Ep. 57: ESG Litigation in the UK and Beyond

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Jose Garriga: Hello and welcome to *OnAir with Akin Gump*. I'm your host, Jose Garriga.

Today's episode focuses on recent developments and trends concerning litigation focusing on environmental, social, and corporate governance, or ESG, issues in the U.K., but also in the wider EU context.

It'll come as no surprise to listeners, particularly those who've been following the show in the recent past, to hear that ESG issues are increasingly at the top of the corporate and political agenda. Given this, it is similarly unsurprising that there is an increasing focus on litigation as a means of testing these issues and of enforcing rights.

We have with us today Akin Gump litigation partner Richard Hornshaw and counsel Aimee Smart. They'll be discussing ESG litigation in the U.K. and also in the EU, looking at key cases and the issues that underpin them.

Welcome to the podcast.

Richard, Aimee, welcome to the show. This is, as I mentioned, a very hot topic on both sides of the Atlantic, so let's get right to it.

To start, could you explain please what is meant by “ESG” and also to describe the political and statutory landscape of these issues in the U.K. Aimee, if I could ask you to lead off?

Aimee Smart: Of course, thanks, Jose. ESG is a concept that encompasses a really wide range of issues. Broadly speaking, it describes the trend towards sustainability and ethics playing an increasingly important role in the decision-making processes of investors and businesses. Although it is often thought of as a synonym for climate and the environment, ESG is really a much broader term, including a range of other topics, including human rights, supply chain issues, data protection, employee relations, financial crime, and corporate governance.

The regulatory and statutory landscape of the U.K. is increasingly reflecting this shift in focus. Developments such as the Modern Slavery Act and recent parliamentary discussion of plans to require companies actively to prevent human rights or environmental abuses suggest that lawmakers are playing close attention to ESG issues and are increasingly willing to legislate in order to address them.

With the renewed focus brought by President Biden's policies on the environment and the effect that this will have on world sentiment, as well as the postponed COP26 Conference being set to take place in Glasgow in November, the environment, in particular, is set to one of the key issues at this time.

Jose Garriga: Thank you, Aimee. Richard, picking up from that, what is the framework then for bringing ESG-related claims in the English courts?

Richard Hornshaw: Well, I mean, in one sense, there's nothing unique about ESG claims, per se. They need to fit within the established categories of claims that can be broad. I mean, many of the early high-profile ESG claims that we've seen so far in England and the EU have been claims in torts. So, in particular, claims that are alleging a breach of duty giving rise to a claim in negligence, for example.

However, as ESG becomes an ever-more-prominent commercial consideration, and as ESG standards are more routinely incorporated into supply and other types of contracts, we now expect increasingly to see ESG claims which are framed as breach of contract claims. That would be similar to the developments that we've seen in the data security and bribery or FCPA [*Foreign Corrupt Practices Act*] sphere, where those obligations have been imposed on contractual counterparties, thus, ultimately, giving rise to examples of follow-on litigation for breach of contract.

In addition, I think we expect to see ESG-related claims brought under the relevant statutes, including, perhaps most notably, I think claims against issuers of securities who may have misled investors about ESG risks or about the company's ESG policy. Those types of claims could be brought, for example, under section 90 or section 90A of the Financial Services and Markets Act, or there could be claims based on breaches of other statutes. For example, breaches of director's duties that are now codified under the Companies Act.

Jose Garriga: I see. Procedurally, then, how are claimants addressing the fact that ESG issues often affect multiple people simultaneously?

Richard Hornshaw: I mean, that's interesting, and it's a really interesting feature of those types of claims, as you say, Jose. I think, by their nature, ESG claims are often brought on behalf of multiple claimants, and that, in turn, engages another interesting dynamic in England and in the wider EU, which is the parallel growth in class actions.

And although here at least and also on the continent, one of the early key drivers of class action claims has been competition law and, in particular, the rules of the Competition Appeals Tribunal in the U.K., we have seen significant growth of class action claims in other areas, including, in particular, data privacy claims, which, as Aimee was explaining, form part of the ESG umbrella. For example, in

that sphere, we're all now closely watching a potentially landmark case brought by an individual, Mr. Lloyd, against Google.

