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The Practitioner's Guide to Global Investigations - Tenth Edition

Parallel civil litigation: the UK perspective

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Parallel civil litigation: the UK perspective

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Summary

1 INTRODUCTION

Corporates that are subject to investigations increasingly face civil litigation based on the same or similar issues under investigation. The public disclosure of the existence or outcome of an investigation can often trigger litigious activity by a wide range of affected parties, from shareholders to third-party suppliers. As steps taken during an investigation may affect related litigation – and ***vice versa*** if the investigation remains active – it is essential that clients anticipate and address broader strategic and practical issues at each stage of a matter.

This chapter considers key types of civil litigation that may run alongside or follow promptly from investigations into corporates, and the challenges that clients must navigate when managing parallel proceedings.

2 KEY TYPES OF PARALLEL CIVIL LITIGATION

Investigations may lead to individual or collective civil claims being brought against corporates. In the United Kingdom, there has been a proliferation of the latter in recent years, assisted by the rise of specialist claimant law firms, growth in third-party litigation funding[1] and the availability of 'after the event' insurance, although the collective proceedings regime continues to develop in this jurisdiction[2] (in contrast with the United States, where the class actions regime is well established). We set out below a very high-level overview of the key types of individual and collective claims to which corporates may be exposed as a result of internal, regulatory or criminal investigations.

2.1 SHAREHOLDER LITIGATION

Where there is misconduct by or within a corporate, shareholders frequently look to the outcome of any investigation into the corporate to help mount their claims,[3] particularly because there tends to be an asymmetry of information between the parties in that much of the relevant evidence will be in the hands of the corporate.

Section 90 and Schedule 10A (which succeeded section 90A) of the Financial Services and Markets Act 2000 (FSMA) provide statutory remedies for shareholders who have suffered loss as a result of untrue or misleading statements, or omissions of necessary information by issuers of securities.[4] Although many FSMA claims in the past have fallen at the initial hurdles or have settled, in 2022, the High Court handed down a landmark judgment in *Autonomy v. Lynch*,[5] providing important guidance on shareholder litigation in the first Schedule 10A claim to reach full trial. In contrast with other FSMA claims – which are generally brought by groups of investors who have acquired an interest in the defendant company – the claims in the ***Autonomy*** case uniquely arose out of the wholesale acquisition by Hewlett Packard of the entire issued share capital of Autonomy. The market is therefore still waiting for a 'typical' securities action to go all the way to trial. However, recent cases have provided important (albeit conflicting) guidance on the reliance requirement for claims brought by 'passive' investors under Schedule 10A.[6]

Adverse findings from an investigation may also lead a minority shareholder to bring an unfair prejudice petition against the majority under section 994 of the Companies Act 2006, alleging mismanagement of the company's affairs. If the alleged wrongdoers retain control, this could raise the possibility of a derivative claim by shareholders against those wrongdoers on the company's behalf pursuant to Part 11 of the Companies Act 2006.

2.2 FINANCIAL SERVICES LITIGATION

Adverse findings made against firms regulated by the Financial Conduct Authority (FCA) or the Prudential Regulation Authority can often prompt parallel civil litigation by affected parties. Section 138D of the FSMA affords a statutory cause of action to 'private persons' who suffer loss as a result of a breach of a qualifying rule found by either regulator; however, the circumstances in which this statutory cause of action can be invoked are relatively restricted. Among other things, many regulatory rules fall outside its scope:[7] the term 'private person' has a narrow meaning, which means that some putative claimants will not have standing to bring a claim,[8] and even a valid claim will be subject to the usual defences applicable to a claim for breach of statutory duty.[9] Claimants in this area may therefore seek to pursue common law causes of action in addition to, or instead of, the statutory route (e.g., claims for financial mis-selling based in misrepresentation or negligent misstatement).

