

# Strategic Errors in Climate Litigation: *ClientEarth v Shell Plc & Others*

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## I. Introduction.

A company is a legal person.<sup>1</sup> Hence, when a company has been wronged, only the company itself has the standing to bring a claim against those who wronged it.<sup>2</sup> Of course, a company is not a sentient being in the way that a human person is. The decision to file a lawsuit will be taken in accordance with the managerial structure of the corporation—and ordinarily such a commitment must be approved by the board of directors.<sup>3</sup> What, then, is to be done when the wrongdoers *are* the directors? If the interests of a company could be irreparably harmed, and the malefactors had the ability to prevent any legal recourse, then “the law would fail in its purpose. Injustice would be done without redress.”<sup>4</sup>

This is the basis for what is known as the ‘derivative claim’, a legal action now codified in ss.260-264 of the Companies Act 2006. Under this scheme, any shareholder may seek to ‘derive’ the right of a company to protect its interests from wrongdoers where the company cannot do so itself; that is, they seek the ability to exercise that right on the company’s behalf. In doing so, however, the shareholder must first establish a ‘*prima facie* case’ for the claim—that is, a possibility of success at first consideration, which a court must endorse.<sup>5</sup> This includes showing that their cause of action is rooted in a director’s act or omission, either actual or proposed, which constitutes negligence, default, breach of duty, or breach of trust.<sup>6</sup> At this preliminary stage, there is no burden on the company to provide evidence.<sup>7</sup>

On February 9<sup>th</sup>, 2023, ClientEarth, a minor shareholder in Shell plc, filed for a derivative claim in the High Court.<sup>8</sup> They argued that the directors’ “failure to set an appropriate emissions target”, their “strategy as regards the management of climate risk”, and their lack of “a plan to ensure timely compliance” with a Dutch court order compelling them to reduce their emissions by 45% by 2030 each represented breaches both of the board’s s.172 duty to act in the best interests of the corporation and ensure its long-run viability and of their s.174 duty to exercise reasonable care, skill, and diligence.<sup>9</sup> As such, ClientEarth sought to derive the company’s cause of action against its directors and to procure an injunction from

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<sup>1</sup> *Salomon v A Salomon & Co Ltd* [1896] UKHL 1, [1897] AC 22.

<sup>2</sup> *Foss v Harbottle* [1843] 2 Hare 461, 67 ER 189.

<sup>3</sup> see, e.g., *Breckland Group Holdings v London and Suffolk Properties* [1989] 4 BCC 542 (Ch).

<sup>4</sup> *Wallersteiner v Moir (No. 2)* [1975] QB 373 at 390. This case used to contain the rules for derivative claims, which are now formalised in the Companies Act.

<sup>5</sup> Companies Act 2006 s.261.

<sup>6</sup> *Iesini v Westrip Holdings Limited* [2009] EWHC 2526 (Ch) at [78], citing *Prudential Assurance Co Ltd v Newman Industries Ltd (No. 2)* [1982] Ch 204 at 222A.

<sup>7</sup> *ClientEarth v Shell Plc & Others* [2023] EWHC 1897 (Ch) at [9], citing the Civil Procedure Rules 19.15(3).

<sup>8</sup> *ibid.*

<sup>9</sup> *ibid* at [39]. Note that the Dutch court order comes from an earlier case against Shell, *Milieudefensie v Royal Dutch Shell plc* ECLI:NL:RBDHA:2021:5339.

the court that the board “(a) adopt and implement a strategy to manage climate risk in compliance with its statutory duties and (b) comply immediately with the Dutch Order”.<sup>10</sup>

Mr Justice Trower ruled that ClientEarth failed to demonstrate a *prima facie* case for a breach of either duty.<sup>11</sup> This is particularly startling given that it is the first case where such a failure has occurred.<sup>12</sup> The bar for establishing a *prima facie* case is “not a high one”,<sup>13</sup> and so the High Court’s decision is especially damning in this regard and reflects very poorly on ClientEarth’s submissions. Where did things go wrong?

