HOUTHOFF

The Hague Court of Appeal overturns the 2021 District Court judgment in the climate case of Milieudefensie (Friends of the Earth Netherlands) et al v Shell Plc

In an important landmark ruling, the Hague Court of Appeal overturned the 2021 District Court judgment in the climate case of Milieudefensie v Shell. The Dutch version of the ruling can be found here. The English translation, provided by the Judiciary, can be found here. The translation provided by the Judiciary is solely intended for information purposes and is an unofficial translation.

The Court of Appeal's ruling can be summarised as follows:

1. **The Court of Appeal applied an unwritten standard of due care in its assessment of Milieudefensie's claims (grounds 7.1 – 7.3).**
   The Court of Appeal applied a standard of due care in its assessment of Milieudefensie's claims, which must be defined on the basis of all circumstances of the case. The Court of Appeal ruled that this standard of due care must be interpreted as much as possible on the basis of objective starting points, such as legislation, general legal principles, fundamental rights, case law and/or expert reports.

2. **The Court of Appeal reiterated that protection against dangerous climate change is considered a human right (grounds 7.6 – 7.17).**
   With reference to important case law like the Dutch Supreme Court *Urgenda* judgment and the ECtHR decision in the *KlimaSeniorinnen* case, the Court of Appeal reiterated that protection against dangerous climate change is considered a human right. The *Urgenda* judgment held that Articles 2 and 8 of the European Convention on Human Rights (ECHR) require states to take preventive measures against

environmental hazards, including climate change. The ECtHR's decision confirmed that states have a positive obligation to protect citizens against the adverse effects of climate change. The Court of Appeal also considered that United Nations bodies also recognise a "clean, healthy, and sustainable environment" as a human right, urging states to take appropriate measures to protect this right.

The Court of Appeal concluded that protection against dangerous climate change is considered a human right, in ground 7.17:

> "[…] *there can be no doubt that protection from dangerous climate change is a human right. It is recognised worldwide that states have an obligation to protect their citizens from the adverse effects of dangerous climate change. Not surprisingly, the ECtHR has considered that: "climate change is one of the most pressing issues of our times". It is primarily up to legislators and governments to take measures to minimise dangerous climate change. That being said, companies, including Shell, may also have a responsibility to take measures to counter dangerous climate change. The doctrine of the indirect horizontal effect of human rights is important for this purpose. This doctrine is discussed and elaborated on in the next chapter, focusing on 'protection against dangerous climate change'.*"

3. **The Court of Appeal ruled that human rights can have an indirect effect on civil law obligations of private parties in their relationship with other private parties, on which basis an obligation may exist for companies to limit their CO_2 emissions (grounds 7.18 – 7.27)**.

The Court of Appeal ruled that human rights have, in principle, 'direct vertical effect', meaning that they apply in the relationship between private parties and the state. However, like the District Court in first instance, the Court of Appeal accepted that – certain – human rights can have an indirect horizontal effect between private parties. The values embodied in human rights are of such great importance to society as a whole that, under certain circumstances, they can also be invoked, at least to some extent, by citizens in their relationship with a private company. In this context, the Court of Appeal cited the UN Guiding Principles on Business and Human Rights (UNGP), the OECD Guidelines for Multinational Enterprises on Responsible Business Conduct and a number of other initiatives that emphasise that companies have responsibilities to respect human rights and mitigate adverse impacts. These guidelines suggest that companies should conduct due diligence and take preventive or mitigating measures to address human rights impacts. Based on this, the Court of Appeal found that although provisions on human rights (including treaty provisions) are primarily directed at governments, this does not alter the fact that they can also affect private law relationships by defining open standards, such as unwritten civil law standards of care.

In defining the standard of due care in this case, the Court of Appeal concluded that *"there is no doubt that the climate problem is the greatest issue of our time*" and that climate change infringes the rights under Articles 2 and 8 ECHR.

