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ISSUE 13

INTERNATIONAL INSIGHTS
Q2'S PERSPECTIVE FOR COMMERCIAL DISPUTES

INTRODUCTION

"We should have a great fewer disputes in the world if words were taken for what they are, the signs of our ideas only, and not for things themselves."

- John Locke

We are delighted to present Issue 13 of the Disputes magazine to our readers. This edition, which encapsulates the broad landscape of M&A Disputes, Crypto & Digital Assets, Defamation, Privacy & Reputation Management, ESG, and Class Actions, boasts a superlative collection of written insights. Each theme delves deep into the issues at the fore, and presents an informative publication of thought leadership.

As always, we extend our sincere thanks to our community partners, contributors, and readers for their support in bringing this issue to you. Do keep an eye out as we continue to offer various exciting events from within the Disputes community.

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LG Display Defence Reduces Claim by 93 Percent

In only the third fully litigated cartel damages trial in the UK, *Granville Technology Group Ltd (in liquidation) and others v. LG Display Co. Ltd and others*, the court sided with LG Display on the key issues of overcharge and pass–on.

The claim originated from the 2010 finding that a group of LCD panel manufacturers infringed Article 101 of the Treaty on the Functioning of the European Union (TFEU) through engaging in a cartel, prompting Granville (a group of computer manufacturers and retailers) to seek damages in excess of £60 million. Acting in defence of LG Display, BRG expert David Parker's evidence was preferred on all material points,* resulting in the damages awarded being around 7 percent of the amount originally claimed.

The Analysis

In follow-on matters the existence of a cartel is not disputed: the case focused on the amount by which the cartel impacted the claimants and therefore the damages that should be awarded. This required analysis of three main issues:

i. estimation of overcharge

ii. assessment of pass-on

iii. lost volume of commerce to the claimants resulting from (i) and (ii)

(i) Econometric estimation of overcharge

Mr. Parker and his team identified suitable control variables, assessed how to control for the "endogeneity" of demand and considered the role and importance of statistical tests in choosing between different regression models.

(ii) Assessment of upstream and downstream pass-on

Mr. Parker and his team considered the importance of different types of evidence, including economic theory; whether it was necessary to trace a particular cost increase through to a particular price increase to demonstrate pass-on; what can be drawn from evidence of pass-through of other types of cost; and the extent and implications of 'psychological price points' for pass-on.

(iii) Lost-volume effect resulting from pass-on of overcharge

Mr. Parker and his team analysed the elasticity of downstream demand, the relevant margin and the extent of any sales recapture by Granville that would have taken place on other (unaffected) products.

The Result

The judgement, handed down on 8 February 2024, preferred the defendants' evidence almost exclusively regarding issues (i) and (ii), which were the key material elements in this case; and favoured both sides in different aspects of issue (iii). These findings resulted in damages of approximately £4.4 million (over half of which was interest) being awarded against a claim of over £60 million.

** Mr. Parker joined BRG in December 2023. This engagement took place while Mr. Parker was working for a previous firm.*

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GEOPOLITICAL TENSIONS AND MACROECONOMIC SWINGS

HEIGHTEN CHALLENGES FOR DEALMAKERS

Authored by: Berkeley Research Group

Rapid macroeconomic shifts and deepening geopolitical tensions are intensifying challenges for dealmakers and increasing the likelihood of deal-related disputes as sharp run-ups in interest rates, heightened regulatory scrutiny and conflicts over trade and territory cast a shadow over the mergers and acquisitions (M&A) landscape.

Despite pent-up demand from the recent deal drought—and multibillion-dollar deals in energy, technology and pharma—M&A transactions that made sense in a time of cheap money and high valuations face steeper hurdles at every step of the dealmaking process.

Berkeley Research Group's (BRG) fifth-annual M&A Disputes Report finds those changes are wreaking havoc on business calculations, deepening the risk of disputes over earnouts and other M&A provisions as parties seek to limit risk.

Some buyers, for instance, are trying to back out from deals that no longer make economic sense. Others are taking more aggressive steps to recover value, such as revisiting due diligence conducted during the pandemic era, when standards were looser, or more closely scrutinising representations and warranties clauses that could provide a basis for legal action. Meanwhile, debt financing is increasingly hard to come by—a particularly salient factor for private-equity (PE) backed deals—and the cost to service that debt is climbing.

Against that backdrop, our research reveals that:

- Dealmakers are tamping down their M&A expectations for 2024 after a year marked by surging interest rates, limited financing availability and stalled transactions.
- However, respondents expect M&A-related disputes to increase moderately in the coming year — slightly higher than was predicted in our mid-year report—as deals come under increased scrutiny in a more challenging fiscal and geopolitical climate. This diverges from the historical correlation between upticks in deals and disputes that we observed in prior reports.
- Key issues impacting disputes include tumult in cryptocurrency, the energy transition, heightened regulatory action, increased scrutiny on national security and environmental, social and governance (ESG) factors.
- Dealmakers are using artificial intelligence (AI) for valuations and risk mitigation, with PE professionals leading in some respects. AI tools may speed transactions but also present new risks.

This and other key takeaways come from our latest exploration of the dynamics around deal-related disputes and what dealmakers can expect in 2024. This year's report draws on extensive qualitative interviews conducted in September and October 2023 with disputes and corporate lawyers in Asia-Pacific (APAC); Europe, the Middle East and Africa (EMEA); and North America. It also broadens the global focus of our previous research to include perspectives from Latin America, as well as from the above regions, via a November 2023 online survey of 225 lawyers, PE professionals and corporate finance advisors.

"In the fifth year of our research into M&A disputes, we see the heightened impact of ongoing geopolitical and financial volatility in an increasingly unpredictable world"

said BRG Principal Executive Officer and President Tri MacDonald. "At the same time, emerging concerns around digital assets like cryptocurrency and the evolving role of ESG that we noted in previous reports have turned out to be prescient. Those areas are featuring more prominently in disputes across the globe, demonstrating the importance of our report's multifaceted insights for dealmakers navigating unprecedented macroeconomic terrain".

Digital Assets and Energy Ranked Top Dispute Areas For 2024

Respondents predict that digital assets & services, followed by energy & climate, will be the two leading areas for M&A disputes, consistent with our mid-year forecast. Digital assets & services—which include cryptocurrency, fintech and AI—also loomed large in 2023, a turbulent year that saw major crypto figures plead guilty to criminal charges while Bitcoin's price rose 160% in anticipation of increased trading volumes as major institutions launch spot Bitcoin exchange–traded funds (ETFs).

In the crypto-asset space, "There are a large number of small players in a market flush with cash, subject to changing regulation and going through an existential crisis because some of the biggest players are falling away for various reasons", said James Rogers, a London-based international arbitration partner with Jenner & Block.

"As recent history has shown us, fraud and dishonest conduct are not unheard of within the industry".

Energy will also be in the hot seat "for the foreseeable future", Rogers said, as the shift to renewables prompts market activity as oil and gas producers reorganise their holdings, with increased transactions opening the door for M&A disputes around a host of factors—particularly ESG. BRG Managing Director Phillip Solomon noted that liquefied natural gas trading disputes stemming from market disruption in 2022 and 2023 are reaching arbitration this year. Investments in renewable projects such as offshore wind and competition around emerging technologies like green hydrogen and battery storage are also contributing to an increase in dispute activity as the sectors mature.

EMEA Remains Leading Region For Disputes

As forecast in BRG's 2022 report, EMEA was the leading region where respondents saw increased M&A dispute volumes in 2023—and the region is also expected to lead in dispute volume in 2024. Survey respondents who singled out EMEA cite legal structures across the region as a major cause, after the expected correlation between increased deal activity bringing on additional disputes.

Recent European Union (EU) efforts to regulate AI hint at more deal-related disputes in the coming months. So do competition probes like the United Kingdom (UK) Competition and Markets Authority's investigation into the planned merger between Vodafone and CK Hutchison's Three UK mobile network. That comes as the UK deemed a stake in Vodafone held by the state-controlled Emirates Telecommunications a national security risk, and as the UK government is scrutinising the role of an Abu Dhabi-backed investment group in a proposed takeover of the Telegraph newspaper group.

"EU and UK regulators are flexing their muscles, particularly when it comes to technology and competition issues", said Daniel Ryan, a BRG managing director and head of the firm's London office. "At the same time, heightened scrutiny around foreign investment and transactions involving industries deemed critical to national security, like telecommunications, is extending the timeline for some deals and increasing the likelihood of disputes".

ESG Takes Centre Stage

ESG-related M&A disputes are on the rise amidst a diverse range of environmental, social and governance challenges, from ESG claims around sale terms and greenwashing to data privacy and employment-related issues like fair pay and equal employment opportunities.

Respondents expect regulatory scrutiny and political and investor pressure around ESG to increase in the coming year as emphasis on the energy transition, activist investor pressure and the lack of established ESG metrics and requirements deepen dispute exposure.

Edward Taylor, a Hong Kong-based international arbitration partner with Shearman & Sterling, noted that his M&A colleagues "are now regularly advising clients on ESG-focused due diligence—this reflects the increasing risk of ESG disputes and the need to properly assess and then manage that risk in transactional documents".

In the US, heightened visibility and various political and stakeholder pressures on ESG have prompted some companies to carefully evaluate how they communicate about those efforts, said BRG Director Dr. Dubravka Tosic. A number of lawsuits have been filed in US courts involving allegations that ESG-related disclosures are inaccurate and/or untrue, she said, underscoring the importance of evaluating those statements "to confirm that what is disclosed is correct and accurate and can be documented".

[Read BRG's M&A Disputes Report 2024]

60-SECONDS WITH:

SEB ORAM
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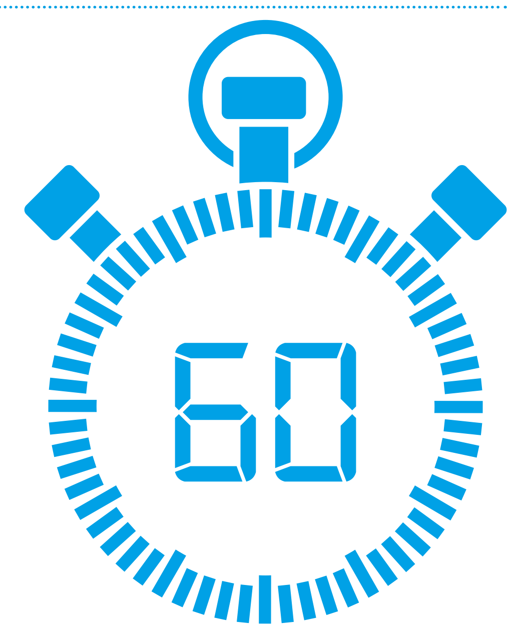


Q Imagine you no longer have to work. How would you spend your weekdays?

A I would be doing something quite different. My 'plan B' always involved foreign languages, and I would volunteer on an international charitable project. I spend my free time contributing as a trustee for two mental health charities, and find that immensely rewarding. Litigators have a lot to contribute to the non-legal world, and I suspect that I would do more of the same.

Q What do you see as the most exciting thing about your job?

A Things rarely go as you expect them to. We are trained to deal with the unexpected, and even after 15 years in the profession, the adrenaline is the same. It feels as though judges, opponents, witnesses—and sometimes clients—will gang up to keep you on your toes. It will never wear off that you can strategise and build a case over 5 years, but it will be made or broken by how you anticipate, react and reorientate to the hidden surprise that hits you at trial.

Q What's the strangest, most exciting thing you have done in your career?

A My first pupil supervisor was an Intellectual Property specialist, and my first case in pupillage was a Chancery action relating to copyright in the artistic works of the pop band, Busted. I spent 6 weeks tracking the development and every iteration of their catalogue of songs. That's not what I went to school for.

Q What is the best life lesson you have learned?

A Listen to understand, not to reply. The adversarial nature of litigation drives us towards assuming that our opponents are bound to be wrong, before we have listened to what they have to say. Experience has taught me that 90% of disputes are borne out of a genuine grievance, and that you are far more likely to resolve it (consensually or otherwise) if you have properly listened to it.

Q What is one important attribute that you think everyone should have?

A Confidence. Our key skill is the ability to persuade, in whatever form or forum. Like it or not, you cannot expect your counterparty to be persuaded, unless you develop your arguments confidently. The weaker your argument, the greater the necessary confidence.

Q What film do you think everyone should watch, and why?

A *Dallas Buyers Club* has to be my favourite film in the last 10 years. It's an emotionally charged film about a cowboy who struggles to overcome a diagnosis with AIDS against popular prejudices in mid-1980s Texas. The themes are powerful, the scripting is brilliant, and it is apparently based on a true story. The soundtrack is pretty good too.

Q Dead or alive, which famous guests would you invite to a dinner party?

A Warren Buffett, Gordon Brown, and (Baroness) Brenda Hale—three powerful contributors to the worlds of business, politics and the Law, with no doubt a diversity of social views—and probably Derek Trotter, to lighten the mood.

Q What is the best novel of all time?

A It would have to be one of Charles Dickens', and my personal choice would be *Little Dorrit*. I was undertaking an Insolvency pupillage when I read it, and it was a powerful reminder of how social attitudes can change over a relatively short timescale. Dickens also has a wonderful way of weaving plotlines and building in interesting characters.

Q What legacy would you hope to leave behind?

A Goodness! If I get as far as a judicial career, there are aspects of the law that I would love to re-examine. Aspects of the law of guarantees, joint debts and fiduciary duty are ripe for the picking.

Q What is the most significant trend in your practice today?

A Since I started practice in 2009, the privatisation of dispute resolution and the adoption of bespoke procedures has been the continuing trend. Whether it is through adjudication, ad-hoc arbitration, early neutral evaluation or tiered negotiation/mediation, parties are becoming more novel in their approach to disputes. Except in the biggest cases, the cost and forensic perfection of a court trial genuinely are a last resort.

Q Do you have any hidden talents?

A Nothing that would turn heads at a party, but I do speak three languages pretty fluently (French, Spanish and Italian).

Q What is one work related goal you would like to achieve in the next five years?

A To appear in the Supreme Court. Not that it's completely in my hands, of course.