## II. Statutory Duties and the *Prime Facie* Case.

The Companies Act 2006 s.172 requires that directors must act in a way which they decide in good faith would “promote the success of the company for the benefit of its members as a whole”.<sup>14</sup> In doing so, they must have regard to a list of six considerations, one of which is “the impact of the company’s operations on the community and the environment”.<sup>15</sup> There is no requirement, however, that their resulting determinations be accurate or reasonable; as long as they are taken under a good faith belief that they are in the best interests of the company.<sup>16</sup>

This duty stems from a notion of ‘shareholder primacy’, whereby the board must act in a way which prioritises the financial welfare of the company’s shareholders.<sup>17</sup> The need for long-run viability, which is a crucial part of this principle, is elucidated in the six considerations. The Act, however, does not impose any substantive requirements on the directors to address those factors. As long as they are weighed in good faith, and reported,<sup>18</sup> that is sufficient.

In respect of the s.172 duty, ClientEarth destroyed its own argument. Operating under the misapprehension that these considerations were in fact subject to a reasonableness qualification,<sup>19</sup> they

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<sup>10</sup> *ibid* at [81].

<sup>11</sup> *ibid* at [84].

<sup>12</sup> Or, at least, the first reported case under the Companies Act scheme. Gibbs-Kneller, David, and Chidiebere Ogonnaya. “Empirical Analysis of the Statutory Derivative Claim: De Facto Application and the Sine Quibus Non.” *Journal of Corporate Law Studies*, vol. 19, no. 2, Oct. 2018, pp. 303-32 at 319: “The amount of claims that have demonstrated a *prima facie* case has risen from 55.6% to 100% under statute.”

<sup>13</sup> *McGaughey v Universities Superannuation Scheme Ltd* [2022] EWHC 565 (Ch) at [12].

<sup>14</sup> Companies Act 2006 s.172.

<sup>15</sup> *ibid* s.172(d).

<sup>16</sup> *TMO Renewables Ltd v Yeo & Others* [2021] EWHC 2033 (Ch) at [389]-[390], citing *Re Smith & Fawcett Ltd* [1942] Ch 304 and *Regentcrest Plc v Cohen* [2001] 2 BCLC 319. Note that, in the instant case, Trower J qualifies the pure subjectivity of the test by stating that “ClientEarth must show a *prima facie* case that there is no basis on which the Directors could reasonably have come to the conclusion that the actions they have taken have been in the interests of Shell.” But Smith J in *TMO Renewables* at [391] maintains that such an objective test only applies where the company verges on, or is in fact in, a state of insolvency, which Shell is quite certainly not. Otherwise, it seems that the objective aspect is only utilised in cases of bad faith or if the interests of the company are disregarded entirely: see Arnold, Mark, and Marcus Haywood. “Duty to Promote the Success of the Company.” *Company Directors: Duties, Liabilities, and Remedies*, edited by Simon Mortimore, Oxford University Press, 9 Mar. 2019, pp. 282–286. *TMO Renewables*, as a High Court case, does not bind Trower J, but he seems nonetheless to have misinterpreted Smith J’s directive: *ClientEarth* at [38]. Such a difference would only be resolved on appeal, which the EWCA has declined to hear.

<sup>17</sup> see, e.g., Benjamin, Lisa. “The Responsibilities of Carbon Major Companies: Are They (and Is the Law) Doing Enough?” *Transnational Environmental Law*, vol. 5, no. 2, Oct. 2016, pp. 353-378, at 358-359.

<sup>18</sup> As required by The Companies (Miscellaneous Reporting) Regulations 2018, SI 2018/860 s.4.

