

Action Filed in UK Against Shell's Board Members Regarding Management of **Climate Risk**

NGO ClientEarth seeks to hold Shell directors responsible for acting against the company's interests on climate

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On February 9, 2023, NGO ClientEarth sued all eleven members of the board of directors of Shell plc before the English High Court, for allegedly failing to take steps to protect Shell against climate-change-related risks. The lawsuit is one of the first cases of its kind in Europe, in taking aim at individual board members with respect to climate matters.

The case is pending before the High Court of Justice of England and Wales, and has already received the public endorsement of several major European pension funds and asset managers invested in Shell.

In May 2021, Shell was ordered by a Dutch court in The Hague to cut its greenhouse gas (GHG) emissions by 45% by 2030 compared to 2019 levels (in line with the Paris Agreement). After the judgment – which was appealed by Shell – the company moved its headquarters to the United Kingdom.

This alert briefly summarises the case's arguments and its wider context.

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I. Background

Since its establishment in 2007, London-based ClientEarth has been a very active environmental litigant, with 170 lawsuits pending against governments and large corporates, and initiatives spanning more than 50 countries. Legal actions brought by ClientEarth target a range of issues, from plastic and chemicals pollution to greenwashing in product advertisements.

ClientEarth now looks to raise the stakes, by bringing claims against individuals instead of just companies.

The 2021 Dutch emissions judgment against Shell¹

In 2019, Shell was the target of a seminal suit filed by Dutch NGO Milieudefensie (“Friends of the Earth”), joined by 17,379 Dutch citizens.

On May 26, 2021, the District Court of The Hague issued a judgment ordering Shell to reduce net GHG emissions by 45% by 2030, in line with the global 1.5°C temperature goal pathway. For scope 1 and 2 emissions (which Shell has direct control over), the judgment sets a hard reduction requirement (*i.e.*, an “obligation of result”). For scope 3 emissions (which represents 85% of Shell’s total) the court set a “significant best efforts” obligation, in consideration of Shell’s ability to influence end users’ emissions through the energy package offered.

The claimants alleged that Shell was in breach of its duty of care towards nationals as sanctioned under Article 6:162 of the Dutch Civil Code, due to its failure to adequately reduce emissions deriving from its operations and the use of its products. The Dutch Code imposes on companies a duty not to act in conflict with what, “*according to unwritten law, has to be regarded as proper social conduct.*”

To determine the “proper social conduct” for Shell, the Dutch Court interpreted national norms on the basis of several elements. These included international “soft law”

instruments such as the “OECD Guidelines for Multinational Enterprises” and the “UN Guiding Principles on Business and Human Rights” – global standards that consolidate existing international law, and place a (non-binding) responsibility on companies to respect human rights and set policies to this effect.

The court also grounded its decision in climate science; it did so, for example, by considering the reports² of the UN Intergovernmental Panel on Climate Change (IPCC) – an inter-governmental institution that “*assesses the most recent scientific and technical information that is made available worldwide*”³ – and the analyses of the International Energy Agency (IEA) – which “*offers analyses and insights into developments in the energy market and what these developments signify for energy certainty, environmental protection and economic developments*”.⁴

Although Shell was not held liable regarding past emissions, the court declared its order, which imposes on Shell an obligation to reduce its emissions, provisionally enforceable. The court observed that breach of that emissions reduction obligation was “imminent”, and that the “*provisional enforceability of the order may have far-reaching consequences*” for Shell.⁵

Importantly, the Court held that Shell’s ultimate parent company and its board are responsible for setting climate policy across the whole group, in “[*all*] countries in which [*it*] operates”.⁶ It then noted that “*all enterprises regardless of their size, sector, operational context, ownership and structure*” have a responsibility to respect human rights, and do their part to help prevent dangerous climate change.

Shell appealed the ruling in March 2022. Around the same time, Milieudefensie put on notice 30 other companies with a footprint in the Netherlands, asking them to disclose their transition strategy or face potential action.

¹ The judgment in C/09/571932 / HA ZA 19-379 *Vereniging Milieudefensie and others v Royal Dutch Shell plc* (the “**2021 Shell Judgment**”) is accessible in English [here](#). For a detailed analysis of the 2021 Shell Judgment, see our dedicated alert [here](#). Cleary Gottlieb also published a comprehensive review of climate change litigation against corporates, accessible [here](#).

