If this Transcript is to be reported or published, there is a requirement to ensure that no reporting restriction will be breached. This is particularly important in relation to any case involving a sexual offence, where the victim is guaranteed lifetime anonymity (Sexual Offences (Amendment) Act 1992), or where an order has been made in relation to a young person.
This Transcript is Crown Copyright. It may not be reproduced in whole or in part other than in accordance with relevant licence or with the express consent of the Authority. All rights are reserved.

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
ADMINISTRATIVE COURT
[2023] EWHC 3301 (Admin)

No. AC-2023-LON-000668

Royal Courts of Justice

Wednesday, 13 December 2023

Before:

MRS JUSTICE LANG DBE

B E T W E E N :

THE KING
on the application of
CLIENTEARTH — Claimant

- and -

FINANCIAL CONDUCT AUTHORITY — Defendant

- and -

ITHACA ENERGY PLC — Interested Party

____

MR A GEORGE KC, MR H ADAMSON and MR R FAKHOURY (instructed by ClientEarth) appeared on behalf of the Claimant.

MR J CROW CVO KC and MS C IVIMY (instructed by Legal Division, FCA) appeared on behalf of the Defendant.

MR N VENKATESAN (instructed by Pinsent Masons LLP) appeared on behalf of the Interested Party.

____

J U D G M E N T

MRS JUSTICE LANG:

1 The claimant renews its application for permission to apply for judicial review of the decision of the defendant ("the FCA") to approve the prospectus of the interested party ("Ithaca"), on 9 November 2022, under the Prospectus Regulation (EU) 2017/1129. Permission was refused on the papers by Sir Ross Cranston, sitting as a High Court Judge, on 18 April 2023.

2 Under its procedures, the FCA does not publish reasoned decisions in relation to prospectus approval applications. Ithaca's registration document was initially approved and published by the FCA on 18 October 2022. The claimant then raised its concerns with the FCA. The FCA disclosed the claimant's letter to Ithaca, considered the position and published a revised and final version of the document on 9 November 2022.

3 The claimant alleges that the FCA's decision to approve Ithaca's prospectus was unlawful on the following grounds:

Ground 1: The FCA erred in law by approving Ithaca's prospectus in circumstances where the prospectus failed to disclose, or describe adequately, Ithaca's assessment of the materiality of its climate-related financial risks, in breach of Article 16 of the Prospectus Regulation.

Ground 2: The FCA erred in law by approving the prospectus in circumstances where the prospectus failed adequately to disclose or describe the specificity of the climate-related risks associated with Ithaca's securities, in breach of Article 16 of the Prospectus Regulation.

Ground 3: The FCA's conclusion that the prospectus contained the necessary information which is material to an investor for making an informed assessment of Ithaca's financial position and prospects, as required by Article 6 of the Prospectus Regulation, was rationally unsustainable.

Delay

4 CPR r.54.5(1) requires that a claim must be filed promptly and, in any event, not later than three months after the grounds to make the claim first arose. The decision under challenge was taken on 9 November 2022. The claim was not filed until 8 February 2023.

5 The FCA submits that it was incumbent on the claimant to act with the utmost promptness as the declaration sought by the claimant risks creating market uncertainty and adversely affecting investor confidence. Ithaca submits that the claim should have been brought before trading commenced on 14 November 2022 but does not take a point on lack of promptness.

6 Although the claim was filed at the end of the three month longstop period, I do not consider that the extent of the delay, and the impacts of the delay, are such that permission ought to be refused for lack of promptness.

Standing

7 I have carefully considered the competing submissions and case law on standing. I have concluded that the claimant has standing to pursue this claim on a public interest basis

because the subject-matter of the claim falls within its area of expertise (the environment) and its mission to ensure that public bodies act in accordance with their legal obligations in relation to the climate crisis.

Legal framework

8 The FCA's powers in relation to listing and prospectus regulation derive from Part 6 of the Financial Services and Markets Act 2000 (FSMA 2000). Section 85 FSMA 2000 provides that, unless a relevant exemption applies, it is unlawful for transferable securities to be offered to the public unless an approved prospectus has been made available to the public before the offer or request is made. To similar effect, LR 2.2.10 of the FCA's Listing Rules provides that a prospectus must be approved by the FCA and published before a prospective issuer can be admitted to the official list (subject to exemptions).

