CASE REVIEW

GLOBAL TRANSITION TO CLEAN ENERGY: A REVIEW OF THE HAGUE DISTRICT COURT DECISION AGAINST ROYAL DUTCH SHELL*

Abstract

Recently, the Hague District Court delivered a ground-breaking decision against the Royal Dutch Shell ("RDS"), ordering RDS and its affiliates to limit or cause to be limited the aggregate annual volume of all CO2 emissions into the atmosphere (Scope 1, 2 and 3) due to the business operations and sold energy-carrying products of the Shell group to such an extent that this volume would have been reduced by at least net 45% at the end of 2030, relative to 2019 levels. This judgment constitutes an important step in establishing the responsibility of multinational companies in achieving the clean energy goals of the global community and, also, stands a good chance of positively influencing the outcome of similar cases in many other countries where climate change activists are likely to pursue kindred suits – especially if the legal frameworks in such countries are conducive to such climate change litigations.

Keywords:

The Netherlands, Climate change, Royal Dutch Shell, Hague District Court, CO2 emissions, Milieudefensie

1. Introduction

In a class-action instituted by climate change activists, the Hague District Court on 26 May 2021 delivered judgment against RDS, ordering *"*RDS, both directly and via the companies and legal entities it commonly includes in its consolidated annual accounts and with which it jointly forms the Shell group, to limit or cause to be limited the aggregate annual volume of all CO2 emissions into the atmosphere (Scope 1, 2 and 3) due to the business operations and sold energy-carrying products of the Shell group to such an extent that this volume will have reduced by at least net 45% at end 2030, relative to 2019 levels"[1]. This decision which signals judicial support for transition to clean energy is indeed ground-breaking being the first of its kind court order against a private entity to reduce its global CO2 emissions.[2]

2. The Legal Basis of the Suit

Non-governmental organizations with focus on climate change[3] (the "NGOs") instituted the class action against RDS riding on Book 6 Section 162 of the Dutch Civil Code which identifies a tortious act as *"a violation of someone else's right[4] (entitlement) and an act or omission in violation of a duty imposed by law or of what according to unwritten law has to be regarded as*

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[1] Paragraph 5.3 of the Judgment.

[2] RDS has since indicated that it plans to appeal the decision. However, it is left for the appellate court to decide where the pendulum swings.

[3] The Non-Governmental Organisations that instituted the class action are Milieudefensie, Greenpeace Nederland, Fossielvrij NL, Waddenvereniging, Both Ends, Jongeren Milieu Actief and ActionAid. The claims of ActionAid were denied because its objects (with a special focus on Africa) as stated in its Articles of Association do not align with the interest served with the class action - which is for the benefits of the residents of Netherland and the Wadden region.

[4] The rights of the inhabitants of the Netherlands and the Wadden region which the court sought to protect are the right to life and the right to respect for private and family life of Dutch residents and the inhabitants of the Wadden region as enshrined in the European Convention for the Protection of Human Rights and Fundamental Freedoms and the International Covenant on Civil and Political Rights.

proper social conduct, always as far as there was no justification for this behaviour." The NGOs argued that RDS has an obligation ensuing from the unwritten standard of care (pursuant to Book 6 Section 162 of the Dutch Civil Code), to contribute to the prevention of dangerous climate change. It was argued that this obligation rests on RDS as it determines the corporate policy of the entire Shell group.

3. Decision of the Court

3.1 Admissibility of Class Actions

The Court held that while the common interest of preventing dangerous climate change can be protected in a class action, the interest of the entire world's population is not suitable for bundling in a class action. This is because the principal interest of the world's population does not meet the requirement for 'similar interest' under Dutch law as there are huge differences in the time and manner in which the global population at various locations will be affected by the global warming caused by CO2 emissions. The class action is therefore limited to the interest of Dutch residents and inhabitants of the Wadden region.

3.2 Applicable Law

The court held Dutch law to be the applicable law since the damage of the Co2 emissions occurred in the Netherlands and the Wadden region; and the policy-setting responsibility of RDS for the Shell group is an event giving rise to the damage.[5]