And that case is currently awaiting judgment in the Supreme Court. It's been brought using what's known as the representative action procedure under our applicable civil procedure rules here in England. And that procedure is applicable when the claimants in such claims share what is described as the same interest.

So, as well as the importance of standard question as to whether damages are recoverable breaches of the Data Protection Act even where there's no pecuniary loss or distress, it's going to be fascinating for us all to see whether the Supreme Court allows the claim to proceed as a representative action on behalf of the potentially innumerable people who are allegedly affected by Google's actions. And interestingly and perhaps unsurprisingly, in anticipation of a positive result from the Supreme Court, a number of similar claims have now been filed as representative actions. Most of those are paused pending the outcome of the case in Lloyd and Google.

Those include claims against a number of household names, including YouTube and TikTok, claiming, in total, billions of pounds for misuse of children's data.

Jose Garriga: Wow! You've mentioned one notable, certainly, case. What about these types of cases? Aimee, what trends are we seeing in the U.K. as to the types of cases that are being brought?

Aimee Smart: Well, one of the key current trends is attempts by claimants to hold English parent companies accountable in England for the ESG or human rights impacts of their overseas operations and supply chains. For example, in the Justia case against British American Tobacco and Imperial Tobacco, claims have been brought by over 7,000 farmers from Malawi for the allegedly dangerous and exploitative conditions they were forced to work under on tobacco farms that are supplying those companies.

The farms in question were not owned by BAT or by Imperial, but the farmers claim that the companies were aware of the conditions on the tobacco farms and facilitated and encouraged those conditions in order to maximize their own profits. The English High Court has held that such claims against the parent companies are sufficiently arguable to be allowed to proceed to a full trial, despite the fact that the farms were not actually owned by the defendants in those claims.

Similarly, Mariana and BHP is a similar type of claim which is brought on behalf of over 200,000 claimants whose villages and communities were affected by the collapse of a dam in Brazil. Companies within the BHP Group jointly owned and operated the dam. And again, the English Court of Appeal has confirmed that such claims can proceed to trial.

Richard Hornshaw: That's really interesting, Aimee. I mean, not least obviously because of the numbers involved. I mean, obviously, as we know, it's pretty rare to see claims being brought on behalf of 200,000 people and particularly in circumstances in which all of the relevant activity, as I understand it, took place offshore. Given that, what would you say, Aimee, are the key legal issues, excuse me, in these types of cases?

Aimee Smart: That's a very good question, Richard. Seeking to hold U.K.-based parent companies accountable engages, as you would expect, a threshold jurisdiction issue, as whilst, in principle, the English Court will have jurisdiction over an English-incorporated parent company, the obvious primary alleged wrongdoer, as you say, will be the overseas subsidiary. That raises, therefore, an issue about whether the English Court has or should exercise jurisdiction to hear a claim brought against the English parent company.

And as part of that analysis, the court will need to consider the extent to which management or control was exercised by the English parent company over its operations abroad. As you know, the jurisdiction issues in two of these cases have quite recently been considered by the UK Supreme Court. What's your take on those cases, Richard?

Richard Hornshaw: Well, I mean, I guess, first up I say that they're fascinating, and they really represent an interesting development of the law in this area and has forced the Supreme Court to grapple with some new and quite difficult issues.

I mean, if you take the first of those cases, for example, which was a claim that was brought by a large group of Zambian claimants against the English-based parent company of the Vedanta Resources Mining Company and also against its Zambian subsidiary, in that claim, the claimants are alleging serious personal injury, damage to property, and loss of income resulting from pollution from a copper mine, which was, in that case, owned and also operated by the Zambian subsidiary.