² See paragraphs 2.3.5.1 through to 2.3.5.4 of the 2021 Shell Judgment.

³ See paragraph 2.4.4 of the 2021 Shell Judgment.

⁴ See paragraphs 2.4.10 to 2.4.11 of the 2021 Shell Judgment.

⁵ See paragraph 2.5.7 of the 2021 Shell Judgment.

⁶ See paragraph 4.4.14 of the 2021 Shell judgment.

The Dutch appeal is unlikely to reach a conclusion for at least a few more years.⁷ Unless overturned before the English proceedings go to trial, the Dutch precedent may strengthen ClientEarth's position in the English proceedings.

II. The UK lawsuit against Shell's board members

The ClientEarth lawsuit against Shell's board is the first of its kind in Europe, although similar cases have been brought before US courts.⁸

(a) Claims brought

ClientEarth has brought a derivative claim against Shell's board members under Section 260 of the UK Companies Act 2006. This permits a shareholder to bring a claim on behalf of the company against its directors in respect of certain causes of action, including breach of the directors' duties to the company. The claim is brought for the benefit of the company (rather than the shareholder bringing the claim).

A shareholder requires the permission of the court to continue a derivative claim, which requires the court to be satisfied that the shareholder has established a "prima facie" case (taking into account certain discretionary factors prescribed by statute). The court is also required to automatically refuse permission to continue the derivative claim in certain circumstances, including where the court is satisfied that a person acting in accordance with the duty under Section 172 of the UK Companies Act 2006 to promote the success of the company (see below) would not seek to continue the claim.

These procedural and substantive hurdles mean that derivative claims are less common and more challenging to successfully pursue in the UK compared to certain other jurisdictions, including notably the US. Regardless of the prospects of success, derivative claims can be used by well-resourced activists to generate publicity and put pressure on UK public company boards.

ClientEarth accuses Shell's board members of breaching their duties to the company by:

- Failing to manage material risks posed to the company by climate change;
- Failing to adopt an energy transition strategy that is aligned with the Paris Agreement and as such protects the company and long-term shareholder value; and
- Failing to be on track to deliver a 45% reduction in the group-wide emissions by the end of the decade, as was ordered in the Milieudefensie case in 2021.

In its lawsuit, ClientEarth notes that Shell "faces a number of **material climate-related risks** arising from the **physical impacts** of the climate crisis, the effects of the energy transition, and the increased likelihood of litigation linked to regulatory compliance and climate inaction. Shell's facilities and other infrastructure are heavily exposed to extreme weather events and rising sea levels caused by climate breakdown". The company would also be exposed to considerable **transition risk** resulting from regulatory, market and societal shifts spurred by the energy transition. According to ClientEarth, "this puts many of the company's assets (which typically require huge capital expenditure and have decades-long operating lives) at serious risk of becoming stranded in future. As the energy transition progresses, the company is facing potentially massive write-downs."

ClientEarth claims that ensuring the company stays competitive in the energy markets implies a need to move away from fossil fuels, towards an alternative business model – a priority that Shell's group strategy and business plan allegedly do not take sufficiently into account. ClientEarth considers that this puts the company's long-term commercial viability at risk, potentially causing its value to plummet and causing significant capital loss to investors.⁹

ClientEarth also highlights a number of alleged inconsistencies in the company's net zero plan, including with respect to the fact that the group's net zero targets are not reflected in its operating plans or budgets. It also

3:19-cv-01067-K (N.D. Tex.).

⁷ The appeal process for *Urgenda Foundation v. Kingdom of the Netherlands* (where the Dutch state was condemned for climate inaction and ordered to lower national GHG emission by 25% before 2020 compared to 1990 levels) took over four years.

⁸ See, e.g., *In re Exxon Mobil Corp. Derivative Litigation*, No.

⁹ ClientEarth's press release on the claim can be accessed [here](#). Information made available on the lawsuit includes an FAQ document describing in some detail the claims brought (as here summarised).

cites third party research showing that the plan would result in a mere 5% reduction in overall net emissions by 2030 (contrary to the goals stated, and what was ordered by the Dutch court).

