Neutral Citation Number: [2023] EWHC 2182 (Ch)

Case No: BL-2023-000215

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
INSOLVENCY AND COMPANIES LIST (ChD)

DERIVATIVE CLAIM

Royal Courts of Justice, Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 31/08/2023

Before :

THE HONOURABLE MR JUSTICE TROWER

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Between :

ClientEarth **Claimant**

- and –

(1) Shell Plc
(2) Sir Andrew Stewart Mackenzie
(3) Wael Sawan
(4) Euleen Yiu Kiang Goh
(5) Sinead Gorman
(6) Arie Dirk (Dick) Boer
(7) Neil Andrew Patrick Carson OBE
(8) Ann Frances Godbehere
(9) Catherine Jeanne Hughes
(10) Jane Holl Lute
(11) Martina Therese Sophie Hund-Mejean
(12) Abraham (Bram) Schot

Defendants

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Daniel Saoul KC, **Edward Brown KC**, **Sam Goodman** and **Judy Fu** (instructed by **Pallas Partners LLP**) for the **Claimant**
Robert Howe KC, **Shaheed Fatima KC**, **Edward Davies KC** and **Jack Rivett** (instructed by **Slaughter and May**) for the **First Defendant**

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Approved Judgment

This judgment was handed down remotely at 10.30am on 31 August 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives (see eg https://www.bailii.org/ew/cases/EWCA/Civ/2022/1169.html).

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THE HONOURABLE MR JUSTICE TROWER

Mr Justice Trower :

1. On 24 July 2023, the court made an order refusing ClientEarth's application for permission to continue these proceedings and dismissing the claim. This judgment is concerned with the costs of the proceedings on which I have received written submissions from the parties.

2. Shell seeks an order that ClientEarth pay its costs. It submits that it is entitled to all the costs of the action, including the application for permission to continue. ClientEarth submits that Shell is not entitled to its costs of the written and oral submissions on the application for permission to continue or its attendance at the oral hearing preceding the judgment I handed down on 24 July 2023 ([2023] EWHC 1897 (Ch)).

3. The general rule is that the unsuccessful party will be ordered to pay the costs of the successful party (the "general rule"), although the court has a discretion to make a different order (CPR 44.2(2)). If the general rule is to be applied in this case, Shell will obtain the benefit of an order for its costs of the proceedings to be paid by ClientEarth. It has succeeded in procuring a dismissal of the action and it cannot be said (and is not said) that it is not the successful party or that ClientEarth is not the unsuccessful party.

4. However, one of the circumstances in which the general rule will not normally be applied is set out in CPR PD 19A para 2. This provides that, at the *prima facie* stage of an application for permission to commence a derivative claim, "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".

5. This derogation from the general rule bears some resemblance to the language of CPR PD 52B para 8.1, which provides that, where a respondent to an appeal chooses to attend an application for permission to appeal, the starting point, subject to some exceptions including an invitation from the court itself, is that they will not be entitled to their costs of attendance. In both contexts the court will normally deal with the relevant application, having only received written or oral submissions from the applicant. However, unlike on an application for permission to appeal, the court on an application for permission to continue a derivative claim will not have the benefit of the decision of a lower court or tribunal.

6. It follows from the wording of CPR PD 19A para 2 that one of the circumstances in which the derogation from the general rule does not apply at the *prima facie* stage, is where the court invites the company's submissions and attendance. This did not happen in the present case. As soon as the proceedings were issued, Shell's solicitors, Slaughter and May, wrote to the court indicating its intention to file written submissions to assist the court with its appraisal of the permission application on the papers. It then submitted a written submission signed by four counsel on 17 March 2023, after which there was a brief exchange of correspondence from the parties' solicitors in which further points were made by both sides.

7. The position was slightly different at the oral renewal hearing. Having dismissed the application on the papers, the order made on 12 May 2023 provided for Shell to notify the court and the claimant of whether it wished to attend any oral hearing and if so for the parties to agree directions. On 22 May 2023, Slaughter and May wrote to confirm that Shell wished to attend the oral hearing and to be represented by counsel. In

accordance with the directions agreed by the parties, Shell filed a detailed skeleton argument signed by the same four counsel and was represented by leading and junior counsel at the hearing.