When that reached the Supreme Court back in April 2019, the way that the Supreme Court looked at it was to say that they considered that the key question on jurisdiction, i.e., whether this claim could be brought against the English parent company in these circumstances, was whether that parent company had sufficiently intervened in the management of the mine, such that it had assumed a duty of care to the claimants. And, interestingly, the Supreme Court held that it was arguable…we'll wait to see how that developed…but at least at this stage, the Supreme Court held it was arguable that a parent company could assume duty of care in respect to the activities of a subsidiary and perhaps by only taking such relatively limited steps as implementing group-wide policies and guidelines, which had stated that the parent company's board had oversight of the subsidiaries.

I think another interesting feature of these kind of cases is going to be the comparative analysis that the court engages in to determine which is the appropriate jurisdiction for the hearing to take place. And in this case, the court held that although Zambia would, for fairly obvious reasons, be the proper place for the hearing of the claims, the judge at first instance had been entitled to find that there was a real risk that the claimants would not, in fact, be able to obtain substantial justice if they brought their claim in Zambia.

Aimee Smart: That latter point is particularly interesting, isn't it?, in an ESG context, Richard, because often victims of multinationals operations on the ground in countries where mining or drilling or deforestation is taking place are unable to access effective justice in the local courts. As I understand it in the Vedanta decision, the reasons cited for the potential inability to access effective justice were the

unavailability of legal aid and the unlawfulness of conditional fee agreements, for example. And in addition, the lack of access in Zambia to legal teams with sufficient experience to manage litigation of this sort of scale and complexity. Those are likely to be issues in a number of other countries, in particular in the emerging markets where these operations are often taking place. Are there any other issues which you can see coming into play in this aspect of the analysis?

Richard Hornshaw: For sure. I think the starting point is the court is entitled to take into account all [*features that are*] relevant. To that extent, I mean, there is, in fact, literally no limit on the features that could come into play in the analysis. But I think one obvious one, which we've probably all come across in practice when we've been dealing with cross-border litigation would be situations where claimants can point to evidence of corruption or, perhaps less dramatically, serious and lengthy delays, which affect the local court systems.

You can see how those are types of features which claimants may well seek to rely on in order to persuade a court here in England that it's appropriate for this court to determine these issues. I guess, just moving on beyond that to look quickly at the other Supreme Court case which you mentioned a moment ago, Aimee, which has also looked at these jurisdiction questions, and that's a case that has been brought against Royal Dutch Shell, the oil and gas company.

And that was a claim which, again, consistent with a number of these other claims we're mentioning, was brought by a significant number of claimants. 40,000 in the Shell case. There, they were Nigerian them who have brought their claims against the Royal Dutch parent company and, again, also its local, in that case, Nigerian subsidiary. There, the claimants say they are the victims of substantial environmental damage caused by Shell's Nigerian subsidiary in what was obviously a very high-profile oil spill event.

The claimants argue, in that case, that Royal Dutch Shell owed them a direct duty of care on the basis that it exerted significant control over the subsidiary and its operations; alternatively, that the parent company assumed responsibility for the subsidiary's operations. And amongst other things, the claimants have pointed to Shell's own groupwide mandatory policies, which the parent company applies to its subsidiaries to support those arguments.

And again, the Supreme Court took a pretty consistent approach here to the one that we had seen it take in April 2019 in the Vedanta case. It considered it a factual matter the extent to which the Shell parent company was exercising de facto control over the relevant operations of its subsidiary. Consistent with its approach in Vedanta, it found that the Shell parent could, in some circumstances, be found to have assumed a duty of care simply by issuing relevant groupwide policies or by holding out to the world at large that it, in fact, had control over its own subsidiaries.

And interestingly, the Supreme Court also went on to consider the extent to which a business is organized along functional lines rather than according to separate corporate identity to be significant. And on the facts, it found that there were real issues to be tried, which is the applicable test at the jurisdictional stage, and, therefore, that the case can and should proceed in England.

Yes, Aimee, I mean, obviously, as we both appreciate, these decisions, interesting though they are, are only addressing the low bar of whether a claim is arguable. But it is noticeable, or, at least, I think it's noticeable, that the Supreme Court seems to have taken a really flexible and fact-specific approach to determining the key jurisdictional question at this stage as to whether a parent company assumes a duty of care. I'd be interested to know, Aimee, whether you think that that kind of flexible approach might be expected to encourage further claims at this type. And if so, whether that could, in fact, be against a wider set of U.K.-based entities than we've seen so far.