<sup>19</sup> *ClientEarth* at [38]; see further Arnold & Haywood (n 16) *supra*.

adduced evidence which demonstrated the directors' weighing of the environmental consideration; namely, the climate risk strategy itself.<sup>20</sup> Since the s.172 duty essentially sets out a procedural requirement,<sup>21</sup> ClientEarth's strategy—to cite the climate risk strategy and then argue it is inadequate or unreasonable—was self-defeating.

In fact, the reason that ClientEarth failed to show a *prima facie* case for a breach of the second duty is much the same. The 2006 Act in s.174 requires directors to take "reasonable care, skill and diligence" in the exercise of their duties.<sup>22</sup> This essentially compels the board to properly inform themselves about the risks that might face their business and weigh those risks.<sup>23</sup> The mere fact that a climate risk strategy exists in the first instance is sufficient to meet that duty. Further, unlike the s.172 duty, s.174 does contain a reasonableness element, which entails asking "whether the decision falls outside the range of decisions reasonably available to the Directors at the time".<sup>24</sup> Mr Justice Trower holds that there is no "universally accepted methodology" for how best to respond to the climate risks identified, and this means that it is impossible to determine that "no reasonable board of directors could properly conclude that the pathway to achievement is the one they have adopted".<sup>25</sup> In other words, the fact that there is no universal consensus on how companies should achieve their climate objectives means that, absent further evidence specific to Shell and its strategies, their approach cannot be held to be unreasonable, and is therefore not in breach of their s.174 duty.

Mr Justice Trower's criticisms, however, do not end there. On the question of duties, two further points are made: (i) that ClientEarth's evidence is not expert testimony and the Court cannot "properly rely" on it,<sup>26</sup> and (ii) that even though the climate risk strategy itself demonstrates s.172 compliance, ClientEarth was unable to explain why "the Directors have gone so wrong in the balancing of ... competing considerations" such as profit-related concerns as to constitute a breach of s.174.<sup>27</sup> Finally, on the point of the Dutch court order, he refers to an excerpt from the ruling which grants Shell the freedom to shape its corporate policy however it sees fit so as to meet the reduction obligation, which is consistent, and in this regard coextensive, with the s.172 duty.<sup>28</sup>

In its derivative claim, ClientEarth sought an injunction requiring the company to implement a new, compliant climate strategy and to observe the Dutch court order—but the judge held that such a request is "too imprecise to be suitable for enforcement, and for that reason alone is an order which a court would

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<sup>20</sup> *ibid* at [65].

<sup>21</sup> Good faith is the only substantive condition. A lack of good faith would be evidenced through, for example, dishonesty or fraud: *see McGaughey* (n 13) *supra* at [192]-[196]. ClientEarth would likely have been able to prove neither.

<sup>22</sup> Companies Act 2006 s.174.

<sup>23</sup> This was the position at common law, before the statutory scheme was in place: *Re Baring Plc & Others (No. 5)* [2000] 1 BCLC 523 at 536A. The same approach is applied now: *Lexi Holdings Plc v Luqman & Others* [2009] EWCA Civ 117.

<sup>24</sup> *ClientEarth* at [32], citing *Sharp v Blank & Others* [2020] EWHC 1870 (Ch). Trower J does not treat the two duties with clear separation, which makes the division between the subjective test for s.172 and the objective test for s.174 more confused: *see* (n 16) *supra*. Presumably at [32] he was referring to the s.174 duty.

<sup>25</sup> *ibid* at [64].

<sup>26</sup> *ibid* at [59]-[63].

<sup>27</sup> *ibid* at [65]-[68].

<sup>28</sup> *ibid* at [73].

be most unlikely to make.”<sup>29</sup> Indeed, with some irony, he remarks that such an injunction would likely disrupt Shell’s business activities to such an extent that it would adversely affect the interests of shareholders, which is exactly what a derivative action is designed to avoid in the first place.<sup>30</sup> ClientEarth also requested a declaration that the directors were in breach of their duty, but “it is difficult to see what legitimate purpose the grant of a declaration would fulfil ... It 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.”<sup>31</sup>

Thus, a *prima facie* case for breach was not established, and no remedy was offered. Both the character and the content of the judgment indicate a deeper issue with ClientEarth’s case. It was, in essence, entirely inappropriate for them to attempt to pursue a climate lawsuit through British company law, because the company law regime is associated with greater judicial conservatism than other fields. ClientEarth’s approach was not “groundbreaking” in any way;<sup>32</sup> it was a failure of strategy.