8. It follows that, although the court did not issue an explicit invitation to Shell to attend the hearing and make submissions, the order of 12 May, which was made before Shell had made clear that it wished to attend the oral hearing, contemplated that appropriate directions should be agreed to accommodate its participation at the oral hearing should it wish to do so. This reflected Shell's proactivity in making clear that it wished to do so. Nonetheless, ClientEarth is correct to submit that Shell, without invitation from the court, volunteered both its original written submission and its attendance at the oral renewal hearing.

9. Against that background, Shell submitted that the general rule (without the derogation for which CPR PD 19A para 2 provides) should be applied to its costs of the *prima facie* stage. It said that ClientEarth's allegations against the Directors and the criticisms it made of their management of Shell's affairs were unfounded but were very serious. They resulted in Shell incurring substantial legal costs in responding to the threatened claim. It said that in, all the circumstances Shell had no choice but to take steps to respond and oppose the application from the outset. ClientEarth did not dispute the characterisation of the allegations it made as 'very serious', but it said that this was of no real significance because it was an inherent feature of most derivative claims; it said that the court's normal approach to costs at the *prima facie* stage should be applied.

10. Quite apart from the seriousness of the allegations made against the Directors, Shell relied on a number of other features of the case as justifying an application of the general rule:

    i) First, it was said that Shell's public profile and the nature of the allegations made, meant that the claim was bound to attract significant media interest, a result which was intended by ClientEarth and which has indeed occurred. ClientEarth did not dispute that this was always likely to be the case, but it said that there could not be one rule for small or medium sized companies and another rule for large companies with a public profile. It also relied on the fact that both parties were asked for comment by the media.

    ii) Secondly, it was said that, before commencing proceedings, the parties' solicitors had exchanged correspondence, but ClientEarth chose to commence proceedings, including voluminous evidence in support of its application for permission to continue, without engaging substantively with any of the arguments raised by Shell in response to ClientEarth's letter before claim. ClientEarth did not accept this description of what occurred, not least because it said that Shell's position was not within the spirit of the PD on Pre-Action Conduct, and it was this which caused the parties' pre-action engagement to reach a dead-end in October 2022.

    iii) Thirdly, Shell said that any decision to the effect that ClientEarth's application displayed a *prima facie* case would itself have had adverse ramifications, given the publicity that such a decision would garner. ClientEarth's response to this submission was that, if this was a good reason to depart from the normal rule, it

would justify an order in favour of the company in every failed application for permission to pursue a derivative claim.

11. Shell also said that the application was not being pursued in good faith, and pointed to the fact that I concluded that ClientEarth had not adduced sufficient evidence to counter the inference of collateral motive which I discussed in paragraphs 92 and 93 of my second judgment. This was said to take the case out of the normal situation catered for by CPR PD 19A para 2.

12. ClientEarth's response to the submission on good faith was that this was only one of the reasons that the court determined the application against it (and indeed is only one of the relevant statutory factors to which the court must have regard) and did not of itself take the application outside the norm. It also disputed Shell's characterisation of its conduct as a misuse of the court's procedures, relying on my conclusion that there was no reason to doubt ClientEarth's honest belief that the claim was in the best long term interests of Shell and the fact that it pursued its application with significant investor support from a number of highly reputable institutions.

13. Shell also relied on the fact that the claim was devoid of merit and that the application failed to observe basic procedural and evidential requirements. In particular it relied on the absence of proper expert evidence to support its case on unreasonable conduct by the Directors sufficient to make out a *prima facie* case.

14. ClientEarth disputed this description of the manner in which it had made the application and the quality of the evidence it had adduced in support. It also said that there was nothing wrong with the way in which it had approached the preparation of its evidence in support of the claim, because it had been candid throughout that Mr Benson's witness statement was not advanced as expert evidence. The most that could be said is that the court concluded that the evidence was insufficient to establish a *prima facie* case.

