

CLIMATE CHANGE AND DIRECTORS' DUTIES – KEY MESSAGES FOR DIRECTORS

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In July 2023, the English courts handed down two decisions dealing with the interaction between climate risk and directors' duties:

- *McGaughey and another v Universities Superannuation Scheme and others* [2023] EWCA Civ 873

An application to bring a derivative claim against the directors of a pension trustee company alleging breach of directors' duties, including by failing to operate a plan for divestment from fossil fuels.

- *ClientEarth v Shell Plc and others* [2023] EWHC 1897 (Ch)

"Both of these judgments should provide comfort to directors."

The oral hearing of an application for permission to bring a derivative claim against the directors of Shell Plc for alleged deficiencies in Shell's response to climate risks, following the denial of permission on the papers. For more detail on the allegations made, see our earlier article: [Climate Change and Directors' Duties – ClientEarth v Shell Decision Provides Comfort for Directors](#).

KEY MESSAGES FOR DIRECTORS

Both of these judgments should provide comfort to directors. They reinforce earlier decisions that confirm the limited scope of court procedures improperly used to bring these claims.

It is also possible to extract a number of practical takeaways for directors when dealing with climate change related issues:

- climate change creates financial risks for companies which need to be properly assessed by directors when setting strategy/ taking decisions;
- directors are to make a judgement call on how to best balance these issues against other competing risks facing the company;
- there is no single way in which complex decisions can properly be made – a range of decisions could all be made without being irrational;

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- a director must exercise their judgement, based on their own subjective views (so long as they are also views which could reasonably be held by another director exercising such reasonable skill and care as could be expected of a director in their position);
- this means that directors do need to consider whether they are sufficiently informed on climate change (as well as all other pertinent risks) and take steps to improve their knowledge if necessary;
- it is also prudent for directors to take advice where necessary to understand the scope of their powers (particularly where this is governed by regulation – as is the case in relation to pension schemes); and
- the court is inherently unlikely to grant a mandatory injunction specifying how directors are to act on complex issues. Such an injunction is unlikely to be capable of specific enforcement and would have a disruptive impact bearing in mind the possible disputes over compliance.

ClientEarth has already publicised its intention to appeal the decision.

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