### III. The Business Judgement Rule and Litigation Strategy.

It is worth first considering patterns of language in Mr Justice Trower’s ruling. It is a “basic principle of company law that it is for the directors themselves to determine the weight to be attached to the non-exhaustive list of factors referred to in s.172”;<sup>33</sup> “if the court should not interfere with the commercial question of the strategy to be adopted, the same principle of restraint should be applied to the means by which that strategy is to be implemented”;<sup>34</sup> “The weighing of all these considerations [as set out in s.172] is essentially a commercial decision, which the court is ill-equipped to take, except in a clear case”.<sup>35</sup> These quotations reflect longstanding principles in company law that the judiciary is, by and large, not well-placed to question decisions taken by a board of directors as to the lawful operation of a company; as Keay and Loughry explain, “the courts have often refrained from holding directors liable for alleged breaches of the duties, instead deferring to directors’ judgments. Courts have simply not been willing to substitute their judgment for that of directors.”<sup>36</sup> This approach is, in other jurisdictions, termed the Business Judgement Rule, and although no such principle has been formally expounded by the British courts, it remains the case that the spirit of the Rule is frequently adopted.<sup>37</sup>

The practical effect of this is that the circumstances under which a board can be said to have breached their duties is very limited. It is generally restricted to cases of fraud or dishonesty,<sup>38</sup> perverse intentions,<sup>39</sup>

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<sup>29</sup> *ibid* at [81].

<sup>30</sup> *ibid*.

<sup>31</sup> *ibid* at [83].

<sup>32</sup> As they themselves claimed: ClientEarth. “We’re Taking Legal Action against Shell’s Board for Mismanaging Climate Risk.”

<sup>33</sup> *ClientEarth* (n 7) *supra* at [25].

<sup>34</sup> *ibid* at [26].

<sup>35</sup> *ibid* at [28], quoting *Jesini* (n 6) *supra* at [85]. The substance is repeated in *ibid* at [32].

<sup>36</sup> Keay, Andrew, and Joan Loughry. “The Concept of Business Judgment.” *Legal Studies*, vol. 39, no. 1, 11 Dec. 2018, pp. 36-55.

<sup>37</sup> *ibid*. The authors cite *Howard Smith v Ampol Petroleum* [1974] 1 All ER 821 at 835, *Devlin v Slough Estates Ltd* [1983] BCLC 497 at 503–504, and *Birdi v Specsavers Optical Group Ltd* [2015] EWHC 2870 (Ch) at [246].

<sup>38</sup> *see* (n 21) *supra*.

<sup>39</sup> For instance, when a director sets up a company pension for their partner: *Re W&M Roith Ltd* [1967] 1 WLR 432.

or demonstrable gross irrationality. In the instant case, Mr Justice Trower was happy to acknowledge that ClientEarth's evidence represented their "genuinely held" beliefs, but also that those beliefs constituted nothing more than a difference of opinion.<sup>40</sup> Paradigmatically, judges will defer to the board's decisions unless they meet one of the special cases above; *ClientEarth* is no exception.