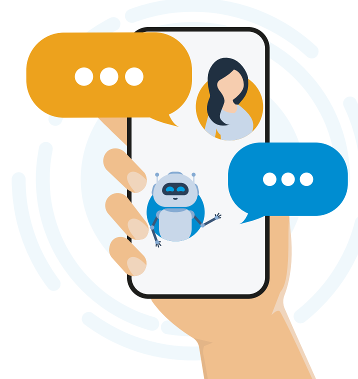
THE USE OF ARTIFICIAL INTELLIGENCE BY BUSINESSES

A DOUBLE-EDGED SWORD?

Authored by: Mariya Peykova (Barrister) - 3PB

The recent proliferation of artificial intelligence ("AI") is changing the way in which businesses and individuals operate - from the way in which we manage our schedules, to the manner in which we gather and disseminate knowledge and information.

The novel and disruptive nature of AI technology has created a massive window of opportunity that is rife for exploration by businesses, potentially reaping significant benefits for society as a whole, but also creating serious risks, if left unregulated.



What Is Artificial Intelligence?

There are several definitions of AI, which mostly focus on its ability to perform tasks that would otherwise require human intelligence or intervention. Lord Hodge, in a speech he delivered at De Montford University late last year, preferred to define AI as 'computer systems able to perform tasks which traditionally have required human intelligence, or tasks whose completion is beyond human intelligence.'

Recent years have seen the rise of generative AI, which is capable of creating, modifying and replicating various forms of content.

One example of a generative AI tool is ChatGPT. The evolution of generative AI has highlighted the complex interplay between the rising use of existing AI models (as well as the potential use of theoretical AI models) and data protection law, especially the Data Protection Act 2018 ("DPA 2018") and the UK GDPR.

The Implications Of using AI For Business Purposes

Businesses can use AI technology to automate certain processes, communicate with customers, gain insight through data analysis, and streamline business decision-making through the use of predictive analytics. Whilst there are several advantages in using modern AI tools, businesses need to be aware of the many risks which they pose, and ensure that their use of AI tools is compliant with existing legal and regulatory frameworks, in particular the provisions of the DPA 2018 and the UK GDPR.

For example, automated decision-making may seem like an attractive option for many businesses that need to make decisions relatively swiftly based on large amounts of information, such as credit applications or applications for employment, where automated-decision making (including profiling) is permissible under the UK GDPR where it is necessary for the performance of a contract, where it is required or authorised by domestic law, or where consent is expressly obtained from the data subject.[1] Data controllers must also process the personal data in a fair, lawful and transparent manner,[2] among other things.

However, AI systems based on supervised machine learning[3] are trained by humans, and could thus replicate the human propensity for error and bias.

This could expose businesses to potential claims under the Equality Act 2010 ("EqA 2010"), as the Act applies to the provision of services, and decisions made based on a set of criteria introduced by humans could potentially be discriminatory. Furthermore, AI systems based on machine learning are fed with a large amount of data (which could include personal data not obtained from the data subject) and thus promote the creation of enormous data sets ("big data"), which can potentially expose individuals to data profiling, further feeding into any inherent bias in the automated decision-making process.

Whilst data controllers must provide data subjects with clear information regarding the extent and purpose of the processing, where the data subject does not possess the requisite knowledge and skills to understand the complexity and scale of the processing (or appreciate the possible risks), attempts to introduce transparency and obtain a data subject's consent to processing could ultimately be rendered meaningless. Moreover, in many (if not most) cases the algorithmic model used by AI tools is opaque, and thus it may be difficult, or even impossible to inspect properly. Thus, for the purposes of assessing the substantive fairness of an automated decision, it may be challenging to identify and extract the exact flaws in the algorithm which may have potentially caused the unfairness.

Practical Tips For Ensuring Compliance With The Relevant Laws and Regulations

In order to mitigate the possible risks associated with the use of AI tools in day-to-day business activities,[4] businesses need to be mindful of the following:

(i) Where the specific AI tool used is designed to extract and utilise data from a wide range of sources, such as third-party websites and organisations, the data controller is required to provide the data subject with an article 14 notice under the UK GDPR. An article 14 notice provides the relevant data subject with information regarding the origin of the data, the intended use, the categories of recipients and other relevant information necessary to ensure transparency, which is central to the GDPR (as found by the Upper Tribunal in Experian Limited v Information Commissioner [2023] UKFTT 00132 (GRC) and more recently confirmed by the Upper Tribunal in Information Commissioner v Experian Limited [2024] UKUT 105 (AAC)). Whilst it will always be good practice to provide an article 14 notice when using AI tools to automate certain internal processes, businesses may need to adapt the way the handle different types of data, depending on its origin and purpose, and it is recommended to seek advice on what other action might be necessary in each case.

(ii) Where businesses rely on automated decision-making, it is always advisable to introduce a system whereby automated decisions are subject to review by a human employee if they are challenged, for example. Human involvement must be substantive, and applicants should always be provided with a full explanation of the reasons for a failed application, as well as what they can do to improve their prospects of success, if possible. This is particularly important in the context of loan applications and applications in the context of education or employment.

(iii) Where a type of processing (in particular where new technologies are used) is likely to result in a high risk to the rights and freedoms of natural persons (i.e. where it may result in data profiling), the controller is required to undertake a data protection impact assessment ("DPIA"). DPIAs are a useful way to gauge the level of risk, as well as the potential impact of the processing on data subjects. Businesses who employ a data protection officer should always consult with them about the need and scope of a DPIA. Depending on the circumstances of the project and the extent of the processing, it may also be advisable to consult the ICO and/or specialist counsel about the implications of a type of processing and the best way to mitigate any risks.

1 Article 22 (2) UK GDPR.
2 Article 5 (1) (a) UK GDPR.
3 Supervised machine learning is a subcategory of machine learning and artificial intelligence. Supervised learning is a method of creating artificial intelligence in which a computer algorithm is trained on input data that has been labelled for a particular output. The model is trained (usually through human intervention) until it can detect the underlying patterns and relationships between the input data and the output labels, enabling it thus to yield accurate labelling results when presented with never-before-seen data. In supervised learning, the aim is to make sense of data within the context of a specific question.
4 The possible risks are too many to list in a short article of this nature, hence the author has focused on the more obvious risks in general. Full advice should be sought by a specialist in order to assess all risks inherent in the specific context of each case.

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THE IMPORTANCE OF THE JUDGMENT AGAINST CRAIG WRIGHT

AND WHY IT MATTERS FOR THE CRYPTO INDUSTRY

Authored by: Konstantinos Adamos (Group Lead Legal Counsel (Crypto), Non-Executive Director RT Digital Securities) - Revolut

There has been considerable media attention and public interest concerning the recent High Court judgment against Craig Wright in a case brought by the Crypto Open Patent Alliance ("COPA"), a non-profit organisation whose members include prominent crypto assets exchanges such as Coinbase and Kraken as well as other interested parties.

Dr. Wright is an Australian computer scientist who for several years has been claiming to be the man behind the pseudonym Satoshi Nakamoto; the creator of Bitcoin.

Although the full written judgement will follow later, the judge declared that on the basis of the evidence presented to him, which he described as "overwhelming", Dr. Wright is neither Satoshi Nakamoto nor the creator of Bitcoin.

Why Is This Important?

The restoration of the truth is of course important in its own right. However, the ruling also has important practical implications, in particular in relation to the passing-off claims Wright has brought against crypto assets exchanges Coinbase and Kraken. In those claims Wright is seeking no less than £500 billion in damages - alleging that the exchanges have misled investors by marketing and selling their own cryptocurrencies using the Bitcoin brand. Wright claims that the Bitcoin 'fork' called Bitcoin Satoshi Vision ("BSV") is the only real version of Bitcoin.

While the most recent case did not consider Wright's passing-off claims, it is virtually certain that the decision will adversely influence these claims, which are predicated on him being the creator of Bitcoin.

Furthermore, it is likely that the decision will impact any future attempts Wright may pursue to assert intellectual property rights over Bitcoin.

The Background

Over the course of several years, in addition to his claims of being Satoshi Nakamoto, Wright has been trying to assert that he has certain database rights over parts of the Bitcoin blockchain, copyrights over the Bitcoin File Format and over the Bitcoin White Paper. These claims were often pursued by means of litigation.

In a separate case argued before the Court of Appeal in July 2023 [1], Wright successfully sought to overturn a High Court ruling[2] that refused him permission to serve a claim form on defendants outside of the UK.

A small but important procedural victory which allowed Wright to continue pursuing his claim. Wright's underlying claim in that case concerned an alleged infringement of his copyright over the Bitcoin File Format (i.e. the methodology in which new blocks of transactions are added to the Bitcoin file). Copyright that Wright claimed to have by virtue of the fact that he is Satoshi Nakamoto. Wright also objected to two airdrops which he claimed significantly changed the Bitcoin system without his consent. Such claims not only run contrary to the fact that Bitcoin is made available as an open source code but also are against the fundamental principles of Bitcoin as a permissionless network where no one person has the right or the ability to control the network.

By way of background, decentralised cryptocurrency networks such as Bitcoin or Ethereum operate on permissionless blockchains meaning that anyone can contribute. A blockchain is a series (a chain) of consecutive transaction blocks, validated by consensus subject to a set of rules and going all the way back to the genesis block.

Blockchains rely on their community of developers to maintain their operating code; a fork may happen when the community decides to make a change to the underlying protocol, the set of rules governing the cryptocurrency network.

This may result in a new chain splitting from the original; the derivative chain will share all of the previous transaction blocks (same as the original chain) but it will become a new autonomous chain governed by the new set of rules. The success of a new chain, or lack thereof depends on the support it finds within the developer and user community.

The first airdrop happened in August 2017 and created a "fork" in the blockchain called the BTC Network, which ran in parallel to the Bitcoin blockchain. The second airdrop took place in November 2018, creating the BCH Network, another parallel blockchain. Wright claims that these parallel chains contain previous blocks and therefore infringe on his copyright in the Bitcoin White Paper, the Bitcoin File Format and various database rights.

COPA is backed among others by prominent figures in the tech and crypto industries (including Twitter founder Jack Dorsey). According to its mission statement, it was "formed to encourage the adoption and advancement of cryptocurrency technologies and to remove patents as a barrier to growth and innovation". COPA has also applied for injunctions seeking to restrict Dr. Wright's ability to publicly state that he is Satoshi Nakamoto, although these remain to be decided.

Conclusion

The true identity of Satoshi Nakamoto will likely remain a mystery, at least for the foreseeable future. According to the judge, it could be anyone except for Craig Wright. This decision will also hopefully stop Wright from pursuing spurious lawsuits against developers and other members of the crypto community who have consistently rebuffed his claim of being Nakamoto.

1 Wright & Ors v BTC Core & Ors[2023] EWCA Civ 868
2 Wright & Ors v BTC Core & Ors [2023] EWHC 222 (Ch)

INCREMENTAL APPROVAL OF CRYPTOASSET EXCHANGE TRADED PRODUCTS

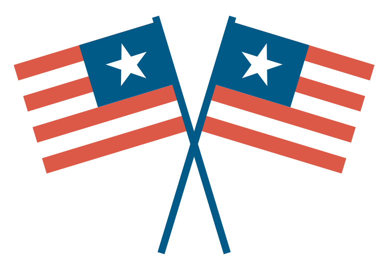
Authored by: Leigh Sagar (Barrister) - New Square Chambers

It is over 50 years since Malkiel suggested that "a blindfolded chimpanzee throwing darts at The Wall Street Journal could select a portfolio that would do as well as the experts".[1]

On this basis, active investment may seem pointless and, investing passively by copying the market, or some part of it, such as by tracking an index fund, could well be more efficient and as profitable.

A market maker (or "authorised participant") might acquire a collection of shares in the companies making up a share index and exchange them for shares in a company created for the purpose and known as an exchange traded fund ("ETF"). The ETF shares could be traded by the authorised participant in the secondary market, like any other shares. An ETF share tends to trade at, or near to, a price calculated from the aggregate values of the underlying shares. Further ETF shares can be created if demand rises, or cancelled if it falls.

The digital asset market has long been knocking at the doors of the regulators for opportunities to create cryptoasset-backed exchange traded products but with little success, until now.



The US Position

In July 2013, a Bitcoin ETF was proposed by Tyler and Cameron Winklevoss, who had in 2004 sued Mark Zuckerberg, founder of Facebook. At the time, the bitcoin exchange Mt Gox was handling 70% of the world's bitcoin trades and was experiencing difficulties, which eventually led to its halting all bitcoin withdrawals in February 2014.

1 Malkiel, B. (1973) A Random Walk Down Wall Street, W. W. Norton & Co., London

In an article about the proposal, Abby Woodham of Morningstar wrote that bitcoin was "best conceptualised as a highly speculative commodity whose volatility is driven, in part, by price manipulation and its faulty infrastructure".[2]

The application was rejected by the US Securities and Exchange Commission ("SEC"), as were other such applications, by the Winklevoss brothers and others, after that. There was concern for "potential for fraudulent or manipulative acts and practices" in the market.[3]

Times have changed and the technology and legal consequences of bitcoin and other cryptoassets are now more understood and accepted. Other jurisdictions have approved bitcoin exchange traded products, including Canada, Germany, Jersey, Switzerland. On 30th April 2024, six spot bitcoin and ether ETFs, which had been approved by Hong Kong's securities regulator, started trading.

On 11th January 2024, the SEC approved 11 spot bitcoin ETFs.[4] Contrary to the usual method of funding, the SEC required that creation and redemption of ETF shares must carried out be using cash and not in-kind (bitcoin tokens).

Looking at the prospectus published by Bitwise for the Bitwise Bitcoin ETF:[5]

(1) For the creation of a basket of ETF shares the purchaser must pay the US dollar amount needed to buy the relevant quantity of bitcoin, and redemption involves a sale of the relevant quantity of bitcoin.

