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ESG in the Disputes and Contentious Regulatory Sphere—a Mini-series: ESG in Civil Litigation

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Perhaps the most obvious civil litigation risk in the ESG context is that of the investor / shareholder action arising from inaccurate or misleading statements about a company's ESG credentials. As we have seen in the last decade in the context of securities class actions, investors / shareholders (as a defined and readily ascertainable group) are the perfect candidates to hold corporates to account for false or misleading statements in financial accounts, a prospectus, or another public-facing document. As ESG-related disclosures become more commonplace, or even mandated by changing legislative and regulatory regimes, we can expect stakeholders to be keeping a weather eye on how multi-nationals are presenting their ESG credentials to existing and future shareholders.

The evolving litigation landscape in England and Wales has also created a perfect storm for ESG-related actions to be brought within the jurisdiction by numerous other stakeholders. In recent years, the liberalisation of the group action regime has led to an increasing number of such claims. A new stratum of "claimant firm", along with increasing numbers of litigation funders, have sprung up to pursue and fund group actions in a financially viable way (where previously it would have been unprofitable for a single claimant to "go it alone" on an ESG-related claim). This has been paired with a further recent litigation phenomenon, the "trans-national tort", which takes advantage of generous jurisdictional gateways used by the courts of England and Wales in order to determine whether this jurisdiction is the proper place to bring a claim. Such claims use a U.K.-based corporate parent of a foreign subsidiary as an "anchor defendant" in order to found jurisdiction in England and Wales. The combination of these factors, which we explore in more detail below, has led to the courts of England and Wales being a highly desirable forum for ESG-related actions.

One of the main ESG risks foreseen by civil litigators in England and Wales is the proposed draft EU Directive on Corporate Due Diligence and Corporate Accountability (the "**Draft Directive**"). This Draft Directive envisages a regulatory enforcement regime similar to that imposed by the General Data Protection Regulation ("**GDPR**") but also a civil liability regime including provisions which would allow third parties to hold a company liable for infringements of applicable human rights, environmental, and governance standards. Now that the U.K. is outside the legislative reach of the EU, the Draft Directive will not become law in this jurisdiction, though there remains a possibility that the U.K. will enact equivalent legislation in due course. However, the rise of trans-national tort claims (discussed in depth below) and the likelihood that U.K. businesses will be part-and-parcel of the supply chains of EU-headquartered businesses mean that the Draft Directive will continue to be of relevance to the U.K. even now, and potentially still lead to disputes before the courts of England and Wales.

Taken together, these seemingly disparate developments have put England and Wales on the map as a highly desirable jurisdiction in which to bring ESG-related claims. We explore each of these topics in more detail in this article.

Shareholder claims

From the perspective of the litigator, there are a number of immediately apparent ESG-related litigation risks for corporates—most obvious amongst these is the possibility of shareholder claims. The "What", "When", and "How" of investor reporting on ESG issues is likely to take corporates aback, being both more time-consuming and voluminous than many in the C-suite are expecting. Keeping up with new regulations, and ensuring that there is data on which to report, will be the first hurdle. The second will be how to communicate this to current shareholders and potential investors in a way that is both accurate and fair. Due to its multi-faceted nature, ESG reporting cannot be managed by any one team; it will need to be ingrained into the fabric of the business so that appropriate strategy can be created, reporting implemented and performance monitored.

The consequences of getting it wrong are likely to be significant. We have seen examples of shareholder activism in a number of sectors to date, with the financial sector in particular being no stranger to "inaccurate prospectus" claims brought by groups of disgruntled shareholders—for example in the *RBS Rights Issue Litigation*[1] (which settled before trial), the *Lloyds/HBOS*[2] litigation, and the *Tesco*[3] shareholder litigation (which also settled shortly before trial). This shareholder activism, combined with the increasing number of disclosures that corporates are expected to make, flag this as an area ripe for dispute. This litigation risk only increases with the expanding number of required ESG disclosures (already more numerous when compared with the position just a decade ago), and when we consider that ESG disclosures may well be more nuanced, difficult to quantify, and more easily contested than the financial information which has underpinned shareholder actions to date.