9 Section 87A FSMA 2000 provides that the FCA may not approve a prospectus "unless it is satisfied that … (b) prospectus contains the information required by Article 6.1 or 14 of the Prospectus Regulation and (c) all of the other requirements imposed by or in accordance with this part of the Prospectus Regulation or Prospectus Rules have been complied with."

10 Article 6.1 of the Prospectus Regulation provides:

> "Without prejudice to Article 14(2) and Article 18(1), a prospectus shall contain the necessary information which is material to an investor for making an informed assessment of (a) the assets and liabilities, profits and losses, financial position, and prospects of the issuer and of any guarantor; (b) the rights attaching to the securities; and (c) the reasons for the issuance and its impact on the issuer."

Article 6(2) provides that the information in a prospectus shall be concise and comprehensible.

11 Article 16.1 of the Prospectus Regulation makes provision for the prospectus to address risk factors affecting the issuer. It provides as follows:

> "The risk factors featured in a prospectus shall be limited to risks which are specific to the issuer and/or to the securities and which are material for taking an informed investment decision, as corroborated by the content of the registration document and the securities note.
>
> When drawing up the prospectus, the issuer, the offeror or the person asking for admission to trading on a regulated market shall assess the materiality of the risk factors based on the probability of their occurrence and the expected magnitude of their negative impact.
>
> Each risk factor shall be adequately described, explaining how it affects the issuer or the securities being offered or to be admitted to trading. The assessment of the materiality of the risk factors provided for in the second subparagraph may also be disclosed by using a qualitative scale of low, medium or high.
>
> The risk factors shall be presented in a limited number of categories depending on their nature. In each category the most material risk

factors shall be mentioned first according to the assessment provided for in the second subparagraph."

12 Recital 54 of the Prospectus Regulation states, in summary, that the primary purpose of these requirements is to ensure that investors make an informed assessment of such risks and take investment decisions in full knowledge of the facts.

13 Article 20 requires scrutiny and approval of a prospectus by the competent authority. Article 20(4) provides for the competent authority to seek further information if required.

14 The European Securities and Markets Authority (ESMA) has published "Guidelines on Risk Factors under the Prospectus Regulation" ("the ESMA Guidelines"). I refer in particular to Guidelines 1-4, 6, 11 and 13.

15 The FCA Handbook provides, at PRR 1.1.7, that in determining whether the Prospectus Regulation has been complied with, the FCA will consider whether a person has acted in accordance with the ESMA Guidelines on risk factors.

Grounds 1 and 2

16 It is convenient to consider Grounds 1 and 2 together because of the overlap between them. Under Ground 1, the claimant submits that the prospectus does not disclose, adequately or at all, Ithaca's assessment of its climate-related financial risks, by reference either to the probability of their occurrence, or the expected magnitude of their negative impact on Ithaca. The prospectus only refers to climate change, the Paris Agreement and the net zero commitment in broad generic terms. This is contrary to Article 16 and the ESMA Guidelines.

17 The claimant submits that the FCA has misinterpreted Article 16 and the ESMA Guidelines in two main respects. First, the FCA erroneously assumes that the obligation to assess materiality under Article 16 is discharged in the process of identifying and presenting the risk factors, but that there is no obligation for the issuer to describe that assessment on the face of the prospectus. Second, the claimant submits that the FCA is mistaken in its view that it is for the FCA to be "satisfied" under s.87A FSMA 2000 that the prospectus complies with Article 16(1), and that its decision can only be challenged on public law grounds. Instead, the claimant submits that the question is whether an issuer has complied with its obligation to disclose its assessment of the materiality of a risk factor, and that is a hard-edged question of law for the court, not a matter of discretion or rationality.

18 Under Ground 2, the claimant submits that the prospectus fails adequately to disclose or describe the specificity of the climate-related risks associated with Ithaca's securities in breach of Article 16 and the ESMA Guidelines. Reference is made to the possibility of climate activism negatively impacting the process of obtaining approval for further development and there is reference to material adverse effect on the hydrocarbon industry and the group's business, financial condition and results of operation. However, the claimant submits that these references are not specific enough, and do not shed sufficient light on Ithaca's particular situation, as opposed to the situation of the industry in general.