(2) The fund is held in a Delaware statutory trust and the trustee continuously issues common shares representing units of undivided beneficial ownership of the Trust that can be purchased and sold on the NYSA Arca exchange;

(3) Part of the administration of the Trust, including its creation and the ongoing listing and registration of the ETF shares, is carried out by the Sponsor, a Delaware company;

(4) Other administration duties, including tax and accounting services and financial reporting, and the issuance and redemption of ETF shares, are undertaken by a New York bank;

(5) The New York bank also acts as a custodian of the cash held in the Trust Fund, including cash to be used to acquire bitcoin and Trust expenses and liabilities; and for distribution to authorised participants in connection with redemptions;

(6) A limited purpose New York chartered trust company, namely Coinbase Custody Trust Company LLC, acts as the custodian of the bitcoin purchased held in the Trust Fund; and

(7) A Delaware Trust Company serves as statutory Trustee.

The holders of the ETF shares, who can be institutional or retail investors, have no voting rights and take no part in the management or control in the Trust's operations or business. All private keys for the Trust's bitcoin are securely stored using multiple layers of high-quality encryption and in the custodian's offline hardware vaults in secure environments. No access to the private keys is given to any third parties.

The UK Position

In the UK, an ETF is typically an open-ended collective investment scheme ("CIS"), the units of which are traded on regulated markets and investment exchanges. It is typically structured as non-UK resident company and is for tax purposes considered to be within the definition of an offshore fund.[6] The majority of European ETFs are structured so as to comply with the requirements of the UCITS Directive,[7] and in the UK, the FCA has responsibility for authorisation and compliance.[8] No cryptoasset related exchange traded products have been approved by the FCA.

In 2019, the FCA took the view that unregulated cryptoassets had no inherent value, being opaque, complex and unreliable as reference assets for investment products.[9]

They also formed the view that the integrity of, and confidence in, the cryptoasset market affected retail consumers holding crypto-derivatives because their value is directly affected by any sudden devaluation or price dislocation in underlying token prices.[10] In October 2020, the FCA announced that as from 6th January 2021, sale or distribution of a cryptoasset derivative or a cryptoasset exchange traded note to a retail client was to be prohibited.[11]

2 https://www.morningstar.com/articles/601775/does-the-world-need-a-bitcoin-etf

3 See the SEC's analysis at https://www.sec.gov/files/rules/other/2018/34-83723.pdf

4 Referred to as "spot bitcoin ETFs", to distinguish them from a bitcoin futures ETF (which was based on the Chicago Mercantile Exchange bitcoin futures) that had been approved in October 2021

5 https://s3.amazonaws.com/static.bitwiseinvestments.com/BITB/BITB-Bitwise-Bitcoin-ETF-Prospectus.pdf; Bitwise has been selected by throwing a dart at a list; no recommendation or otherwise should be inferred

6 See HMRC Investment Funds Manual from para 12000, onwards, at https://www.gov.uk/hmrc-internal-manuals/investment-funds/ifm12000

7 2009/65/EC; see guideline 3 of the ESMA's Guidelines on ETFs and other UTICS issues, (ESMA/2012/832); section 236A of the Financial Services and Markets Act 2000

8 See generally the Collective Investment Schemes Sourcebook of the FCA Handbook

9 See para 3.4 of the consultation paper, Prohibiting the sale to retail clients of investment products that reference cryptoassets (CP19/22)

10 Paragraph 3.18 of CP19/22

11 Policy Statement Prohibiting the sale to retail clients of investment products that reference cryptoassets (PS20/10); a retail client is a client who is not a professional client

Following the approval by the SEC of spot bitcoin ETFs in January 2024, the FCA appeared to have altered course. It announced that it would not object to requests from Recognised Investment Exchanges to create a UK listed market segment for cryptoasset-backed exchange traded notes, provided they meet all the requirements of the UK Listing Regime and are available only to professional investors.[12]

A cryptoasset exchange traded note ("ETN") is a debt security that can be traded on a regulated market, with a return that tracks the performance of the cryptoasset. No dividends or interest are payable on the ETN.[13] The financial institution sponsoring the ETN (offering to take the loan) promises to tie the amount of the investment to the value of the cryptoasset and to repay the investor the value of the asset on maturity. No acquisition or sale of the cryptoasset is involved in the transaction.

A shift, but not too far. The FCA remains cautious about making positive decisions in what it perceives as a speculative and unstable cryptoasset market.

It is noticeable that the announcement by the FCA did not distinguish between regulated and unregulated cryptoassets for tracking by the ETN. It merely reminded readers that "cryptoassets are high risk and largely unregulated". No doubt it will take into account the particular cryptoasset that is the subject of the particular ETN when the application for listing is made.

(examples of professional clients are investment firms and credit institutions): para 3.4.1R of COBS

12 See COBS 22.6; https://www.fca.org.uk/news/statements/fca-updates-position-cryptoasset-exchange-traded-notes-professional-investors

13 See the Glossary of the FCA Handbook

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PROTECTING THE BRAND FROM BAD EVIDENCE

Authored by: Elizabeth Ortega (Founder) - ECO Strategic Communications

Litigators will tell you it's important to avoid being forced to explain where relevant but salacious evidence came from when the primary source is confidential. Yet sometimes we let our worse angel's penchant for winning at all costs override our better angel's forethought and common sense.

Manipulating tainted evidence is nothing new. In 2021[1], a private intelligence agency, was described as an "army of spies"[2] that used fabricated evidence against innocent civilians, including a Canadian judge and journalists.

Let's explore an ongoing and consequential case:[3] The heirs of an Israeli-Belgian diamond trader are fighting over his estate, with the surviving children accusing their widowed stepmother of hiding a virtual treasure trove of assets.

The children's prominent London-based law firm obtained, through noted private investigators, evidence that the stepmother spirited away over £100M to accounts at private banks in Switzerland, Monaco, and Luxembourg. The PI firm also got its hands on SWIFT messages showing transfers of over US$140M to the stepmother following her husband's death.

In court all looked promising for the children until bank officials testified they had no accounts associated with the stepmother. One banker noted the purported SWIFT transfers were printed in the wrong format – in other words, they appeared to be forged.

The High Court judge seemed to agree, remarking at a recent hearing, "the evidence of forgery is, as it presently appears, very strong".[4]

1 https://www.wsj.com/articles/black-cube-was-paid-large-amount-of-money-to-improperly-discredit-judge-court-rules-11617210208

2 https://www.npr.org/2017/11/07/562486257/ronan-farrow-on-harvey-weinsteins-army-of-spies#:~:text=With%20the%20latest%20revelations%20in,spy%20on%20actresses%20and%20journalists.

3 https://www.ft.com/content/512d879c-1e98-44be-822e-1efd46b15ca3?sharetype=blocked

4 https://www.greyhawk-uk.com/russia-based-spies-claim-backdoor-access-to-european-central-bank/

Now the litigation is in turmoil, with the children's lawyers under the gun to reveal sources their own investigators are trying to shield. The law firm had relied on trusted investigators who, in turn, had relied on trusted sources. But no matter – with reputations on the line, inevitably the buck stops with the lawyers. The negative impact on the lawyers' and law firm's brands, which should have been protected as fiercely as the PI firm protects its sources, is incalculable.

This is only one recent example of lawyers grappling with the reputational fallout of judges questioning the veracity of financial evidence in high-stakes cases.

In another case involving the same high-powered lawyers and investigators, the admission of tainted evidence cost the law firm a freeze order, precious time, and strategic leverage, not to mention what may happen if, eventually, the lawyers are found to have committed any legal or ethical offences.

Takeaways From Cautionary Tales

All of those losses and setbacks are avoidable if law firm leadership prioritises communications and due diligence. Here are some constructive key points:

- Pause and reflect before presenting unusually good documentation, as misinformation always hurts clients and reputations.
- Heed smoking guns. Since all advocates aim to represent their clients to the best of their abilities, they may, with only good intentions, neglect to closely examine potentially game-changing information. Or they may inadvertently rely too heavily on questionable evidence that supports their most helpful courtroom narrative.
- Consider public perception. Once a name has been tainted by an ignominious episode, it can never escape innuendo. In today's digital marketplace, the social media e-highway runs at warp speed.

Mind Reputational Risks

- A law firm can avoid brand deterioration by always questioning results. Does evidence from investigators look too good to be true? This can be especially concerning if it comes from confidential sources. Conservative documents from known sources usually provide the most reliable facts.
- Assuming the law firm's evidentiary situation is already in the public arena, it creates a paracrisis, a turning point that can devolve into a full-blown reputational disaster if nothing is done to halt the downward trajectory.
- The best way to keep this from happening is to face the audience head on, as opposed to denying reality by discounting legitimate inquiries from stakeholders and mainstream media. The law firm may use its own controlled channels (website, social media, podcasts, etc.) to broadcast an exclusive explanation of how the thorny situation unfolded.
- While it is imperative to step forward confidently, one need not have all the answers immediately. It's about respectfully managing and addressing possibly damaging situations as soon as they occur. With the understanding that clarifying particulars takes time the law firm should designate a credible spokesperson to promptly communicate what is known and admit what is uncertain. This representative must remain clear and on point for the duration.
- And finally, the law firm's messaging should repeatedly assert the point that if this can happen to sophisticated litigators, it can happen to anyone.

Credibility is a key influencer of revenue and growth. Positive reputations inspire trust and allegiance. A tainted reputation can be damaging to profitability and retention, but it can also lead to discoveries that can enhance corporate governance and better business practices. Brand reputation maintenance is a continuous process of going over what not to do and internalising key lessons. Primarily, law firm leadership must always prioritise due diligence to maintain corporate reputation through strategic communication.

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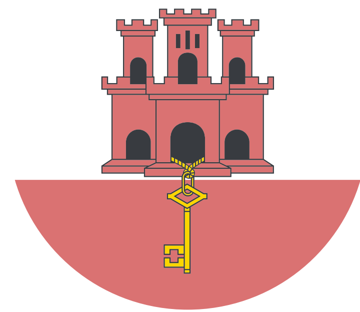
PRIVACY AND DEFAMATION IN GIBRALTAR

A BRIEF OVERVIEW

Authored by: Paul Grant (Associate) - Signature Litigation

The law of defamation in Gibraltar is largely based on various provisions taken from the different stages in the evolution of defamation law in England and Wales, most recently the Defamation Act 1952. The (Gibraltar) Defamation Act 1960 is informed by the common law of Gibraltar as well as that of England and Wales.



Bringing A Claim

The procedure for bringing and responding to a claim is governed by the English Civil Procedure Rules, which apply in the absence of local rules pursuant to rule 6(1) of the (Gibraltar) Supreme Court Rules 2000. Actions can be brought for both libel and slander. The substantive law regarding what must be proved is governed by common law principles developed both in Gibraltar and in England and Wales.

The communication must:

(1) Be published to a third person;

(2) Identify the claimant;

(3) Be defamatory of the claimant.

Ford v Labrador is a prime example of the Gibraltar Court's approach to defamation claims, in which it applied the test set out in Sim v Stretch, namely: "Would the statement tend to lower the plaintiff in the estimation of the right-thinking members of society generally?"

Burden Of Proof

The burden of proof in relation to proving the elements of the claim falls on the claimant. Since falsity of a statement is not one of the elements of the tort of defamation, there is no requirement for the claimant to prove the falsity of a statement which is presumed. In fact, the burden to prove that a statement is true falls on the defendant.

Defences

A defendant may argue that the statement was not published to anyone other than the claimant, does not refer to the claimant or is not defamatory in nature.

As in England and Wales, the defendant can also avail himself of the common law defences of justification (truth) and fair comment (honest opinion).

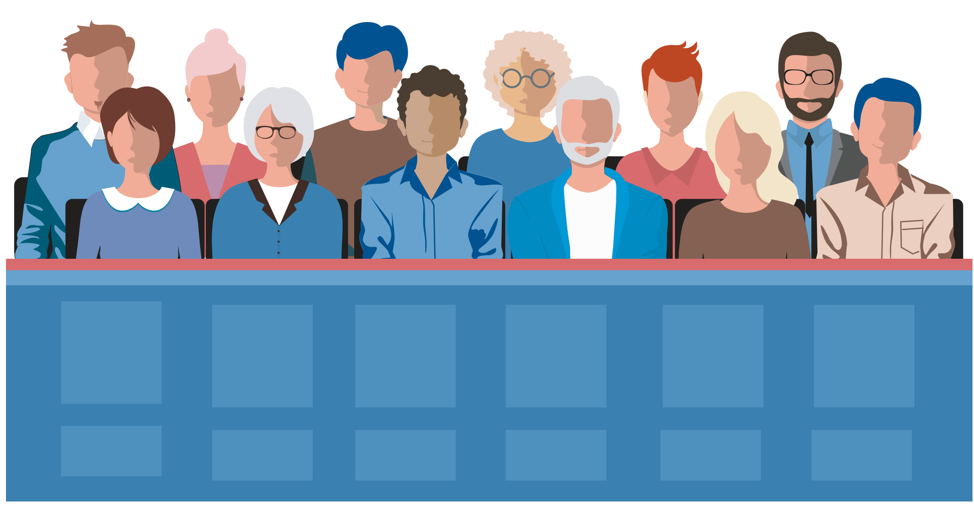
Newspapers also have the benefit of statutory defences of absolute privilege for fair and accurate reports of court proceedings, qualified privilege, and publication without malice or gross negligence coupled with publication or offer of apology.

Remedies

It is open to the defendant to offer an apology in mitigation of damages caused to the claimant. A successful claimant is entitled to compensatory damages and may also be entitled to special, aggravated, and exemplary damages, depending on the circumstances. The claimant may also seek an injunction to prevent further publication of the defamatory statement.

Privacy

Section 7(1) of the Gibraltar Constitution Order 2006 (replicating the wording of Article 8 of the European Convention on Human Rights) enshrines the right of every person to "respect for his private and family life, his home and his correspondence".



Section 16(1) of the Constitution provides for a free-standing action to be commenced in the Supreme Court by any person alleging a breach, or potential breach, of any of the fundamental rights laid out in the Constitution in relation to him.

The Gibraltar Constitution, at section 10, also protects the right to freedom of expression, in terms largely similar to Article 10 of the European Convention. As a result, a similar balancing exercise to that exercised by the English courts in breach of confidence actions would need to be adopted by the Gibraltar Court in such an action.

