

GROUND-BREAKING CLIMATE CHANGE JUDGMENT OF 26 MAY 2021 BY THE HAGUE COURT IN THE NETHERLANDS

By Peter J.M. Declercq

A concrete reduction obligation is imposed on Royal Dutch Shell Plc (“RDS”) requiring a change of policy which will require an adjustment of the Shell group’s energy package

What Happened?

Class action on behalf of Dutch residents:¹ Using a Dutch class action, a number of organisations on behalf of – in short – the Dutch residents commenced in April 2019 Dutch legal proceedings against RDS, the English ultimate parent company of the worldwide Shell group headquartered in the Hague.

Net 45% CO2 Emissions Reduction Obligation by 2030: In its 26 May 2021 judgment (the “Judgment”) the Dutch court concluded² that RDS is obliged to reduce the CO2 emissions of the Shell group’s activities by net 45% at the end of 2030, relative to 2019, through the Shell group’s corporate policy.

Obligation of Result for Shell Activities: This reduction obligation relates to the Shell group’s entire energy portfolio and to the aggregate volume of all emissions (Scope 1 through to 3).³ It is up to RDS to design the reduction obligation, taking into consideration its current obligations. The reduction obligation is an obligation of result (or “resultaatsverplichting”) for the activities of the Shell Group.

Significant Best-Efforts Obligation for Activities of Shell Business Relations: With respect to the business relations of the Shell group, including the end-users, the reduction obligation is a significant best-efforts obligation (or “inspanningsverplichting”) and in this context RDS may be expected to take the necessary steps to remove or prevent the serious risks ensuing from the CO2 emissions generated by them, and to use its influence to limit any lasting consequences as much as possible.

Is RDS’s reduction obligation onerous or disproportionate?

In response to these questions, the Dutch court assumed that the reduction obligation will have far-reaching consequences for RDS and the Shell group and considered the following:⁴

- **Shell group’s potential growth could be curbed:** The reduction obligation requires a change of policy, which will require an adjustment of the Shell group’s energy package. This could curb the potential growth of the Shell group.
 - **Interest served by the reduction obligation outweighs Shell group’s commercial interests:** However, the interest served with the reduction obligation outweighs
-

the Shell group's commercial interests, which for their part are served with an uncurtailed preservation or even increase of CO₂-generating activities. Due to the serious threats and risks to the human rights of Dutch residents,⁵ private companies such as RDS may also be required to take drastic measures and make financial sacrifices to limit CO₂ emissions to prevent dangerous climate change.

- **Very serious threat, high risk of damage and serious human rights impacts:** The court considers that the CO₂ emissions for which RDS can be held responsible⁶ by their nature pose a very serious threat, with a high risk of damage to Dutch residents⁷ and with serious human rights impacts.⁸ This applies to both current and future generations. A characteristic feature of dangerous climate change is that every emission of CO₂ and other greenhouse gasses, anywhere in the world and caused in whatever manner, contributes to this development. In turn, each reduction means that there is more room in the carbon budget.⁹ RDS is able to effectuate a reduction by changing its energy package. This all justifies a reduction obligation concerning the policy formation by RDS for the entire, globally operating Shell group. 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.
- **Global reduction obligation gives RDS full freedom to shape at its discretion the compliance with it:** RDS has total freedom to comply with its reduction obligation as it sees fit, and to shape the corporate policy of the Shell group at its own discretion. The court notes that a "global" reduction obligation, which affects the policy of the entire Shell group, gives RDS much more freedom of action than a reduction obligation limited to a particular territory or a business unit or units.
- **RDS' reduction obligation is derived from an unwritten standard of care in the context of the Dutch legal concept of wrongful act:** In short, the Dutch court held that the legal basis for the reduction obligation imposed on RDS is found in the Dutch legal concept of tort or wrongful act ("onrechtmatige daad").¹⁰ In this case, when RDS determines the Shell group's corporate policy, it must observe the due care exercised in society. A wrongful act requires a standard of care to be breached. This standard of care, however, is unwritten and the interpretation of this unwritten standard of care requires an assessment by the court of all relevant facts and circumstances, including the best available science on dangerous climate change and how to manage it, and the widespread international consensus that human rights offer protection against the impacts of dangerous climate change and that companies must respect human rights.¹¹ This assessment of the Dutch court¹² results in the conclusion that RDS is obliged to reduce the CO₂ emissions of the Shell group's activities by net 45% at the end of 2030 relative to 2019 through the Shell group's corporate policy.
- **While the Judgment is still subject to appeal, it is yet another significant wake-up call that the threat of climate change is real and to combat it our joint responsibility:** For a period of 3 months, the Judgment can still be appealed and is therefore not yet final. However, the Judgment shows that for a truly global threat like climate change that manifests itself in countries across the world at multiple levels and across disciplines, the Dutch court of the Hague has decided it also has its own responsibility to use existing

What is the legal basis of RDS' reduction obligation?

tools in the Dutch legal tool box to make its impact. Irrespective of whether the Judgment will ultimately be upheld if appealed, this bold and brave move requires other countries as well as other material non-state parties similar to the Shell group to take notice and seriously reflect.

- **With or without the Judgment, urgent action from large business enterprises such as the Shell group is required to timely and appropriately combat climate change:**

Tanka's mission is to create and develop portfolios of leading materials and process technologies and the legacy industries they can revitalize in order to increase efficiencies, reduce externalities and create a renewed future.