19 Under Ground 2, the claimant also makes similar submissions on the interpretation of Article 16 and s.87A FSMA 2000 in relation to specificity that it makes under Ground 1 in relation to materiality.

20 In my judgment, Grounds 1 and 2 are unarguable and have no realistic prospect of success, for the reasons set out by the FCA in its summary grounds of defence. Parliament has conferred upon the FCA responsibility for approving a prospectus. Section 87A FSMA 2000 provides that the FCA may not approve a prospectus unless it is satisfied that the prospectus contains the information required by Article 6(1) or 14(2) of the Prospectus Regulation and all of the other requirements imposed by or in accordance with the Prospectus Regulation and the relevant provisions of the FSMA.

21 It follows that the FCA's decision to approve Ithaca's prospectus can only be challenged on public law grounds, i.e., that it has misdirected itself on the meaning of the law it has to apply, or failed to take relevant considerations into account, or made an irrational decision. I accept the FCA's submissions that the requirements of Article 16(1) are not hard-edged and whether they have been met requires an evaluative judgment which may admit of more than one view. In such a case, the court may not substitute its own view if the FCA's assessment is rational: see *R v Monopolies and Mergers Commission, ex parte South Yorkshire Transport Ltd* [1993] 1 WLR 23 [32F-33A], *R (Ali) v Secretary of State for Justice* [2013] 1 WLR 3536 at [56-57] and [61-62]. This court has held that these principles apply to a review of a decision under s.87A FSMA 2000: see *R (Yukos Oil) v Financial Services Authority* [2006] EWHC 2044 (Admin) at [51-52].

22 In my view, the FCA's interpretation of Article 16(1) is plainly correct on a natural reading. Article 16 requires the disclosure of those risk factors that are material but it does not impose a separate requirement for the issuer to disclose its assessment of risk and materiality. The ESMA Guidelines do not indicate such a requirement either. Under Article 16(1) no particular form of quantitative or qualitative analysis is required. The option of using "a qualitative scale of low, medium or high", to be found in para.3 of Article 16(1), does not signal a freestanding requirement for the issuer to disclose its assessment of risk.

23 As to specificity, Article 16(1) provides that the risk factors be limited to risks that are specific to the issuer and that each risk factor shall be adequately described, explaining how it affects the issuer or the securities being offered. There is no separate requirement in Article 16(1) for the issuer to disclose its assessment of risk and specificity. The ESMA Guidelines do not indicate such a requirement either.

24 In my view, the case of *R (Friends of the Earth) v SSBEIS* [2023] 1 WLR 225, [2022] EWHC 1841 (Admin) is clearly distinguishable from this case.

25 Here the FCA, in its capacity as an expert regulator, was required to make an exercise of judgment as to whether the legal requirements of Article 16(2) were met. The prospectus plainly did address risks to Ithaca's business and securities arising out of climate change factors, associated regulatory measures and changes in consumer use. The FCA considered that the risk factors were adequately described.

26 The claimant disagrees with the FCA's evaluation but it has failed to demonstrate any arguable error of law in the approach taken by the FCA or its conclusions. The court will not substitute its view or that of the claimant for the considered judgment of the FCA. Therefore, permission is refused on Grounds 1 and 2.

<u>Ground 3</u>

27 The claimant submits that the FCA acted irrationally in concluding that the prospectus complied with Article 6 as it contained the necessary information which was material to an

investor to make an informed assessment of Ithaca's financial position and prospects. The claimant referred to the FCA's technical note, TN801.2, which states:

> "In order to provide adequate information to the market for this purpose, information on climate change and other ESG-related matters may need to be provided where relevant to the issuer. For instance, in the context of the UK Government's target to achieve net-zero carbon emissions by 2050 and to achieve the goals of the Paris Agreement more generally, many companies are likely to need to consider significant changes to their business. Such changes may be material to an investor's assessment of the prospect of the company and the risks and opportunities shaping it."

The claimant submits that Ithaca is in a comparable position to the companies referred to in TN801.2. However, the prospectus does not adequately deal with the potential impacts of the Paris Agreement on its business, were it to be fully implemented.