Trial by Jury

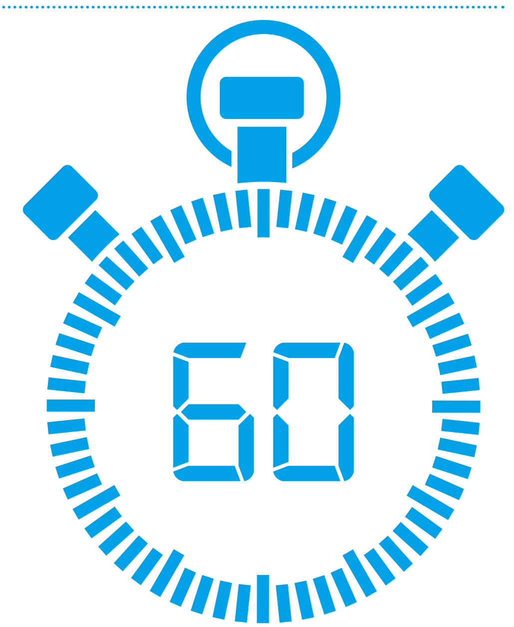
This is a continuing peculiarity of Gibraltar law in respect of defamation. In 2022, the Court of Appeal for Gibraltar confirmed in Allen v Panorama the continuing right of defendants to be tried by jury under the Defamation Act 1960. The case raised some salient points both in relation to the law of defamation and the applicability of English law to Gibraltar.

The Defendants contended that whilst legislative developments have taken place in England that have made the right to jury trials in defamation claims the exception rather than the norm, the position in Gibraltar reflected the position in England prior to these reforms.

The Defendants detailed the historical development of the right to trial by jury in Gibraltar and submitted that the common law right to trial by jury in defamation proceedings as it existed in England in 1883 (and which entered into force in Gibraltar when the 1884 Order in Council was passed) remains the position in Gibraltar today in accordance with section 2 of the English Law (Application) Act

Paul Grant is a barrister and acting solicitor of the Supreme Court of Gibraltar and an Associate at Signature Litigation (Gibraltar) Limited.

60-SECONDS WITH:



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Q Imagine you no longer have to work. How would you spend your weekdays?

A I would follow the ATP tennis tour in person for around 6 months. A colleague of mine used to do this and came back incredibly relaxed on each occasion.

Q What do you see as the most exciting thing about your job?

A Addressing judges and being able to turn them from any initial adverse view they might have taken to your client's case. Seeing the Judge having a "light bulb" moment as he/she understands your client's position and begins to accept it always brings huge excitement as you know that you have made a difference.

Q What's the strangest, most exciting thing you have done in your career?

A When acting for Doug Ellis on one of his non-football businesses, having to attend consultations in the Chairman's Office at Villa Park – having been a Villa supporter for all my life, it was a joy to be able to get the full "behind the scenes" view.

Q What is the best life lesson you have learned?

A Life is rarely easy for anyone. Whether it is clients, colleagues or family members, sometimes life throws unexpected things at them and you. Most people are doing their best in the situations that they face.

Q What is one important attribute that you think everyone should have?

A Kindness – it brings with it understanding, empathy and patience.

Q What film do you think everyone should watch, and why?

A *Mephisto* starring Klaus Maria Brandauer. It reworks the story of Faust and Mephistopheles in the setting of pre-war Nazi Germany. Brandauer gives an incredible performance of a man so desperate to achieve his goal (in his case to be the country's greatest actor) that he completely loses sight of his morals. It is a stark warning of the dangers of becoming too driven and intense.

Q Dead or alive, which famous guests would you invite to a dinner party?

A Roger Federer, Clint Eastwood, Catherine of Sienna, Nando Parrado, Nina Simone – all astonishing people in their different ways.

Q What is the best novel of all time?

A I am not sufficiently qualified to determine that. The novels I have enjoyed most include Tolstoy's *War and Peace* (which I read by a lake in Hangzhou while recuperating from a burst ear drum in 1987 just before pupillage) and *Mistry's A Fine Balance*. But my staple diet is crime procedurals on Audiobooks – it is a very easy way to switch off.

Q What legacy would you hope to leave behind?

A It is for others to decide what my legacy, if any, will be. I would like to think that people will think of me as someone they respected and (in most cases) liked.

Q What is the most significant trend in your practice today?

A The ease with which allegations of dishonesty are made on the skimpiest of evidence. It seems very rare that people accept that things can go wrong without someone having tried to cheat someone else.

Q Do you have any hidden talents?

A If so, they are so well hidden that not even I have recognised them.

Q What is one work related goal you would like to achieve in the next five years?

A It will not be for me to achieve, but I would love to see the restoration of legal aid in civil litigation to the state it was when I started in practice. I strongly believe it would be the best way to restore access to justice to huge numbers of people, for whom it is currently very difficult. I think the whole system works best when people have the opportunity to be represented by lawyers, being paid properly. But I don't expect it to happen.

FIFTY SHADES OF GREEN?

ESG PRESSURES VS THE RISK OF GREENWASHING

Authored by: Belén Satorre (Associate Director) - S-RM, Rob Meade (Partner) - Bracewell, and Mark Hunting (Partner) - Bracewell

The current pressure on companies to be “green” is unprecedented. It is the natural result of the world becoming more focused on the risk of climate change and the need for a successful transition to cleaner energy. This pressure has led to many companies making public statements about their green credentials, often to allay the concerns of consumers or investors. However, increased regulation has introduced new risks and compliance burdens, all designed to ensure that such statements are not misleading.

It has never been more important for companies to practice what they preach and to avoid painting a rosier – or greener – picture of their organisation’s activities.

What Is Greenwashing?

Greenwashing refers to a practice by which a company makes inaccurate or misleading claims about its business or products in order to improve their environmental or social credentials. Such claims are traditionally made in advertising or marketing promotions. However, they are increasingly appearing in annual reports, investor documents and contractual agreements.

What Are The Regulatory and Legal Risks of Greenwashing?

Those operating in the UK need to be aware of the UK legal and regulatory regime which could catch and penalise greenwashing.

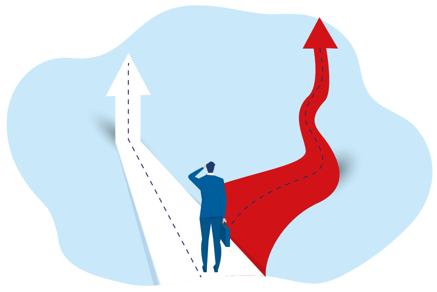
Thus far, the main targets have been misleading advertising and marketing (with enforcement action being taken by the Advertising Standards Authority and the Competition and Markets Authority). However, new UK legislation arguably creates strict or near-strict liability for companies and directors of companies that engage in greenwashing activities. This includes statutes targeting fraud and false accounting. In addition, the new strict liability offence for failing to prevent fraud introduced by the Economic Crime and Corporate Transparency Act 2023 paves the way for corporate liability for greenwashing, much as the Bribery Act 2010 did for bribery. It creates an offence for corporates who fail to prevent fraud by their employees, agents and other associated persons.

For offences not within the fraud category, such as unfair commercial practices, new provisions around corporate liability for the conduct of senior managers create similar risks.

Greenwashing allegations have already become a focus for a number of NGOs and climate activist organisations. Given greater ESG awareness, it is likely only a matter of time before prosecutors, whether government or private, begin to bring cases against organisations and groups engaged in activity that they see as greenwashing.

Greenwashing can also give rise to civil litigation risk. There are a wide range of potential civil actions that can be brought by shareholders, customers and other interested parties. These include derivative actions under the Companies Act 2006 and claims under Financial Services and Markets Act 2000 While early days, it is clear this is a developing area.

The penalties for failure to comply with the regulatory and legal regime in the UK can be significant. However, as with other forms of compliance and financial crime, much of the penalty is in the process of being investigated and/or prosecuted, even if a conviction is not subsequently secured.



What Are The Other Risks Associated With Greenwashing?

Driven by the pressure to be 'green' and to achieve competitive advantage, many companies position their products or themselves as sustainable. Should the consumer trust them all? Many organisations set ambitious sustainability targets that often fall short of what is required, are not fit for purpose, or cannot be met. The lack of consensus as to what constitutes 'green standards' or 'sustainable' is often defined by third-party verification or certification bodies, which means that it can be difficult for companies and consumers alike to distinguish greenwashing claims, without a clear global standard or knowledge behind the label.

Going forward, products and services that are marketed as 'eco', 'carbon neutral' or 'environmentally friendly' will be subject to increased scrutiny and will require validation. Making unsubstantiated or unvalidated claims could lead to serious consequences.

Consumer trust, often earned over periods of many years may easily break down after an incident of greenwashing, impacting companies' revenue, reputation and operations, potentially causing substantial damage to companies' bottom-lines.

It is not only greenwashing that companies must manage, but 'greenwishing' and 'greenhushing' as well.

In some cases organisations will choose not to publicise their ESG credentials at all (greenhushing) for fear of making claims they cannot substantiate, or being penalised by investors who might consider ESG to undermine profit. While silence on sustainability matters might reduce the risk for corporate liability, it can also increase the reputational risk if there is a lack of transparency.

Companies may also unknowingly or unwillingly set unrealistic targets or make unfounded public statements about their intent to improve their sustainability profile (greenwishing). They may overpromise and underdeliver by greenwishing, perhaps hoping to meet specific sustainability credentials however lacking the internal resources, capabilility, budget or will to do so. There are cases where this is particularly challenging for those SMEs that may not be able to afford to pay for advice, or for annual certification fees to validate their ESG claims. However, this should not stop any company looking to achieve better sustainability outcomes and communicating their progress honestly and openly. There is publicly available government guidance, which is free to everyone, which helps companies to avoid making unsubstantiated or misleading claims.

How Do We Find The Right Balance?

It may be quite easily concluded that between greenwashing, greenwishing and greenhushing, making material progress on ESG issues and communicating on this effectively is an ever-complicated minefield. However, being transparent about a company's current state and progress on their sustainability efforts has never been more crucial.

It is true that embedding ESG in a company's strategy and communicating this to stakeholders is never a straightforward journey. It requires investment and cross-functional ownership.

The perceived complexities should not deter efforts. However, organisations could mitigate the risks by seeking suppliers that have evidence based ESG credentials for their value chains. It is true that this may sometimes incur initial capex outlays, or higher operational costs. However, this initial expenditure could be dwarfed by the risks to revenue, operations and reputation that may result from misleading ESG strategies.

There is no one-size-fits-all approach. Companies must find the appropriate balance for them by continuing to evaluate their sustainability initiatives, conducting external due diligence and integrating ESG into their risk frameworks. Companies that do so will have the confidence to communicate their substantiated claims with clarity and are more likely to benefit in the long-run.

GREENWASHING AND ESG CLAIMS

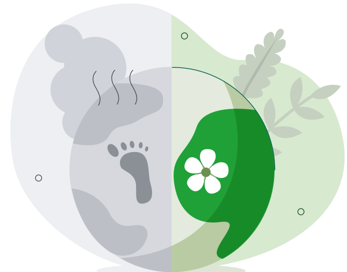
HOW LITIGATION CAN HOLD POLLUTERS TO ACCOUNT

Authored by: Tom Davey (Co-Founder and Director) - Factor Risk Management

One of the biggest trends in the class action space, ESG claims will likely remain a significant area of litigation over the coming years, as evidenced by current trends and case volumes.

At the same time, while pure 'greenwashing' claims are somewhat limited at present, these are only likely to become much more significant in the future as a result of legal developments and the application of more intense scrutiny to corporate practices.

The Intergovernmental Panel on Climate Change (IPCC) and other global organisations concerned with environmental affairs are continuing to drive political change at governmental level across the world, helping ensure that an ever-growing number of protections are codified into law at both national and international level. However, this macro level action takes place at a relatively glacial pace and is often compromised to accommodate the priorities of countries, such as the need for less developed countries to continue their industrialisation to improve the wealth and standard of living of their citizens.



This has been seen in the recent reversal of climate targets in Western Countries around the implementation of Net Zero goals due to political and economic factors. It is also often proving difficult for climate campaigners to convince ordinary voters to see climate change as a threat. As such, the issue is often dismissed as a "tomorrow problem", thanks to voters' apathy to the subject encouraging politicians to kick the can down the road for future governments and organisations to tackle instead.

However, while macro level changes may find themselves hampered by political apathy, more successful changes to law and practices around the environment can be found at the micro level. We have seen that small-scale projects are able to improve the lives of people and environments at the local level, which in the aggregate leads to significant impact at the macro level. For example, reforestation in the northern hemisphere compensates, to some extent, for the deforestation of the Amazon.

Where policy fails, or where corporates take advantage of lesser regulated countries, litigation can therefore act as a useful tool to effect change when none is otherwise readily forthcoming.

Such litigation can also bring useful compensation into communities to rebuild their lives or their region's environment after disastrous events occur, such as the 2015 Brazilian dam collapse, for which the mining giants BHP and Vale were ordered to pay $15bn in damages.

Environmental-based litigation is by no means a new phenomenon, and over recent decades there have been many high-profile claims across multiple jurisdictions. Some of the most notorious cases have involved oil companies, exemplified by 30,000 members of the Ivory Coast's fishing communities bringing - and winning - a claim against commodities trading house Trafigura following the illegal dumping of toxic waste by the firm in 2006.

Many environmental claims are brought on the back of "old law", such as negligence, tort, and nuisance.

However, there are an emerging number of cases which will tackle greenwashing directly, utilising more recently enacted legislation, such as Chicago City's launching of a claim against oil companies who the claimants alleged had deceived the public about the climate crisis.

Scrutiny should always be applied to what companies say and promise compared with what they deliver, as well as to their potential exploitation of loopholes in current regulation and law. Corporates often champion a green agenda to a Western audience but directly cause environmental problems in less-regulated countries where they are unlikely to face serious sanctions, if any at all.

Electric cars are an interesting example of this issue. While their creation and use helps to solve the climate concern of air pollution in Western cities, the extraction of toxic materials or the disposal of green tech elsewhere in the world involved in production means they are somewhat of a double-edged sword.