The decision to pursue a claim in company law is, then, an error of strategy. *Pace* Dr Iglesias- Rodríguez, who contends that the *ClientEarth* decision will precipitate a number of positive sociopolitical changes,<sup>41</sup> I argue that the more plausible outcome is that climate-destructive companies operating under English law will find greater confidence in relying on their own models, predictions, and reports to substantiate their decision-making, which will further skew the underlying forces driving their activities away from the long-run common good and towards the short-run profit motive. The High Court's scathing rejection of every single one of ClientEarth's submissions bolsters the *de facto* directorial immunity from judicial interference inherent in the Business Judgement Rule and reproduces this unspoken cornerstone of English company law. Such derivative actions may find a better foothold in other jurisdictions,<sup>42</sup> but it is at least arguable that this type of argument was doomed to failure.<sup>43</sup>

Evidently, this is open to the criticism that someone must pioneer a certain line of reasoning and thereby set the first precedent.<sup>44</sup> This is true, of course, but it does not bear upon the importance of strategy in such matters. Even in landmark cases that transform the law, there is often some kind of foretold—*obiter* comments in prior judgements,<sup>45</sup> unwelcome application of the existing precedent,<sup>46</sup> or other signals of a general sense amongst the judiciary that a change is necessary.<sup>47</sup> Before pursuing a case,

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<sup>40</sup> *ClientEarth* (n 7) *supra* at [59].

<sup>41</sup> Iglesias-Rodríguez, Pablo. "ClientEarth v Shell Plc and the (Un)Suitability of UK Company Law and Litigation to Pursue Climate-Related Goals." *Journal of Environmental Law*, vol. 35, no. 3, 28 Aug. 2023, pp. 445-454.

<sup>42</sup> For remarks on the potential of claims in the US under Delaware law, see Tigre, Maria Antonia, and Cynthia Hanawalt "The Fiduciary Duty of Directors to Manage Climate Risk: An Expansion of Corporate Liability through Litigation?" *Climate Law Blog*, 15 Feb. 2023. According to Brady-Banzet, Lall & Assereto, "Climate-related derivative claims are on the rise in the United States", although no evidence of such claims is offered: Brady-Banzet, James, et al. "Derivative Claims in ESG Litigation against Directors—Q&A." *INSIGHTS*, vol. 37, no. 7, July 2023, pp. 17-20. The outlook is perhaps more doubtful in France: see Colombet, Astrid Mignon, and Alfred Reboul. "Justice Climatique : Les Limites Du Name and Shame." *Esprit*, 2023, no. 10, 2 Oct. 2023, pp. 10-13.

<sup>43</sup> It has been argued that "derivative litigation challenging strategy on climate risk may ... not be worth powder in shot" because, amongst other things, even if a *prima facie* case for a breach can be made, "it is unlikely that [directors] will be unable to come up with at least one principled reason for the court to exercise their discretion to refuse permission for such allegations. This will then leave the claimant shareholder liable for costs, as they are allocated on English-rule loser pays ...": Gibbs-Kneller, David. "Corporate Strategy on Climate Risk in the Courtroom: Not Worth Powder in Shot." *Environmental Law Review*, vol. 25, no. 4, 1 Dec. 2023, pp. 326-335 at p. 330. There is a glimmer of a chance, however small, in *McGaughey* (n 13) *supra* at [90], where, on appeal, Lord Justice Asplin left open the possibility of climate-related beneficiary derivative claims, which are rooted in the law of trusts.

<sup>44</sup> If Walter Leechman had advised May Donoghue that, based on the precedent of *Mullen v AG Barr & Co Ltd* [1929] SC 461, a writ against David Stevenson would fail, we would never have had *Donoghue v Stevenson* [1932] AC 562.

<sup>45</sup> Consider *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] AC 465, in which the House of Lords cited *obiter* remarks in an earlier case, *Candler v Crane, Christmas & Co* [1951] 2 KB 164.

<sup>46</sup> In *Murphy v Brentwood District Council* [1991] 1 AC 398, the House of Lords overruled an earlier transformative judgment, *Anns v Merton LBC* [1978] AC 728, in part because of how the expansive negligence liability principles in *Anns* were giving rise to difficult decisions such as *McLoughlin v O'Brien* [1982] 2 All ER 298.