The Court of Appeal further concluded, in grounds 7.26 and 7.27, that the standard of due care creates an obligation for companies like Shell to limit CO_2 emissions:

> "*It is an established fact that fossil fuel consumption is largely responsible for creating the climate problem and that addressing climate change is something that cannot wait. To combat the danger posed by climate change, everyone has a responsibility. To fulfil that responsibility, the focus does not lie exclusively on states. Especially companies whose products have contributed to the creation of the climate problem and have it in their power to contribute to combating it are obliged to do so vis-à-vis other inhabitants of the earth, even when (public law) rules do not necessarily compel them to do so. This follows from the instruments discussed*

above, including the OECD guidelines and the UNGP, to which Shell has subscribed. Those instruments place responsibility for protection against dangerous climate change also on (large) companies and call on them to take appropriate measures themselves to counter dangerous climate change.

In summary, the court of appeal is of the opinion that companies like Shell, which contribute significantly to the climate problem and have it within their power to contribute to combating it, have an obligation to limit CO_2 emissions in order to counter dangerous climate change, even if this obligation is not explicitly laid down in (public law) regulations of the countries in which the company operates. Companies like Shell thus have their own responsibility in achieving the targets of the Paris Agreement."

4. **EU climate legislation (for example, EU ETS-1 and ETS-2, CSRD, CSDDD) is not exhaustive and leaves room for discretion of the Court of Appeal to impose an obligation derived from an unwritten standard of due care (grounds 7.28 – 7.57).**

The Court of Appeal considered whether climate legislation is exhaustive or whether it leaves room for discretion for the Court of Appeal to apply an unwritten standard of due care. The Court of Appeal discussed several key EU Directives focusing on climate and the environment, including the EU Emissions Trading System (EU ETS-1 and EU ETS-2), the Corporate Sustainability Reporting Directive (CSRD) and the Corporate Sustainability Due Diligence Directive (CSDDD), which should be taken into account in interpreting the standard of due care for companies like Shell:

a. The Court of Appeal held that Shell's European scope 1 and 2 emissions fall within the scope of EU ETS-1, and that Shell had argued that its European scope 3 emissions would also fall within the scope of the upcoming EU ETS-2 Regulation. The Court of Appeal found it difficult to reconcile the EU ETS system with Milieudefensie's claims. In view of the EU ETS system, it would not be quite fitting to require Shell to reduce its 'European emissions', for which it obtains and then surrenders emission allowances, by 45%. The EU ETS system does not achieve the reduction of CO_2 emissions by imposing an obligation on companies to reduce their emissions by a certain percentage. This goal is achieved through an emissions cap combined with freely tradable emission allowances.

b. The Court of Appeal ruled that the CSRD and the CSDDD do not impose absolute reduction obligations on individual companies or industries. The CSRD defines reporting standards, and while the CSDDD obliges companies to create a 'transition plan' to align their operations with the goals of the Paris Climate Accords, it does not necessarily require them to implement an absolute, static percentual emission reduction target.

The Court of Appeal went on to assess to what extent decisions on reducing CO_2 emissions belong to the domain of the legislator rather than that of the civil courts. The Court of Appeal concluded that the aforementioned legislation is not exhaustive and does not specifically stipulate that companies that comply with existing schemes to combat climate change have no further obligations to reduce their CO_2 emissions even more. According to the Court of Appeal, governments have stressed that companies also have their own duty to reduce their emissions. In other words, obligations arising from existing regulations do not preclude a duty of care based on the standard of due care for individual companies to reduce their CO_2 emissions. Nonetheless, the Court of Appeal ruled that existing legislation, like EU ETS, must be taken into account when defining a standard of due care.

The Court of Appeal then concluded that the aforementioned regulations are furthermore not exhaustive in the sense that companies would merely have to comply with the obligations contained in those regulations in order to meet the standard of due care. In addition to complying with these regulations,

companies also have a duty of care to reduce their emissions. However, the Court of Appeal also found that this 'general' obligation does not automatically mean that Milieudefensie's claim for a 45% reduction of emissions is allowable.

