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## Milieudefensie v Shell – a Pyrrhic victory for the oil and gas industry?

*Maurits Dolmans and Andreas Wildner at Cleary Gottlieb analyse the Hague Court of Appeals judgment, finding that it is likely to have important implications for future litigation against oil and gas companies.*

### Introduction

On 12 November, the Court of Appeals in The Hague allowed Shell’s appeal against a district court judgment obliging Shell to reduce its emissions by 45% by 2030.<sup>1</sup> While the Court of Appeals annulled the underlying judgment on the ground that there was insufficient support to impose a company-specific obligation on Shell, it rejected Shell’s foundational arguments, and in an important obiter dictum suggested that Shell’s policy of continuing to develop new fossil fuel fields could be illegal under Dutch tort law. Future litigants may seize on this suggestion. Shell’s victory may turn out to be a Pyrrhic one.

We discuss below the factual background and the parties’ main arguments, the judgments of the Hague District Court and the Court of Appeals, and some implications.

### Factual background and parties’ arguments

In 2019, Friends of the Earth Netherlands (Milieudefensie) filed a class action lawsuit against Shell.<sup>2</sup> Six other Dutch non-governmental organisations (NGOs)<sup>3</sup> and approximately 17,000 individual co-claimants joined (the Claimants).

The Claimants highlighted the dangerous effects of climate change, as well as the role of anthropogenic CO<sub>2</sub> emissions and the fact that Shell is one of the biggest individual producers.<sup>4</sup> They argued that Shell failed to take sufficient measures to reduce emissions, and so contributed to climate damage they have suffered and will suffer. This, the Claimants argued, constituted a tortious act by Shell under Article 6:162 of the Dutch Civil Code, whereby it is unlawful to act knowingly or negligently in a way that conflicts with what is generally accepted according to written or unwritten rules in society, and causes damage to others. The “unwritten standard of care” under Article 6:162 was, in the Claimants’ argument, informed not only by past case law on endangerment (*gevaarzetting*), but also by other sources of law such as various conventions and statutory provisions, including in particular the global climate target laid down in the Paris Agreement, the scientific findings on which these targets are based, and the European Convention

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<sup>1</sup> Shell Plc v Milieudefensie et al, ECLI:NL:GHDHA:2024:2100 (Court of Appeals, The Hague, 12 November 2024), (unofficial English translation)(the *Appeal Judgment*), accessible [here](#).

<sup>2</sup> An unofficial translation of the original summons (the *Summons*) is accessible [here](#).

<sup>3</sup> The other NGOs are Stichting Greenpeace Nederland, Stichting ter Bevordering Fossielvrij-Beweging, Landelijke Vereniging tot Behoud van de Waddenzee, Stichting Both Ends, Jongeren Milieu Actief, and ActionAid.

<sup>4</sup> See Summons, especially paragraphs 5, 6 and 12.

on Human Rights (ECHR), specifically Articles 2 (*Right to life*) and 8 (*Right to respect for private and family life*).

While acknowledging that emissions should generally be reduced, Shell disputed that it was under an individual, enforceable obligation to reduce emissions.<sup>5</sup> Amongst a number of procedural and substantive defences, Shell argued that there was no unwritten legal standard to impose the emissions caps sought by Milieudefensie.<sup>6</sup> This was because, according to Shell's defence, Shell's activities complied with all legal obligations and, in fact, had express permits to emit CO<sub>2</sub> under the EU's Emissions Trading Scheme, and because demand for fossil fuel remains high as it is, at present, indispensable to the functioning of society. Shell also argued that emissions control was a matter of politics, not for the courts to decide, and that its individual efforts could have no appreciable impact, and that it was unfair to hold it liable without pursuing other greenhouse gas emitters.

## Decision in the Hague District Court

The court held that only the claims of six of the NGOs were admissible.<sup>7</sup> However, the court found that Shell was, by virtue of Article 6:162, under an obligation to take effective steps to reduce its emissions.<sup>8</sup> In particular, Shell was ordered to:

- i. Reduce, by 2030, the CO<sub>2</sub> emissions of its group activities (scope 1 and 2 emissions) by net 45% compared to 2019 levels (an obligation of result), and
- ii. Undertake best efforts to reduce the CO<sub>2</sub> emissions of its business partners, including suppliers and end-users (scope 3 emissions), by the same amount. The court expected Shell to take the necessary steps to remove, prevent or compensate for the serious risks arising from scope 3 CO<sub>2</sub> emissions, and to use its influence to limit any lasting consequences as much as possible.