15. It also said that the normal approach to costs at the *prima facie* stage was founded on an assumption that the applicant had failed to demonstrate a *prima facie* case (because that was the context in which the applicant would be the unsuccessful party), and so the lack of merit in the application cannot be a reason to displace the normal rule. In short, it said that the mere fact that the court has concluded that the proceedings are unfounded or misguided is insufficient to displace the rule for which CPR PD 19A para 2 normally provides, because that rule contemplates that an applicant has not succeeded in establishing a *prima facie* case in any event.

16. More generally, ClientEarth submitted that the order sought by Shell was unprecedented and would cut across the signal which CPR PD 19A para 2 sends to potential litigants that the pursuit of relief for corporate wrongdoing by way of derivative action carries with it a limited costs risk. It is said that such an order would stifle future attempts to pursue board members of large well-resourced companies for breach of duty. It also relied on the fact that it has a track record of acting responsibly (see the comments in *R (on the application of ClientEarth) No 3 v. Secretary of State for Environment Food and Rural Affairs* [2018] EWHC 398 (Admin) at [16]) and there can be no question that it acted frivolously or vexatiously in seeking permission to continue the claim.

17. ClientEarth also relied on the fact that CPR PD 19A para 2 specifically contemplates a situation in which the company volunteers a submission or attendance by invitation of the court and submitted that it was always open to Shell to have sought the court's invitation to take that course in order to protect its position. This was not done in the present case, and if it had been, it would then have enabled ClientEarth to seek to manage Shell's costs of the proceedings including by seeking a costs capping order.

18. ClientEarth also submitted that there was an illogicality in Shell's case that the application raised points of law on which it considered that the court would benefit from its assistance: it could not both say that the case was so weak that it should be dismissed summarily, but so difficult that the court required Shell's assistance to take that course. In essence, it said that because it was Shell's position that the case has no merit, it cannot be heard to say that the court required the assistance of the company in reaching its determination.

19. It is important to identify why CPR PD 19A para 2 provides for a derogation from the general rule. Why is it the case that a company, even if the successful party, will not normally be entitled to its costs of making submissions and appearing at any hearing at the *prima facie* stage unless invited by the court to do so?

20. I do not accept ClientEarth's submission that CPR PD 19A para 2 is designed to send a signal to potential litigants that the pursuit of relief for corporate wrongdoing by way of derivative action carries with it a limited costs risk. That may be its effect in many cases, but what is said in para 2 is still limited to what normally happens, not what always happens nor even what happens in all but an exceptional case.

21. Furthermore, the fact that the normal rule for which CPR PD 19A para 2 provides does not apply where the court invites the company to make submissions or to attend an oral hearing is inconsistent with any idea that the purpose of the rule is to limit the costs risk for applicants without more. If this were to be the case, the court would be faced with an obligation to take into account and weigh in the balance as significant factors both the ability of an applicant to fund the proceedings and the cost benefit to the company of appearing on the application when deciding whether or not the company should be invited to participate at the *prima facie* stage.

22. In my view, the question of how best to limit a claimant's costs' exposure is an issue which primarily arises for consideration by the court on any application for relief under CPR 19.19(1) once a *prima facie* case has been established. At that stage, the court can consider whether or not to order a company for the benefit of which a derivative claim is brought to indemnify a claimant against any liability for costs incurred in the permission application or the derivative claim itself. There is no indication that the factors I referred to in the previous paragraph are factors to which the court should have significant regard when deciding whether or not to invite the company to attend at the *prima facie* stage, and I do not think that they are what the drafters of para 2 had in mind when providing for a disapplication of the general rule.

23. I think that a more accurate explanation for CPR PD 19A para 2 is that it operates as a filter for the protection of the company reflecting the fact that it is not expected to participate at this stage of the proceedings and that it should not do so unless there is some reason which takes the case out of the norm. The normal approach, involving a derogation from the general rule, is intended to be consistent with that aspect of the

procedure which was described by Mr David Donaldson QC in *Re Seven Holdings Limited* [2011] EWHC 1893 (Ch) at [62] as being "so that the court can make a properly informed decision whether it is right to put the company (and the potential defendant) to the expense and inconvenience of considering and contesting the application". It is not designed to facilitate applications for permission to continue in respect of which a *prima facie* case might not be established.