Similarly, the growth of the garments industry led to consumers buying twice as many clothes in 2015 compared with a decade earlier, resulting in clothes now being discarded in half the time. Countries such as Chile now import clothes to recycle to such an extent that vast amounts end up forming mountains in the Atacama Desert, a fact of which Western consumers may well not be aware when they send clothes to be recycled in good faith.

Litigation is therefore a useful tool to apply pressure to make sure green goals are delivered rather than kicked along the road and recreating issues in another manner or jurisdiction.

The limitation, however, is that is approach can be expensive, jurisdiction-driven, and often painfully slow, since it needs to work in conjunction with public support, understanding, and policy.

While local change is being implemented, it is vital that we take a closer, more holistic look at our local companies and hold them to account in cases where they have breached either environmental law or green pledges made to consumers and stakeholders.

Examples of how we are doing so of late include the emission cases and wider greenwashing litigation.

There is also clear evidence that the introduction of mandatory ESG reporting and disclosures by financial firms has played a critical role in helping the sector address climate change and sustainability. The disclosure regime is also being used to address issues such as poor workplace diversity and gender pay gaps, while several jurisdictions have introduced or plan to introduce rules to dealing with ESG risks in supply chains, helping to widen the impact of ESG legislation even further.

On the face of it, new regulatory implementations such as the clean air zones and city emission charges as well as the growth of electric cars are helpful, but companies need to also consider the impact that this will have further down the line.

To this end, it will pay dividends to be proactive now rather than reactive in future, and to learn from the mistakes of the emission cases before it is too late. Future generations depend on us today to ensure that robust regulation and effective legislation is enacted across the board, to prevent the impacts of climate change and environmental damage wreaking irreversible damage on the world they are set to inherit.

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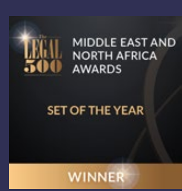

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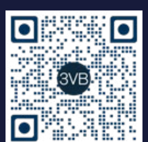

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HOW WHISTLEBLOWING CAN HELP YOUR ESG STRATEGY

Authored by: Sybille Raphael (Legal Director) - Protect

No business is immune from ESG risks, if only because of consumer consciousness, staff pressure, regulators' and investors' expectations.

How an organisation treats its people, how it impacts and influence its communities and its environment are questions that can't be ignored anymore: businesses are being held accountable for their social and environmental footprint.

And the trend is only growing. Parent companies are increasingly liable for action (or omission) of their subsidiaries overseas. Directors themselves are at increased risks: their fiduciary duties mean that they cannot ignore ESG outcomes.

The question is therefore not whether organisations need an ESG strategy, but how to define it, how to implement it, and how to monitor its effectiveness and value to the business. In all this, whistleblowing is key.

Defining Your ESG Priorities

An ESG strategy will allow you to measure your performance against key metrics or standards, and will need to cover what stakeholders' (investors, employees, financiers, customers) expect of your business.

Staff expectations – and perceptions of what constitutes wrongdoing – will provide some useful pointers. What is raised internally as a whistleblowing concern allows you to keep track of what matters to your staff. It can also provide valuable suggestions for the specific strategic ESG concerns, KPIs or targets you may want to consider.

Workers' perceptions of what is right and wrong closely follow society's evolution. Over the course of Protect's 30-year history, we have spoken to more than fifty thousand whistleblowers. Until 10 years ago, calls were all about patient safety and financial misconduct.

But in the wake of the #MeToo and BlackLivesMatter movements, the definition of what is and is not in the public interest has changed. Now discrimination and harassment, 'toxic culture' and ethical issues take centre stage. Whistleblowing allows you to detect emerging ESG risks.

Whistleblowing will also give you data on the cost, risk and opportunity associated with your ESG agenda. Looking at concerns' substantiation (or lack of), how the business responded to them, and the follow up (whether this ended in litigation, commercial or reputational loss, etc) will give you valuable information on both risks and opportunities offered by your ESG goals.

ESG is, by definition, a moving landscape. Your ESG strategy should make clear what you are measuring, how you will get there, and the policies and procedures you need in place to meet these targets. Analysing the type of concerns and behaviour your staff blow the whistle about is a key way to ensure your targets and goals remain relevant and effective.

Implementing and Monitoring Your ESG Strategy

Having an ESG strategy is obviously only the first step. Your stakeholders expect proof of commitment, you will need to demonstrate compliance and deliver results. An ESG strategy needs to be managed, monitored and promoted otherwise it will remain dead letter and prime territory for 'greenwashing' and 'purpose-washing' complaints.

A healthy speaking-up culture is one of the best guarantors of a company's compliance with its regulatory and ethical duties.

It is also fundamental to monitoring whether your strategy is working, to get some key measures of its impact, to identify risks and difficulties posed by it, and to demonstrate transparency and credibility.

Arguably, an ESG strategy that is not accompanied by a proper whistleblowing system and culture is pointless and will do more harm than good. It sends a disastrous message regarding the trustworthiness and transparency of the organisation. The G of ESG stands for governance. There can be no accountability and no deterrence when people do not know how and/or feel too scared to speak up.

Your staff are the eyes and ears of your organisation. They are likely to be the first to spot when climate and sustainability credentials are being misrepresented, when climate funds are being spent incorrectly, laws are being breached, or environmental harm is occurring. Many big organisations choose to make their whistleblowing reporting lines to their suppliers, which offers a key route to identifying the risks within your supply chain.

The Whistleblowing Cornerstones

There are already minimum standards applying to all employers with 50 or more workers in the EU including maintaining the confidentiality of whistleblowers, having impartial and competent person/ department to investigate concerns, providing acknowledgement and feedback within set timeframes, and keeping records of reports.

Some regulators go further. The UK financial regulator, the FCA, for instance requires organisations to allocate a board member to defend the whistleblowers against the rest of the organisation, to be their champion.

A whistleblowing policy should clearly set out how staff should raise concerns, with typically multiple reporting routes. It should be easy to understand and set out who will do what, how the process will work and what it requires of key members of staff.

But how a company approaches its whistleblowing policy is every bit as important as the policy itself. At Protect, we are experts at helping organisations create an ecosystem of supporting actions. One of those is training: ensuring staff are aware of how to raise concerns, and that managers understand how to respond to them. Are there particular demographics, locations or characteristics that make a member of staff more or less likely to report wrongdoing? If so, are there measures the organisation can put in place to empower them to do so?

How concerns are investigated and dealt with will also be key. Our analysis of more than three thousand cases that we received last year revealed that two in five called (41%) said their whistleblowing concern had been ignored by their employer. Simply setting up a system and expecting people to "speak up" is not enough – employers must listen to and investigate the concern to ensure accountability and keep track on how the systems work in practice.

Protect flagship Whistleblowing Benchmark Tool is used by organisations to identify gaps in their systems and compare their progress against international best practice. Designed for use by larger organisations it covers all aspects of the EU Whistleblowing Directive and provides personalised recommendations tailored to an organisation's specific needs and challenges.

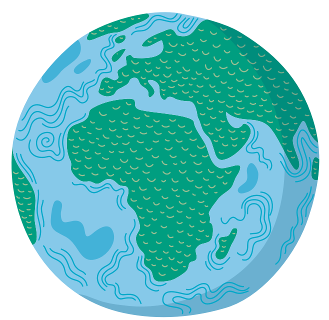
Sybille Raphael is Protect's legal director. She is a leading specialist whistleblowing lawyer working alongside employers, regulators and whistleblowers. She has a key role in Protect's legal reform campaign to improve the UK whistleblowing legal framework. She also has wide-ranging expertise in helping organisations improve their whistleblowing arrangements and 'speak up' culture.

CAN YOU CLAIM BEING GREEN WITHOUT BEING WASHED AWAY BY LITIGATION?

Authored by: Sylvie Gallage-Alwis (Partner) - Signature Litigation

News of claims being filed against companies on the ground of greenwashing are flooding the media. The latest industry which has been targeted is the airline industry. The Olympics to be held in Paris this summer are not immune to accusations. The company ArcelorMittal which manufactured the torch is being accused by some of greenwashing, having said that the steel used would be low-carbon steel[1].

Banks, apparel, insurers, food, electronic products, airlines, automotive, packaging, marketplaces, these are some of the many industries which are under scrutiny by NGOs. How do they operate?



There is first a scrutiny of the websites and any claims placed on the products when they are goods. There is a then an analysis of the annual reports and any sustainability reports published by the company. Each word is analysed, each objective assessed. Third, the services around the delivering of the products are analysed (type of transport chosen, storage, quality of servers, are contracts sent through attachments, links, etc.). Some NGOs go as far as testing products or testing the water/soil/air/population around manufacturing sites to assess the environmental and health impact of industrial activities. Finally, NGOs will investigate the company's suppliers. Indeed, a company can be "green" but its suppliers may not. In that case, exposure to litigation remains.

This explains why Directive (EU) 2024/825 of 28 February 2024 "as regards empowering consumers for the green transition through better protection against unfair practices and through better information" has been passed.

1 https://www.france24.com/en/live-news/20240507-arcelormittal-hit-by-olympic-flame-greenwashing-accusations

This texts notably prohibits "Making a generic environmental claim for which the trader is not able to demonstrate recognised excellent environmental performance relevant to the claim", "Making an environmental claim about the entire product or the trader's entire business when it concerns only a certain aspect of the product or a specific activity of the trader's business", "Claiming, based on the offsetting of greenhouse gas emissions, that a product has a neutral, reduced or positive impact on the environment in terms of greenhouse gas emissions".

The following practices are also expressly inserted in the Annex of the Directive as prohibitions for products which include a software, showing the will of the European legislator to address new types of products: "Withholding information from the consumer about the fact that a software update will negatively impact the functioning of goods with digital elements or the use of digital content or digital services", "Presenting a software update as necessary when it only enhances functionality features", "Falsely claiming that under normal conditions of use a good has a certain durability in terms of usage time or intensity".

Member States are asked to implement sanctions against companies which would not comply with such rules when advertising their services and products.

French law has several legal tools to combat greenwashing. Misleading commercial practices are the ideal ground used to punish professionals who use environmental claims that are misleading to consumers regarding

the true impact of the product or company on the environment. Article L. 121-2 of the French Consumer Code thus prohibits commercial practices that mislead consumers regarding the ecological characteristics of a product, a service or more generally a company. The penalties incurred can be a fine of no more than €300,000 for a natural person (or €1,500,000 for a legal entity). These amounts may be increased to 10% of the annual average turnover calculated over the last three years, or 50% of the amount of the expenses incurred to communicate on the misleading claim, when the profit generated from the misleading practice exceeds the amount of the initial fine. The amount of this fine can be increased to 80% when it is a misleading environmental claim[2].

In terms of advertising, since 1 January 2023[3], advertisers are prohibited from claiming in an advertisement that a product or service is carbon neutral (or equivalent wording) without complying with a specific framework, the terms and conditions of which are defined by decree[4]. Ignoring such an obligation exposes professionals to a maximum fine of €20,000 for a natural person and €100,000 for a legal entity. The purpose of this measure is to ensure the transparency and accuracy of the information provided to the consumers regarding the carbon footprint.

To be more concrete on what can be claimed, one can refer to the Practical Guide on Environmental Claims[5], The French National Consumer Council (NCC) published in summer 2023.

The NCC Guide reminds that the AGEC law established Article L. 541-9-1 of the French Environmental Code, according to which the wording "biodegradable", "environmentally friendly" or any other equivalent, cannot be affixed to the products or their packaging. In a non-exhaustive list, the NCC notes that the following wording may be considered equivalent to "environmentally friendly", and therefore prohibited: "environmentally responsible", "bioresponsible", "biocompatible", "nature-friendly", "planet-friendly", "environmentally favourable", "good for the environment", "good for climate", "good for the planet", "ecological", "eco-friendly", "ecologically correct", "protects climate", "preserves the environment", "green" or "nature lover". These claims are considered as all-inclusive and present a high risk of misleading consumers regarding the real environmental qualities of the product, thus constituting greenwashing.

Obviously, some claims are authorised, if they are sufficiently substantiated (e.g., "reduced carbon footprint", "reduced ecotoxicity", "organic", "ecodesigned"). That is the key for green claims as it is for any claims: substantiation. Let's indeed not forget that greenwashing claims are not just about money, it is mostly about reputation and follow-on civil claims such as class actions and mass tort. It is therefore wise to be cautious and to prefer a "shy" approach rather than being bold in this field.

2 Article L. 132-1 of the French Consumer Code

3 Law no. 2021-1104 of 22 August 2021 on combating climate change and strengthening resilience to its effects (Climate and Resilience Law)

4 Decree no. 2022-539 of 13 April 2022 relating to carbon offsetting and claims of carbon neutrality in advertising

5 Guide accessible via the following link: https://www.economie.gouv.fr/files/files/directions_services/cnc/avis/2023/Allegations_environnementales/guide_2023.pdf?v=1685082633#:~:text=Une%20all%C3%A9gation%20environnementale%20sert%20%C3%A0,le%20produit%20et%20son%20emballage

ESG DEVELOPMENTS

NAVIGATING THE CORPORATE SUSTAINABILITY LANDSCAPE

Authored by: Dr. Robert Kovacs (Partner) and Ciara Samuels (Trainee Solicitor) - Withers

In recent years, Environmental, Social, and Governance (ESG) factors have emerged as critical considerations for businesses globally. Companies are increasingly recognising the importance of integrating sustainable practices into their operations as the landscape of reporting social and environmental issues is evolving and mandatory disclosure is increasing, both in terms of the requirements and the types of companies with reporting requirements.

This article explores recent developments in ESG, with a focus on the EU Corporate Sustainability Reporting Directive (CSRD) and the EU Corporate Sustainability Due Diligence Directive (CSDDD).

ESG Integration in Corporate Strategy

ESG criteria encompass a wide range of factors, including employment practices, carbon emissions, respect for human rights, board diversity, supply chain management, and corporate governance.

Embedding sustainability into their business models, is no longer a nice to have for companies, but it is now becoming a minimum requirement for doing business globally.

Investors and customers are increasingly demanding the adoption of sustainable practices in relation to social and environmental issues, and regulators are requiring reporting on these issues.