28 In my judgment, Ground 3 is unarguable and has no realistic prospect of success. The Paris Agreement was identified as a material risk for the business in the prospectus. The claimant and Ithaca presented competing arguments as to its compatibility with the Paris Agreement and the difference of view was referenced in the prospectus at para.1.7. The FCA lists, at para.17.3 of its summary grounds, the ways in which the prospectus did address risks to Ithaca's business and securities arising out of climate-related factors. Ithaca refers to para.2.7 of the summary of the prospectus and para.1.7 in the section of the prospectus headed "Risk factors".

29 The FCA was satisfied that the prospectus complied with Article 6. Although the claimant disagrees with the FCA's conclusion, it does not come close to demonstrating that the FCA acted irrationally, which is a high hurdle to overcome. Therefore, permission is refused on Ground 3.

L A T E R

30 CPR 46.24 limits the costs recoverable between parties in Aarhus Convention claims. These provisions were previously to be found in CPR 45.41. An Aarhus Convention claim is defined by CPR 46.24(2)(a) as "a claim brought by one or more members of the public by judicial review or review under statute which challenges the legality of any decision, act or omission of a body exercising public functions" which is within the scope of Article 9(3) of the Convention and other provisions.

31 So far as material, Article 9(3) of the Convention provides:

> "… each Party shall ensure that, where they meet the criteria, if any, laid down in its national law, members of the public have access to administrative or judicial procedures to challenge acts and omissions by private persons and public authorities which contravene provisions of its national law relating to the environment."

32 As a non-governmental organisation which promotes environmental protection, ClientEarth is a member of the public for the purposes of the Convention (Article 2(4) and (5)).

33 The Convention's Implementation Guide is a relevant aid to construction: see *Venn v Secretary of State for Communities and Local Government & ors* [2015] 1 WLR 2328 at [10]-[11]. The Implementation Guide considers what is meant by the expression "national law relating to the environment" at p.197:

> "… national laws relating to the environment are neither limited to the information or public participation rights guaranteed by the Convention, nor to legislation where the environment is mentioned in the title or heading. Rather, the decisive issue is if the provision in question somehow relates to the environment. Thus, also acts and omissions that may contravene provisions on, among other things, city planning, environmental taxes, control of chemicals or wastes, exploitation of natural resources and pollution from ships are covered by paragraph 3, regardless of whether the provisions in question are found in planning laws, taxation laws or maritime laws."

34 In *Venn* the Court of Appeal decided that the broad description of "environmental information" in Article 2(3) was an indication of the intended ambit of the term "environmental" as it appears in the Convention [10].

35 The most recent English authority on the scope of Article 9(3) is *R (Lewis) v Welsh Ministers* [2022] EWHC 450 (Admin). In that case it was asserted by the interested party that the claim was not an Aarhus Convention claim because it related to a funding decision. The court held that the claim was an Aarhus Convention claim on the basis that one of the grounds was that the defendant had breached a duty under the Environment (Wales) Act 2016 [33, 36]. It was the nature of the claim that mattered not the nature of the impugned decision [29-32].

36 Although the words "relating to" can be interpreted very broadly, a purposive approach indicates that a mere connection with the environment is not sufficient. The FCA refers, by analogy, to *Department for Business, Energy and Industrial Strategy v The Information Commissioner* [2017] EWCA Civ 844, where the Court of Appeal considered the limits of the meaning of "environmental information". The Court, citing in particular the judgment of the CJEU in *Glawischnig* EU/C/2003/343, emphasised that there must be a focus on the statutory definition, and a purposive approach adopted, so as to avoid an overly broad interpretation which would encompass any information with a connection to the environment [16-17, 43, 45].

37 Even where a provision has a connection with the environment, it must be sufficiently close to come within Article 9(3). In *Austin v Miller Argent (South Wales) Ltd* [2014] EWCA Civ 1012, the Court of Appeal considered whether a complaint in private nuisance of noise and dust from an open-cast coal mining operation fell within Article 9(3). The Court of Appeal recognised that private nuisance formed part of the UK's environmental law but held that a complaint in nuisance only fell within Article 9(3) where it has a close link with the particular environmental matters regulated by the Convention and the claim would confer significant environmental benefits [17-22].