Regulatory findings in this area may also lead to complaints to the Financial Ombudsman Service (FOS), which is empowered to resolve certain types of complaints between financial businesses and their customers. In some circumstances, and in particular where the FCA deems there to have been a widespread or regular failure by regulated firms to comply with relevant rules, the FCA can require a firm to set up a consumer redress scheme (i.e., a mass scheme intended to offer compensation to consumers other than through civil claims or FOS complaints).[10]

2.3 COMPETITION LAW CLAIMS

In the context of competition law matters, decisions of the Competition and Markets Authority (CMA) and the European Commission (the Commission) have spawned significant follow-on litigation[11] from customers of corporates found liable in regulatory proceedings. Follow-on claims rely on a CMA or Commission decision as the basis for a finding of liability and are focused narrowly on the question of whether the infringement caused the claimant or claimants to suffer loss or damage. Corporates may also be subject to stand-alone claims, which are either not derived from a CMA or Commission decision, or allege unlawful conduct beyond that found in the decision. Competition law infringement cases are now a common feature of the litigation landscape in the United Kingdom; for example, various proceedings ensuing from the Commission's decision in ***Trucks***[12] have been heard by the English courts, up to the Supreme Court level.

Collective proceedings may be brought only in respect of a breach of specified provisions of competition law. They cannot proceed as of right; instead, the proposed class representative must be authorised to act as such, and the proposed claims must be certified by the Competition Appeal Tribunal (CAT) as eligible. This involves the class representative applying for, and the CAT making, a collective proceedings order (CPO).

The CAT granted its first CPO in 2021[13] and more successful applications have since followed. Judgment has been handed down in ***Justin Le Patourel v. BT Group Plc and British Telecommunications Plc***,[14] the first opt-out collective action to go to trial, with decisions pending in ***Mark McLaren Class Representative Limited v. MOL (Europe Africa) Ltd and Others***,[15] ***Dr Rachael Kent v. Apple Inc and Apple Distribution International Ltd***[16] and ***Justin Gutmann v. First MTR South Western Trains Limited and Another / London & South Eastern Railway Limited & Others / Govia Thameslink Railway Limited & Others***.[17] There are also examples of collective proceedings that have settled.[18] The collective proceedings regime has enabled consumer (and other) claims to be pursued against corporates in

circumstances in which it would not have been economically viable to pursue these claims on an individual basis. Accordingly, corporates that have infringed competition law face the prospect of claims not only from big customers but also from consumers and businesses who would not otherwise have been in a position to pursue a claim for damages, thereby increasing their likely overall exposure.

2.4 DATA BREACH LITIGATION

Against a landscape of increasingly sophisticated cybercrime and subsequent data breaches, enforcement action by data and information rights regulators, including the Information Commissioner's Office (ICO), has been on the increase. Given the nature of data breach or misuse incidents, with a single incident often affecting the data of many thousands or even millions of individuals, corporates suffering data breaches risk facing collective proceedings seeking very significant collective damages (although smaller individual claims are possible too).[19] Such claims are generally based on a breach of a corporate's duties under the UK General Data Protection Regulation and the Data Protection Act 2018, or common law causes of action, including misuse of confidential information, breach of confidence and negligence.

That said, the prospects of success of collective proceedings in this area suffered a setback in *Lloyd v. Google LLC,*[20] which was brought following a US Federal Trade Commission investigation into the misuse of data by Google. The UK Supreme Court effectively ended the claim by refusing permission to serve out of the jurisdiction, in doing so raising questions regarding the suitability of the representative action mechanism[21] for collective proceedings based on data breach or misuse, and reducing the categories of damages available. Although the decision will undoubtedly give potential claimants in this area pause for thought, parallel litigation nevertheless remains a real risk for any corporate under investigation by the ICO.

2.5 ENVIRONMENTAL, SOCIAL AND GOVERNANCE LITIGATION

Increasing public attention on environmental, social and governance (ESG) issues means that ESG investigations are moving up the agenda for corporates.[22] In the United Kingdom, ESG disclosure obligations have taken effect for a large number of corporates,[23] and regulators have taken an active interest in ESG issues by not only setting new regulatory requirements to address ESG issues but also taking enforcement action; for example, (1) the Advertising Standards Authority has acted to investigate alleged greenwashing[24] and (2) the CMA has secured formal undertakings from companies in the fashion sector.[25] The CMA has new powers under the Digital Markets, Competition and Consumers Act 2024, including the ability to impose fines of up to 10 per cent of annual group turnover for misleading practices such as greenwashing.[26] In June 2024, the FCA confirmed that it had opened its first enforcement investigation into climate-related issues.[27] Adverse regulatory findings are likely to prompt litigation by various parties, such as consumers, shareholders and civil society groups seeking to hold corporates to account for ESG issues.

