Is innovation best left to the scientists? ClientEarth's novel legal challenge falls at the first hurdle

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1 June 2023

The energy transition has provoked some really innovative thinking from scientists and engineers: floating wind turbines are being towed out to sea to take advantage of winds where the seabed is too deep for traditional turbines, geothermal energy is to be generated from the granite that lies under Cornwall and "smart" palm trees are sprouting up in Dubai, providing shade as well as solar charging and wifi hotspots. However, scientists and engineers are not the only ones prompted to think innovatively by the challenges posed by the energy transition; lawyers are also coming up with new ways to use the law to support the energy transition and challenge significant greenhouse gas emitters. As with the projects themselves, some of these innovations find more success than others.

Climate activists have enjoyed notable successes in the courts in the Netherlands and Germany in particular. In the Dutch courts, one case saw the Dutch state being required to increase its emissions reduction targets (***Urgenda Foundation v Netherlands***) and another a private corporation being ordered to improve its own carbon dioxide emissions targets to align with Paris Agreement commitments (***Milieudefensie v Shell***). In Germany, the courts have ruled admissible a case brought by a Peruvian farmer seeking to claim from power company RWE 0.47% of the cost of flood defence measures to protect his property, on the basis that RWE is responsible for 0.47% of historic global carbon dioxide emissions (***Lliuya v RWE***). These cases display considerable legal ingenuity and illustrate how the law can be used to put pressure on states and businesses to meet climate goals.

In the UK, one innovative action recently hit a bump in the road. In ClientEarth, the English High Court refused permission to ClientEarth to proceed with an action against the directors of Shell (***ClientEarth v Shell Plc and others*** [2023] EWHC 1137 (Ch)).

ClientEarth sought to bring a derivative action against Shell's directors for alleged breaches of duty under the Companies Act 2006. ClientEarth had acquired a small number of shares in Shell in order to position itself to bring an action of this kind. If successful, ClientEarth would have brought a claim on Shell's behalf against its directors. Under English law, the permission of the court is required to bring such an action. This is because a derivative action is an exception to the general principle that it is a matter for the company, not its shareholders, to determine whether to pursue an action that may be available to it.

A derivative claim is brought under s.260 of the Companies Act 2006, which permits shareholders to seek relief on behalf of a company in respect of a cause of action arising from negligence, default, breach of duty or breach of trust by a director of the company. Under s.261 of the same legislation, the court's permission is required to proceed with a derivative claim. In order to gain that permission, the application must demonstrate a *prima facie* case.

The Companies Act provides that an application for permission must be refused if a person acting in accordance with his or her duty to promote the success of the company would not seek to continue the claim (s.263(2)). The Act also provides for a number of discretionary factors for the court to take into account when reaching its decision, including whether the shareholder is acting in good faith (s.263(3)). The court is also required to have regard to the views of shareholders who have no personal interest in the matter (s.263(4)).

ClientEarth alleged that Shell's directors had failed to adopt and implement a strategy to manage climate risk in compliance with their duties as directors and had also failed to comply with the order of the Dutch court in the ***Milieudefensie*** case mentioned above. ClientEarth's action sought a declaration to that effect, and a mandatory injunction requiring the directors to adopt a strategy to manage climate risk in compliance with their statutory duties and to immediately comply with the order of the Dutch court.

Mr Justice Trower decided that ClientEarth had not established that the directors' actions were such that no reasonable board of directors would manage the risks of the business in the way that they did. The evidence did not reach the standard required to establish a *prima facie* case that the way in which the directors were managing Shell's business could not properly be regarded as in the best interests of Shell's members as a whole. It is well-established that the English courts will not act as a form of supervisory jurisdiction over the management of a company. In this case, the Judge noted that ClientEarth's case *"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".*

Furthermore, the Judge found that there is no recognised duty for directors to ensure that a company complies with the order of a foreign court.

With regards to the relief sought if the claim were to move forward, the Judge noted that the requested mandatory injunction (ordering Shell's directors to adopt and implement a strategy to manage climate risk in accordance with its statutory duties and to comply immediately with the Dutch court order) did not provide for the type of relief that a court would grant, on the basis that constant supervision would be required to determine whether the business was being run in accordance with the terms of such an injunction. Disputes over compliance would likely have a disruptive effect on Shell's business. In respect of the requested declaration (that the directors have breached their duties), the Judge noted that such a declaration would be unlikely to be considered to fulfil a legitimate purpose on the basis that "[i]*t 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."*

Although the Judge found that the required prima facie case for the relief sought had not been made out, he nonetheless went on to consider the discretionary factors listed within s.263(3), in particular whether ClientEarth would be acting in good faith if it were to continue the claim. Whilst ClientEarth maintained that the proceedings would be for the benefit of Shell's members as a whole, with the aim of protecting Shell's long term value, the Judge preferred Shell's position that the application is a misuse of the derivative claim procedure made in order to publicise and advance ClientEarth's own policy agenda. In addition, the Judge considered the views of Shell's other members (in accordance with s.263(4) of the Companies Act). He noted that Shell's energy transition strategy was supported by 80% of its members at its 2022 AGM. In contrast, ClientEarth has received support for its claim from members holding approximately 0.17% of Shell's total shareholding, with letters expressing support from members representing an additional similar proportion of Shell's shareholding. The Judge therefore concluded that the application and evidence before him do not support a *prima facie* case for giving permission to continue the claim.

While ClientEarth's challenge appears to have fallen at the first hurdle, it could be revived; ClientEarth has indicated that it will ask for the decision to be reconsidered, as it is entitled to do under CPR 19.15(10). In the event that this does not succeed, it is inevitable that legal ingenuity will ensure that other routes are pursued to challenge greenhouse gas emitters to do more to reduce their emissions and to push forward climate goals through the courts.

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Claire Stockford specialises in arbitration, both international commercial arbitration and investor state disputes. Claire was called to the Bar of England and Wales in 1999. Before joining Quadrant, Claire spent more than 20 years practising from the London offices of international and UK law firms, for the last seven of those years as a partner.

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