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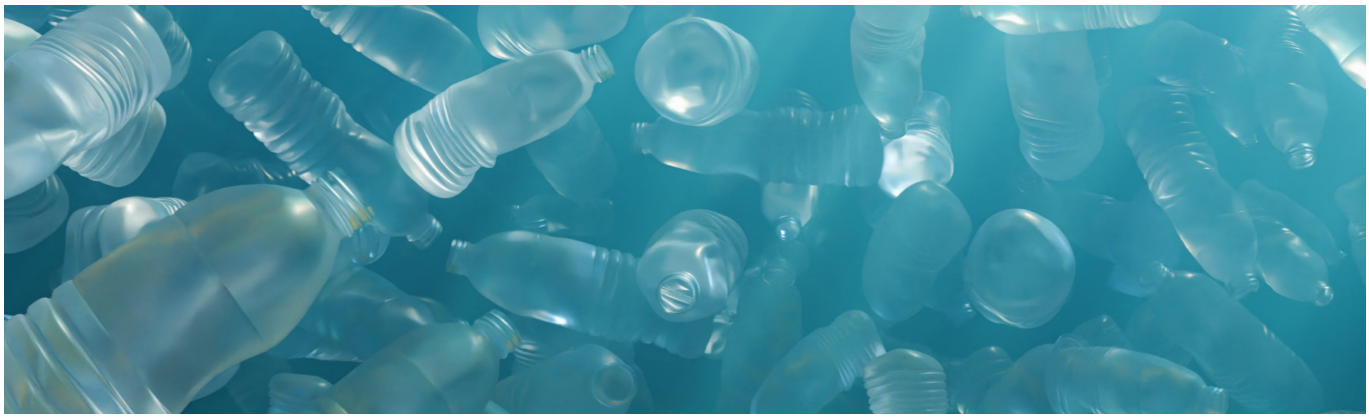

CLIMATE CHANGE LAW. CURRENT PERSPECTIVES.

Greenwashing: Some Thoughts on Future Claims under English Law

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Consider the following definitions of greenwashing:

"Greenwashing is a PR tactic used to make a company or product appear environmentally friendly, without meaningfully reducing its environmental impact … Greenwashing aims to boost a company's public image or make more sales by convincing us that buying from them aligns with our values." (Greenpeace)

"Greenwashing is when the management team within an organization makes false, unsubstantiated, or outright misleading statements or claims about the sustainability of a product or a service, or even about business operations more broadly." (Corporate Finance Institute)

"Greenwashing is the process of conveying a false impression or misleading information about how a company's products are environmentally sound. Greenwashing involves making an unsubstantiated claim to deceive consumers into believing that a company's products are environmentally friendly or have a greater positive environmental impact than they actually do." (Investopedia)

As can be seen, understandings of what constitute greenwashing vary, with narrower ones focusing on products or the specific responsibility of the management team, and broader ones encompassing corporate operations and output. However, the common core is essentially a type of misrepresentation based on how green characteristics or business credentials have been presented. That is important to note, because there is not (at present) an 'Anti Greenwash Act' or, for example, a tort of greenwashing. Much like cryptocurrency – a new asset class which is being tested against existing legal frameworks – greenwashing is a newfound focus for the application (and development) of laws which are already there. However, given wide recognition of the climate emergency, and more general prominence for other environmental concerns, the impetus for further legislative change in this area is strong.

Regulation and Civil Claims: An Overview

Against that background, allegations of greenwashing being levied against products or companies are highly visible, with the media highlighting fresh examples on a regular basis and watchdog organisations devoted to calling out offenders. Greenwashing is also currently the domain of increasing regulatory activity. This month, the Advertising Standards Agency announced updated guidance for advertising that makes sustainability claims, including "carbon neutral" and "net zero", which built on the Competition & Markets Authority's previous guidance (i.e. the Green Claims Code) in this area. Following a consultation between October 2022 and January 2023, the FCA is intending to publish new rules in the first half of 2023 dealing with matters such as investment product labels on sustainability, the use of sustainability related terms such as 'ESG', 'green' or 'sustainable' in product names and marketing, and an explicit anti-greenwashing rule. Although enforcing these standards will be the domain of the relevant regulators, it is likely to also have some impact on civil claims in due course – at a minimum, one only has to think about banking misconduct, cartels and data protection as areas in which regulatory findings have formed an important platform or jumping off point for subsequent private law actions.

By contrast, civil claims in court which focus on greenwashing are not yet a significant feature of the English litigation landscape. Instead, much environmental and climate related litigation focuses on steps that were taken or not taken by the defendant company, with one example being ClientEarth's derivative action against Shell which alleges breach of directors' duties in failing to adopt and implement an energy transition strategy that aligns with the Paris Agreement. Greenwashing claims, by contrast, are centred on the allegation that there has been a misleading *presentation* of the steps that are being taken (or not taken).