5. **Oil and gas companies are expected to consider the negative consequences of new investments for the energy transition (grounds 7.58 – 7.62).**
The Court of Appeal discussed whether Shell's planned investments in new oil and gas fields are inconsistent with the standard of due care. It noted that to keep the climate goals of the Paris Agreement within reach, emissions must be drastically reduced by 2030, which will require not only taking measures to reduce demand for fossil fuels, but also limiting the supply of fossil fuels. The standard of due care, interpreted on the basis of Articles 2 and 8 ECHR and soft law such as the UNGP and the OECD Guidelines, requires producers of fossil fuels to take their responsibility in this respect. It is reasonable to expect oil and gas companies to also consider the negative consequences of a further expansion of the supply of fossil fuels for the energy transition when investing in the production of fossil fuels. The Court of Appeal ruled that this also applies to Shell's planned investments in new oil and gas fields but that it did not have to review the effects of these investments, given that this was not at issue in the proceedings against Milieudefensie, since Milieudefensie's claims were aimed at achieving specific overall absolute emission reduction percentages.

6. **The Court of Appeal ruled that it could not establish an impending breach of the reduction obligation in relation to Shell's scope 1 and 2 emissions and dismissed Milieudefensie's claims in this respect (grounds 7.63 – 7.66).**
The Court of Appeal then addressed Milieudefensie's claims regarding Shell's scope 1 and 2 emissions. It found that there is no imminent threat of Shell breaching its alleged reduction obligations, as Shell has committed to reducing these emissions by 50% by 2030 compared to 2016 levels, which is a more far-reaching commitment than the 45% reduction obligation compared to 2019 sought by Milieudefensie. The Court of Appeal dismissed Milieudefensie's argument that Shell might decide to change course, as it has changed policies before. According to the Court of Appeal, Milieudefensie had failed to show that it is likely that Shell will not realise its commitments:

   a. Shell's commitments are laid down in its business plan and documentation filed with the Securities and Exchange Commission, as well as in its Energy Transition Progress Report 2024;

   b. Shell has already realised a large part of its commitments. At the end of 2023, Shell's scope 1 and 2 emissions were down 31% compared to 2016.

   In conclusion, the Court of Appeal dismissed Milieudefensie's claims regarding a reduction obligation for scope 1 and 2 emissions on the ground that an impending breach of this reduction obligation had not been established.

7. **The Court of Appeal ruled that it could not impose a specific percentual reduction obligation regarding Shell's scope 3 emissions (grounds 7.63 – 7.110).**
The Court of Appeal then addressed Milieudefensie's claims regarding Shell's scope 3 emissions using a step-by-step approach:

   a. The Court of Appeal first assessed whether the reduction target of 45% by 2030 compared to 2019 can serve as a general norm. The Court of Appeal found that this percentage stems from IPCC reports and is consistent with the Paris Climate Accords. It also held that this percentage represents a global average reduction pathway, with certain sectors and companies in certain countries having higher or lower reduction norms, and concluded that it could not determine the exact norm that applies to

Shell in this context. As an example, the Court of Appeal explained that if Shell were to start supplying gas to a company that previously obtained its energy from coal, this would increase Shell's scope 3 emissions, but on balance may reduce global CO_2 emissions, as coal power emits more CO_2. That example indicates that subjecting Shell to the general standard of a 45% reduction by the end of 2030 (or 35% in the alternative or 25% as a second alternative) is not sufficiently case specific. The Court of Appeal therefore concluded that the standard is not designed for that purpose and that, on the contrary, there are indications that different, sector-specific reduction pathways are appropriate, and that they may also differ per country. The Court of Appeal also found that Shell is a major player in the oil and gas market and can therefore be expected to make a special effort. This finding also carried weight in its decision that Shell has a legal obligation to reduce its emissions. However, given that there are different reduction pathways for different sectors in different countries, this fact does not mean that Shell can be compelled to meet the average global reduction rate. Nor can such an obligation be inferred from the so-called principle of 'equity'. In this context, that concept means that, for example, social aspects are taken into account when dividing the burdens (and benefits) of the energy transition. Such aspects could include the fact that climate change is largely caused by industrialised countries, and that they have reaped the benefits, for which reason industrialised countries are expected to make a greater effort in combating climate change. However, that standard is also too general to infer that Shell has a 45% reduction obligation.