<sup>47</sup> Especially indications of reluctance to follow precedent: see, e.g., Goff LJ in *Elliott v C* [1983] 1 WLR 939, who was bound by the test set in *R v Caldwell* [1982] AC 341: "I agree with the conclusion reached by Glidewell J, but I do so simply because I

especially within the novel domain of climate litigation, these factors need to be carefully evaluated to gain a better sense of the prospects of success. In a case like *ClientEarth*, where there was ultimately no indication that the courts would diverge from well-established company law principles, such prospects were minimal.

Perhaps it is disingenuous to criticise the approach in *ClientEarth* without offering a strategically superior alternative. The unfortunate truth, however, is that there does not appear to be one. There is a broader underlying aversion towards issuing climate-positive decisions in British courts, because such a decision would ordinarily be seen as trespassing on the province of the executive.<sup>48</sup> Exceptions to this only arise if the legislative will can be invoked.<sup>49</sup> Further, in the absence of a codified constitution which would set out with clarity the role of the courts to safeguard the citizenry in certain specific ways, an *Urgenda*<sup>50</sup>-style case based on the European Convention on Human Rights would also likely fail, given that the relationship between climate change and the fundamental rights that the ECHR protects is not so clear and unambiguous as to overcome the basic principle that the courts defer to the sovereign Parliament on such matters of policy.<sup>51</sup>

In the end, then, the correct strategy is something of a waiting game—at least for the UK. The judicial restraint prevalent in these fields might be slowly relaxed if persuasive precedent in other common-law jurisdictions (Australia, New Zealand, South Africa, and the United States especially) is built over time, until it constitutes an overwhelming case for a change in position. Alternatively, certain statutory proposals involve empowering the courts to exercise greater oversight on climate issues.<sup>52</sup> In either case, a major shift in judicial or legislative position would be required. Currently, without such a shift, fertile

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believe myself constrained to do so by authority. I feel moreover that I would be lacking in candour if I were to conceal my unhappiness about the conclusion which I feel compelled to reach.” Not more than two decades later, the test was overturned: *R v G and Another* [2003] UKHL 50, [2004] AC 1034. Alternatively, especially in the US, the ‘general sense’ can stem not from the judiciary, but from the public—see Bassok, Or. “The Supreme Court’s New Source of Legitimacy.” *University of Pennsylvania Journal of Constitutional Law*, vol. 16, no. 1, Oct. 2013, pp. 153–99.

<sup>48</sup> see, e.g., *R (Friends of the Earth & Others) v Heathrow Airport Ltd* [2020] UKSC 52 at [144]: “The authority must be free to form a reasonable view of its own on the nature and amount of information required, with the specified considerations in mind ... A standard more intense than that would risk the court being invited, in effect, to substitute its own view on the nature and amount of information included in environmental reports for that of the decision-maker itself. This would exceed the proper remit of the court.”

<sup>49</sup> see, e.g., *R (Friends of the Earth & Others) v SoS for Business, Energy, and Industrial Strategy* [2022] EWHC 1841 (Admin) at [239]: “The defendant’s narrower interpretation of the scope of s.14 is not supported by the expert role given by the CCA 2008 to the CCC. On the contrary. The legislation requires Parliament to be provided with statements each year by the Secretary of State ... Those proposals and policies are the central focus of the methods laid down in the statutory scheme for meeting the carbon budgets and the 2050 target.”

<sup>50</sup> *State of the Netherlands v Urgenda Foundation* ECLI:NL:HR:2019:2006. This case is the first successful instance of climate litigation which engaged with the ECHR.

<sup>51</sup> The most a senior court could do in relation to primary legislation is to issue a ‘declaration of incompatibility’ with the ECHR, but this is unlikely given the constitutional severity of such a declaration and the legally tangential connection between climate change and human rights. A positive obligation might be imposed on the executive in the face of inaction, but this is also unlikely in light of the Climate Change Act 2008, which displaces the court’s role in this area.

