

ClientEarth claim may expand scope of directors' duties

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ClientEarth is an environmental law charity and non-governmental organisation. It uses the law to hold governments and companies to account over climate change, nature loss and pollution via wide ranging activities. Supported by lawyers and experts it is organised and sophisticated with global reach. Since 2016 it has been a minority shareholder in the multinational oil and gas company Shell.

At first glance such a shareholding would appear to be rather at odds with ClientEarth's aims and motivations; however recent developments have revealed just how it seeks to use that shareholding to promote its climate agenda.

The basic dispute

On the heels of a letter of claim sent to Shell in 2022, in early February 2023 ClientEarth issued a claim form within the England & Wales jurisdiction against Shell's Board of Directors (some 11 individual directors) alleging that the directors are personally liable for mismanaging the risks of climate change through the adoption of an inadequate energy plan.

ClientEarth sues in its capacity as a shareholder – as such it is pursuing a derivative action. It is effectively seeking to step into the company's shoes, to pursue the Board for wrongs allegedly committed against the company. According to its website the claim is supported by institutional investors with over 12 million shares in the company and more than half a trillion US dollars (£450 billion) in total assets under management.

Whilst there are currently no documents publicly available from the action, it is reported that the alleged failings are wide ranging including failing to devise a strategy in line with the Paris Agreement (which aims to limit global temperature rises to below 2°C by substantially reducing fossil fuel emissions); over investment in new fossil fuel projects and on the other hand under investment in net zero transition. ClientEarth asserts that by reason of such failings the directors are in breach of their statutory duties under the Companies Act 2006 – to promote the success of the company for the benefit of its members as a whole (section 172) and to exercise reasonable skill, care and diligence in the discharge of their duties (section 174).

Stepping back from the detail ClientEarth's message is that this litigation is in the company's best interests, highlighting how Shell must prepare for a carbon constrained world if it is to remain viable as the economy inevitably shifts away from fossil fuels. It seeks to advance the climate agenda by effectively challenging whether a company's adopted model can survive long term in a changing world. In a press release on 09 February 2023 ClientEarth said, "*Long term, it is in the best interests of the company, its employees and its shareholders – as well as the planet – for Shell to reduce its emissions harder and faster than the Board is currently planning.*" [[ClientEarth files climate risk lawsuit against Shell's Board with support from institutional investors](#) | [ClientEarth](#)]. For their part the Board has said it will defend its position robustly and that they have published an Energy Transition Strategy which is in step with society.

So what's new?

Utilising litigation in this way represents a shift in approach in the promotion of the climate change agenda. A move away from other more common protest strategies (eg boycotts, civil disobedience, marches, efforts to influence government policy) to an unprecedented

application of directors' statutory duties as a mechanism to drive change.

By their lawyer's own admission the arguments are "highly novel", and "uncharted territory" by, in this way, seeking to hold a board of directors to account for failing to properly prepare for the net zero transition.

The action will provide another platform for ClientEarth to keep the issues arising in the news and create disruption in the relationship between directors and shareholders in a way not really explored before.

Procedural hurdles

We are in the foothills of the procedural journey of this derivative action; next step will be for the High Court to decide whether to grant ClientEarth permission, as a shareholder, to bring the claim (CA 2006 section 261). The threshold to secure such permission is high; it must be refused if the court is satisfied that a director, complying with their statutory duties, would not bring the claim.

Undoubtedly the hearing of that application will be closely tracked, and the outcome forensically scrutinised by all those with an interest in the scope of directors' duties. The court will need to wrestle with a plethora of questions such as, does a company falling behind a long term target and/or pledge justify intervention by the court and on what basis does the court assess that whilst balancing the need for a company to adapt to changes in trading conditions and commercial realities? How does the court weigh the need for a company to make short term decisions as against the impact on long term aims? It seems that to grapple with these questions the court must scrutinise the soundness of Shell's business strategy and policies and determine whether a tardy implementation of a sound strategy justifies intervention.

Climate change targets and implementation dates are discussed and agreed internationally at very high level without really scratching below the surface to establish how they can be practically achieved. It potentially puts directors and officers in a difficult position. Some might say that industry needs to lead the way. Others will argue the contrary, that solutions must be government led and whatever the driver litigation is not the appropriate arena. Perhaps the true answer is government and industries must work together to set and achieve targets. However, the overarching question in this litigation is the extent to which litigation can and should be used to drive social agendas.

Moving forward

For ClientEarth and more widely for directors and officers the outcome of the permission hearing (and any appeal) will be crucial – how will the court approach the test for permission and how will this area of the law evolve.

ClientEarth may say that whatever the outcome of the litigation there will be "wins" for them in promoting the climate change agenda and the accountability of directors on the issue; making Shell's net zero strategy (and its climate commitments more generally) subject to more intense public scrutiny and increasing the pressure on Shell for the change it seeks.

There is also the potential for ClientEarth's strategy to start to chart a course for other forms of shareholder activism to emerge and accordingly increase the prospect of future claims of this ilk against directors. Subject to the court's approach in the ClientEarth action more shareholder claims of this nature may follow, not only in the climate sphere but also in relation to other ESG issues and beyond. Failures to promote diversity and inclusion and to take advantage of related opportunities; greenwashing practices that attract negative media attention; failures to adequately protect against cyber threats - these matters all have the potential to form the basis of claims.

Perhaps the real consequence of this action will be that it adds to the picture that the activities of companies and their directors and officers are increasingly coming under the spotlight. Scrutiny of activities and decisions taken should be expected together with the prospect of being held to account especially where disclosures are inaccurate or required / pledged standards are not met.

This will be of concern to directors and officers given the exposure to a personal liability and to those that insure them – aside from issues as to liability claims made are notoriously time and cost expensive to defend. Directors and officers should keep shareholder activists in mind and engage proactively and constructively with them exploring ways to manage the business which can accommodate activist groups. There will often be tensions in that relationship – a constructive dialogue will be key.

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