b. The Court of Appeal then assessed whether it could establish a sectoral standard for oil and gas companies. It referred to the many scientific and expert sources submitted by Milieudefensie and Shell and concluded that no sufficiently unequivocal conclusion regarding the reduction required could be drawn from these sources on which a civil court could base its decision. The Court of Appeal also ruled that the "precautionary principle" does not justify a different conclusion. This principle implies that it may also be appropriate to intervene in a certain activity in the event of scientific uncertainty regarding the occurrence of certain consequences. The precautionary principle also precludes non-intervention based on scientific uncertainty regarding the consequences of a given action. However, the Court of Appeal found that this case did not involve uncertainty about the consequences of a particular action (emitting CO_2), but uncertainty about which standard to apply. The Court of Appeal concluded that the precautionary principle does not justify ignoring this uncertainty at the expense of a private party and setting a legal standard for that private party.

c. Lastly, the Court of Appeal considered whether a reduction obligation for scope 3 emissions would be effective. The Court of Appeal ruled that it follows from the District Court's judgment that Shell is free to determine for itself how to fulfil the obligation imposed by the District Court. Milieudefensie did not lodge a cross-appeal against this element of the judgment. The Court of Appeal therefore had to assume that Shell could choose to comply with the obligation imposed by the District Court by restricting third-party fossil fuel sales to end users. This raises the question whether this would serve the interest defended by Milieudefensie in these proceedings. Article 3:303 of the Dutch Civil Code provides that there must be a sufficient interest in a legal action. Whether there is a sufficient interest can be assessed by comparing the situation in which the claim is allowed with the situation in which it is denied. If there is no relevant difference between the two situations, in the sense that allowing the claim does not actually bring the claimant any benefit, then that claimant lacks the required interest. In relation to Milieudefensie's claims, this means that Milieudefensie has no interest in an order obliging Shell to reduce its scope 3 emissions by 45% (or 35% or 25%) by the end of 2030, if that order can be complied with in a manner that does not contribute to the interests being defended by Milieudefensie, more specifically the interests of the residents of the Netherlands and of the Wadden Sea region, by ensuring a net reduction of CO_2 emissions in order to protect them against dangerous

climate change caused by those emissions. The Court of Appeal held that it is possible that other companies will 'take over' or 'maintain' the scope 3 emissions reduced by Shell, given that Shell is allowed to limit its resale operations of oil and gas bought and sold from and to third parties, whereas those sellers and buyers will continue selling and buying the same amounts of oil and gas. Taking that into account, a scope 3 reduction obligation will not lead to a net reduction of emissions, according to the Court of Appeal.

In conclusion, the Court of Appeal also dismissed Milieudefensie's claims for a scope 3 emission reduction obligation. It justified this decision by ruling that while Shell has an obligation to reduce scope 3 emissions, the Court of Appeal cannot apply a specific reduction norm because the available climate science does not allow it to conclude that a 45% reduction obligation (or any other percentage) applies to Shell in respect of scope 3 and because the effectiveness of an obligation for Shell to reduce its scope 3 emissions by a certain percentage cannot be established.

8. Conclusion

The Court of Appeal quashed the District Court's decision, dismissed Milieudefensie's claims and ordered Milieudefensie to pay the costs of the proceedings in first instance and on appeal. The judgment is provisionally enforceable.

The parties can lodge an appeal with the Supreme Court within three months, on 12 February 2025 at the latest.

The Hague Court of Appeal 12 November 2024, ECLI:NL:GHDHA:2024:2100

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