ESG risks are often complex. They may relate to conduct that is not undertaken by the corporate directly but by its subsidiaries, or even legally distinct third parties within the corporate's broader value chain, and involve a wide range of actors, including local communities affected by the conduct in question. Given these complexities, it is anticipated that ESG issues will provide fertile ground for litigation in the coming years.

2.6 OTHER TYPES OF COMMERCIAL LITIGATION

Internal and regulatory investigations can also prompt other types of private litigation by parties with whom the corporate has a commercial relationship. In particular, a finding of misconduct by a regulator (or the possibility that such a finding may be imminent) can provide a basis for a counterparty to argue that a contractual representation or obligation (e.g., to comply with certain applicable laws, regulations or policies) has been breached, an indemnity has been triggered or a contract has become tainted by illegality.

As an example, the well-publicised bribery and corruption investigations initiated against Airbus by the United Kingdom's Serious Fraud Office (SFO), France's National Financial Prosecutor's Office and the United States Departments of State and Justice resulted not only in deferred prosecution agreements (DPAs), fines and shareholder litigation being issued, but also commercial litigation and arbitration initiated by Airbus consultants and other third parties.[28] Clients must therefore be aware of the risk of investigations triggering potential liability to commercial counterparties.

2.7 EMPLOYMENT LITIGATION

Finally, investigations may give rise to employment claims from employees who may be either the subject or the complainant in an investigation.[29] If an employee is the subject of an investigation, typical claims they may bring are those relating to discrimination (they may allege the 'real' reason they are being investigated is because of a protected characteristic), whistleblowing (they may allege the 'real' reason they are being investigated is because they have previously made a protected disclosure) or unfair dismissal (if the result of the investigation is the termination of the individual's employment). If the individual is the complainant, they may be dissatisfied with their treatment during the investigation (or more broadly in the workplace) and look to allege that the treatment constitutes detrimental treatment arising from them having blown the whistle or a form of discrimination. In cases of alleged sexual harassment, complainants may also look to allege that their treatment during an investigation process amounts to a failure by the employer in its duty to prevent sexual harassment. An employee can bring discrimination and whistleblowing detriment claims while still employed, making the ongoing employment relationship, and any ongoing investigation, difficult to navigate.

3 KEY CONSIDERATIONS IN MANAGING PARALLEL PROCEEDINGS

In light of the myriad of potential litigation risks faced by a corporate, it is important that clients identify at the outset the types of parallel claims that may arise based on the matters under investigation. Depending on the nature and subject of the investigation, these may be obvious, though there may also be less obvious sources of litigation risk (e.g., from material contracts that are not directly connected to the investigation but contain provisions such as representations regarding compliance with applicable laws or policies that may be invoked by a key counterparty).

Scoping the client's potential exposure will help anticipate potential issues and their impact across parallel proceedings. Often, the approach taken in one set of proceedings can generate tensions in another set of proceedings; a tactical step to the client's advantage to secure a better outcome in regulatory proceedings may be to its detriment in related litigation. Clients therefore need to consider how issues may play out when devising an overall case strategy. We set out below the key considerations that are frequently encountered in parallel proceedings.

3.1 PRIVILEGE

Privilege in the context of investigations is an ever-thorny subject. It is essential that clients consider from the outset whether materials generated during the course of an investigation will be protected by privilege under English law and therefore be immune from disclosure to third parties. This is particularly so in circumstances where it is envisaged there will be subsequent litigation in which non-privileged materials may need to be disclosed.

Under English law, there are two relevant types of privilege: legal advice privilege and litigation privilege.[30] The ambit of legal advice privilege is confined to communications between (a very narrowly defined) client and lawyer for the dominant purpose of giving or receiving legal advice.[31] This type of privilege, therefore, is often of limited use in investigations, as it will not protect communications (including, importantly, interview notes) with individuals who do not form part of the client group. Litigation privilege, on the other hand, will extend to communications of this nature but often gives rise to difficult questions regarding (1) whether an 'adversarial' investigation or litigation was in fact in reasonable contemplation at the point at which a particular document was created and (2) even if it was, whether that document was produced for the dominant purpose of obtaining advice or information concerning that investigation or litigation. Case law abounds on these two highly fact-sensitive questions.

Ultimately, if the trigger point for neither legal advice privilege nor litigation privilege is reached, materials generated during an investigation will be susceptible to disclosure in any subsequent litigation. Being clear from the outset about whether privilege is available and, if it is not, being mindful of that fact when generating materials in the course of the investigation is therefore key to managing litigation risk.

