# ClientEarth Ordered to Pay Shell's Costs After Dismissal of Derivative Claim Against Shell's Board of Directors

*September 6, 2023*

On February 9, 2023, ClientEarth, a non-profit environmental law organisation and UK registered charity, brought a claim against the directors of Shell plc ("**Shell**") before the English High Court, alleging breaches of their duties as directors for failing to take certain steps to protect Shell against climate-change related risks.[1]

On May 12, 2023, the English High Court refused ClientEarth's application for permission to continue its claim on the papers,[2] and this decision was reaffirmed, following oral submissions, in a judgment dated July 24, 2023.[3]

Following a hearing on costs, Mr Justice Trower, on August 31, 2023, ordered ClientEarth to pay Shell's costs in connection with all aspects of the action, including submissions and attendance during the prima facie stage.[4]

This memorandum explores the reasoning of the costs decision and its wider implications.

If you have any questions concerning this memorandum, please reach out to the authors or to your regular firm contact, including

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[1] Our alert memorandum relating to the commencement of these proceedings is accessible here. A follow-up set of Questions & Answers regarding derivative claims against directors in the context of ESG-related litigation is accessible here.

[2] *ClientEarth v Shell plc and others* [2023] EWHC 1137 (Ch) (the "**May 12 Judgment**"), accessible here. For further analysis of the May 12 Judgment, please refer to our firm's dedicated alert memorandum, accessible here.

[3] *ClientEarth v Shell plc and others* [2023] EWHC 1897 (Ch), accessible here. For further analysis of the July 24 Judgment, please refer to our firm's dedicated alert memorandum, accessible here.

[4] *ClientEarth v Shell plc and others* [2023] EWHC 2182 (Ch), accessible here. paragraph references in this memorandum are references to this judgment.

## I. Background and parties' arguments

The general rule in respect of costs orders is that the unsuccessful party will be ordered to pay the costs of the successful party (albeit that the court may make a different order).[5]

The situation is different, however, in the context of applications for permission to bring a derivative claim, the decision on which will normally be made without submissions from or, in the case of an oral hearing, attendance by the company. In respect of those circumstances, the Civil Procedure Rules provide that, if without invitation from the court the company volunteers a submission or attendance, the company will not normally be allowed any costs of that submission or attendance.[6]

In the context of ClientEarth's application for permission to bring a derivative claim, Shell, without invitation from the court, volunteered both its original written submission and its attendance at the oral renewal hearing.[7]

Nonetheless, Shell sought an order that ClientEarth pay all its costs of the action, including the application for permission to continue. Shell argued that the claim was bound to attract significant media interest; that ClientEarth had not engaged substantively with the arguments Shell had raised in its response to ClientEarth's letter before claim; that the claim was not being pursued in good faith; that the claim was devoid of merit; and that ClientEarth had failed to comply with procedural requirements, such as adducing adequate expert evidence.[8]

ClientEarth objected to these points, arguing that they do not constitute reasons to displace the default position under the Civil Procedure Rules; that the Civil Procedure Rules signal to potential litigants that the pursuit of relief for corporate wrongdoing by way of derivative action carries with it a limited costs risk at the preliminary prima facie case stage (and the costs order Shell sought would cut across such signal); that Shell could have sought the court's invitation to make submissions/attend the hearing in order to protect its position but did not do so; and that it was contradictory for Shell to say, on the one hand, that ClientEarth's claim lacked any merit, and, on the other hand, that the court required Shell's assistance in reaching its decision on it.[9]

## II. Judgment

Rejecting ClientEarth's arguments, Mr Justice Trower held that "*it was appropriate and proportionate for Shell to attend the oral hearing and make submissions at both parts of the prima facie stage and that it is just for the general rule referred to in CPR 44.2(2)(a) to apply to all the costs of the action*".[10]

Mr Justice Trower considered that, in assessing whether or not the default position in Civil Procedure Rules should be departed from, the following factors would be relevant:

(i) whether the nature of the proposed application has material unusual features on which it is reasonable for costs to be incurred by the company;

(ii) whether those features are such that allowing the case to proceed to a substantive application for permission will give rise to significant cost and expense (and, in particular, what the impact on the company generally would be of permitting the matter to proceed to a substantive application, even if the application were to prove to be ill founded);

(iii) whether there is a real possibility that a prima facie case will not be established (albeit that the merits of the application are only of limited relevance, given that the normal approach to costs at the preliminary stage of a derivative action applies, by definition,

[5] CPR 44.2(2).

[6] CPR, PD 19A, paragraph 2.

[7] At [8].

[8] At [10] – [13].

[9] At [10] – [18].

[10] At [33].

where the application for permission has failed at the outset on the grounds that the applicant has not shown a prima facie case);

(iv) whether the court will receive material assistance from the company in reaching a conclusion on whether or not that is the case;

(v) whether these features should have been anticipated by the applicant; and

(vi) where the balance of justice lies having regard to questions of proportionality and the overriding objective.[11]

Considering these factors, Mr Justice Trower found that ClientEarth's application was "*far from the norm for many reasons*".[12] In particular, Mr Justice Trower considered that:

(i) ClientEarth's application was always bound to garner significant publicity;

(ii) a full-blown application for permission would be unusually expensive and resource intensive, and Shell was entitled to take the view that the mere finding of a prima facie case would have an unusually significant adverse impact on the conduct of its affairs;

(iii) the case was unusual because it made serious claims of breach of duty against all the directors of a major international company without distinction and attacked its business strategy looking to the future rather than specific acts of corporate wrongdoing causing measurable loss;

(iv) given the above elements, attendance at the hearing and the making of submissions was a proportionate response by Shell and Shell's submissions were of material assistance to the court (e.g., by drawing the court's attention to important points in pre-application correspondence), and, even if Shell had not volunteered its participation at the prima facie stage, the court would have been likely explicitly to extend the invitation contemplated by CPR PD 19A para 2 in any event; and

(v) ClientEarth was, or should have been, well aware of the above factors.[13]

Lastly, Mr Justice Trower also refused ClientEarth's application for permission to appeal.[14]

## III. Implications

By making an adverse costs order against ClientEarth in the context of its derivative claim against Shell, the Court has indicated that such claims carry significant financial risks for applicants. Mr Justice Trower expressly rejected ClientEarth's submission that the Civil Procedure Rules are designed to send a signal to potential litigants that the preliminary prima facie case stage of a derivation action carries with it a limited costs risk [15] As such, this claim structure, which ClientEarth knew was novel, may no longer be a viable means of seeking to challenge organisations on their ESG policies, because the risk of an adverse costs order is a significant disincentive for NGOs and other parties who seek to bring these types of claims.

The judgment also raises issues regarding the suitability of private litigation as a means of enforcing any ESG-related obligations, and whether private parties such as NGOs are the appropriate parties to seek to police any ESG-related obligations, or whether that is a role best performed by the authorities.

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[11] At [26].

[12] At [27].

[13] At [27] – [32].

[14] At [34].

[15] At [20].