

# The Personalization of Climate Liability

Directors' duties

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# Fiduciary duty and climate change - fundamentals

## *Climate context?*

- Fiduciary = trust/loyalty + competence in exercising core functions (*strategy, risk oversight, reporting*)
    - Best interests, good faith, proper purposes
    - Due care & diligence - to exercise powers with the same **degree of care and diligence as a reasonable director** in the circumstances
    - *Plus* statutory duties on accountability – *disclosure*
  - ‘Stepping stone liability’ in some jurisdictions – breach of duty in relation to risk oversight where failure to ensure corporate compliance with other laws
- Then* – ‘environmental, ethical, non-financial’ – contrary to financial best interests  
*Now* – material financial risk (& opportunity)
- Then* – at its highest, compliance with environment & planning laws, ‘social licence’  
*Now* – foreseeable risk, consider materiality, proportionate to magnitude of risk
- Then* – non-financial, immaterial, nothing mandatory, voluntary in narrative reports  
*Now* – materially financial (note difference between management and financial reporting materiality), proliferation of mandatory regimes, financial statement consequences

# Rubber meet road: ClientEarth derivative action against Shell directors

- Shareholder derivative action in High Court of England & Wales on behalf of institutional directors February 2023
- Alleges Shell directors in breach of duties under UK *Companies Act*:
  - act in good faith to **promote the success of the company**, having regard to certain mandatory factors, including the long-term success of the company, and its impacts on workers, communities and the environment (s 172); and
  - exercise **reasonable care, skill and diligence** (s 174).
- Remedies sought:
  - declarations; and
  - order that the directors prepare and adopt a strategy that includes GHG emission reduction targets aligned with the Paris goals (in accordance with Dutch Court’s judgment in *Millieudefensie* case (2021)).
- Appears CE will argue for a ‘heightened duty’ interpretation of these sections, citing [Lord Sales 2019 speech](#) while acting Justice of a UK Supreme Court: *‘As things stand, there is much force in the view that directors may, and increasingly, must take into account and accord significant weight to climate change in their decision-making ... Under certain circumstances, however, their companies’ interests may be so implicated by climate change effects that their general fiduciary and due care obligations actually require them to cause their companies to take action to reduce their contribution to climate change activity’*.

*‘Shell’s emissions and climate strategy have a material impact on the world’s carbon budget. Shell is disproportionately exposed to climate risks when they materialise, especially in the medium to long term. No reasonable director could fail to reduce exposure to these risks.’*

CE to institutional investors at webinar, 31 March 2022

## Claim goes to fundamentals of corporate governance

1. *Strategy* – board failure to align business strategy with a Paris-aligned trajectory
2. *Strategy & Oversight* – failure to align business strategy with the targets it does have in place, and to ensure the business credibly pursues those targets

# Why is the strategy and oversight by the Shell board alleged to be inadequate?

**#1** Targets / transition strategy is not Paris-aligned – net zero ambition is heavily caveated

**#2** Short and medium-term absolute emissions reduction targets are ‘inadequate’ (2050 only)

**#3** Intensity-based emissions targets to 2030 are ‘insufficient’ (scope 1 and 2 only, 10% of total footprint)

**#4** Shell’s transition plan relies on gas as a ‘lower emissions’ source of energy, and ‘unrealistic levels’ of CCS and NBS

**#5** Shell’s transition strategy is a ‘wait & see’ approach

**#6** Shell’s capex is inconsistent with achieving targets, and not integrated into operating plans & budgets



***Is this just oil & gas?***

*For which sectors is climate change not a material physical or economic transition risk?*

*Strategic litigants do not wait for stock-drops...*

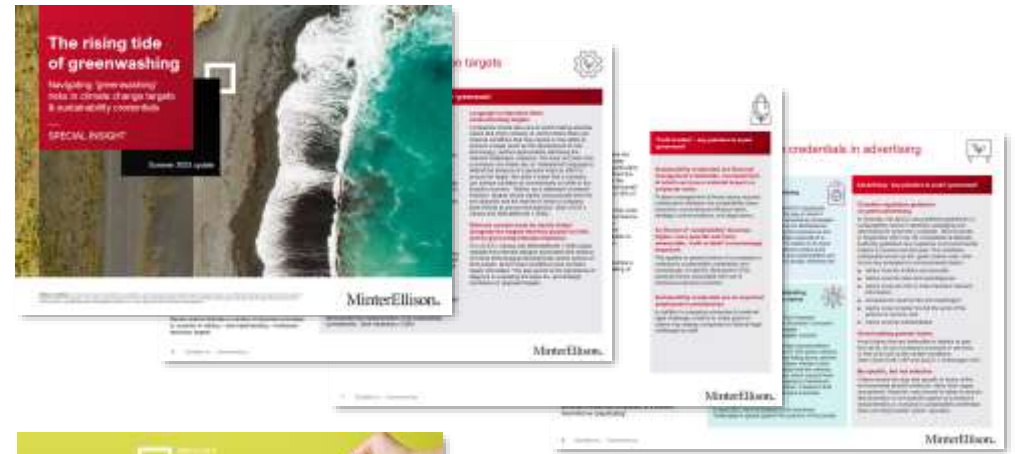
# For more information



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