Dutch Court orders Shell to reduce CO2 emissions in landmark climate change case

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In a significant decision handed down on 26 May 2021, a Dutch court (the Hague District Court) found oil giant Shell responsible for CO2 reduction ordering Shell to cut greenhouse emissions by net 45% at end 2030, relative to 2019. This is the first time that any court in the world has ordered a fossil fuel company to comply with global climate goals and to become aligned with the Paris Agreement.

In a class action brought by Milieudefensie, and other NGOs, against Royal Dutch Shell (RDS), seeking to obtain an order for RDS to reduce its emissions in line with the objective of the Paris Agreement, a Dutch Court handed down a ground-breaking judgment last week in *Milieudefensie et al v Shell*. In an unprecedented judgment, the Court found oil giant Shell obliged to reduce the CO2 emissions of the entire Shell group's activities by net 45% at end 2030, relative to 2019, through the Shell group's corporate policy.

How did Royal Dutch Shell come to be responsible for the CO2 emissions of its subsidiaries and its supply partners?

The claims of Millieudefensie et al were directed against the Royal Dutch Shell (RDS), established in The Hague, as the parent company of the Shell group.

The Court noted that RDS was the top holding company of the Shell group. A key issue for making RDS responsible for its subsidiaries and its supply partners was the finding that RDS establishes the general policy for the Shell group, including having oversight of climate change risk management. The Court held that "RDS endorses the need to tackle climate change by achieving the goals of the Paris Agreement and reducing global CO2 emissions".

As the top holding company, RDS – noted the Court – "reports on the greenhouse gas emissions of the various Shell companies, both on the basis of the relevant company's operational control (100% of the emissions of companies and joint ventures operated by one of the Shell companies) as well as on the basis of the relevant company's share capital (equity share of the emissions of the companies and joint ventures in which Shell participates)".

The Court also noted that RDS reports on greenhouse gas emissions on the basis of the World Resources Institute Greenhouse Gas Protocol (GHG Protocol) observing that the GHG Protocol categorises greenhouse gas emissions in Scope 1, 2, and 3 as follows:

- Scope 1: direct emissions from sources that are owned or controlled in full or in part by the organisation.
- Scope 2: indirect emissions from third-party sources from which the organisation has purchased or acquired electricity, steam, or heating for its operations.
- Scope 3: all other indirect emissions resulting from activities of the organisation but occurring from greenhouse gas sources owned or controlled by third parties, such as other organisations or consumers, including emissions from the use of third-party purchased crude oil and gas.

The Court noted that in its 2019 submissions to the Carbon Disclosure Project (CDP) – an international not-for-profit charity that runs the global disclosure system for investors, companies, cities, states and regions – RDS stated that its CEO "has ultimate responsibility for the general management of the Shell group", and "the most senior individual with accountability for climate change". It also noted that the 2019 submissions of RDS to the CDP identified climate change and risks resulting from GHG emissions "as a significant risk factor for Shell".

The Court noted that RDS' value chain included the closely affiliated companies of the Shell group, "on which it has policy-setting influence". "These also include the business relations from which the Shell group purchases raw materials, electricity, and heat" – held the Court. The Court also held that the end-users of the products produced and traded by the Shell group are at the end of RDS' value chain. The responsibility of RDS "therefore also extends to the CO2 emissions of these end-users (Scope 3)", held the Court.

In a telling segment of the judgment the Court found that the total CO2 emissions of the Shell group (Scope 1 through 3) exceeds the CO2 emissions of many states including the Netherlands.

RDS unsuccessfully tried to argue that the claims required a decision

which would go beyond the law-making function of the court and that these matters should be resolved by the legislator and politics. The Court dismissed this argument. It held that its task was to interpret the unwritten standard of care, applicable in the case, under Dutch Law (as found to be the applicable law below).

The applicable law

The claimants made a choice of law within the meaning of Article 7 of Rome II (Regulation (EC) No 864/2007 of the European Parliament and the Council of 11 July 2007 on the law applicable to non-contractual obligations). Article 7 of Rome II determines that the law applicable to a non-contractual obligation arising out of environmental damage or damage sustained by persons or property as a result of such damage shall be the law determined pursuant to the general rule of Article 4 Paragraph 1 Rome II, unless the person seeking compensation for damage chooses to base his or her claim on the law of the country in which the event giving rise to the damage occurred.

The Court noted that the parties had been correct to take as a starting point that climate change, whether dangerous or otherwise, due to CO2 emissions constitutes environmental damage, in the sense of Article 7 Rome II. The Court, however, had to decide on what constituted in the case the "event giving rise to the damage" in the sense of Article 7 Rome II. Milieudefensie argued that the event giving rise to the damage was the corporate policy as determined for the Shell group by RDS, and therefore the applicable law was Dutch law. RDS alleged that the event giving rise to the damage was actually the CO2 emissions (the corporate policy was only a 'preparatory fact') which led to the applicability of a "myriad of legal systems." The Court concluded that when applying Article 7 Rome II, RDS' adoption of the corporate policy of the Shell group constituted an independent cause of the damage, which may contribute to environmental damage and imminent environmental damage with regard to Dutch residents and the inhabitants of the Wadden region. The Court thus concluded that the applicable law in the case was Dutch law.