In reaching this conclusion, the court interpreted Article 6:162 in the light of 14 indicators of social norms and rules, including "soft law" instruments such as the UN Guiding Principles on Business and Human Rights (UNGP) and the OECD Guidelines for Multinational Enterprises, as well as case law of the Dutch Supreme Court on negligence, rights protected by the ECHR, scientific insights, and consensus reflected in the Paris Agreement objectives. In particular, the court deduced from the UNGP and other soft law instruments that companies must respect human rights and avoid infringing on the human rights of others. Noting that the extent of an individual company's responsibility varies depending on size, sector, operational context, ownership, structure and severity of relevant human rights impacts, the court considered that "much may be expected" of Shell.<sup>9</sup> The court further held that human rights, specifically Articles 2 and 8 of the ECHR, offer protection against the consequences of dangerous climate change due to CO<sub>2</sub> emissions-induced global warming.<sup>10</sup>

The court did not find Shell in breach of these obligations, but it noted that Shell's policy, policy intentions and ambitions were incompatible with its reduction obligation, which implied that

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<sup>5</sup> Shell's Statement of Defence (the *Defence*) in the Hague District Court is accessible [here](#).

<sup>6</sup> Defence, Section 7.2.

<sup>7</sup> The claims brought on behalf of "current and future generations of the world's population" were, as far as the global population's interest in curbing climate change were concerned, too diffuse to be bundled in a class action. As far as the interests of current and future generations of Dutch residents and (with respect to the Waddenvereniging) of the inhabitants of the Wadden Sea area were concerned, these were sufficiently served by the class actions and they did not have an interest in a separate claim.

<sup>8</sup> *Milieudefensie et al. v Royal Dutch Shell plc*, NL:RBDHA:2021:5339 (Hague District Court, 26 May 2021)(the *District Court Judgment*), paragraph 4.4.55.

<sup>9</sup> *District Court Judgment*, paragraph 4.4.16.

<sup>10</sup> *District Court Judgment*, paragraph 4.4.10. This finding was, amongst other things, deduced from the Dutch Supreme Court's decision in *State of the Netherlands v Urgenda Foundation*, NL:HR:2019:2007 (December 20, 2019), available at <https://www.urgenda.nl/wp-content/uploads/ENG-Dutch-Supreme-Court-Urgenda-v-Netherlands-20-12-2019.pdf>

breach was imminent.<sup>11</sup> This was on the basis that Shell’s transition plan amounted “to rather intangible, undefined and nonbinding plans for the long-term” which were furthermore conditional and lacked intermediate targets.<sup>12</sup>

On 22 March 2022, Shell filed an appeal against the Hague District Court’s decision,<sup>13</sup> requesting the Hague Court of Appeal to overturn the district court judgment.

## Judgment in the Court of Appeal

The Court of Appeal allowed Shell’s appeal and set aside the district court’s judgment on the basis that:

- (i) as regards Shell’s scope 1 and 2 emissions, there was no imminent violation in light of Shell’s public commitments and its progress so far in reducing emissions more than Milieudefensie demanded,<sup>14</sup> and
- (ii) while Shell has obligations to reduce scope 3 emissions, there is insufficient basis to impose a company-specific target of a 45% reduction. This was because the 45% target represents an average target for the world, and the transition path can differ for different sectors, companies and countries.<sup>15</sup> The court explained, for instance, that if a coal power plant is converted to a gas-fired power plant, emissions from that plant would decrease, whereas Shell’s emissions would increase. Therefore, notwithstanding the fact that Shell is a large oil company in a sector responsible for major emissions in a rich economy with high historical emissions (and therefore has significant legal obligations to reduce its emissions), the court did not hold Shell to the average global reduction target.
- (iii) Milieudefensie also failed to show that an obligation for Shell to reduce its resale activities by a certain percentage would be effective to reduce its scope 3 emissions, because other resellers would just take over Shell’s market share.<sup>16</sup>

Nonetheless, the court noted that “there is no doubt that the climate problem is the biggest problem of our time”,<sup>17</sup> and confirmed a number of key findings of the first instance judgment that would be relevant for future litigation:

1. Shell has an individual obligation to reduce emissions;
2. “There can be no doubt that protection from dangerous climate change is a human right.”<sup>18</sup>
3. Treaty provisions on human rights and soft law instruments can have an impact on private-law relations by giving substance to open standards,<sup>19</sup> including by creating an obligation to combat climate change. Companies such as Shell, which contribute significantly to climate change and have the means to contribute to combating it, have an obligation to limit CO<sub>2</sub> emissions to counter climate change, and have a responsibility of

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<sup>11</sup> *District Court Judgment*, paragraph 4.5.3.

<sup>12</sup> *District Court Judgment*, paragraph 4.5.2.

<sup>13</sup> An unofficial translation of Shell’s Statement of Appeal (the “Statement of Appeal”) is accessible [here](#).

<sup>14</sup> *Appeal Judgment*, paragraph 7.65.

<sup>15</sup> *Appeal Judgment*, paragraph 7.81.

<sup>16</sup> *Appeal Judgment*, paragraph 7.111.

<sup>17</sup> *Appeal Judgment*, paragraph 7.25.

<sup>18</sup> *Appeal Judgment*, paragraph 7.17.