3.1.2 LIMITED WAIVER OF PRIVILEGE

Where privilege does apply to materials generated during an investigation, a subsidiary question to consider is whether to onward share those materials with third parties. English law recognises the concept of a limited waiver of privilege. This makes it possible to waive privilege in a given set of materials as against specific third parties without waiving privilege in those materials as against the rest of the world, provided that the third party keeps the shared materials confidential. In addition, it is prudent to specify to the third party the limited purpose for which the materials are being shared with it.

The question of sharing privileged materials most often arises where a regulator has an interest in the outcome of a client's internal investigation,[32] and the client wishes voluntarily to share the privileged output of the investigation even if it is not compelled to do so, such as in the interests of openness and cooperation, or to demonstrate to the regulator that a thorough internal investigation has been conducted. That same document, however, may prejudice the client's position in any related litigation.

The protection from providing privileged materials on a limited waiver basis only extends so far, as regulators may not be prepared to agree to tie their hands as regards the use to which they will put those materials, and in particular may not be prepared to agree to keep them confidential. For example, although the FCA strongly encourages regulated firms voluntarily to share with it the privileged materials generated during their own internal investigations on a limited waiver basis, it 'cannot accept any condition or stipulation which would purport to restrict its ability to use the information in the exercise of [its] statutory functions'.[33]

This means that while it may have significant advantages, voluntarily sharing privileged materials with a regulator on a limited waiver basis will invariably entail some risk that the regulator onward shares those materials such that privilege is ultimately lost as against the wider world; for example, a regulator may share privileged materials with a regulator in another jurisdiction that does not recognise the English concept of a limited waiver of privilege, or reference those materials in a final public enforcement decision. Balancing the rewards of sharing privileged information with a regulator against these risks is ultimately a decision to be taken by clients on a case-by-case basis.

3.2 DISCLOSURE

Parties to civil litigation in the United Kingdom are typically subject to a broad obligation to disclose all documents within their control that are relevant to the issues in dispute, including documents that contradict or materially damage their case, or support the case of an opposing party.[34] Accordingly, documents generated as a result of any internal or regulatory investigation are, if relevant and not privileged, likely to be caught by this broad disclosure obligation in any subsequent litigation. Disclosed documents can be put to use in the litigation and can potentially also, through that process, become a matter of public record and obtainable by other parties considering further litigation against the corporate.

Such an outcome is illustrated by the decision in *Omers Administration Corporation & Ors v. Tesco plc*.[35] During an SFO investigation, the SFO provided Tesco with certain documents that the SFO had obtained from third parties, as well as transcripts of SFO interviews with third parties. Tesco was subsequently sued by several of its shareholders in relation to the conduct that was the subject of the DPA. The court held that the materials Tesco had obtained from the SFO were relevant to the shareholder litigation and therefore disclosable within it, notwithstanding that the materials had originally been obtained by the SFO from third parties under compulsion, on a confidential basis, and for the purpose of the criminal investigation into Tesco's conduct only. The need to ensure that the subsequent litigation was dealt with fairly essentially trumped any public or private interest in maintaining confidentiality in the materials, although the court did put certain additional safeguards in place to try to ensure that confidentiality was maintained.

In many circumstances, little can be done by clients to mitigate disclosure risk, beyond being aware that it may materialise and being ready to deal with it should it arise; however, there are certain situations where sensible document management can reduce the risk of materials becoming disclosable either to a regulator or in subsequent litigation. Where an investigation is under way that has a cross-border element or involves multiple entities within a group structure, it is advisable to consider the implications of moving relevant materials from one jurisdiction to another, or between entities within a group, before doing so.

There are often good reasons to be cautious in this area in any event, including local law restrictions on transfer or data protection or confidentiality concerns; however, it may also be the case that retaining materials in their original jurisdiction, and outside the United Kingdom, assists in protecting them from disclosure to regulators and in any subsequent litigation. In *R (on the application of KBR, Inc) v. Director of the SFO*,[36] for example, the Supreme Court held that a US company was not required to comply with an SFO notice requiring it to produce materials held by it in the United States on the basis that the statute underpinning the SFO's information-gathering powers did not have sufficient extraterritorial effect to be used in this manner.