24. In my view, the point is well-expressed in Gore-Browne on Companies at Chapter 18 para [17]:

> "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. The aim is that unmeritorious claims will be disposed of without the company becoming involved, in much the same way that unmeritorious appeals are resolved without the respondent to the appeal being required to participate."

However, that will not always be the case. As the editors went on to say:

> "Nevertheless, there are situations in which it would plainly be appropriate for a company to participate prior to the claimant successfully demonstrating a prima facie case, and where a company might expect to displace the usual rule precluding the recovery of its costs of doing so. If the company has a knock-out point that can be swiftly, cheaply and incontrovertibly deployed, then it is submitted that the company's participation would be appropriate."

25. The merits of the application are of some relevance when assessing the just result, but I accept it is limited because the context in which the normal approach under CPR PD 19A para 2 applies is where the application for permission has failed at the outset on the grounds that the applicant has not shown a *prima facie* case.

26. Of greater significance is (a) whether the nature of the proposed application has material unusual features on which it is reasonable for costs to be incurred by the company, (b) 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, (c) whether there is a real possibility that a *prima facie* case will not be established, (d) whether the court will receive material assistance from the company in reaching a conclusion on whether or not that is the case, and (e) whether these features should have been anticipated by the applicant. It is also relevant for the court to take into account the impact on the company generally of permitting the matter to proceed to a substantive application even if the application were to prove to be ill founded, whether the applicant will or should have known that was the position and where the balance of justice lies having regard to questions of proportionality and the overriding objective.

27. I have reached the conclusion that this is a case which is far from the norm for many reasons. First, ClientEarth's application was always bound to garner significant publicity, a fact of which ClientEarth was well aware. In my view 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.

28. Secondly, 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. This unusual consideration was well illustrated by the fact that declaratory and injunctive relief designed to interfere with strategic management decisions was sought rather than damages or compensation for identifiable breaches of duty.

29. Thirdly, this feature was thrown into sharp relief by the unusual fact that ClientEarth was the holder of such a small number of shares and, although support for its objectives was indicated by a larger body of shareholders, there was little if any support for taking the course it has elected to take.

30. Fourthly, it would always have been anticipated both by Shell and ClientEarth that, given the number of defendants, the nature of the allegations and the potential impact on Shell's business if permission were to be granted, a full-blown application for permission would be unusually expensive and resource intensive. Not only did this take the case out of the norm, it also meant that attendance at the hearing and the making of submissions was a proportionate response by Shell and should have been anticipated by ClientEarth to be such.

31. One final related factor is that the nature of ClientEarth's application was such that, 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. That is an eventuality which ClientEarth can have been expected to anticipate at the time it commenced the proceedings. In the event Shell's submissions were of material assistance to the court in that they helped me to identify what I consider to have been the right path to the conclusion I reached, including by drawing my attention to the important points in the lengthy pre-application correspondence. Without that assistance, I cannot rule out the possibility that the court would have determined that a full hearing of the application for permission was required, with the consequential incurring of substantial additional time and cost.

32. In my view it is no answer to this feature for ClientEarth to say that Shell could have engineered a request to the court to invite Shell to attend so that, warned that the provisions of CPR PD 19A para 2 would then be excluded, ClientEarth could have applied for costs management such as a costs capping order. Quite apart from the artificiality of seeking to engineer an invitation from the court, it was always open to ClientEarth to take that course whether or not an invitation to Shell was extended and it would have been the prudent course had it mattered, given that the derogation from the general rule was only the normal approach not the invariable approach contemplated by para 2.

33. In all these circumstances, I have concluded 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. The normal approach described in CPR PD 19A para 2 will not be applied to disallow Shell's costs of making written submissions and attending the oral hearing by leading and junior counsel. I will therefore make an order that ClientEarth pay Shell's costs of the proceedings to be assessed on the standard basis if not agreed.

34. The parties are to agree and submit a draft order reflecting this judgment. That draft should also reflect my refusal of ClientEarth's application for permission to appeal, the summary reasons for which are included in the Form N460 I have prepared.