tied to Shell's own disclosures or third-party research reflecting the scientific consensus. The criticisms made were not 'opinions', but references to conclusions drawn by the wider climate science community:

42.4.1. As to C(1) ("*emission reduction targets*"), Benson 1 ¶¶101-105 cite the research underlying the consensus that intensity targets are not sufficient to achieve emissions reductions **[H/7/119-121]**.

42.4.2. As to C(2) ("*new projects*"), ¶¶125-128 and 132-135 cite 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 **[H/7/126-127, 128-130]**.

42.4.3. As to C(3) ("*capital expenditure*"), ¶147(d) cites the World Benchmarking Alliance's conclusion that Shell's investment in non-fossil fuel investment "*are not changing at the rate required*" to deliver GTO alignment **[H/7/134]**.

42.4.4. As to C(4) ("*Carbon capture and storage/nature-based solutions*"), ¶¶156-161 cite the research underlying the consensus that there are well-recognised difficulties with both technologies **[H/7/137-139]**.

42.5. 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 Shell's current plans do not put the company in a position to meet the Climate Strategy to which it has committed. As put at Benson 1 ¶13(d), the Board's management of climate change risk is "*fundamentally unreasonable, by reference to independent third-party research and assessments*" **[H/7/88]**. If accepted, a director acting reasonably would take note and change the course of Shell's strategy.

'universally accepted methodology'

43. At ¶47 the Judgment states that "*it is very difficult to treat what is said as providing a proper evidential basis for alleging that no reasonable board of Directors could properly conclude that the pathway to achieve is the one they have adopted*" **[H/1/15]**. The reason given is that there is no "*universally accepted methodology as to the means by which Shell might be able to achieve the targeted reductions referred to in the ETS*".

44. However, it is not the law that, because there is no single universally accepted way of achieving a particular goal which it is agreed is in the company's best interests, it would be impossible for the Court to assess whether a business decision implemented by the Board to reach that goal falls outside the realm of rationality.

45. Rather:

45.1. The question for the Court is not of identifying a singular (or even best) method of achieving the Climate Strategy. It is whether the directors' methods fall within

a reasonable range of methods open to directors seeking to meet the goals of the Climate Strategy.

45.2. ClientEarth's case is that the director's strategy does fall outside the reasonable range. That case is supported by a significant volume of independent analysis and scientific consensus.

45.3. In fact, taken at its reasonable highest, the evidence before the Court is that on its current trajectory, Shell will not meet the goals set out in its Climate Strategy.

45.4. Thus, regardless of the fact that there may be different ways to deliver on the Climate Strategy, the point is that the approach taken by the directors is not one of them.

'does not engage"

46. At ¶48 the Judgment states that "*the evidence does not engage with the issue of how the Directors are said to have gone so wrong in their balancing and weighing of the many factors which should go into their consideration of how to deal with climate change…that no reasonable director could properly have adopted the approach that they have*" **[H/1/15-16]**.

47. ClientEarth respectfully disagrees. Shell's directors have already considered "*how to deal with climate change*". They have set the Climate Strategy. ClientEarth's case is concerned with the approach that has been adopted in trying to achieve the objectives of the Climate Strategy, which ClientEarth says falls outside a reasonable range of options open to the directors. Its case is squarely put on the basis that no reasonable decision-maker could have made the decisions taken to date: see e.g., Pallas' letter of 24 April 2023 ¶6 **[H/10/186]**. The evidence set out and referred to in Benson 1 provides a wealth of material explaining how the directors have gone wrong: their decisions are not ones reasonably open to them, because they do not evince a realistic approach to achieving the Climate Strategy.

48. Insofar as the Court was suggesting that ClientEarth should have engaged in a detailed analysis of Shell's internal decision-making process, to explain and challenge *how* Shell's directors came to the conclusions they did, that is not within ClientEarth's gift – precisely how Shell's directors reached the conclusions they did is a matter only within

their knowledge, and ClientEarth cannot be expected to engage with this at this stage, prior to disclosure. What matters however is that ClientEarth can demonstrate that when one measures the decisions taken against the Climate Strategy they are expected to achieve, the disconnect between the two is so significant that the decisions taken cannot be within the range of reasonable decisions open to the Board. This is a legitimate way to proceed and is analytically sound.