Nevertheless, a failure to transfer documents into the jurisdiction absent good reason (including the aforementioned local law restrictions or data protection or confidentiality concerns) may damage regulatory relationships, even where no power of compulsion on the part of the regulator exists. A regulator unable to obtain materials from the requestee directly may still be able to obtain them indirectly via a local regulator or other appropriate authority.

3.3 RELIANCE ON REGULATORY FINDINGS

Findings in regulatory proceedings usually culminate in a published decision setting out the nature and scope of the wrongdoing by the defendant. Claimants may attempt to use findings of fact or liability against a corporate, be it in settled or contested regulatory proceedings, to strengthen their position in related litigation. Many factors will be in play for a client when deciding whether to settle regulatory proceedings, and litigation risk may not be the main, or even a determinative, driver for the decision;[37] nevertheless, it is important for clients to bear in mind the position outlined below regarding the admissibility of regulatory findings when considering the implications for any parallel litigation.

Published regulatory decisions will alert potential claimants to the possibility of bringing claims based on wrongdoing of which they were not already aware and assist them in formulating those claims in the strongest possible way (although if the regulatory investigation itself has been publicly announced before the settlement, putative claimants may already have been alerted to the possibility of claims).

3.3.1 REGULATORY FINDINGS IN THE CIVIL CONTEXT

Outside competition cases, regulatory decisions in the civil context have no determinative effect in related proceedings (i.e., a regulatory finding of wrongdoing will not absolve the claimant of having to prove wrongdoing before the court). The starting point under the rule in *Hollington v. Hewthorn*[38] is that, absent the operation of estoppel, findings of fact by earlier tribunals are inadmissible in subsequent civil litigation because they constitute opinion evidence, and decisions in the latter forum should be made only by the judge appointed to hear it.[39]

Nevertheless, a claimant may still attempt to rely on the contents of a regulatory decision, particularly any facts admitted within it, as hearsay evidence. Further, a decision following settlement may also have some optical effect in the sense that it will set the tone with the court in subsequent civil litigation.

Different rules apply to competition law claims.[40] Claimants can rely on decisions of the CMA[41] and, in some circumstances, decisions of the Commission,[42] as a basis for a finding of liability, leaving open only questions of causation and loss. Further, in *Ab Volvo (Publ) & Ors v. Ryder Limited & Ors*,[43] the Court of Appeal upheld a decision of the CAT that, except where limited exceptions apply (e.g., where a party relies on new evidence that it could not reasonably have accessed at the time of the investigation), it would constitute an abuse of process for a defendant to deny or 'not admit' facts recorded in a settlement decision of the Commission in subsequent follow-on litigation.

3.3.2 REGULATORY FINDINGS IN THE CRIMINAL CONTEXT

The position with regard to regulatory findings in the criminal context is again different. Under section 11 of the Civil Evidence Act 1968, UK (but not foreign) criminal convictions are admissible as evidence in civil litigation that an offence has been committed. This does

not technically prevent defendants from arguing otherwise but they will have to overcome an extremely high bar.

While a criminal investigation cannot be 'settled', a corporate defendant can bring it to an early conclusion by either pleading guilty or entering into a DPA. A key consideration is that a DPA will be accompanied by an agreed – and public – detailed statement of facts pertaining to the underlying misconduct and, as such, could potentially be utilised as hearsay evidence by claimants in related civil proceedings.

3.3.3 CONSIDERATIONS WHEN SETTLING REGULATORY OR CRIMINAL INVESTIGATIONS

To mitigate the risks arising in related litigation, clients will need to consider very carefully the scope and terms of any regulatory settlement or deferred prosecution agreement they propose to sign up to and, critically, to negotiate the wording of any published decision to the extent possible. This typically involves seeking to narrow the scope of any agreed or admitted findings of fact and liability as much as possible (e.g., to only those that are truly relevant to the regulatory investigation).