Aimee Smart: Precisely. I absolutely agree with that. A very recent example, I suppose, is a claim which has been made again against BAT and Imperial Tobacco and some of their subsidiaries, which was filed only last week on behalf of another group of Malawi and tobacco farmers. One can see that this claim was no doubt encouraged by the recent Justia decision that I spoke about a moment ago. Obviously, we'll be following these cases with interest to see how they proceed, as you say, at the evidentiary and trial stage, having overcome the initial hurdle of jurisdiction.

And as a related development, we are also aware of a case in which U.K.-based entities within a multinational professional services firm have been held liable for breaching ethical standards on the basis of an audit, which was conducted by an overseas member of the corporate group. Following the Vedanta decision in December 2020, the appeal against this decision was withdrawn, meaning that that first instance decision stands. And at the moment, the professional services firm remains liable for breaching those ethical standards.

Obviously, these cases are super interesting, and we'll be following them, as I said. But I know that the claimants are still quite a long way from finally determining parent company liability. Based on that, Richard, how do you see these cases playing out when they actually get to a substantive trial?

Richard Hornshaw: Well, I mean, that is literally the million-dollar question, isn't it? I think what you can say for sure is that these are going to be long and complicated and factually intensive trials, which are likely to run for a significant period of time. Ultimately, of course, the outcome is going to depend on how those facts emerge at trial and, indeed, the legal arguments which are ultimately advanced by the claimants and the defendants.

But I think it seems from these Supreme Court decisions we've just been discussing that a major focus of that factual investigation is going to be an inquiry into the level of control or supervision that the U.K. parent exerted over the subsidiary at the relevant time, and that will also include an analysis of the extent to which it held itself out publicly to the world at large as having that control.

I mean, I think there are as well, and that's just focusing on one aspect which emerges most clearly from these jurisdictional decisions, but you don't have to look too far to spot a bunch of other issues which are going to come up and which are features of any tortious claim. For example, causation and foreseeability. And, actually, the question of foreseeability came up in a case that we were involved in a couple of years ago where the court was required to look at the extent of the evidence that a parent company could or should have foreseen the relevant harm.

And that case was a case that was brought by a number of Sierra Leonean mine workers against a mining group called African Minerals, a case in which we represented the English-listed parent company, which, at the time of the proceedings, was already in administration in England. In that case, the Court of Appeal found that, although African Minerals Limited, the parent company, may have foreseen that excessive violence could theoretically have been used by the local state police forces it had employed as security, that theoretical possibility is not sufficient to establish liability.

I think the court is indicated that there was a higher degree of foreseeability that was going to be required, and that that requirement is going to mean that claims that are based on the actions or omissions of third parties as opposed to the parent company or its overseas subsidiary itself are likely to be more challenging.

Jose Garriga: That's interesting. Thank you both. Taking, then, a broader look, we talked about in the intro about how this was something that was relevant to England and the EU. In parallel with these developments that you've described in England, Aimee, can you give any examples of ESG-related cases in the EU or elsewhere?

Aimee Smart: If one looks at The Netherlands, for example, there have been a couple of very significant decisions there, including the 2019 Urgenda and Netherlands case. It was a landmark case in the Dutch Supreme Court in which individual claimants succeeded in establishing that their government has a legal duty to prevent climate change. One can see the wide-reaching significance of that sort of decision. The claim itself there was based on Articles 2 and 8—so, right to life and right to respect for private and family life—of the ECHR [*European Convention on Human Rights*]. And the Dutch state was ordered to reduce Dutch greenhouse gas emissions by 25% by the end of 2020.

And other similar claims have followed. The successful claim in the Hague District Court of Milieudefensie and Royal Dutch Shell is seen as an extension of the Urgenda decision to apply now also to private corporations rather than governments. In the Milieudefensie case, the court found that Shell was bound by the so-called unwritten standard of care in the Dutch Civil Code. And that standard implies a duty of care not to act in conflict with customary rules.