Across the board, claimant law firms and litigation funders will be looking to the press and announcements from regulators to spot the "next big thing". This is as true of shareholder-based claims as it is of the consumer claims considered below. Litigation often follows the announcement of a regulatory investigation and this will only increase in the ESG sphere. Accordingly, corporates must proceed cautiously when making announcements to the market, when preparing shareholder documents, and in statements made at AGMs or in annual accounts. This is likely to increase the time, effort, and expense of pulling together all of these documents and will necessitate input from even more of the business. The General Counsel and Risk teams are going to be crucial in overseeing and managing this exercise but it is inevitable that something, somewhere, will slip through the net. Claimant law firms will be waiting.

Attempts to impose a "duty of care" on parent companies in an ESG context

Historically, English common law has not recognised the liability of a parent company for the actions of its subsidiaries, on the basis that a subsidiary has a separate corporate personality. In order to look beyond the corporate structure, historically and typically, there must be a sound basis for attributing the actions of the subsidiary to the parent. However, in the arena of "mass tort" claims, judicial creep towards recognising the responsibility of the parent company for negligence committed by its subsidiary seems to be gaining ground, despite this being something of an anathema to the traditional recognition of separate corporate personalities. In the ESG context, therefore, negligence claims have the potential to be a highly potent route to holding corporates accountable for environmental and human rights issues, even if those issues occur as a result of the actions or omissions by a parent company's subsidiary.

In a recent spate of cases, claims of negligence arising out of the operations of foreign subsidiaries of U.K.-based parent companies have been brought in England and Wales by employees of such subsidiaries, their families, and local residents; usually in the wake of high-profile environmental incidents and human rights abuses. Although not explicitly termed as "ESG litigation" it is clear that these cases, which commonly feature a question of whether the U.K.-based parent owes a "duty of care" to the claimant, are just one aspect of the developing ESG litigation landscape.

This sort of mass tort claim, and its potential for use in ESG litigation, is made possible by the "jurisdictional gateways" in the English civil procedure rules. In order to demonstrate that the English courts have jurisdiction over a claim the claimants need to pass the joint hurdles of the "real issue to be tried on the merits" and "necessary and proper party" thresholds. If the claimant is successful in meeting these requirements, the jurisdiction of the courts of England and Wales is established, and the case will be allowed to proceed to trial. It might be thought that these twin hurdles would be difficult to meet for any claimants seeking to bring an ESG group claim. However, a number of recent decisions have shown that this might not be as difficult as first supposed.

- In the first of these cases, the Court of Appeal decision of *AAA v Unilever Plc*,[4] rioters committed a number of acts of violence against the live-in employees of a tea plantation, owned and operated by a subsidiary of Unilever, following a breakdown of law and order in Kenya. The 218 claimants argued that their claims should be allowed to proceed in England and Wales with Unilever Plc as an "anchor defendant" as Unilever owed them a duty of care and had failed in that duty by not implementing adequate crisis management procedures. Although the Court of Appeal disagreed that Unilever owed a duty of care in the present circumstances, and noted that whilst there was no special doctrine for establishing that a parent company owes a duty of care (the usual tests of "proximity" and "foreseeability" apply), the Court acknowledged that a duty of care is more likely to arise in circumstances where a parent company has, in substance, taken over the management of the relevant activity of the subsidiary in place of (or jointly with) the subsidiary's own management and/or where the parent has given relevant advice to the subsidiary about how it should manage a particular risk.

- Shortly afterwards two similar cases found their way to the Supreme Court: *Lungowe v Vedanta*[5] and *Okpabi v Shell*.[6] In *Vedanta* the claim was brought by 1,826 Zambian villagers against Vedanta (domiciled in the U.K.) and its Zambian subsidiary in respect of alleged environmental pollution and toxic emissions from the Nchanga Copper Mine. The Supreme Court found that the claimants had a good arguable case that Vedanta owed them a duty of care and that it was not an abuse of process to sue Vedanta as an "anchor defendant" irrespective of the connection with Zambia. The court considered that there was at least a triable issue that Vedanta owed a duty of care to the claimants, with Lord Briggs stating that:

  > *I regard the published materials in which Vedanta may fairly be said to have asserted its own assumption of responsibility for the maintenance of proper standards of environmental control over the activities of its subsidiaries, and in particular the operations at the Mine, and not merely to have laid down but also implemented those standards by training, monitoring and enforcement, as sufficient on their own to show that it is well arguable that a sufficient level of intervention by Vedanta in the conduct of operations at the Mine may be demonstrable at trial . . .*

  This case suggests that the court will carry out an analysis of the degree of management and control of the parent company over the subsidiaries' activities on a case-by-case basis to establish whether there is a "real issue to be tried".

