

Court dismisses claim against directors for company's climate strategy

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On May 12, 2023, the High Court of England and Wales (Court) [dismissed](#) [PDF] the action by ClientEarth against the directors of Shell plc (Shell) which alleged that the board of directors had breached its fiduciary responsibilities. We discussed this action in a [previous article](#) and noted the similarity of the duties owed by directors in Canada to those upon which ClientEarth sought to rely in its claim. While the Court's subsequent decision to dismiss ClientEarth's claim is not binding on Canadian courts, its reasoning may be influential and could discourage climate activists from pursuing similar claims in Canada.

The original action

ClientEarth's action alleged that the board of directors of Shell had breached its fiduciary responsibilities as a result of (i) the board's acts and omissions relating to Shell's climate change risk management strategy as publicly disclosed by Shell and (ii) failing to cause Shell to comply with an order (the Dutch order) made by the Hague District Court on May 26, 2021, against Shell to reduce the aggregate annual volume of the CO₂ emissions by the Shell Group's business operations and sold energy-carrying products by at least net 45% at the end of 2030, relative to 2019 levels.

In our earlier article, we discussed ClientEarth's novel claim that Shell's board of directors had breached their duty under the U.K. *Companies Act* to promote the success of Shell for the benefit of its members as a whole and to act with reasonable care, skill and diligence by allegedly failing to adopt and implement a climate strategy that is consistent with the Paris Agreement. In order to proceed with its action, ClientEarth needed the Court's permission to pursue the claim on behalf of Shell against its directors.

The dismissal

Under the U.K. *Companies Act*, a court is required to dismiss the application if it appears to the court that the application itself, and the evidence filed in support of it, do not disclose a *prima facie* case for giving permission. The Court accepted — as did Shell, in broad terms — that Shell faces material and foreseeable risks because of climate change that could have a material effect on the company. However, the issue before the Court was whether the board's management of climate risk demonstrated a *prima facie* case of actionable breach of duty. The Court concluded that ClientEarth had failed to meet that standard.

The Court noted that there is no universally accepted methodology as to the means by which Shell could achieve the targeted reductions in its Energy Transition Strategy. Although ClientEarth criticized the adequacy of Shell's Scope 1, 2 and 3 emissions targets, argued that

worldwide supply is adequate without further development and criticized Shell's proposed use of carbon capture and storage and nature-based solutions to address climate change risk, ClientEarth's arguments were not enough to show that Shell's business was being managed in a way that could not properly be regarded by the directors as being in the best interests of Shell's members as a whole. The evidence did not support a conclusion that no reasonable board of directors could properly conclude that the pathway to achievement was the one Shell had adopted.

The Court stated that a "fundamental defect" in ClientEarth's claim was that "it completely ignores the fact that 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 classic management decision with which the court is ill-equipped to interfere."

Although ClientEarth also argued that Shell's response to comply with the Dutch order was insufficient, the Court dismissed that argument as the Dutch order specifically proved 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 Court also assessed certain additional factors which it is required to consider in determining whether to grant leave, including whether the member was acting in good faith in seeking to pursue the claim. While noting that there was no reason to doubt that ClientEarth genuinely believed that its claim is in the long-term best interests of Shell, its shareholders and employees, the Court concluded that ClientEarth had an ulterior motive for pursuing its claim: to advance ClientEarth's policy agenda. The Court found that motive was the dominant purpose for making the claim and, but for that purpose, the claim would not have been brought at all. As a result, the Court was not satisfied that the claim was brought in good faith.

The Court ultimately concluded that ClientEarth had not made a *prima facie* case for its derivative claim against Shell. The Court therefore denied leave to permit the claim to continue.

ClientEarth had seven days to request an oral hearing to reconsider the High Court's decision. It has indicated that it has made a reconsideration request and been granted a [hearing](#).

Implications for Canadian boards

Under Canadian corporate statutes, the leave of a court is required to pursue a derivative action in the name of the corporation against the board of directors. The court may not grant leave unless it is satisfied that (i) the complainant is acting in good faith and (ii) it appears to be in the interests of the corporation that the action be brought. While the decision of the Court is not binding on Canadian courts, its reasoning may be influential and could discourage climate activists from pursuing similar claims in Canada.