The Dutch Order

49. At ¶49-53 the Judgment **[H/1/16-17]** considers the alleged breach relating to compliance 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*".

50. The Judgment takes a similar (and, in ClientEarth's submission, incorrect) approach to van Mierlo 1 as it did Benson 1. At ¶53 the Judgment criticises van Mierlo 1 for failing to "*comply with CPR PD35 because it is addressed to ClientEarth's solicitors not the court, it does not exhibit his instructions, it does not contain the statement identified in PD35 para 3.2(9) and it is not verified by the statement of truth required by PD35 para 3.3*" **[H/51/17]**. Those are not reasons to discount van Mierlo 1 at this *prima facie* stage. Van Mierlo 1 is a legal opinion issued to Pallas, which forms part of Mr Hooker's evidence. It is not a CPR 35 compliant report because ClientEarth does not yet have permission to adduce expert evidence. The Court has flexibility on how matters of foreign law are to be proven: see *Chancery Guide §9.46* **[A/22/383]** and *FS Cairo (Nile Plaza) LLC v Lady Brownlie* [2021] UKSC 45 at [148] **[A/12/157]** per Lord Leggatt: *"The old notion that foreign legal materials can only ever be brought before the court as part of the evidence of an expert witness is outdated*".

51. For that reason, it is not unusual in *ex parte* procedures for matters of foreign law to be dealt with as ClientEarth has (for example, if foreign law is relevant to an application for a freezing order or an application for permission to serve out of the jurisdiction). This is a pragmatic and reasonable approach at this early stage of the process. Once again, this is also a circumstance in which the Court should have taken the evidence "*at its reasonable highest*". If it proves to be disputed at the *inter partes* stage, the approach to Dutch law can be subject to discussion and direction by the Court at that point, including

potentially the granting of permission to the parties to adduce CPR 35 compliant expert reports.

52. Instead of adopting this approach, it appears from ¶¶52-53 that the Court considered the Dutch Judgment of its own accord and in the absence of full submissions from the parties, picking out a passage which "*seems to me to cut across*" the conclusions in van Mierlo 1 **[H/1/16-17]**. That approach is wrong in principle. The effect of the Dutch Judgment/Order is a matter of Dutch law, which is a matter of fact to be proved. The only evidence currently before the Court is van Mierlo 1, and the correct approach was to take that evidence at its highest.

53. The Court also erred in determining summarily (at ¶¶22-23) against ClientEarth its case in respect of the additional duties (or "further obligations") **[H/1/9]**. Section 172(1)(e) requires a director to have regard to the desirability of the company maintaining a reputation for high standards of business conduct, which is apt to include compliance with a foreign court order **[A/1/3]**. Section 174 requires a director to exercise reasonable care, skill and diligence **[Hearing Bundle / 2 / 6]**. As the Court identified at ¶24 **[Hearing Bundle / 1 / 9]** the relevant proposition is whether the directors' approach to the Dutch order is in breach of the English law duties. That is the basis on which ClientEarth puts its case and it is not possible, summarily, to determine that there can never be any such duty or application to these circumstances. The scope of the English law duty in relation to a foreign court order is a matter which justifies proper examination, rather than summary disposal.

The relief sought

54. At ¶¶55-58 **[H/1/17-18]** the Judgment criticises the relief sought, on the basis that:

    54.1. The mandatory injunctive relief sought is "*too imprecise to be suitable for enforcement*" (¶57) **[H/1/17]**; and

    54.2. As to the declaratory relief sought, "*it is difficult to see what legitimate purpose the grant of a declaration would fulfil*", and "*It is not the court's function to express views as to the Directors' conduct which have no substantive effect and which fulfil no legally relevant purpose*" (¶58) **[H/1/18]**.