3.3 RDS' Reduction Obligation

The Court held that RDS' reduction obligation ensues from the unwritten standard of care laid down in the Dutch Civil Code, which means that acting in conflict with what is generally accepted according to unwritten law is unlawful. In interpreting the unwritten standard of care, the court considered several factors including: (1.) the policy-setting position of RDS in the Shell group, (2.) the Shell group's CO2 emissions, (3.) the consequences of the CO2 emissions for the Netherlands and the Wadden region, (4.) the right to life and the right to respect for private and family life of Dutch residents and the inhabitants of the Wadden region, (5.) the UN Guiding Principles, (6.) RDS' check and influence of the CO2 emissions of the Shell group and its business relations, (7.) what is needed to prevent dangerous climate change, (8.) possible reduction pathways, (9.) the twin challenge of curbing dangerous climate change and meeting the growing global population energy demand, (10.) the ETS system and other 'cap and trade' emission systems that apply elsewhere in the world, permits and current obligations of the Shell group, (11.) the effectiveness of the reduction obligation, (12.) the responsibility of states and society, (13.) the onerousness for RDS and the Shell group to meet the reduction obligation, and (14.) the proportionality of RDS' reduction obligation. In this decision, the court, relying on the World Resources Institute Greenhouse Gas Protocol, recognised 3 scopes of emissions:

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 of its operations (e.g. suppliers);
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 consumers.

[5] This was held in accordance with Regulation (EC) No 864/2007 of the European Parliament and the Council of 11 July 2007 on the law applicable to non-contractual obligation.

Although the court noted that RDS does not actually cause the Scope 1 - 3 emissions of the Shell group by itself, it noted that RDS' adoption of the corporate policy of the Shell group constitutes an independent cause of the environmental damage and RDS must take responsibility for that. In arriving at the percentage of reduction required of RDS (net 45% at end 2030, relative to 2019 levels), the court considered the SR15 report.[6]

4. The Implication of the Decision

One apparent implication of the decision is that while it is for the benefit of only the residents of the Netherlands and inhabitants of the Wadden region, it potentially could affect the global business of the Shell group. This would mean that an entity's choice not to operate in the Netherlands – as long as its activities affects the residents of the country, ie Netherlands - may not be a concrete defence to a similar suit before the Dutch court. This applies in particular when one considers the decision of the court that *"every emission of CO2 and other greenhouse gases, anywhere in the world and caused in whatever manner, contributes to this [environmental] damage and its increase".* The decision will inevitably affect Shell's decision globally and the court noted so that *"a consequence of this significant obligation may be that RDS will forgo new investments in the extraction of fossil fuels and/or will limit its production of fossil resources"*. The flip side is that this would likely affect investments in the African continent with many countries naturally endowed with these resources. That again has a direct effect on the Gross Domestic Product of countries like Nigeria whose economies are heavily reliant on crude oil and where the transition to clean energy is still at its lowest ebb. This decision is a further wake up call to Nigeria and other developing countries to rethink their economic policies towards clean energy and diversified green economies. These are issues that the relevant stakeholders must remain conscious of – especially now that the global community is determined to reduce the effects of greenhouse gases in the atmosphere. Regardless of the above position, it could be argued that the Dutch decision does not really have a global effect since the court restricted itself to the activities of the Shell Group affecting Dutch residents. In particular, the suit filed by ActionAid was not allowed because the court considered the interests of Dutch residents not sufficiently promoted by the organisation. Relying on ActionAid's articles of association, the court held that object of the organisation pertains to the world with a special focus on Africa. However, the court allowed the class action suits filed by *Milieudefensie et al* because the objects of their articles of association sufficiently promote the interests of Dutch residents. Therefore, the limitation of this decision is that what happens elsewhere may not be redressed in a Dutch court except if the claimant shows that it promotes the interests of Dutch residents and that the outside activities complained of affects Dutch residents adversely. Since, countries in Africa are battling with severe budget deficits and/or funding shortfalls, and have not boldly taken any step to enforce the United Nations Framework Convention on Climate Change ("UNFCCC"), International Convention on Oil Pollution Preparedness, Response and Cooperation ("ICOPPRC"), Paris Agreement, etc, there might be no political will to compel oil companies operating in the continent to observe the *Milieudefensie et al* decision. Regardless, it is clear that this decision will inspire similar suits by climate change activists - either in the Netherlands or in other jurisdictions across the globe. This is particularly in light of the fact that this case is following the decision of the Dutch Supreme Court in *Urgenda Foundation vs. State of the Netherlands*, where the Dutch State was ordered to reduce greenhouse emissions by at

[6] IPCC Special Report on the impacts of global warming of 1.5ºc, 2018. The court noted that research has shown that a safe temperature increase should not exceed 1.5ºc by the year 2100 and the SR15 report identifies that limiting global warming to 1.5ºc requires a net reduction of 45% in global CO2 emissions in 2030 relative to 2010 and a net reduction of 100% in 2050.

least 25% as of late 2020 relative to 1990. It remains to be seen what approach the courts will take if, or when, such lawsuits are commenced in Nigeria or elsewhere in Africa.