Whilst financial profit has historically remained the most important benchmark of a company's success, the global increased focus on sustainability has forced organisations to reassess and reprioritise their corporate framework and supply chains. As ESG reporting requirements increase, there is becoming a greater need for the integration of ESG factors into corporate strategy and business practices.

Corporate Sustainability Reporting Directive

The CSRD represents a significant milestone in advancing ESG disclosure standards within the European Union.

On 5 January 2023, the CSRD came into force, with the objective of providing stakeholders with greater transparency in order to evaluate the sustainability performance of companies.

This new directive requires that companies operating in the EU must report on a full range of sustainability matters relevant to their businesses.

This includes the actual or potential adverse impacts of their operations, products and services, and actions to identify and address these adverse impacts. Large and listed companies operating in the EU are required to start reporting for the year 2024, with first reports due in 2025.

Under the CSRD, a wide range of public and private companies (including some non-EU companies) will be required to disclose comprehensive information on their sustainability performance, risks, and impacts. This encompasses detailed reporting on ESG matters according to the European Sustainability Reporting Standards which are currently developed in draft form.

Notably, the CSRD requires disclosure on a 'double materiality' basis. That is, companies must disclose the impact of their activities on society and the environment as well as the financial and business risks to the company from sustainability factors.

By standardising reporting practices, the CSRD seeks to provide investors, policymakers, and other stakeholders with consistent, useful information for assessing companies' sustainability performances and driving sustainable investment.

Corporate Sustainability Due Diligence Directive

In parallel with the CSRD, the European Commission published a proposal for the CSDDD in February 2022 to further address the social and environmental impacts of business activities. The directive aims to establish a common framework for corporate due diligence, requiring companies to identify, prevent, mitigate, bring to an end and account for certain adverse human rights and environmental impacts in their own operations, those of their subsidiaries and their value chains.

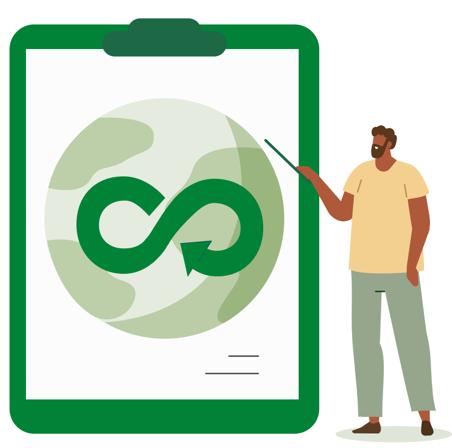
Under the proposed directive, relevant companies will be obligated to conduct due diligence assessments to identify and address risks of harm associated with their operations and supply chains.

This includes conducting risk assessments, integrating due diligence into their company policies, tracking performance, carrying out remediation to actual adverse impacts and providing transparent reporting on due diligence efforts. By holding companies accountable for their impacts, the directive seeks to prevent human rights abuses, foster responsible and sustainable business conduct, and anchor human rights and environmental considerations in companies' operations and corporate governance.

In April 2024, the European Parliament passed a revised final version of the CSDDD and following a vote of endorsement by the Council of the EU, the CSDDD is expected to be published in the Official Journal in June 2024.

Implications for Corporate Sustainability

The CSRD and CSDDD signal a shift in corporate accountability and transparency, raising the bar for sustainable business practices. By harmonising reporting standards and strengthening due diligence requirements, these directives empower stakeholders to make more informed decisions and allow regulators to hold companies accountable for their impacts.



For businesses, compliance with the CSRD and the CSDDD presents both challenges and opportunities. Companies will need to invest in robust systems, processes, and data collection mechanisms to satisfy reporting obligations and conduct effective due diligence. This may require integrating sustainability considerations into risk management frameworks, enhancing transparency within supply chains, investigating and remediating negative impacts and engaging with stakeholders to address any emerging issues.

However, beyond regulatory compliance, by embracing ESG principles, companies can future-proof their operations, attract investment, and create long-term value for shareholders and society. These directives further harmonise the legal framework in the EU, creating greater legal certainty for companies.

As the global focus on sustainability intensifies, businesses are under increasing pressure to demonstrate their commitment to ESG principles and practices. The CSRD and CSDDD represent significant steps towards enhancing accountability, transparency, and responsible business conduct. By proactively managing these developments, companies can not only meet regulatory requirements but also take advantage of the opportunities to drive innovation and manage sustainability risks.

THE ELECTRIC VEHICLE PARADOX

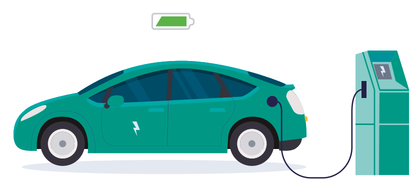
EXPLORING THE ESG IMPACT OF EVS

Authored by: Emily Butler (Senior Associate) - Charles River Associates

The rise in corporate attentiveness to ESG initiatives, along with accompanying cross-partisan governmental support, has led to the rapid development of various green initiatives worldwide, not the least of which is the growth of the market for electric vehicles ("EVs").

EVs have witnessed a meteoric rise in popularity in recent years. In January 2024, U.S. Energy Secretary Jennifer Granholm announced that, in 2023, a record 1.4 million EVs were sold in the US – a 50% increase from the year prior, bringing the total EV share of the US vehicle market to 7.6%. [1] [2]

Globally, 14 million EVs were sold in the same period,[3] and these numbers will only increase as countries in North America and Europe promote clean energy regulations restricting the use of internal combustion engine ("ICE") vehicles, which are measurably more carbon intensive through their lifetime.[4] In January 2024, for example, the UK passed into law a new zero emission mandate that requires 80% of new cars and 70% of new vans manufactured be zero emissions by 2030, increasing to 100% by 2035.[5] [6] This legislation, matched with London's Ultra Low Emission Zone ("ULEZ") scheme – which requires vehicles with high tailpipe emissions to pay a charge each day – will most likely act as a catalyst for the widespread switch to EVs.[7]



However, despite widespread agreement that EVs have a lower emissions impact than their ICE vehicle counterparts, and therefore a lower environmental impact, EVs are also not immune from environmental, social and governance

1 https://www.energy.gov/articles/statement-us-energy-secretary-jennifer-m-granholm-2023-ev-sales#:~:text=Granholm%20on%202023%20EV%20Sales,-January%205%2C%202024&text=%22Today%2C%20I'm%20delighted,50%25%20increase%20in%20one%20year.

2 https://www.coxautoinc.com/market-insights/q4-2023-ev-sales/

3 https://www.iea.org/reports/global-ev-outlook-2024/executive-summary

4 https://www.iea.org/data-and-statistics/charts/comparative-life-cycle-greenhouse-gas-emissions-of-a-mid-size-bev-and-ice-vehicle

5 https://www.gov.uk/government/news/pathway-for-zero-emission-vehicle-transition-by-2035-becomes-law

6 https://www.nytimes.com/2024/03/20/climate/biden-phase-out-gas-cars.html

7 https://tfl.gov.uk/modes/driving/ultra-low-emission-zone

("ESG") shortfalls which require resolution. Indeed, EVs face significant short-term risks and challenges in their supply chains. As such, there is a danger that by not addressing these areas of potential concern in a systematic way, companies not only face increased exposure to regulatory censure, litigation, and reputational risks, but also to questions from investors about the true environmental and social impacts of these green initiatives.

Beyond Emissions

Despite the way some EVs are marketed, their production requires various components, including metals and batteries, and the related raw material extraction processes pose significant environmental and social implications. Similarly, the manner in which these raw materials are procured are subject to potential geopolitical considerations and sanctions-related issues.

Declining stocks of crucial materials like lithium and cobalt have led to operational challenges and potential adverse conditions in remaining mines, and mining activities associated with EV supply chains raise concerns about environmental degradation and human rights abuses.

In November 2023, Global Witness, the international non-profit organization, reported on corruption and rights abuses related to lithium mining in Africa. During the course of their investigation, the organization scrutinized three emerging lithium mines in Zimbabwe, Namibia, and the Democratic Republic of Congo ("DRC") and found that the rush for lithium from the continent "risks fueling corruption, and a range of other [ESG] problems."[8] Global Witness found staff working in unsafe conditions and reports of child labor, corruption, and bribes. In addition, an area referred to as the lithium triangle in South America – an area spread across Chile, Argentina, and Bolivia – has experienced heavy water depletion in relation to extensive lithium extraction in the region. According to Earth.org, producing one ton of lithium, which can be used to supply 100 car batteries, requires approximately 2 million tons of water.[9] The mining of nickel and cobalt, also used in the manufacture of EVs, has been criticized for the impact mining has on the environment and local communities. In February 2024, Climate Rights International published a report on the human and climate costs of Indonesia's nickel industry, highlighting land rights violations, deforestation, and pollution associated with mining on the island of Halmahera and calling for global automakers who source their nickel from Indonesia Weda Bay Industrial Park to exert pressure on miners and smelters in an effort to prevent environmental and human rights abuses.[10]

Sourcing Materials

In addition to these human rights issues, the increased presence of EVs from China is an area of concern. In March 2024, it was reported that Chinese-made cars will soon comprise a quarter of EVs on the road in Europe.[11] But Human Rights Watch asserts the Chinese government has "shown hostility to the human rights and responsible sourcing policies many carmakers profess to apply across their businesses," noting that almost a tenth of the world's aluminum, a metal key to the production of EVs, is produced in the Xinjiang Uyghur Autonomous Region, where in recent years, the Uyghur ethnic minority has faced significant human rights abuses, including reports of forced labor, mass internment camps, and cultural repression.[12] [13]

China also dominates the lithium industry, and Chinese companies have spent billions in a quest to control supplies of lithium in Africa and South America, as well.[14]

This raises the importance of understanding the full length of a supply chain. While some changes are being made to address forced labor issues, like the enactment of the Uyghur Forced Labor Protection Act ("UFLPA") in the US, the presence of Chinese companies in countries like Zimbabwe demonstrate that businesses continue to face indirect exposure to the same labor-related issues despite their location.[15]

It should be noted that some EV manufacturers have begun addressing supply chain ESG through battery recycling and country-of-origin enquiries as they relate to sourcing raw materials. However, supply chain challenges remain – including around transportation, manufacturing, and final disposal – compounding environmental impacts. EV manufacturing processes often have a significant carbon footprint compared to ICE vehicles. As noted above, battery production, in particular, is energy-intensive, contributing to greenhouse gas emissions and resource depletion. Further, waste management issues arise from battery disposal and recycling, necessitating sustainable solutions. According to Science Magazine, governments have been moving towards codifying recycling measures, and researchers have been urging EV and battery makers to start "designing their products with recycling in mind" as certain batteries can take up to two hours to dismantle and others require toxic chemicals to dissolve cathode binding components.[16]

8 https://www.globalwitness.org/en/campaigns/natural-resource-governance/lithium-rush-africa/
9 https://earth.org/environmental-impact-of-battery-production/
10 https://cri.org/wp-content/uploads/2024/01/NICKEL_UNEARTHED.pdf
11 https://www.cnbc.com/2024/03/28/china-made-vehicles-will-make-up-a-quarter-of-europes-ev-sales-this-year.html
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16 https://www.science.org/content/article/millions-electric-cars-are-coming-what-happens-all-dead-batteries

This isn't to say that ESG hasn't been a topic in the EV industry - some manufacturers have, recently, begun to focus on ESG by implementing supply chain tracking, sustainable practices in lithium sourcing, and reducing reliance on cobalt through cobalt-free battery technologies.

Others have begun integrating recycling processes into vehicle design to enable the reuse of battery materials while exploring repurposing methods for end-of-life batteries, such as converting them into energy storage systems ("BESS"),[17] but it remains important to study these facilities to understand the ownership, reputation, and track record of the entities critical to the process of fulfilling ESG mandates. Specifically, it is vital to look at the environmental and safety measures they have in place in an effort to avoid regulatory fines or labor violations.

A Nuanced Approach To Assessing Potential ESG Impacts

Corporate responsibility and transparency are crucial in managing supply chains to mitigate environmental and social impacts. Technological innovations, such as advancements in battery technology and recycling methods, can reduce environmental footprints, and policy interventions, including regulations and incentives, are essential to promote sustainability in EV production and supply chains.

Despite positive advancements, EVs still represent a fundamental paradox: their environmental benefits are often overshadowed by supply chain challenges and production impacts, and as governments move to increase the number of EVs on the road, a nuanced approach is necessary to evaluate the true impacts of EVs across the global supply chain and address existing challenges effectively. Noncompliance with ESG regulations can expose EV manufacturers to legal and regulatory risks, including lawsuits, fines, and sanctions. Imposing sanctions on mining companies, for example, is not without precedent. In June 2022, the Biden administration imposed sanctions on Nicaragua's gold mining sector, including its state owned mining company, saying that it was "using gold revenue to continue to oppress the people of Nicaragua."[18] Mining-related arbitrations have also increased in the last decade, consistent with a rise in mining activity.[19]

Failure to meet ESG standards can also tarnish a company's reputation and can lead to negative publicity. Further, ineffective resource use, environmental issues, and poor labor practices can result in operational inefficiencies, increased costs, and reduced productivity on the part of EV manufacturers. Best practices to enable companies to achieve their ESG objectives focus on actionable steps and strategies such as risk mitigation and due diligence, supply chain analysis, and geopolitical risk management. To this end, collaborative efforts among stakeholders are vital to fostering sustainability in the EV industry and realizing its potential as a cleaner transportation solution.

Emily Butler is a senior associate with the Risk, Investigations & Analytics Practice of Charles River Associates. The views expressed herein are the views and opinions of the authors and do not reflect or represent the views of Charles River Associates or any of the organizations with which the author is affiliated.