55. ClientEarth invites the Court to reconsider these conclusions for a number of reasons.

56. First, the notion that the injunctive relief sought is imprecise does not engage with the substance of ClientEarth's case. Whether or not the relief sought is imprecise depends on the nature of the breaches that will be found. For example, if the Court accepts ClientEarth's case that the Board's strategy is irrational because the setting of intensity targets is not a substitute for absolute emissions targets, then the breach will be remedied by ordering Shell to set emissions targets accordingly. That is neither imprecise nor requires undue policing.

57. Second, the propositions about declaratory relief at ¶58 **[H/1/18]** cut across CPR r. 40.20, which provides that "*The court may make binding declarations whether or not any other remedy is claimed*". They also cut across the case law concerning when declaratory relief should be granted under CPR r. 40.20. See the summary of the relevant authorities by Master Thornett in *Day v Bryant* [2018] EWHC 158 (QB) at [32-34] **[A/13/191-192]**, applying guidance from Neuberger J in *Financial Services Authority v John Edward Rourke* [2002] C.P. Rep. 14:

> "the court should take into account the justice served respectively to the claimant and to the defendant, whether the declaration will serve a useful purpose, and whether there are any other special reasons why or why not the court should grant the declaration" **[A/14/225]**

58. Thus, in *Rolls-Royce plc v Unite the Union* [2009] EWCA Civ 387 **[A/15/241 – 285]**, the Court of Appeal held that it was a proper exercise of discretion to grant declaratory relief about the redundancy selection process under the Employment Equality (Age) Regulations 2006, after the company and union took opposing views about the operation of the Regulations at meetings: see [17] **[A/15/245]**. The reasons, in essence, were that the declaratory relief sought concerned the construction of statute, there was public importance, and the question was likely to affect a large number of people: [51-60] **[A/15/254 – 255]**.

59. That reasoning applies with equal force here. It would be extremely surprising if the Court ultimately concluded at trial that Shell's directors had breached their duties as alleged, but yet refused to grant any relief. The significance of these alleged failures, their potential impact on the business and the importance of directors acting in a company's best interests generally – and not being able to get away with not doing so – militate

firmly in favour of the Court granting such relief, if it were satisfied that the underlying criticisms of the directors' conduct were made out.

60. As to the likely effect of any declaration, were the Court to declare that Shell's current strategy to attain the Climate Strategy amounted to a breach of duty by the members of the Board, it is simply unimaginable that the Board would not then revisit their decisions and pursue a new strategy which complied with their statutory duties. The precise content of any new strategy is of course a matter for the Board, not ClientEarth or the institutional investors supporting ClientEarth's claim.

s. 263(2)(a)

61. At ¶59 **[H/1/18]** the Judgment concludes that "*on the totality of Client Earth's own evidence, the court can be satisfied that a person acting in accordance with s. 172 CA 2006 would not seek to continue the claim. This means the court is bound to refuse ClientEarth permission to do so come what may (s. 263(2)(a))*".

62. The paragraph begins with "*It follows*", but it is not clear to ClientEarth to what specifically this refers. ClientEarth's claims are that the directors are in breach of their duties under s. 172 and s. 174. If those claims are good (which they would be, taking ClientEarth's evidence at its highest at this *prima facie* case), then there is no reason why a director acting in accordance with s. 172 would not consider it appropriate to continue them. Neither Shell's submissions nor the Judgment identify any. It may be that the Court did not intend to be adding anything substantive in this paragraph of the Judgment; ClientEarth raises the point here for completeness.

Good faith

63. At ¶¶60-65 **[H/1/18-19]** the Court further reviewed its conclusion that ClientEarth has not made out its *prima facie* case, by reference to the factors at ss. 263(3) and (4). The conclusion drawn by the Court is that they are "*confirmatory of the fact that a person acting in accordance with s. 172 would not seek to continue the claim*".