In this post, we engage in some horizon-scanning, and attempt to identify the type of claims for civil liability which might be brought in the future as a response to greenwashing which are: (a) product related; and (b) corporate related.

Product Related Claims

A space that seems well adapted to the emergence of greenwashing claims is the field of product liability, namely claims by (individual and/or corporate) consumers that as a result of greenwashing, the product they purchased as represented by the supplier was essentially different to what they in fact purchased. This can easily be envisaged. Consider the following example:

'A company offers a product for sale, marketing it as environmentally friendly in the way it is produced, the way that it operates, or some other aspect of its consumption: for example, a home heater marketed as having low energy usage, cosmetics marketed as using recycled and/or compostable packaging, an airline's flights are marketed as being partially or fully offset. The consumer chooses to buy this product over competitors because she believes that this product is the most environmentally responsible, when in fact it is not.'

Various routes might be available to the consumer to bring a claim.

First, the consumer might allege breach of terms that are implied by statute into all contracts for the sale of goods, and which require that the goods comply with descriptions given at the time of sale, such as s. 11 of the Consumer Rights Act 2015 (for individual buyers) and s. 13 of the Sale of Goods Act 1979 (for business buyers). In extreme examples, where the goods are unable to be lawfully used because they breach legally binding environmental standards, the consumer may also be able to invoke terms guaranteeing that the products would be of satisfactory quality, implied into the contract of sale by legislation such as s. 9 of the Consumer Rights Act 2015 (for individual buyers) or s. 14 of the Sale of Goods Act 1979 (for business buyers). Similar claims may also be available under other legislation, such as the Consumer Credit Act 1974 (for goods bought on credit).

Second, the consumer might bring a claim in deceit. This is likely to be a more difficult claim to make out, requiring the claimant to establish not just that the greenwashing claims made by the seller company were in fact false, but also that the seller company objectively knew they were false (or made the greenwashing claims reckless as to their truth or falsity). Much is likely to depend on the

results of the document disclosure process, making it especially difficult for the prospective claimant to know before bringing the claim whether he has likely grounds for doing so. The claimant will also have to establish that in making the greenwashing claim, the seller knew or intended that buyers like the claimant would be influenced by the greenwashing claim in deciding to buy the product: usually, this would not be difficult to establish by logical inference once the claimant's knowledge of the falsity of the greenwashing had been established. The final hurdle for a greenwashing claim in deceit is the requirement to show that the claimant relied on the seller's false representation, and/or was induced by that representation to purchase the product in question. The law on this is currently unclear, with some cases indicating that a claimant must demonstrate conscious awareness of the misrepresentation (here, the greenwashing representation), and that he turned his mind to that representation when making his purchasing decision; while others take a more broad-brush and permissive approach, looking at the claimant's background knowledge when deciding to purchase, or applying a counterfactual standard (would the buyer have purchased had they known the representation was false?). How this question is resolved will likely be of enormous importance to the ability of purchasers to successfully bring greenwashing claims in deceit.

Third, it might be possible to bring claims of breach of statutory duty, in reliance on legislation establishing environmental standards, and perhaps even in reliance on regulations prohibiting or restricting greenwashing, referred to earlier in this post. Whether such a claim can be viable will ultimately turn on the terms of the particular legislation or regulation: they must be such as to allow the inference that lawmakers intended to impose a statutory duty on a class that includes this defendant, that duty being for the protection of a limited class of person (and not the public as a whole) that includes the claimant, and that the lawmakers intended that the class of person have a private law right of action for breach of the statutory duty: X (Minors) v Bedfordshire County Council [1995] UKHL 9. The terms of the legislation will also be determinative of other important matters, such as the standard of liability (subjective intention, reckless, negligence or strict liability), and the scope of damages within the ambit of the statutory claim. Greenwashing claims of this nature will usually be in uncharted waters, and it will be evident that such a claim would be difficult to maintain – unless, when making environmental and anti-greenwashing legislation and regulations, lawmakers pay particular mind to the possibility of civil law claims.

Proving Loss?

A thorny issue that is likely to arise across all civil greenwashing claims, no matter the cause of action pursued, is the establishment of loss such as to found a claim in damages. This difficulty has two components. First: what loss has the claimant actually suffered? Put bluntly, the claimant still has a working product, just one that is less environmentally friendly than she had hoped. Claims might try to argue that the purchaser would have paid less for the product had she known its true environmental cost, or would have refrained from purchasing the product at all, but these losses are both difficult to prove and difficult to quantify. In situations where the claimant can show that the product is so environmentally deficient that it will cost the purchaser more to operate (for instance, a car that can only be driven in particular areas upon payment of a daily emissions charge), or that it will be illegal to operate it at all, this problem of damages may be more easily overcome. Second: how can the costs of litigation be worthwhile, given that even if damages are quantified at the entire purchase price of the product, that will presumably be dwarfed by legal fees? The answer to this second problem probably lies in the English courts' provision for mass claims, including especially the group litigation order regime, supported by litigation funding (in which specialist green litigation funders and / or green focused sub-funds may be expected to become more prevalent).