- Finally, in *Okpabi*, some 42,500 individuals from two different areas in the Niger Delta region brought proceedings in the English courts against Royal Dutch Shell Plc (incorporated in England) and Shell Petroleum Development Company of Nigeria Ltd, a subsidiary incorporated in Nigeria. The claimants' alleged environmental damage resulted from numerous oil spills said to have occurred from oil pipelines and associated infrastructure which operated in the vicinity of the claimants' communities. The Supreme Court found that the English court did have jurisdiction over the claims and in particular that it was reasonably arguable that the U.K. domiciled parent company owed a duty of care to the claimants in Nigeria. The Supreme Court considered that there was an arguable case that the parent company had taken over the management of the relevant activity of the subsidiary and/or promulgated group-wide safety and environmental policies and taken active steps to ensure their implementation such that a duty of care could arise. This case will now proceed to trial on the merits before the English courts.

Although these mass tort claims for environmental issues and human rights abuses have been described by some as "class-action" or "jurisdictional" tourism, it is clear that the current jurisdictional framework in England and Wales, combined with the group action regime, is likely to attract claims of this nature. These three recent cases suggest that getting over the "jurisdiction" threshold might not be as difficult as first supposed, even where the relevant events occurred thousands of miles away from the U.K. Such cases are also likely to be picked up by claimant firms looking to build a reputation in "big ticket" litigation. Given that the theories of parent company liability are not exhaustive and are capable of further expansion at the boundaries, such firms are likely to focus on the following factors to establish a parent company's duty of care:

- circumstances where the parent has taken over management or operates on the basis of joint management of the subsidiary or of a specific activity carried out by the subsidiary;
- where the parent has allegedly provided defective advice and/or distributed inadequate policies which are then implemented by the subsidiary as part of its day-to-day operations;
- where the parent disseminates group-wide safety or environmental policies and then actively works to ensure the subsidiary has effected those policies (such as through an annual policy "audit" or similar); and
- situations where the parent represents publically that it exercises a relevant degree of supervision and control over the subsidiary (either overall or in respect of a particular matter—such as for the purposes of a Modern Slavery statement).

In addition, there is no reason that these theories of liability will be limited to direct subsidiaries of the U.K. parent, or even limited to other companies within the corporate structure. There is scope for a wider class of defendant: it is possible to conceive of claims being brought against a U.K. corporate where the supplier or contractual counterparty is the alleged tortfeasor, in circumstances where the parent company has controlled or exerted influence over the practices of that third party. For example if the U.K. corporate requires, as part of its Engagement Terms with a contractor, that certain environmental practices are complied with, then provides training to the contractor and/or seeks to monitor and enforce those practices, a duty of care may be said to arise. With the Draft Directive requiring that corporates look at the ESG credentials of their "value chains", this could well be a trap for the unwary as corporates start to intervene in the activities of their suppliers and contractors in an attempt to comply with the Draft Directive.

Furthermore, mass tort claims based on theories of "duty of care" are not the only avenues by which individuals or consumers may seek to bring claims. There are a number of ways in which existing legal principles may be adopted or adapted to suit ESG group actions including perhaps: (i) unlawful means conspiracy claims for alleged human rights abuses; (ii) asserting an equitable proprietary interest where materials have been produced by forced labour; (iii) the unjust enrichment of a U.K.-based parent company by the inequitable practices of its foreign subsidiary, which may give rise to a restitution claim; and (iv) accessory tortious liability for the harm caused by third parties which are connected to foreign subsidiaries.

Overall, this is an area ripe with possibilities. The English common law is well suited to taking existing causes of action and adapting or expanding them to new situations. ESG compliance, being so wide-ranging and varied, in turn suits the common law. Where ESG issues arise, be it in the U.K. or abroad, inventive claimants (and their lawyers) are likely to find avenues to bring litigation. The well-advised corporate will be alive to these possibilities and take care to balance the competing obligations and risks of assuming responsibility for ESG compliance across its corporate group and supply chains.

Litigation funding and the impact of the group / class action landscape

The final piece of this developing picture is the notable increase in so-called "claimant law firms" and the litigation funders who support them. As with all developments in the litigation arena, there is an increasing need for corporates to exercise vigilance and to monitor and understand how claimant firms and funders operate.