The worldwide petroleum market is a legacy industry that requires an immediate transformation in the absence of which climate change will make it impossible to create the renewed future for next generations. In particular institutional investors in all hydrocarbons urgently need to re-consider their investment allocation strategies to allow this necessary immediate transformation to take place. In that respect, the Judgment can be seen as the messenger, so please don't kill the messenger!

Notes

¹ This includes the inhabitants of the so-called Wadden Sea area. For purposes of the class action, the Dutch court held that the interests of current and future generations of Dutch residents and of the inhabitants of the Wadden Sea area, as part of the Netherlands, are suitable for bundling (paragraph 4.2.4 of the Judgment).

² Paragraph 4.4.55 of the Judgment.

³ Paragraph 2.5.4 of the Judgment explains that: Scope 1 covers direct emissions from sources that are owned or controlled by the Shell group. Scope 2 covers indirect emissions from third-party sources from which the Shell group has purchased or acquired electricity, steam, heating or cooling for its operations. Scope 3 includes all other indirect emissions resulting from the activities of the Shell group, 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 or gas).

⁴ Paragraphs 4.4.53 – 4.4.54 of the Judgment.

⁵ In paragraphs 2.3.7 and 2.3.8 of the Judgment it is clarified that: "The Netherlands has relatively high per capita CO₂ emissions compared to other industrialized countries. The impacts of global warming (globally about 0.8 degrees higher than pre-industrial temperatures and 1.7 degrees in the Netherlands) are already noticeable in the Netherlands, Heat waves, drought, floods, damage to ecosystems, threat to food production and damage to health are expected to intensify in future if the global average temperature rises. According to the Royal Netherlands Meteorological Institute (KNMI), in the future the Netherlands will have to take account of higher temperatures, a faster rising sea level, wetter winters, heavier precipitation and chances of drier summers. (...)
According to the KNMI, a sea level rise of 2.5 to 3 m this century cannot be ruled out. If global warming does not exceed 2 degrees Celsius this century, it is possible that the sea level rise remains limited from 0.3 to at most 2m. (...)"

⁶ In paragraphs 4.4.15 and 4.4.16 of the Judgment, the Dutch court deduces from the UN Guiding Principles (UNGPs) that: "Business enterprises should respect human rights. This means that they should

Notes (Continued)

avoid infringing on the human rights of others and should address adverse human rights impacts with which they are involved. Tackling the adverse human rights impacts means that measures must be taken to prevent, limit and, where necessary, address these impacts. It is a global standard of expected conduct of all businesses wherever they operate. (...) this responsibility of businesses exists independently of states' abilities and/or willingness to fulfil their own human rights obligations, and does not diminish those obligations. (...) The means through which a business enterprise meets its responsibility to respect human rights will be proportional to, among other factors, its size. (...) The court is of the opinion that much may be expected of RDS. RDS heads the Shell group, which consists of about 1,100 companies, and operates in 160 countries all over the world. It has a policy-setting position in the Shell group which is a major player on the worldwide market of fossil fuels and responsible for significant CO₂ emissions, which exceed the emissions of many states (...)."

⁷ In paragraph 4.4.6 of the Judgment the Dutch court considers that: "(...) The risks associated with climate change for Dutch residents and the inhabitants of the Wadden region concern health risks, deaths due to climate change-induced hot spells as well as health problems and an increased mortality risk due to increasing infectious diseases, deterioration of air quality, increase of UV exposure, and an increase of water-related and foodborne diseases, They also concern water-related health risks (...), including flooding along the coast and rivers, excess water, water shortage, deterioration of water quality, salinization, raised water levels and drought. (...)."

⁸ In paragraph 4.4.10 of the Judgment the Dutch court confirms that articles 2 and 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) offer protection against the consequences of dangerous climate change due to CO₂ emissions induced global warming.

⁹ The unit "parts per million" (or ppm) is used to express the concentration of greenhouse gases in the atmosphere. If the concentration of greenhouse gasses in the atmosphere has stayed below 450 ppm by the year 2100, climate science believes there is a good chance the "2 degrees Celsius target" (i.e. the average temperature on earth should not increase by more than 2 degrees Celsius relative to the average temperature in the pre-industrial era) will be reached. For a more aggressive "1.5 degrees Celsius target" to be achieved, a corresponding greenhouse gas concentration level of no more than 430 ppm by the year 2100 is required. The current greenhouse gas concentration level is 401 ppm. In this context, the "carbon budget" refers to the total remaining capacity for further greenhouse gas emissions. In 2017, a carbon budget of 580 Gt CO₂ remained available for a 50% chance of a warming of 1.5 degrees Celsius. However, 3 years later 120 Gt CO₂ of this carbon budget has already been used leaving only 460 Gt CO₂ remaining. (Paragraphs 2.3.2 - 2.3.4 of the Judgment).

¹⁰ Article 6:162 of the Dutch Civil Code. See also paragraphs 4.4.1 and 4.4.2 of the Judgment.

¹¹ Paragraphs 4.1.3 and 4.1.4 of the Judgment.

¹² In its interpretation of the unwritten standard of care the Dutch court has included the following 14 aspects in its assessment, which are each discussed in more detail in the Judgment itself: (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, (11) effectiveness of the reduction obligation, (12) the responsibility of states and society, (13) the onerousness of RDS' reduction obligation, and (14) the proportionality of RDS' reduction obligation. (Paragraph 4.4.2 and paragraphs 4.4.2 – 4.4. 54 of the Judgment)