<sup>52</sup> Including in company law: see, e.g., the proposed Better Business Act, which would amend s.172 to include an obligation that a company operates “in a manner that also—(a) benefits wider society and the environment in a manner commensurate with the size of the company and the nature of its operations; and (b) reduces harms the company creates or costs it imposes on wider society or the environment, with the goal of eliminating any such harm or costs” *The Better Business Act*. Such an enactment would be revolutionary by compelling courts to depart from the Business Judgement Rule more frequently.

options for potential British climate litigants are few and far between. One small region that has seen success is greenwashing and the regulation of advertising campaigns; in October 2022, for instance, the Advertising Standards Authority ruled that HSBC posters which misrepresented their contribution to the climate crisis were misleading, and HSBC was barred from promoting similar materials.<sup>53</sup>

It must also be noted that litigation does not exist in a vacuum. A holistic strategy for an organisation like ClientEarth ought to also include lobbying for statutory reform, supporting academic work on environmental law, assisting with advocacy, influencing judicial reasoning through *amicus* briefs, and supporting public awareness through the dissemination of educational material. All these elements help build a framework which might eventually precipitate a shift in popular and social values so great that the relationship between the law and the climate is generally re-evaluated. This, in turn, creates the foundation for effective future litigation. Encouragingly, ClientEarth recently submitted an *amicus* brief at the Inter-American Court of Human Rights as it considers how climate-related obligations interact with the human rights framework in the Americas.<sup>54</sup>

*ClientEarth* was a strategic error, but perhaps ultimately the decision to litigate cannot be condemned. The vast majority of climate-based cases under British law suffer from the same judicial predilection for restraint. Until we arrive at a broader recasting of the judiciary's role in regulating climate change, litigation strategy needs to be construed more broadly, and should involve some of the non-litigative components listed above. That way, organisations like ClientEarth set the stage for an explosion in successful climate cases once such a recasting occurs. British courts, in turn, must consider whether it is right to continually defer to the legislature, or if the climate crisis is such a gross and fundamental threat to the nation and the world that they, as an organ of the state, have a higher duty—both ethical and constitutional—to ensure that the hubris and inaction of the other elements of government does not engender our collective downfall.

#### IV. Conclusion.

ClientEarth is a non-profit organisation, and a registered charity. It ought to use the funds it raises appropriately and avoid cases such as this, where a cursory examination of the precedent and of the general principles governing company law would have disclosed a near-zero chance of success. This is not unique to this area of law, and a paradigm shift is required for climate lawsuits in the UK to see greater success—as such, the institutional strategy of British climate litigation charities should be broadened to include non-litigative elements. Globally, the efforts of such groups are to be commended, and more successful rulings are being handed down.<sup>55</sup> As *ClientEarth* shows, however, attempts to trailblaze, especially in branches of law checked by judicial restraint, are liable to misfire.

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<sup>53</sup> *ASA Ruling on HSBC UK Bank Plc*, 19 October 2022. As per *Friends of the Earth* (n 49) *supra*, challenges can also succeed where executive action clearly violates a provision in an Act of Parliament, but the near-total control exercised by the Government over Parliamentary lawmaking renders such violations infrequent.

<sup>54</sup> “*Amicus Curiae* Brief: On the Issues in the Request for an Advisory Opinion on the Climate Emergency and Human Rights.” *ClientEarth*, [https://www.clientearth.org/media/uoxeopoj/iacthr\\_ce\\_final.pdf](https://www.clientearth.org/media/uoxeopoj/iacthr_ce_final.pdf).

<sup>55</sup> In the British context, see *ASA Ruling* (n 53) and *Friends of the Earth* (n 49) *supra*. More generally, see Tigre, Maria Antonia, and Margaret Barry. “Climate Change in the Courts: A 2023 Retrospective.” *Sabin Center for Climate Change Law: Publications*, Dec. 2023.