A growing feature of the "big ticket" civil litigation landscape in the English courts is the response of claimant firms and funders to the lucrative opportunities arising out of moments of crisis for corporates. Claimant firms and funders are actively considering potential group actions and in particular are:

- being increasingly proactive and adventurous, and may entertain speculative claims geared towards extracting early settlements or to test defences;
- launching "novel" claims such as that seen in *Lloyd v Google*[7] in respect of damages for "loss of control over personal data"—an issue on which we are currently awaiting a ruling of the Supreme Court;
- immediately prioritising securing English jurisdiction in order to ensure costs recovery for funders;
- launching large-scale advertising campaigns (often using social media) following high-profile or newsworthy incidents to target potential claimants directly;
- cross-referral of claims across jurisdictions (i.e., a successful claim brought in the U.S. might be referred to a partner firm in the U.K. to bring a similar claim) or between claimant firm and funder networks; and
- targeting companies in the same sector or industry in succession, in the hope that a successful claim against one company in the sector might prompt other market players to settle similar claims soon after.

We see these methods in action by the increased number of recently decided or imminent cases before the courts in the group / class action sphere.

The increasing use of the Group Litigation Order ("**GLO**") is another tool in the arsenal of those wishing to bring a group action, alongside the traditional method of bringing a representative action under CPR 19.6 (which requires a named individual to prosecute or defend an action both on behalf of itself and on behalf of a class of individuals but where members of the represented class are not joined to the action).

The advantage of the GLO, as opposed to a representative action, is that a GLO allows for differentiation between claimants of potentially different categories of loss or impact. In contrast, in a representative action, the class of individuals must have the same interest in the claim. However, both representative actions and GLOs are on the rise. By way of example:

- In the data protection sphere, we await the decision of the Supreme Court in *Lloyd v Google* (a representative action) and note the recent settlement of the *British Airways Data Event Group Litigation*[8] in July 2021 (a GLO). The Virgin Media Group and the airline EasyJet are both facing group actions arising out of alleged GDPR breaches which are proceeding under the GLO route. The Marriott hotel chain, Facebook, and Oracle (amongst others) are all also awaiting the outcome of the Supreme Court decision in *Lloyd v Google* before alleged claims against them potentially proceed as representative actions.

- In the competition law arena, the Competition Appeal Tribunal has recently granted the first-ever Collective Proceedings Order ("**CPO**") in *Merricks v MasterCard*.[9] A CPO is a form of opt-out class action, in which the consumer has to opt out of the litigation or will be automatically included within the class as defined by the class representative. It was anticipated that, following this first CPO, others would rapidly follow. At the time the *Merricks* CPO was granted, a further 12 CPO applications were pending before the Competition Appeal Tribunal. At least one of these has now been granted in *Justin Le Patourel v BT Group PLC*,[10] a claim brought on behalf of 2.3 million consumers against BT for abuse of dominance in respect of standalone fixed voice services. Of the 11 applications remaining, it remains to be seen how many such cases will proceed.

- In the domain of consumer protection, further class actions are pending in relation to the emissions scandal (with manufacturers such as Mercedes-Benz and Volkswagen facing existing claims and Vauxhall, Peugeot, and Citroën potentially facing claims in the future over alleged "cheat devices" fitted on some of their diesel vehicles artificially reducing emissions to pass EU tests), and the Ryanair flights litigation after the airline allegedly failed to pay compensation for widespread cancellation of its flights in the wake of strikes by the airline's pilots and cabin crew.

We expect that group claims in these areas will only continue. The role of claimant law firms and funders is crucial to this growth, as without claimant law firms to marshal potential claimants, and funders to foot the bill for legal costs, such claims would likely never get off the ground. Claimant law firms are already horizon-scanning; looking for potential ESG-based claims that might be the next piece of "big ticket" litigation. Given the depth and breadth of ESG initiatives, they are not likely to be disappointed.

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1 *RBS Rights Issue Litigation* [2016] EWHC 3161

2 *Sharp v Blank* [2019] EWHC 3078 (Ch)

3 *SL Claimants v Tesco plc* [2019] EWHC 2858 (Ch)

4 [2018] EWCA Civ 1532

5 [2019] UKSC 20

6 [2021] UKSC 3

7 [2019] EWCA Civ 1599

8 [2021] EWHC 217 (QB)

9 [2021] CAT 28

10 [2021] CAT 30