UK pension funds London CIV and Nest, Swedish pension fund AP3, French asset manager Sanso IS, Belgian Degroof Petercam, and Danish Danske Bank, Danica Pension and APPension, are among those to have written public letters supporting ClientEarth's claim. At the same time, it should be noted that, according to Shell, the company's transition strategy is widely endorsed by its shareholders. At Shell's last Annual General Meeting, for example, shareholders holding 3,525,014,244 shares in the company (almost 80% of the share capital represented at the meeting) voted to approve Shell's Energy Transition Progress as disclosed in the company's annual report.¹⁰

(b) Basis in English law

Under Section 172 of the UK Companies Act 2006, directors of UK companies are under a **fiduciary duty** to promote the success of the company for the benefit of its members as a whole. In doing so, directors are expected to consider (among a list of factors) the impact of the company's operations on the community and the environment.

ClientEarth also alleges a breach of the directors' obligations under section 174 of the UK Companies Act 2006, requiring company boards to exercise reasonable care, skill and diligence in the discharge of their duties.¹¹

ClientEarth articulates the risks to which Shell is subject in connection with climate change as composed of:

- Regulatory risk;
- Demand destruction;
- Increased taxes and fees;
- Stranded assets, revaluation and write-downs;
- Physical impacts;
- Sunken project approval costs;
- Increasing cost of and loss of access to capital;

and

- Higher litigation risk.

Recent regulatory developments in the UK suggest an increased focus on directors' role with respect to climate-related issues. One example of this is the introduction of mandatory climate disclosure requirements for listed companies and other large businesses in line with the recommendations of the "Task Force on Climate-related Financial Disclosures" ("TCFD"), which recommend, amongst other things, disclosures describing the board's oversight of, and management's role in assessing and managing, climate-related risks and opportunities. TCFD-aligned disclosures will provide shareholders and other stakeholders with a significant amount of new disclosure on climate-related risks, the expected impact of those risks on the company's future performance and strategy and the steps the company and its directors are taking to mitigate these risks. This will allow shareholders to more easily scrutinise directors' actions as regards climate risks and is expected to generate more opportunities for climate-related shareholder activism (including similar litigation) going forwards.

In 2019, Lord Sales (a Justice of the UK Supreme Court) gave a speech on directors duties and climate change, acknowledging the potential application of the UK Companies Act 2006 and the need for greater recognition of climate change in directors' decision-making. He emphasised that: "*Under certain circumstances...companies' interests may be so implicated by climate change effects that [directors']...general fiduciary and due care obligations actually require them to cause their companies to take action to reduce their contribution to climate changing activity.*" His views seemed particularly relevant for large company board members, as the Justice went on to explain that: "*Even as things stand, there is much force in the view that directors may and, increasingly, must take into account and accord significant weight to climate change in their decision-making. This is not least because a failure to act sustainably is more and more likely to have adverse financial impacts on companies who are, or are perceived to be, behind the curve on environmental issues*".¹² ClientEarth's claim would seem

¹⁰ See Shell's Result of Annual General Meeting, accessible [here](#).

¹¹ Section 172 of the UK Companies Act is accessible [here](#). Section

174 is accessible [here](#).

¹² Lord Sales' opinion is accessible in its entirety [here](#).

to explicitly refer to this speech.¹³

In terms of remedies, ClientEarth is requesting that the court issue *(i)* a declaration that the directors are in breach of their duties and *(ii)* an order that they adopt a strategy that includes GHG reduction targets aligned to the goals of the Paris Agreement, also in compliance with the 2021 Dutch judgment.

The High Court – which (in addition to exercising supervisory jurisdiction over all UK subordinate courts and tribunals) deals at first instance with high value and high importance civil law cases – will next decide whether to grant ClientEarth permission to continue its derivative claim against the Shell directors.

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¹³ Although ClientEarth has not made the integral text of the claim accessible yet, several documents made available on the NGO's website illustrate the legal basis and arguments behind the case. See in particular the slide deck presented at a webinar organised by ClientEarth and open to Shell's investors, [here](#). In the webinar,

ClientEarth encouraged investors to vote against the company's "Energy Transition Strategy" at the upcoming May 24, 2023 meeting, and to consider joining as co-claimants or third party interveners, to issue statements of support or consult with their asset managers.