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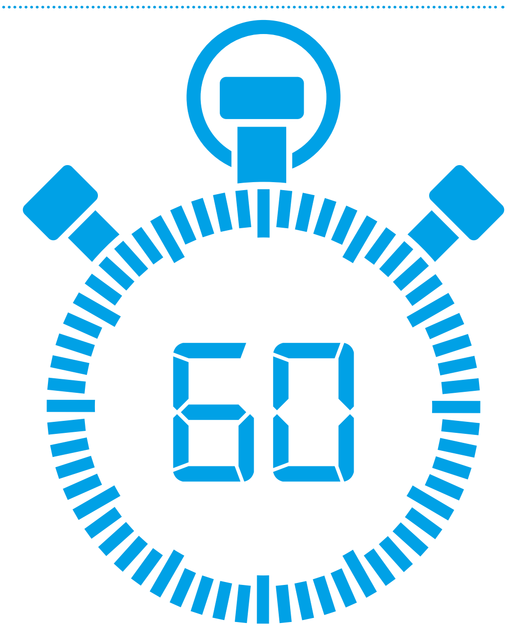

Q Imagine you no longer have to work. How would you spend your weekdays?

A If I wasn't working, I'd spend more time with family and friends, and I'd do more windsurfing, running, and making music. I'd also do some long-distance walks. But I enjoy what I'm doing so I'm in no hurry to stop.

Q What do you see as the most exciting thing about your job?

A I love the sense of being at the heart of a growing community of people who are transforming the way that lawyers serve their clients and society.

Q What's the strangest, most exciting thing you have done in your career?

A Life at the Bar is very stimulating, but you get an entirely different type of excitement from founding a startup. I'd recommend both, but the latter requires an especially forgiving spouse!

Q What is the best life lesson you have learned?

A Whilst the destination is important, you have to enjoy the journey.

Q What is one important attribute that you think everyone should have?

A An open mind.

Q What film do you think everyone should watch, and why?

A *Life is Beautiful*. Best watched with no idea in advance what it's about.

Q Dead or alive, which famous guests would you invite to a dinner party?

A I'd like to invite the key founding figures in the world's great religions, which I think would lead to a fascinating discussion. My wife, however, would invite Aristarchus of Samothrace (the head librarian of the Great Library of Alexandria in 145 BC), so my plan might take second place.

Q What is the best novel of all time?

A I'd nominate the *Lord of the Rings*. Tolkien didn't just write a story. He created a world, complete with its own detailed history, mythology, and languages.

Q What legacy would you hope to leave behind?

A I'd like to have helped to make it easier and less stressful for professionals to collaborate on organising evidence and building and evaluating arguments, without drowning in information.

Q What is the most significant trend in your practice today?

A I recall discussions in the 90s about whether it was safe to use email. Of course, it quickly took over. We're fast approaching a similar tipping point with generative AI; there are so many things it can help lawyers with if we use it wisely.

Q Do you have any hidden talents?

A I taught myself the rudiments of coding a few years ago. Now, with a little help from genAI, I can do some surprisingly useful things. (Obviously, my development team can do much more!)

Q What is one work related goal you would like to achieve in the next five years?

A I'd like a majority of teams in complex cases and investigations to be using Associo, and the others to be wishing they were!

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ARE CLASS ACTIONS IN THE UK CAT A SAFE HAVEN OR SINKHOLE FOR LITIGATION FUNDERS?

Authored by: Matthew Amey (Director) - Erso Capital & TheJudge

If you asked someone unfamiliar with litigation funding what type of a case might be most in need of external finance, they might unwittingly describe a UK Competition Appeals Tribunal (CAT) class action. Those claims often need funding and large amounts of it:

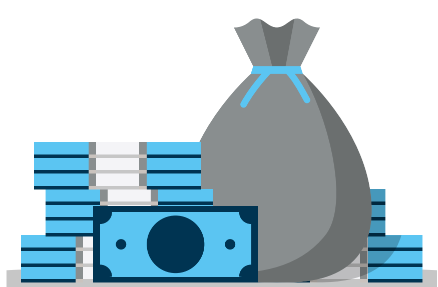
- UK CAT class actions are expensive. The higher the legal budgets, the more likely the claimants are going to find external finance more interesting or perhaps even necessary.
- For a potential class action representative to obtain court approval to represent a class of claimants then they need to prove they have adequate funding and the ability to meet any adverse costs orders that may arise.
- The claimants in competition cases are often described (unfairly) as windfall claimants because in many cases they only become aware of the claim due to regulatory decisions to which specialist claimants' lawyers then attach to potentially recoverable losses for a class. Typically, claimants in such situations are happy to sign-up but only if the costs are paid from the actual recovery or are somehow fixed. Litigation funding allows claimant lawyers to offer these attractive arrangements.

Then if you asked a funder what characteristics of a case are best suited for investment, they too might describe a UK CAT case. The cases look attractive because the pleaded claim values are often very substantial and they either directly follow or are related to a pre-existing finding of wrong-doing following a regulatory investigation.

This is why when UK CAT cases started to turn to litigation funding, it was quickly seen as good business – potentially even 'safe' compared to the volatile world of single-case commercial litigation and international arbitration investments.

But has it become a sinkhole for litigation funding capital?

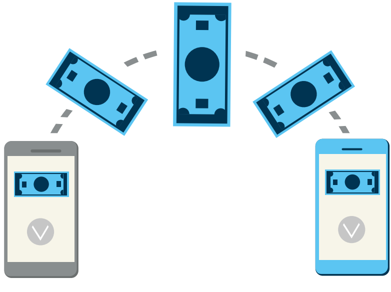
Spoiler alert. It probably is good business for funders but it has not been the walk in the park that funders might have hoped for so far.



- Case budgets have grown to uncomfortable sizes. Big claims attract big legal budgets and the defendants have not shied away from aggressively defending these claims, despite the naïve assumption that liability is not an issue in these matters. Arguments over quantum are just as catastrophic to funders as losing on liability if the claims fail to produce enough proceeds to repay their massive legal budgets.
- The risk of adverse costs - and therefore the cost of ATE insurance - has been far greater than contemplated because these cases

often involve multiple defendants who are represented separately. The CAT may expect the ATE insurance to provide something akin to security for costs to demonstrate that the claimant representative can in fact meet adverse cost orders – and that has increased the cost of insurance enhancements designed to augment the cover (i.e. Anti-avoidance Endorsements)

- Carriage disputes may mean that multi-millions turn on the decision of the CAT as to which claimant representative is best suited to represent the class. Decisions that appear to be based on really very fine margins making carriage contests incredibly difficult for funders to predict. Funders wrongly assumed that such disputes would be rare as UK law firms would sooner agree to settle than fight it out like our friends across the pond.
- Funders have also hit a snag with some regulatory decisions being overturned or modified after significant costs have been invested in launching a case, which is rendered no longer viable.



To rub salt into the wounds, the really quite drastic impact of the Supreme Court judgment in PACCAR[1] which determined that LFAs that charged a percentage of the proceeds were in fact unenforceable DBAs, was most acutely felt in funded CAT cases as DBAs are not permitted at all in the CAT. The result was a frantic re-drafting of LFAs and re-cutting of commercial arrangements that, in many cases, had been settled for years. Although the introduction of a Bill[2] to overturn the ruling has provided some relief, much of the damage to the industry is irreversible, particularly given the uncertainty surrounding the level of support for the Bill to be applied retrospectively at this stage of the legislative process.

Of course, most existing funders continue to battle on with these matters, in order to protect the investments they've already made, but one US investor pulled out of the UK market, presumably never to return.

Even without PACCAR, several funders had already made the decision to press pause on UK CAT cases which were starting to account for too much of their overall portfolio. This is primarily because the cases have been dragging on. At the moment, it feels like every class representative who is awarded certification by the CAT immediately faces a long process of appeals. Millions of pounds, sometimes 10s of millions, are invested and at risk before the main case even begins.

However, after painting such a dismal picture, are there some lighter tones to add?

It feels like cases that have been rumbling for many years are beginning to reach settlements. This will represent the first time that funded CAT cases will start to produce a track record of success for funders. Of course, it remains to be seen what the return on investment will be but fundamentally most of the cases are expected to perform well despite the difficulties getting to that point.

Moreover, even with all the challenges faced, funders will have taken great heart from how the CAT itself has understood and appreciated their crucial role in providing a means of access to justice and ultimately compensating

consumers and businesses following abuse by certain actors in the world of 'big business' who are well-resourced to defend themselves.

The CAT has delivered 'funder friendly' decisions in reaction to PACCAR-related challenges (Sony[3]) and, importantly, the recent CAT decision in Gutmann v Apple [2024] CAT 18.

The latter case helpfully confirmed that a funder can be paid from the gross award prior to distribution to the class and not be relegated to collection from the undistributed residual which would have created a greater risk for funders as well as significant delays in payment.

Whilst many funders will continue to sit on the sidelines and wait for a full cycle of cases to conclude before deciding to re-enter the market for financing CAT cases, younger funders, like our own Erso Capital, will actively support CAT. Having witnessed their passage through the CAT in recent years, we have additional knowledge and insights which can only help us navigate our way towards what might turn out to be safe haven after all.

1 R (on the application of PACCAR Inc and others) v Competition Appeal Tribunal and others [2023] UKSC 28
2 Litigation Funding Agreements (Enforceability) Bill [HL]
3 Reference for Sony Alex Neill Class Representative Limited v Sony [2023] CAT 73

IN-DEPTH LITIGANT BACKGROUNDS

TURNING OPPONENT RESEARCH INTO A STRATEGIC ADVANTAGE

Authored by: Harrison Grad (Senior Managing Investigator) and Kendal Querry (Senior Managing Investigator) – Mintz Group

The sparse party information contained in a complaint, responses to interrogatories or the CV of a witness do little to arm a litigator with the information they need to confront an opponent in a deposition or courtroom.

To understand the full story behind a legal adversary, attorneys increasingly turn to skilled investigative professionals to help them piece together a narrative of a plaintiff's or witness' background from obscure and often hard-to-find sources and digital footprints.

Mintz Group is regularly asked to support counsel in class action suits, and cases from our files highlight how investigations that probe beyond the public record can provide a strategic advantage in the courtroom.

Uncovering Contradictions (And Worse)

At its most basic, background research into the other side of a legal dispute can equip a lawyer with a better understanding of the person they are about to depose or cross-examine. Particularly in a class action context, the information uncovered by a background investigation can be used to undermine the standing of a plaintiff as a representative of the class or an opponent's expert witness. In a recent case, the lead plaintiff in a class action against a technology company claimed the company took advantage of his technological inexperience to breach his privacy.

Uncovering the plaintiff's chat room aliases allowed us to show that far from being technologically naïve, the plaintiff had been writing his own computer code since the age of eleven.

Sometimes, online sleuthing discovers not the contradictions of a plaintiff's claims, but instead their odious behavior, as when one lead plaintiff in a class action against a securities company was found in online forums to have made death threats against the company's executives, along with a slew of racist rants.

Uncovering Relationships

In-depth investigation can also illuminate undisclosed connections between plaintiffs and the plaintiff's attorneys. In one instance, corporate filings and court records showed that the lead plaintiff's sister worked as

an assistant to the plaintiff's lawyer, and had formed an advocacy group that railed against the defendants, at no point disclosing the connection to plaintiff's counsel. In another case, an investigation into the background of a lead plaintiff in a class action against a car company uncovered a recent divorce, financial difficulties—and the fact that both her ex-husband and son were attorneys with a connection to the plaintiffs' counsel.

Cases such as those connecting the lead plaintiff and the plaintiff's attorney via the attorney's assistant illustrate the goldmine of information that can be harvested from a variety of public records, including litigation filings, corporate documents, social media and property deeds, among other, sometimes obscure sources. But they also underscore the extent to which important connections may not be immediately obvious from the public record and require skill and experience to uncover.

Uncovering Alternative Theories of Harm

In-depth research into legal opponents can also point to alternative causes of alleged injury. In one class action suit against a pharmaceutical company, in which plaintiffs alleged that one of the company's therapies caused deteriorating eyesight, a deep dive into the work history of the lead plaintiff revealed that she had worked on a farm many years earlier. Further research uncovered that a pesticide commonly used on the farm's primary crop at that time was later found to cause deteriorating eyesight.

Here again, an additional level of research was needed to provide critical context; the fact that the plaintiff once worked on a farm by itself meant little.

Undermining the credibility a plaintiff in a class action generally doesn't put an end to the litigation—the lead plaintiffs are simply replaced. But doing so forces the plaintiff's attorneys to expend energy and resources to adapt to these curveballs.

Uncovering Conflicts of Interest

Deep background research can also be helpful in conducting diligence on the credentials, histories and potential conflicts of expert witnesses. It is already customary for defense attorneys to examine an expert witness' prior court appearances to see if a judge has ever invalidated their testimony, and to look for conflicts of interest, such as an academic who received research funding from an advocacy group with a history of maligning the defendant. But bringing background research into the process lets litigators probe more deeply for hidden connections. In one case, a materials science professor testifying against a manufacturer was found, along with his research students, to have received funding from a company that, after further digging, was shown to be a front for the toxic torts law firm litigating on behalf of the plaintiffs. Worse still, the professor himself had incorporated the company that was funding his own and his students' research.

Undermining Credentials

Expert witnesses who are subject matter experts testifying on the basis of professional experience generally will lack the same funding trail as academics, but they will have a work history that can be probed. In a class action against a pharmaceutical company, a police officer was brought in as an expert witness to testify to the allegedly addictive nature of one of the company's drugs; the plaintiff's attorneys presented the officer as an expert on narcotics based on the cases he worked on.

A review of every case the officer had handled in his career, however, painted a different picture, illustrating that he had worked primarily on property crimes, not narcotics.

In addition, he and many of the officers he worked with were the subjects of multiple internal investigations.

While the defense attorney's staff might have reviewed some of the officer's history, they very well may not have had the bandwidth or expertise to conduct as thorough of an investigation as was necessary to give a full picture of the officer—and of his shortcomings as a witness.

A Fuller Portrait

As these examples illustrate, in-depth investigations aren't a game of "gotcha" but rather a way to achieve a deeper understanding of the whole person—their relationships, track record, strengths and weaknesses—that, in turn, can provide the litigator with an effective line of attack. An investigative report that contains only a list of findings is often of limited use to a time-pressed litigator. Instead, genuine insight comes from a skilled practitioner weaving together a robust narrative from both findings and context, drawn not only from surface-level public records, but information like social media networks and police activity reports not found in standard databases but which are accessible to experienced professional investigators.