The standard of care

The Court interpreted the standard of care from the applicable law (Book 6 Section 162 of the Dutch Civil Code) (i) on the basis of the relevant facts and circumstances, (ii) the best available science on dangerous climate change and how to manage it (iii) and the widespread international consensus that human rights offer protection against the impacts of dangerous climate change and that companies must respect human rights.

A novel aspect of the case is that the Court decided to 'factor in' human rights standards enshrined in Article 2 (right to life) and 8 (prohibition of interference with one's home) of the European Convention of Human Rights and Articles 6 (right to life) and 17 (prohibition of interference with one's home) of the International Covenant on Civil and Political rights, in its interpretation of the unwritten standard of care. It also did so in respect of soft law like the UN Guiding Principles on Business and Human Rights (UNGP) which the Court held "constitute an authoritative and internationally endorsed 'soft law' instrument, which sets out the responsibilities of states and business in relation to human rights", and the OECD Guidelines for Multinational Enterprises. The Court held inter alia "due to the universally endorsed content of the UNGP, it is irrelevant whether or not RDS has committed itself to the UNGP, although RDS states on its website support to the UNGP". It thus held: "The responsibility of business enterprises to respect human rights, as formulated in the UNGP, is a global standard of expected conduct for all business enterprises wherever they operate. It exists independently of State's liabilities and/or willingness to fulfil their own human rights obligations…". "Tackling the adverse human rights impacts [of climate change] means that measures must be taken to prevent, limit, [and] when necessary, address these impacts. It is a global standard of expected conduct for all businesses wherever they operate."

In a critical passage of the judgment the Court noted that "RDS has for a long time known of the dangerous consequences of CO2 emissions and the risks of climate change to Dutch residents…".

The conclusion of the Court

The Court concluded that RDS is obliged to reduce the CO2 emissions of the Shell group's activities by net 45% at end 2030 relative to 2019 through the Shell group's corporate policy. It held:

- That this reduction obligations relates to the Shell group's entire energy portfolio and to the aggregate volume of all emissions (Scope 1 through to 3).
- That it was up to RDS to design the reduction obligations, taking account of its current obligations and other relevant circumstances.
- The far-reaching 'control and influence' of RDS over the Shell group means that RDS's reduction obligation must be an obligation of result for emissions connected to own activities of the Shell group.
- That with regard to the business relations of the Shell group, including the end-users, it was a 'significant best-efforts obligation' – in which RDS may be expected to take the necessary steps to remove or prevent the serious risks arising

from the CO2 emissions generated by its business relations, and to use its influence to limit any lasting consequences as much as possible.

- A consequence of this significant obligation may be that RDS will forgo new investments in the extraction of fossil fuels and/or limit its production of fossil resources.

On the proportionality of the reduction obligation of RDS the Court held:

- The compelling common interest that is served by complying with the reduction obligation outweighs the negative consequences RDS might face due to the reduction obligation and also the commercial interests of the Shell group, which are served by an uncurtailed preservation or even increase of CO2 generating activities.

The Court ordered that the above measures were all of immediate compliance.

Can a similar type of action reach other jurisdictions such as England?

The class action in *Milieudefensie et al* was a public interest action; that is an action seeking to protect public interests, which cannot be individualised because they accrue to a much larger group of persons. The common interest of preventing dangerous climate change by reducing CO2 emissions could be protected in a class action, the Dutch Court held.

While this type of litigation is different to the group litigation type of cases seen in English courts, the case, however, has broken new ground in making a parent company legally responsible for subsidiaries and its supply partners' CO2 emissions for the first time in history. The analysis of the Dutch court in ascertaining parent company liability may be relevant to the construction of relevant principles under English law. The case is also a precedent accepting that climate change, due to CO2 emissions, constitutes environmental damage, in the sense of Article 7 Rome II (non-contractual responsibility). The reasoning of the Court in deciding what constitutes the 'event giving rise to the damage' in the sense of Article 7 Rome II, in the climate change context, may also assist other courts. All this may ignite litigation in other jurisdictions, including the UK, following the same approach.[1]

Finally, the Court's analysis of the duty of care standard, by way of resorting to human rights and soft law may serve also as a precedent to inform the required standard of duty of care in climate change contexts.

In short, this case is likely to influence a new wave of climate change cases against private sector major emitters.

The views and opinions expressed in this article are those of the author and do not necessarily reflect the position of other members of Twenty Essex.

1. The UK has already incorporated the EU regulations on applicable law in non-contractual matters.

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Monica is currently acting in several climate change cases. She has also developed experience in group litigation relating to environmental damage in tort cases before the High Court.

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