One of the advantages of participating in, for example, the FCA settlement process is that it will generally afford at least some opportunity for the settling party to negotiate the wording of the published final notice. That said, there will be limits on the client's ability to negotiate in the context of admitted wrongdoing, and this will be particularly so in circumstances where the client is seeking to obtain a DPA, which will be predicated on detailed disclosure of relevant facts.[44]

3.4 STAY OF CIVIL LITIGATION

If a civil claim has been commenced while a regulatory investigation is under way, clients may wish to seek a stay of the litigation pending conclusion of the investigation; however, stays are not granted lightly by the courts. Section 49(3) of the Senior Courts Act 1981 sets out the inherent jurisdiction of the High Court and the Court of Appeal to stay any proceedings before them where they think fit to do so, either of their own motion or on the application of any person.[45]

Despite the broad scope of the courts' powers in this area, case law fetters the circumstances in which stays are likely to be obtained. In the context of concurrent criminal proceedings and civil litigation, the power to grant a stay of the latter pending the conclusion of the former will only be exercised 'with great care' and 'where there is a real risk of prejudice which may lead to injustice'.[46] The court's discretion to order a stay 'has to be exercised by reference to the competing considerations between the parties . . . a claimant has a right to have its civil claim decided; the burden lies on a defendant to show why that right should be delayed'.[47] If procedural safeguards falling short of a stay can allay concerns that the civil litigation may be affected by allowing the civil litigation to proceed,[48] a court may take that route instead.[49] Where the related regulatory investigation is civil rather than criminal in nature, the difficulties in obtaining a stay of related litigation are likely to be exacerbated.[50]

3.5 OTHER PRACTICAL CONSIDERATIONS

3.5.1 WITNESSES

Obtaining witness evidence across parallel proceedings can present unique challenges,[51] as in the following examples:

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Where witnesses are required to give an account of the relevant events in both regulatory proceedings and related civil litigation, there is the risk that any prior inconsistent evidence can be adduced as hearsay to undermine their credibility and the position of the corporate defendant seeking to rely on the witness evidence.

- There are differences in the approach to witness evidence in criminal and civil proceedings that may affect how clients are able to procure evidence to support their case in related civil litigation. For example, if a witness gives evidence in an SFO investigation, in most circumstances, the SFO will be reluctant to share that evidence with the corporate for the purposes of related civil litigation.
- There may be concerns regarding self-incriminating evidence from witnesses. While the evidence of individuals compelled to attend regulatory interviews (e.g., by the SFO or the FCA) is not generally admissible as evidence against the interviewee in criminal proceedings, this position does not apply in respect of evidence procured during purely internal investigations. Where there is a risk of self-incrimination, clients will need to balance the impact of this risk materialising against the necessity of the evidence to progress their investigation. In any related civil proceedings, witnesses may refuse to give evidence by asserting privilege[52] against self-incrimination, thereby leaving the client without potentially relevant evidence to draw on (and exposing it to adverse inferences being drawn by the court).

In the employment context, particularly careful consideration must be given to the treatment of any witness who may be either the whistleblower or the subject of an investigation:[53]

- In the case of whistleblowers, once someone has blown the whistle, they are protected from dismissal or detrimental treatment if the dismissal or detrimental treatment is linked to them having blown the whistle. This protection extends to all aspects of their employment; for example, particularly disgruntled employees who have blown the whistle may seek to allege that their manager is subsequently treating them differently and link this to the whistleblowing. This could be something as simple as asking them to sit elsewhere or report to someone else. Employers should be aware, therefore, that the way a whistleblower is subsequently treated must be handled carefully to mitigate risks in existing or future litigation and avoid crystallising detriment claims (which can be brought while an employee is still employed).
- In terms of employees who are the subject of the investigation,[54] consideration must be given to treating them fairly, even though they are under scrutiny, as not doing so may also create or increase litigation risks. Knee-jerk reactions, such as immediate suspension without good reason (balanced against any expectations from any regulators in this regard), changes to their role without justification, overly aggressive interview tactics or more generally proceeding from a place where there is an assumption of wrongdoing may crystallise discrimination, whistleblowing detriment or unfair dismissal claims (including constructive unfair dismissal, whereby the employee resigns because of the employer's treatment of them and that resignation is seen as a dismissal by the employer for the purposes of employment law).

3.5.2 PUBLICITY AND CONFIDENTIALITY

Publicity surrounding matters under investigation is usually unwelcome and can have a detrimental effect on the process (if not the outcome) and create reputational risk for clients.

It can also prompt potential claimants to explore litigation based on or relating to the matters under investigation.

Clients must develop an effective strategy for managing the sharing of salient information with relevant stakeholders, while bearing in mind any reporting or disclosure requirements (e.g., by listed companies to publicly disclose information regarding investigations that may be considered price-sensitive). Where possible, the number of people privy to sensitive information regarding the process and outcome of the investigation should be limited to a need-to-know basis to reduce the risk of leaks.