Corporate Related Claims

The other obvious area in which greenwashing claims can be expected to emerge is in litigation which does not target specific products, but which arises in the corporate context. It can easily be envisaged as arising in relation to equity or debt related transactions, whether by way of private agreement or through UK capital markets. For convenience, in this article we limit ourselves to some observations on the equity side.

Private Transactions: The SPA Example

Consider the following reasonably straightforward example:

'Green Fund seeks to buy shares in companies which meet its investment objectives, which are to invest in companies with Paris Agreement aligned energy transition strategies. A Co, which is well known for publicly making claims to have such strategies, is owned by B Co. As a result, Green Fund and B Co conclude an SPA under which Green Fund purchases all of A Co's shares. One month later, an article appears in the national press which reveals that A Co's claims are false, including because significant pollution output has been deliberately under-recorded.'

Obviously, there would be a lot more complexity in an actual case. But on a general level, the typical SPA contains a range of warranties and indemnities. This hypothetical would engage arguments surrounding the accuracy of the financial warranties given by B Co, and in addition, it would not be surprising to see within an SPA (at least for companies within certain industries) more bespoke warranties such as "*B Co warrants that A Co has complied with all applicable environmental laws and regulations*". The latter may be of particular interest, as it is likely to be a conduit for an allegation of a breach of regulatory requirements to support a private law claim – something which has otherwise proved to be a difficult argument in the past. By way of counterpoint, s.150 of the Financial Services and Markerts Act 2000 (FSMA) only gives limited private law recourse for breaches of FCA rules, and in the context of swaps mis-selling, attempts to elevate regulatory requirements into a parallel but broader common law duty of care failed: Green & Rowley v RBS [2013] EWCA Civ 1197.

Of course, it remains to be seen whether the FCA will form the view that greenwashing requires a bespoke approach in terms of remedies, and also, as mentioned above, the ultimate scope of application of any relevant regulations (going to the question of whether any such bespoke warranty would be engaged on the facts). On the quantum side, in the hypothetical above, a significant impact on the valuation of the business would be expected, not least due to the impact on goodwill, and thus a claim for financial loss may be more easily maintainable than on the product side. This would also take account of the potential or risk for further regulatory action such as fines, normally viewed as at the date the SPA was concluded: MDW Holdings Ltd v Norvill [2022] EWCA Civ 883. Overall, an upturn in SPA disputes in turn raises the prospect of consequential insurance coverage disputes, given the increasing popularity of warranty & indemnity insurance, and a greater scrutiny on the scope of warranties which might be triggered in these types of circumstances in general.

Public Transactions: Listed Companies

The acquisition of shares through UK capital markets as opposed to private transaction has received a fair amount of attention over the past few years, in cases including the *RBS Rights Litigation (s. 90A FSMA), SL Claimants v Tesco, Various Claimants v G4S, Various Claimants v Serco and ACL Netherlands BV v Lynch (s. 90A FSMA)*. However, although a number of important issues about the structure of those provisions has been clarified, several of these cases settled, and so far only the latter has actually come to trial. For present purposes, it is sufficient to note that s. 90 relates to liability for untrue or misleading statements in listing particulars or a prospectus, or the omission of certain matters required to be included. That is a narrow class of information but the additional requirements to be satisfied are looser. In contrast, s. 90A is drawn more broadly as far as the class of information is concerned, relating to liability for misleading statements or dishonest omission in certain published information related to the securities, but via Schedule 10A additional hurdles then have to be overcome by a claimant.

In light of the trends observed in the introduction, it would not be surprising if disclosure requirements concerning the green aspects of a business and associated climate risks which have to be provided within listing particulars are intensified, thus making s. 90 the preferred option when it comes to greenwashing claims arising out of publicly available shares. However, even if not, it is notable that as of April 2022, the Companies (Strategic Report) (Climate-related Financial Disclosure) Regulations 2022 already introduced amendments to the Companies Act 2006 requiring (amongst others) large and/or traded UK companies (including on AIM) to include sustainability related information in their strategic

reports. This builds on the FCA listing rule requirements for premium listed companies (as of January 2021) and standard listed companies (as of January 2022) to make disclosures consistent with the 'Task Force on Climate-related Disclosures' framework, on a 'comply or explain' basis. All of this material would likely be of central importance for grounding an alternative greenwashing claim based on s. 90A.

Conclusion

Greenwashing is the topic of the moment, but it is not always clear how the allegations currently being made in the media will translate to the type of claims which might be seen in the civil courts. There is some scope for greenwashing claims to fit into existing legal frameworks, although each type of claim may face significant hurdles. It is clear that the regulatory and legislative background, which is developing apace, as well as the formulation of the relevant terms within the transaction documents in question, will play an important role in shaping the type and prospects of success of such claims when they are made. This is, and will remain, an area to follow closely.

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