<sup>19</sup> *Appeal Judgment*, paragraph 7.24.

their own in meeting the Paris Agreement goals.<sup>20</sup> This applies to scope 1, 2 and 3 emissions.

4. Policy and legislative measures taken by government (e.g., the EU Emissions Trading Scheme, the Corporate Sustainability Reporting Directive, the Corporate Sustainability Due Diligence Directive) are not in themselves exhaustive of companies' obligations. They do not preclude a more demanding duty of care for individual companies to reduce their CO<sub>2</sub> emissions above and beyond compliance with existing regulatory frameworks.<sup>21</sup> Even an environmental permit does not provide a defence against tort claims.
5. The court considered it plausible that reaching Paris Agreement goals may require limiting the supply of fossil fuels: "It is reasonable to expect oil and gas companies to take into account the negative consequences of a further expansion of the supply of fossil fuels for the energy transition also when investing in the production of fossil fuels. Shell's planned investments in new oil and gas fields may be at odds with this."<sup>22</sup> However, Milieudefensie had not requested an order to ban development of new fossil fuel fields, and this could therefore not be a basis to confirm the 45% reduction target.
6. Shell argued that a remedy curbing its activities would be ineffective, because other companies would just sell what Shell can no longer sell, and emissions would not decrease. The court accepts that for Shell's resale activities. Importantly, however, it said: "There may be a causal relationship between a production limitation and emission reduction, as assumed by the district court (cf. section 4.4.50 of the district court's judgment)" even if Milieudefensie "failed to put forward sufficient grounds to assume that in this case a causal relationship (also) exists between a sales limitation and emission reduction." This, again, is a hint that a case pursuing a ban on new fossil fuel field development could see success.

## Implications

The Court of Appeal's judgment is likely to have important implications for future litigation.

First, the court affirmed that businesses – certainly those in Shell's position – are required to respect human rights (i.e., that human rights law has horizontal effect). This may be an important catalyst for future litigation.<sup>23</sup> The precise legal avenues to hold private entities accountable for their contributions to climate change are, in many jurisdictions, still developing. The judgment suggests that tort law reflects human rights principles, and can be a basis for liability.

Secondly, the court hints that investment in new oil and gas projects may be incompatible with Shell's obligations. This is an obiter dictum, but one of great potential significance. It suggests possible claims for future litigation, and addresses the question of the "business judgment" rule that climate litigants have been struggling with.

In various cases – e.g., the *KlimaSeniorinnen* case in the European Court of Human Rights,<sup>24</sup> the *ClientEarth v Shell* derivative action in the UK,<sup>25</sup> as well as this appeal, to name just a few – courts have found it difficult to impose specific obligations on defendants. Even where companies have a general obligation to combat climate change, the ways and means, and the precise extent of contribution required are largely left to the defendants' discretion. This discretion is not unlimited

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<sup>20</sup> *Appeal Judgment*, paragraph 7.26-7.

<sup>21</sup> *Appeal Judgment*, paragraph 7.53.

<sup>22</sup> *Appeal Judgment*, paragraph 7.61.

<sup>23</sup> See the analysis in Wildner et al., 'ECHR Ruling May Pave Path For A UK Climate Damage Tort' ([here](#)).

<sup>24</sup> *Verein KlimaSeniorinnen Schweiz and Others v. Switzerland* (Application no. 53600/20), accessible [here](#).

<sup>25</sup> *ClientEarth v Shell plc and others* [2023] EWHC 1897 (Ch), accessible [here](#).

– the courts may find liability if the company has set a goal but failed to identify a pathway or strategy that is objectively capable to achieve that goal, as Lord Carnwath pointed out in his extrajudicial critique of the *ClientEarth* judgment.<sup>26</sup> Nonetheless, the difficulty in identifying a sufficiently precise remedy has been a hurdle. The Hague Court of Appeal’s observation that investment in new oil and gas projects may be incompatible with Shell’s obligations suggests a possibly sufficiently precise remedy.

The difficulty in identifying remedies in forward-looking cases such as this one does not necessarily preclude future damage claims. Once damages for climate change related losses are being claimed (i.e., claims become retrospective), courts could seek to find a way to apportion liability according to companies’ contribution, and, in that case, liability of companies such as Shell, may be significant.

From a broader policy perspective, one aspect to note was the court’s finding that no unequivocal standard exists for the emissions reduction that is required from the oil and gas sector.<sup>27</sup> However, that sector’s GHG emissions account for a substantial proportion of total global emissions. An obligation to refrain from development of new fossil fuel fields could sidestep this concern. Nonetheless, policy-makers should reach consensus on the contribution required from the oil and gas sector sooner rather than later.

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<sup>26</sup> Lord Robert Carnwath, “ClientEarth v Shell: What future for derivative claims?” (February 2024), accessible [here](#).

<sup>27</sup> *Appeal Judgment*, paragraph 7.91 – 7.96.