64. The Judgment then focuses on the requirement under s. 263(3)(a) ("*whether the member is acting in good faith in seeking to continue the claim*") **[A/5/15]**, and concluded at ¶64:

> "it seems to me that where the primary purpose of bringing the claim is an ulterior motive in the form of advancing ClientEarth's own policy agency with

the consequence that, but for that purpose, the claim would not have been brought at all, it will not have been brought in good faith. The reason for this is that it will be clear to ClientEarth that it is using an exceptional procedure in the form of a derivative action, for a purpose other than the purpose for which the legislation has made it available." **[H/1/19]**

65. ClientEarth respectfully submits that:

65.1. First, the Court was wrong in principle to apply a "but-for" test, which is not found in the wording of the statute. The test emerges from the judgment of Lewison J in *Iesini*, 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 (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] **[A/17/334]**.

65.2. Second, 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 **[A/18/336-367]**): see *Iesini* at [119] **[A/16/317]**. 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*" then 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 tends to suggest that Lewison J was not intending to set down some sweeping or indiscriminate rule, given the fact-sensitive nature of these assessments; and to the extent that his judgment is to be interpreted as doing so, then that approach was wrong. There is no abuse of process (and therefore no lack of good faith) if the 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, it is respectfully submitted that the question of a party's good (or bad) faith cannot 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 more nuanced approach.

65.3. Third, in this case, as explained further below, ClientEarth's pursuit of the claim in Shell's best interests (and ClientEarth's genuine belief that the relief it seeks is in Shell's best interests) is fully consistent with, and closely related to, its wider policy agenda as perceived by the Court. There is no tension between these two aspects. That is demonstrated by the fact that (as explained further below) ClientEarth's case has support for this claim from a broad church of pension funds and asset managers with a total of £450 billion of assets under management: Benson 1 ¶165 **[H/7/141]**.

65.4. Fourth, and in any event, the Court should not have reached a final conclusion as to ClientEarth's "*primary purpose*" on an *ex parte* paper application. As the NSW Court noted in *Swansson v Pratt* [2002] NSWC 583 ¶46 **[A/23/392]** "*the requirement of good faith for the purposes of s.237(2)(b) is determined on a final basis, not on an interlocutory basis, and the parties must contest the issue on that footing. It is highly unsatisfactory for the Court to have to determine the issue of good faith on the basis of equivocal, incomplete documentary evidence and the bare assertions and counter-assertions of witnesses whose credit has not been tested by cross examination.*"

66. Addressing this last point more fully, the position on the evidence is as follows:

67. First, Benson 1 ¶8(e) states that ClientEarth "*genuinely believes this claim to be in the long-term best interests of the company, its shareholders and employees*" **[H/7/85]**. There is no evidence before the Court as to whether (and what) ulterior motive ClientEarth has, nor any basis to disbelieve Mr Benson. The fact that this view also aligns with other views held by ClientEarth is neither here nor there. In ClientEarth's submission, that ought to be the end of the analysis. It is notable in this regard that a number of other shareholders (with significantly greater shareholdings) also share

ClientEarth's concerns and support this claim (see in particular Hooker 1 ¶¶58-61 **[H/6/77-78]**).

68. Second, it is true that ClientEarth is an environmental law charity. 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] **[A/19/371]**. But the fact that ClientEarth has a policy agenda or holds comparatively few shares cannot legitimately substantiate an inference of lack of good faith. If it were otherwise, that would mean the derivative action procedure is in principle not available to certain shareholders – *e.g.,* any organisation with a so-called ulterior social agenda (non-profit organisations, the Church of England, etc), or indeed any small shareholder. That would have dramatic policy implications. There is nothing in the statutory language to suggest that that was the intention of Parliament. Indeed, "*if the claimant brings a derivative claim for the benefit of the company, he will not be disqualified from doing so if there are other benefits which he will derive from the claim*": see *Iesini v Westrip Holdings* [2010] B.C.C. 241 at [121] **[A/16/318]**.