And now the court found that, in that context, the European Convention on Human Rights was one such customary rule. And as a major player in the worldwide fossil fuel market, Shell is therefore required under Article 2 and Article 8 to take active steps to prevent dangerous climate change. In particular, the court found that Shell had an obligation to reduce CO2 emissions from the group's activities, including indirect emissions by third parties resulting from Shell's activities, by 45% by the end of 2030. There's an even longer-term goal and obligation and on Shell there.

So elsewhere in the EU, we are also aware of a nuisance claim against the German energy company RWE in the German courts. That claim is brought by a man named Mr. Lliuya, who is a resident of Huaraz, a city in the Peruvian Andes. Mr. Lliuya's property is recently at risk of flooding due to the melting of the glaciers that are higher up in the Andes, and he contends that that is a result primarily of anthropogenic climate change.

RWE is said to be responsible for 0.47% of the global greenhouse gas emissions annually and emits more than some countries, such as, for example, The Netherlands. Mr. Lliuya seeks from RWE that same percentage of the costs of the preventative measures that are needed to protect his property against the flood risk. Now, we understand that, at an appeals hearing in November 2017, the court delivered a proprietary opinion largely rejecting RWE's defenses, which had primarily focused on issues of causation, as you would expect.

The court has said to have found that the distance between the emissions and the environmental impacts don't rule out the application of general nuisance or tort law under German law and suggested that RWE's share of global emissions may be sufficient for that purpose. Now, obviously, that was back in November 2017. We understand that the case has been significantly delayed by the pandemic, in particular because it is now proceeding through the evidentiary phase in which the claimant will lead to establish causation at trial.

But that has been majorly delayed. We are obviously watching to see how that case progresses. And then just a final note, further afield, even outside the EU, we're following cases along similar lines, which are on foot in New Zealand, for example, in which the courts are holding that it is at least arguable that companies are liable to the public for damage caused by their emissions, even where those companies are in line with all of the applicable domestic obligations.

All in all, you can see that the trend is very much along the same lines in the EU and further afield. I wondered, Richard, do you have a view on how this trend in ESG-related litigation intersects with the trend for shareholder activism, which I know that you work on many cases of that nature?

Richard Hornshaw: Well, it's really interesting, Aimee. We talked earlier about the kind of intersection with class actions and the growth in that area. I do think there's a really interesting intersection here between the ESG movement and the burgeoning shareholder activism market in the U.K. and elsewhere in the EU. I mean, historically for a number of different types of reasons, the U.K.'s approach to shareholder activism has been really quite different from that in the U.S. Most notably, it has historically been much less litigious in its approach.

However, there have been increasing signs of institutional shareholders of U.K. companies being more and more prepared to flex their muscles. Certainly, we've been tracking very closely outside of the civil litigation context, per se, we've been tracking very closely the trend for resolutions to be proposed by activist shareholders at companies' general meetings.

For example, you've seen countless situations in which shareholders have proposed resolutions requiring the companies to set targets that are consistent with the Paris Climate Agreement or to move away entirely from fossil energy resources or whatever it might be. I think that it seems highly likely that we're going to start to see more litigation following on from this. To state one example, I can see the likelihood of there being a growth in litigation based on what companies have said to investors about ESG issues or how they've managed or mismanaged ESG risk.

You can see how, obviously, shareholder activism where investors look to encourage firms to improve their governance or other ESG standards could

quickly escalate to litigation if those warnings aren't heeded by the directors. I think looking over at the Atlantic, at least from where we see it, you can see a good example of this, where following an environmental disaster, a company's share price could fall, giving rise to claims by investors for the resulting losses.

A particular situation I have in mind is the proceedings that were brought in New York against Vail under some anti-fraud provisions of U.S. securities law. And in that case, the investors alleged that Vail had made materially false and misleading statements about its processes in its safety and sustainability reports, which had artificially inflated the share price of the company, which caused the investors to suffer loss once its share price plunged following obviously the tragic and very well-publicized collapse of a dam in Brazil.