38 The Aarhus Compliance Committee in ACCC.C.2013/85 and 86 (United Kingdom), 29 November 2016, considered the *Austin* case, and found that the law on private nuisance is "part of the law relating to the environment" of the UK because it "regularly concerns various components of the environment and aims to protect them" [72]. It nevertheless rejected a submission that private nuisance claims "as a class" fall within Article 9(3). The

principal criterion is "whether the nuisance complained of affects the environment" [73]. The significance of the claim for the public interest is relevant, but not decisive.

39 Applying these principles to this claim, the claimant alleges that the FCA, in approving Ithaca's prospectus, contravenes s.87A FSMA 2000. The preamble to the FSMA states it is "an Act to make provision about the regulation of financial services and markets". Section 87A 2000 provides for regulatory approval of prospectuses. It is concerned with investor protection and the proper functioning of markets.

40 The basis for the Prospectus Regulation (as incorporated into UK law), is Article 114 of the Treaty on the Functioning of the European Union. Article 114 provides for the adoption of measures for the approximation of laws, regulation or administrative action in member states which have as their object "the establishing and functioning of the internal market". The stated aim of the Prospectus Regulation is "to ensure investor protection and market efficiency while enhancing the internal market for capital" (Recital 7). The Prospectus Regulation make no reference to Articles 191 or 192 TFEU, which are the provisions that concern EU policy on the environment and environmental protection. It does not, therefore, form part of EU environmental law.

41 Therefore, I accept the FCA's submission that neither s.87A FSMA 2000 nor the Prospectus Regulation form part of the UK's environmental law. Their subject matter is not environmental, and their purpose is not to protect or otherwise regulate the environment.

42 The claimant submits that s.87A FSMA 2000 may, in principle, relate to, help to protect or otherwise impact the environment because required risk disclosures pursuant to the Prospectus Regulation, Articles 6 and/or 16, may relate to the environment, as recognised by Recital 54 and the FCA Technical Note 801.2.

43 However, the risks which an issuer must disclose under the Prospectus Regulation are risks which are specific and material to the issuer and/or its securities, and which are therefore relevant to investment decision. Recital 54 in Technical Note 801.2 recognises that some of these risks may arise from environmental circumstances; for example, an issuer's profitability may be at risk by reason of flooding or from changes in environmental regulation. The purpose and effect of the Prospectus Regulation and s.87A FSMA 2000 is, however, to ensure that investors are properly informed about risks which are financially material to the issuer and/or its securities. It is not to protect or regulate the environment in any way. Any connection with the environment and the purpose of the Aarhus Convention is incidental and remote.

44 The claimant also submits that disclosures of such risks contribute to a recognised mechanism to support climate change mitigation, namely the transparent disclosure of climate-related financial risks to make finance flows consistent with a net zero pathway. However, it is not part of the FCA's function, when approving a prospectus pursuant to s.87A FSMA 2000, to evaluate the extent to which a prospectus may or may not promote climate change mitigation or net- zero targets. In these circumstances, it is speculative whether decisions pursuant to s.87A FSMA 2000 could have an impact on investment flows so as to support or hinder climate change mitigation or the transition to net-zero. Even if it were established that the decision could have such an effect, that effect would be incidental and remote. Any consequential effect on the environment will be even more incidental and remote.

45 Accordingly, I agree with the FCA and Ithaca that the factors relied on by the claimant do not establish that s.87A FSMA 2000 or the Prospectus Regulation are provisions of national law which relate to the environment in the requisite sense.

46 Going further and applying a broader approach which looks not just at the provision in issue, but also the nature of the contravention alleged, there is not a sufficiently close connection to the environmental factors regulated by the Aarhus Convention, and even if the claim succeeded, it would not have significant environmental benefits.

47 For these reasons, I conclude that this claim is not an Aarhus Convention claim.

CERTIFICATE

Opus 2 International Limited hereby certifies that the above is an accurate and complete record of the Judgment or part thereof.

*Transcribed by **Opus 2 International Limited***
Official Court Reporters and Audio Transcribers
5 New Street Square, London, EC4A 3BF
Tel: 020 7831 5627 Fax: 020 7831 7737
CACD.ACO@opus2.digital

This transcript has been approved by the Judge.