WILL AN INCREASING RISK OF MORE CLASS ACTIONS TURN THE DIAL FURTHER ON UK CORPORATE PRACTICE?

Authored by: Simon Pugh (Partner, Litigation and Disputes) - Portland Communications

The debate around whether the class action regime is good for consumers, for lawyers and funders, or both, is well-covered. A less considered, and perhaps harder to quantify, aspect of this debate is whether the increasing prevalence of class actions and their consequences is changing corporate behaviour.

Each year, Portland surveys a nationally representative 2,000 people to track trends in how the UK perceives group litigation, forming our annual Class Action Report. It tests public sentiment on a wide range of topics related to group litigation, as well as some of the broader areas associated with it.

We tend to think about the concept of "better corporate behaviour" through an Environmental, Social and Governance (ESG) lens.

The most recent edition of the Report demonstrated the increasing public consciousness of ESG standards and how the public is more willing than ever to take adverse action against companies found to be in breach of these standards.

It revealed that 62% of the UK would join a class action if they were directly impacted by environmental damage from a business' operations. A similar figure believes that individual company directors should be liable for failure to manage climate risks.

ESG litigation is unquestionably on the rise. This is not purely in a class action setting, there are notable examples of derivative, securities, and regulatory actions. The prospect of mass claims, however, adds further weight to the risk companies face. Our polling shows that there is consumer support to join claims of this nature. Whether it be opt-in claims or distribution of settlement in an opt-out, the willingness of the public to seek redress has significant financial implications for defendants.

This makes these claims an appealing prospect for litigation funders. Litigation funders are positioning themselves to support more ESG claims as they are seen an increasingly attractive investment. The $552 million financing deal between group litigation specialists, Pogust Goodhead and investment manager, Gramercy, is one recent example. The Fund's founder stated that the partnership "materially aligns with our ESG and impact investing objectives".

The prospect of more ESG class actions creates a greater risk profile for businesses. There is a financial risk arising from the cost of defending and potentially settling a claim or having to pay damages.

There are also wider legal risks in terms of whether a company may have to disclose information about its operations or its supply chain that it otherwise could have avoided.

The reputational risk posed by litigation is a very real consideration – it can impact commercial performance as well as create concern amongst employees, partners, and investors. 65% of people said that they would consider boycotting a company that has broken the law in a way that affected them.

68% of the public would be less likely to buy shares in a publicly listed company that was facing a class action.

Companies may shrug that off, noting that retail shareholders have limited influence versus institutional investors. But we may well start to see a trickle-down effect. Not only are many institutional investors increasingly ESG-focused, individuals can also carry significant influence by, for example, directing pensions investments to be held in ESG-linked funds.

In the courts, class actions have already started to set legal precedents which have implications for corporate behaviour. The 2021 decision in Uber BV v Aslam, with the support of the GMB union, potentially impacted many business models in the gig economy. The Supreme Court ruled that Uber drivers were workers and not independent contractors, and thus entitled to minimum wage and paid holiday.

Uber subsequently said: "We may not seem like obvious allies [with the GMB], but together we made history by striking a recognition agreement to improve workers' protections and, crucially, give drivers a stronger say in how Uber operates. We hope that working constructively with GMB will show the rest of the industry what can be achieved." It may have fought the litigation but clearly Uber now sees some competitive edge to improved business practices in a competitive market for customers and drivers.

Businesses are feeling the heightened pressure stemming from an increasingly ESG-focused set of regulators. A recent report by Gallagher found that 72% of UK business leaders admitted they felt pressure to set targets without being sure how they were going to reach them. Over half of those surveyed also believed legal action over missed ESG targets was far more likely now than it was 10 years ago. With a significant proportion of people believing that individual company directors should be liable for failure to manage climate risks, there is an increasing risk of those individuals being cited in legal action, listed as defendants in a class action claim, for example.

Portland's Commercial Courts Report, launched in May 2024, examines trends in the London Commercial Courts. Our polling found that 75% of the UK believe the increase in lawsuits over issues related to greenwashing is a positive development. In the UK, new ESG-related disclosure obligations and regulatory enforcement powers are being watched closely. Not only because they give rise to greater opportunity for regulatory penalties, but because they could lead to further group actions.

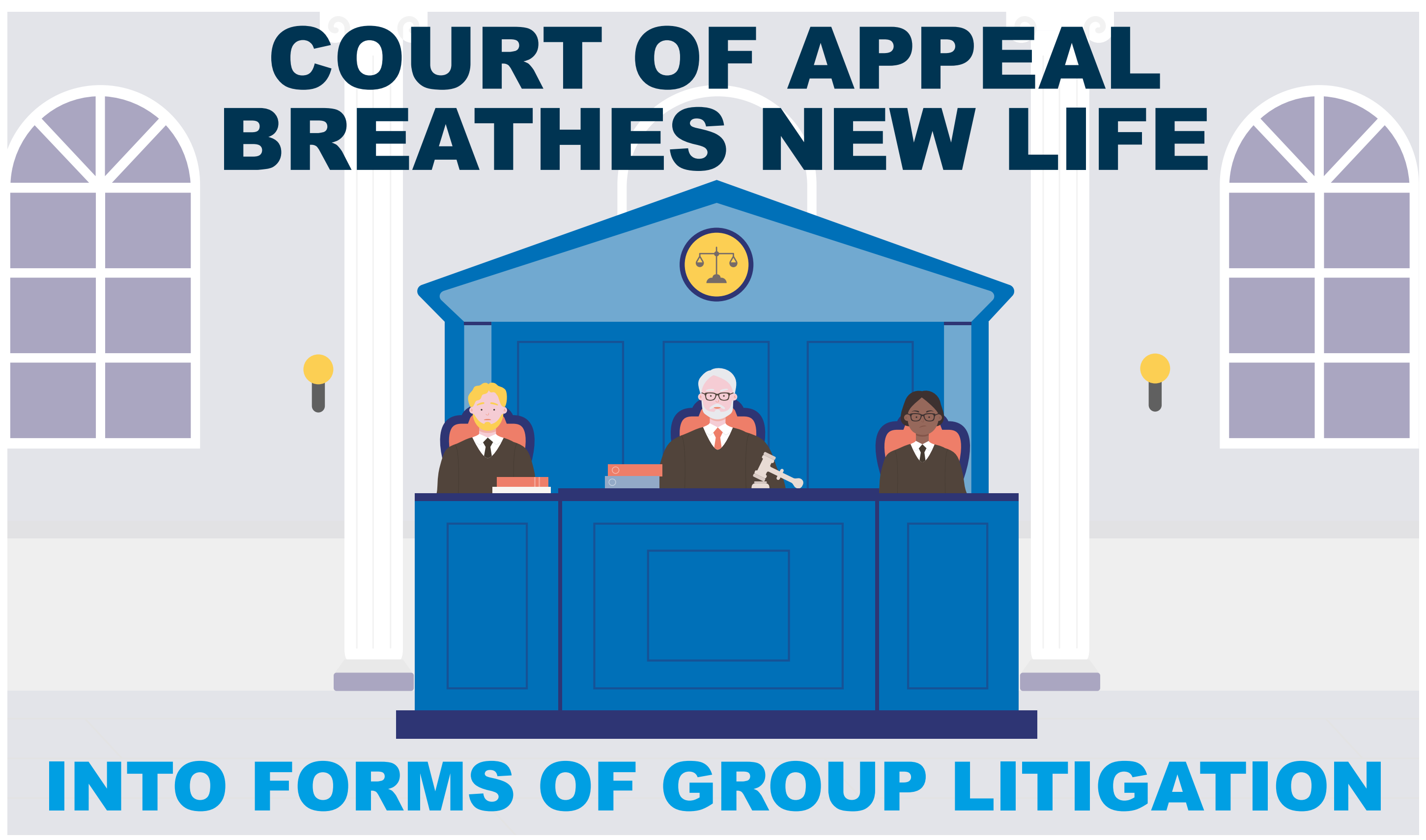
These changes will place a new level of transparency on businesses, with both their customers and shareholders. In February, Mishcon de Reya announced it was investigating a possible group claim against energy company Drax for alleged false environmental claims that had adversely affected its share values. The prospective claims followed a BBC Panorama report revealing an alleged contradiction with Drax's sustainability disclosures.

To manage increased risks, businesses must now consider well ahead of time how to communicate their ESG strategy and associated disclosures. Strict monitoring regimes should be in place so that disclosures are not found to be untrue or misleading at a later date.

The constant review of disclosures must be aligned with a comprehensive media strategy that will mitigate the risks resulting from any serious material changes.

Despite the changing regulatory environment, there is a lack of optimism from the public as to whether greenwashing lawsuits will result in any change in corporate behaviour. A minority (32%) of the public believes that such legal cases would translate into companies being more transparent about the environmental impact of their products. More generally 57% believe that class actions are not an effective means to hold companies accountable.

Scrutiny of corporate ESG conduct will continue to increase from all sectors of society. Increasing acceptance of ESG norms in the UK, as found in Portland's polling, will set the stage for a long-term shift in corporate behaviour. As businesses evolve, the looming threat of increased group litigation should be at the forefront of their planning.



COURT OF APPEAL BREATHES NEW LIFE INTO FORMS OF GROUP LITIGATION

Authored by: Darren Kidd (Partner) - Clarke Willmott

The Court of Appeal has recently handed down two important decisions which indicate a willingness by the higher courts not to stifle group claims.

This article reviews and considers decisions in Morris & Ors v Williams & Co Solicitors [2024] EWCA Civ 376 and Commission Recovery Ltd v Marks & Clerk LLP & Another [2024] EWCA Civ 9 which concerned two ways in which group litigation can be brought in this jurisdiction, respectively (a) multiple claimants bringing claims in a single claim form, and (b) representative actions (the other two forms of group litigation are (c) Group Litigation Orders and (d) 'opt out' collective proceedings in relation to competition claims).

Morris

The case concerned allegations of negligence against a firm of solicitors, who it was argued had breached its duty properly to advise the claimants in relation to investing in property development projects.

The 134 claimants issued their claims in a single claim form. The defendant applied to strike out the claims on the grounds that it was an abuse of process, or an obstruction to the just disposal of the proceedings, or the claim form did not comply with CPR 7.3.

CPR 7.3 provides "[a] claimant may use a single claim form to start all claims which can be conveniently disposed of in the same proceedings". CPR 19.1 provides "[a]ny number of claimants may be joined as parties to a claim".

These rules were considered in the case of Abbott v Ministry of Defence [2023] EWHC 1475 (KB). The court in that case suggested claimants seeking to bring claims in one claim form were required to show that the determination of common issues in a claim by multiple claimants under CPR 19.1 would bind all parties, using a single claim form would have "real significance" and would lead to "real progress" compared to issuing each claim separately.

At first instance, the court dismissed the solicitors' strike out application on the basis that the tests in Abbott were satisfied.

The defendant appealed on the basis that Abbott was wrongly decided. It argued the words of CPR 19.1 and 7.3 severely restrict the situations in which numerous claimants can bring separate claims in one claim form. In particular, the words "[a] claimant" in 7.3 is singular and does not include the plural, and the word "claim" in 19.1 means "a cause of action", and not, as the court held in Abbott, "proceedings".

The Court of Appeal unanimously dismissed the appeal. It rejected the Abbott tests as wrong in law.

It construed a "claim" to mean "proceedings", "a claimant" to include the plural, decided that "conveniently" is a simple English word and held that the court will determine what is convenient according to the facts of every case.

The Court of Appeal decided the claims brought by the claimants in their single claim form could be conveniently disposed of in the same proceedings.

This decision helpfully clarifies the law on the use of a single claim form by multiple claimants following some confusion which was introduced by the Abbott decision last year.

It could assist groups of claimants who may not be able to satisfy the requirements of other group litigation procedures, namely Group Litigation Orders (which require claims to have "common or related issues of fact or law") and representative actions (which are explained below).

Commission Recovery

CPR 19.8 allows one individual to represent other individuals with the "same interest" in a claim against a defendant with any judgment binding the other individuals who have the same interest even though they have not themselves brought claims. A representative action is therefore a form of 'opt out' claim as compared with an 'opt in' claim where each individual brings their own claim as in the case of Morris above.

It was generally considered that a representative action could not be brought if the remedy claimed included damages because each class member's losses would likely be different. However, in Lloyd v Google [2021] UKSC 50, Lord Leggatt suggested a "bifurcated process" for claims for damages which would involve the representative action procedure being used to determine common issues (such as breach of duty) with individual issues (such as loss) being dealt with at a later date.

Commission Recovery concerns claims against a firm of patent and trademark attorneys and a partnership associated with it for allegedly referring clients to an external service provider in return for secret commissions.

The defendants attempted to strike out the claim, including on the basis that the claimant did not plead the facts and matters that would constitute a cause of action on the part of each class member. It also sought a direction that the claimant could not act as a representative because the "same interest" requirement was not met, or alternatively the court should refuse to exercise its discretion to allow the claimant to act in that capacity.

At first instance, the court dismissed the application because neither differences between claims (like whether class members knew about the payments), nor differences between amounts of commission received per client, prevented them from sharing a common ground of complaint – it was sufficient to show that each proposed class member had contracted with the defendant using its standard terms of conditions.

The Court of Appeal dismissed the defendants' appeals. deciding that there was a common issue in which all class members have the same interest – namely whether, subject to two potential defences (relating to disclosure and informed consent, and limitation) all that a client of the defendant needs to prove in order to establish liability in bribery and/or breach of fiduciary duty is the fact that it contracted with the defendant on its standard terms of business and the fact that commission was paid. In doing so the court said there is nothing wrong in principle with resolving common issues on a representative basis even if they do not lead to a conclusion on liability.

The defendants sought permission to appeal to the Supreme Court. However, this was refused (including by Lord Leggatt who had given the leading judgment in Lloyd v Google) on the basis that the appeal "did not raise an arguable question of law".

This is the first appellate decision in relation to representative actions since Lloyd v Google and will be welcomed by prospective claimants, particularly where, as in this case, individual claims themselves might be too low in value to pursue.

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