Closer to home for us, in the EU, you can see some interesting legislative developments as well. For example, the introduction in 2019 of a new regulation which aims to address what is known as greenwashing, which is the practice of firms using their marketing material to claim without proper basis that they pursue ESG-related objectives. And in England specifically, we saw, as recently as last week, the CMA [*Competition and Markets Authority*] announcing plans to carry out a full review of misleading green claims made by businesses as early as next year.

It seems to me at least, Aimee, that the result of this increased regulation and these types of investigations by regulatory bodies is that publicly available information on firm's ESG credentials and their failures to comply with them could be expected to become more widespread and more detailed. And that's likely to provide fertile ground for shareholder claims in litigation where shareholders were misled into relying on information which now turned out to be false. Look, I mean, I think there's a lot here, right?

I mean, a lot of interesting development, and I guess, Aimee, I'd be interested know, certainly from your perspective, what you think the key takeaways might be out of all of this mass of information and developments for companies and their stakeholders when they're looking at ESG litigation.

Aimee Smart: Certainly. I mean, look, not only do the environmental and social effects of a company's operations carry with them significant reputational and operational risk, as we all already know, but there is now, additionally, a growing appetite for effective parties to enforce their rights, including, in some cases, to claim compensation, whether that be through tortious claims by the affected community, financial claims by investors as you were discussing a moment ago, or contractual claims by business partners, as I think, Richard, we mentioned right at the beginning of this episode.

It's a very real risk now and something which is front and center of business' minds. Claimants are now more frequently referring to a company's own public disclosures and marketing as a means of holding them to the standards they set themselves. And often those disclosures and marketing are modeled on international standards, such as those arising under the UN Guiding Principles on Business and Human Rights, the UN Sustainable Development Goals, or the OECD Multinational Enterprises Guidelines.

The prevailing sentiment, then, seems to be at the standards of behavior that are set in these frameworks and which businesses often readily adopt should be given teeth in the form of legal liability for failing to adhere to them. So, there are a growing number of examples obviously of claimants using a company's own ESG marketing and disclosures against it in litigation.

For example, following the 2012 Deepwater Horizon accident, a successful class action was brought against BP in part on the basis of false statements made in press releases and sustainability reports about its own safety policies. More recently, the Vail investor class action that, Richard, you mentioned a moment ago, was settled for $25 million.

Richard Hornshaw: Look, I mean, it is fascinating, isn't it? There are some huge numbers, whether it's numbers of claimants, whether it's amount of damages being sought or paid. It's a really economically significant area the way that ESG issues are now starting to be the subject of litigation.

It seems to me it's rapidly becoming a topic where, really, any responsible company and, indeed, any responsible fund wealth asset manager who invests in those companies is going to need to make sure that they are fully up to speed on the risks and fully up to speed on the opportunities to enforce right and recover compensation in this growing area. I think we've seen a lot of developments over the last couple of years, and I think there's every reason to think that that pace is going to continue. And we're going to see many more similar developments over the coming couple of years.

Jose Garriga: Thank you, Richard. Thank you both. Listeners, you've been listening to Akin Gump litigation partner Richard Hornshaw and counsel Aimee Smart. Thank you both for coming on the show today and sharing with listeners your thoughts and insights into this critical facet of the vibrant ESG scene. On the topic of greenwashing, for example, we've had some interesting episodes previously featuring Ezra Zahabi to which I would point listeners to hear a bit more of a discussion on that topic as well.

So, as always, thank you listeners for your time and attention. Please make sure to subscribe to *OnAir with Akin Gump* with your favorite podcast provider to ensure you do not miss an episode. We're on, among others, iTunes, YouTube and Spotify.

To learn more about Akin Gump and the firm's work in, and thinking on, ESG and litigation matters, look for “ESG” and “litigation” at the Experience and the Insights & News tabs at akingump.com, and then take a moment to read Richard's and Aimee's bios on the site as well.

Until next time.

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