69. Third, to the extent this analysis in the Judgment arises from Shell's submissions at ¶14 (citing the Parliamentary debates) **[H/8/160]** the comment made in Parliament about "*a pressure group pursuing a viewpoint that is not about the commercial success of the company*" is inapposite. It ignores the fact that Shell's directors have already determined that the Climate Strategy is in the company's commercial interests. It is in everyone's commercial interests that it does so lawfully.

70. Yet further, there is no tension between ClientEarth's desire to ensure that Shell's Board takes decisions which are within the range of reasonable decisions available to them in light of the Climate Strategy, and any wider policy agenda which the Court considers that ClientEarth may have. ClientEarth's claim is directed at requiring the directors of Shell to take steps to render the business resilient to climate change – able to meet the Climate Strategy and to thrive commercially whilst doing so. There is nothing incompatible between this, and any wider objectives that the Court may consider ClientEarth may hold or which have caused the claim to be pursued.

71. In this regard, s. 172 makes plain that Shell's commercial interests and environmental considerations are not mutually exclusive. The Parliamentary intent behind s. 172 was summarised by the then-Minister of State for Industry:

> "[s. 172][3] heralds and articulates a radical, historic and vital cultural change in the way in which companies conduct their business—a change that the Government enthusiastically promote in the Bill. In the past, business success in the interests of shareholders has been thought to be in conflict with society's aspirations for people who work in the company or in supply chain companies, the long-term well-being of the community and the protection of the environment. The Government challenge that view. We think that the two purposes are complementary, not contradictory." **[A/21/379]**

72. This case is a very good example of this, given the nature of climate change as a material financial risk.

Views of other members

73. The Judgment at ¶¶67-70 **[H/1/19-20]** concerns the factors at ss. 263(2)(b) and (c) and 263(4). It is rightly noted that no authorisation or ratification has occurred (¶67), so there can be no sound conclusions about the level of support for the ETS for the purposes of s. 263(4).

74. However, it appears to ClientEarth that the analysis in this section of the Judgment contains a number of material errors:

    74.1. ¶68 states that "*In my view, Shell is correct to say that the strength of the members' support for the Directors' strategic approach…is a factor to which the court is bound to have particular regard*". But it is very important to bear in mind what the members are said to have supported **[H/1/20]**. As explained at Benson 1 ¶169, the vote in question was expressly stated to be "*purely advisory*", "*will not be binding on shareholders*", and "*does not shield or abdicate the Board's or management's legal obligations under the UK Companies Act*" **[H/7/142]**. It is therefore wrong as a matter of principle for the Judgment to construe the vote as reflective of shareholder views on the Board's obligations under the Companies

[3] Note at the time of this Parliamentary debate what is now s. 172 was previously framed as s.173.

Act. And even if the vote *was* reflective of shareholder views, those shareholders were (1) voting on the assumption that the Board were not acting in breach of duty; and (2) voting on the basis of partial information.

74.2. ¶69 downplays the support which ClientEarth has received for its claim, apparently on the basis that the letters of support received "*all appear to be based on a detailed common template*" and are "*in any event a very small proportion of the total shareholder constituency*" **[H/1/20]**. The Judgment does not explain how either of those features are relevant. It is wrong to discount the support ClientEarth's case has because of the format in which that support is communicated. There is also nothing in the statutory language which calls for an assessment of the size of the membership for the purpose of s. 263(4).

74.3. ¶70 states that the 'Follow This' resolution "*demonstrated material minority support for more information to be provided*". That misconstrues the resolution that was tabled **[H/1/20]**. As explained at Benson 1 ¶169(b), the resolution required that the company "*set and publish targets that are consistent with the goal of the Paris Climate Agreement*" – i.e., take steps that will deliver alignment with the GTO **[H/7/142-143]**.

Disposal

75. In all the circumstances, the Court is invited to reconsider and set aside its Order and to make directions for the matter to proceed to the *inter partes* permission stage.

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

SAM GOODMAN **JUDY FU**

28 June 2023

[redacted]