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Insights

JUDICIAL REVIEW AGAINST THE FCA IN ITHACA ENERGY CASE

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SUMMARY

ClientEarth has launched a judicial review against the FCA for approving a prospectus which ClientEarth claims contained inadequate climate-related disclosures. This is part of an increased use by environmental pressure groups of judicial channels to challenge companies - and now regulators - and to promote the transition to Net Zero. The courts of England and Wales have shown that they are willing to hear cases of this type and this trend is likely to continue.

ClientEarth, an environmental law charity, has filed a judicial review claim against the FCA arguing that the FCA's decision to approve Ithaca Energy's 2022 IPO prospectus was unlawful.

As part of the FCA's role in approving a prospectus, it must review the document and conclude that it complies with the requirements of the UK Prospectus Regulation. The Regulation requires disclosure of material risks which are specific to the issuer. It also states that environmental circumstances may constitute specific and material risks that must be disclosed.

While Ithaca's prospectus included climate-related risk factors, ClientEarth argues that the risks disclosed were too general in nature. In particular, they say the prospectus failed to explain how the business model of Ithaca Energy and its financial prospects would need to change, or be affected, if the Paris Agreement goals and the aim of reaching Net Zero are to be achieved.

The stated aim of ClientEarth in bringing this claim is to ensure that in the future the FCA gives full consideration to whether climate-related risks have been adequately disclosed in prospectuses. ClientEarth argues that full and transparent disclosure of these risks is necessary to ensure that investors can make informed decisions and support the transition towards Net Zero.

It remains to be seen whether the courts will grant permission for the claim to proceed. However, this is an example of the increasing use of the courts by pressure groups and others to raise the profile of environmental issues.

This trends seems likely to continue and the recent introduction in the UK of mandatory climate change reporting requirements aligned with the requirements of TCFD ('Taskforce on Climate-Related Financial Disclosures') are likely to provide instances of alleged "greenwashing" that these groups will be keen to bring before the courts. ClientEarth is already awaiting the court's permission to continue a derivative claim against Shell's directors, alleging that they are in breach of their statutory duties to promote the success of the company by failing to prepare properly for Net Zero.

Claimants have also been encouraged by the increased willingness of the courts of England and Wales to hear environmental claims generally, including claims arising from further afield. For example, the Supreme Court has determined that residents of communities in Nigeria who allege that they had been harmed by oil spills in their vicinity can bring a case that Shell, as an English parent company of a local subsidiary, owed a duty of care to them for the acts of its subsidiary. This decision meant that the claim can proceed to trial. Shell also recently fought and lost a significant climate-related claim in the Netherlands.

Looking ahead, activists will no doubt seek to employ the full range of legal actions at their disposal before the English courts to raise the profile of climate-related issues, and companies are increasingly aware of the potential impact on their share price and reputation. Minority shareholder actions, derivative claims, claims under FSMA and claims for misrepresentation and/or negligent misstatement are all weapons in the armoury of the ESG activist and it is clear from the Shell case that the English courts will not shy away from considering hearing such cases. Judicial review against regulators has now been added to the armoury.

Companies need to think very carefully about how to protect themselves going forward from this increasingly broad climate-change litigation risk. We would argue that there is no substitute for sound environmental governance that looks strategically at environmental risks and opportunities, builds them into the company's long terms plans and reports on them clearly, positively and accurately.

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