4 CONCLUSION

Parallel proceedings can give rise to a whole host of complex issues that need to be carefully considered throughout each stage of a matter. It is essential that individuals within the corporate that are managing the investigation and any related civil litigation coordinate closely to consider how the legal, regulatory and procedural issues within each set of proceedings affect the other. The solution for resolving any tensions is rarely clear-cut. Developing a coherent strategy to manage any challenges is likely to entail a delicate balancing exercise of the client's objectives and priorities.

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ENDNOTES

[1] Questions remain as to whether the growth of collective proceedings will be curbed in light of the Supreme Court's decision regarding the enforceability of litigation funding agreements in R (on the application of PACCAR Inc & Ors v. Competition Appeal Tribunal & Ors [2023] UKSC 28.

[2] There are various procedural mechanisms for bringing collective claims in England and Wales, including (1) the naming of large numbers of claimants in a single Part 7 claim form, (2) the collective proceedings order regime established by the Consumer Rights Act 2015 (applicable only to competition law claims), (3) representative actions under Civil Procedure Rule (CPR) 19.8 and (4) group litigation orders under CPR 19.22.

[3] For example, claims under the Financial Services and Markets Act 2000 (FSMA) were brought by groups of Tesco's shareholders after Tesco accepted responsibility for false accounting practices in a deferred prosecution agreement with the Serious Fraud Office (SFO) in April 2017 and was subject to a Financial Conduct Authority (FCA) final notice in relation to the same conduct in March 2017. See guidance containing the deferred prosecution agreement with Tesco and its accompanying statement of facts, judgment and details of compliance, published by the SFO on 10 Apr. 2020, https://www.gov.uk/government/publications/sfo-deferred-prosecution-agreement-with-tesco; FCA Final Notice to Tesco plc and Tesco Stores Limited (28 Mar. 2017).

[4] Section 90 of the FSMA applies to prospectuses and listing particulars. Schedule 10A of the FSMA applies to all publications made by an issuer via 'recognised means' and is also available where there is a dishonest delay in publishing information.

[5] [2022] EWHC 1178 (Ch).

[6] *Allianz Funds Multi-Strategy Trust and Others v. Barclays Plc* [2024] EWCH 2710 (Ch) and *Various Claimants v. Standard Chartered PLC* [2025] EWHC 698 (Ch).

[7] FSMA, s.138D, subsections (3) and (5).

[8] Financial Services and Markets Act 2000 (Rights of Action) Regulations 2001, Regulation 3.

[9] FSMA, s.138D, subsections (1) and (2).

[10] In late 2024, the Supreme Court granted permission to appeal the Court of Appeal's decision in *FCA v. BlueCrest Capital Management (UK) LLP* [2024] EWCA Civ 1125, which reversed the Upper Tribunal's decision to restrict the FCA's statutory power to impose a redress requirement on a single firm in BlueCrest Capital Management v. FCA [2023] UKUT 00140 (TCC), such that the power was available only where the breach relied on has caused actionable loss to persons affected by it.

[11] Competition follow-on claims may be brought in the United Kingdom pursuant to decisions of the Competition and Markets Authority (CMA) or the European Commission, provided the Commission initiated its investigation or published its decision before 31 December 2020 (i.e., the end of the Brexit transition period).

[12] Case AT.39824, 19 July 2016.

[13] In Walter Hugh Merricks CBE v. Mastercard Incorporated and others [2021] CAT 28.

[14] *Justin Le Patourel v BT Group Plc and British Telecommunications Plc* [2024] CAT 76.

[15] *Mark McLaren Class Representative Limited v. MOL (Europe Africa) Ltd and Others* [2025] CAT 24.

[16] *Dr. Rachael Kent v. Apple Inc. and Apple Distribution International Ltd* [2022] CAT 28.

[17] *Justin Gutmann v. First MTR South Western Trains Limited and Another; Justin Gutmann v. London & South Eastern Railway Limited & Others; and Justin Gutmann v. Govia Thameslink Railway Limited & Others* [2023] CAT 23.

[18] Such settlements require approval from the Competition Appeal Tribunal (CAT) (Competition Act 1998, ss.49A and 49B; and CAT Rules 2015, Rules 94 to 97). The United Kingdom's first 'collective settlement approval order' was granted by the CAT on 6 December 2023.

[19] For example, an investigation by the Information Commissioner's Office in 2019 into a data breach of British Airways' security systems led to a £20 million fine being imposed on British Airways and collective proceedings being issued by a group of affected customers (which were subsequently settled). See also this guide's chapter on data protection from the UK perspective.

[20] Lloyd v. Google LLC [2021] UKSC 50.

[21] In CPR 19.8 (then CPR 19.6).

[22] See also this guide's chapter on environmental, social and governance (ESG) investigations.

[23] See the implementation of mandatory reporting aligned with the recommendations of the Task Force on Climate-Related Financial Disclosures in, for example, the Companies (Strategic Report) (Climate-related Financial Disclosure) Regulations 2022 (for certain kinds of large companies), the Limited Liability Partnerships (Climate-related Financial Disclosure) Regulations 2022 (for certain kinds of large limited liability partnerships), the FCA Listing Rules LR 9.8.6R(8) (for companies with a UK premium listing), LR 14.3.27R (for issuers of standard listed shares), and the FCA Environmental, Social and Governance sourcebook (for certain asset managers and asset owners). The expansion in mandatory reporting requirements is expected to lead to an increase in ESG litigation, including claims by investors under Schedule 10A of the FSMA. The case of ClientEarth v. Shell Plc & Ors [2023] EWHC 1137 (Ch) and [2023] EWHC 1897 (Ch) also demonstrates the appetite for shareholders to bring derivative actions that focus on alleged breach of statutory duties in relation to directors' management of ESG risk.

[24] The Advertising Standards Authority (ASA) has ruled environmental claims to be misleading where, among other things, advertisements were found to have omitted significant information about the overall environmental effects of a leading fossil fuel producer's business activities, and advertisements published by several leading airlines were found to have given a misleading impression of the advertiser's environmental impact. Other investigations by the ASA, such as one into the green claims of a state-owned oil giant, are continuing. See ASA, 'Environmental claims: General "Green" claims', 29 May 2024, www.asa.org.uk/advice-online/environmental-claims-general-green-claims.html and 'Rulings on environmental issues', https://www.asa.org.uk/general/climate-change-and-environmental-claims/rulings-on-environmental-issues.html.

[25] CMA, Press release, 'Green claims: CMA secures landmark changes from ASOS, Boohoo and Asda (27 Mar. 2024), https://www.gov.uk/government/news/green-claims-cma-secures-landmark-changes-from-asos-boohoo-and-asda.

[26] See Digital Markets, Competition and Consumers Act 2024 for details of the CMA's investigatory and enforcement powers. The FCA has also introduced a new 'anti-greenwashing' rule as part of the sustainability disclosure requirements regime; the rule came into force on 31 May 2024 and applies to all FCA-authorised firms.

[27] ClientEarth, Press release, 'UK financial regulator opens one climate investigation, lawyer-led FOI reveals', 20 June 2024, https://www.clientearth.org/latest/press-office/press-releases/uk-financial-regulator-opens-one-climate-investigation-lawyer-led-foi-reveals.

[28] Airbus, Press release, 'Airbus reaches agreements with French, U.K. and U.S. authorities' (31 Jan. 2020), www.airbus.com/en/newsroom/press-releases/2020-01-airbus-reaches-agreements-with-french-uk-and-us-authorities; 'Progressing with purpose', Airbus Annual Report 2022, www.airbus.com/sites/g/files/jlcbta136/files/2023-05/Airbus_SE_2022_Annual_Report.pdf.

[29] See also this guide's chapter on employee rights from the UK perspective.

[30] See also this guide's chapter on privilege from a UK perspective.

[31] The Court of Appeal provided some comfort in Al Sadeq v. Dechert LLP & ors [2024] EWCA Civ 28 [229] as to the applicability of legal advice privilege in an investigations context, but its limitations in respect of communications outside the lawyer–client group remain.

[32] Another example is where an auditor requests sight of the investigation report.

[33] FCA Handbook, 'The Enforcement Guide', para. EG 3.11.13.

[34] See also this guide's chapter on the production of information to authorities.

[35] [2019] EWHC 109 (Ch).

[36] [2021] UKSC 2.

[37] Not settling can risk a less advantageous regulatory outcome for the corporate.

[38] [1943] KB 587.

[39] A relatively recent application of the Hollington v. Hewthorn rule can be found in AXA France IARD SA & Anor v. Santander Cards UK Ltd & Anor [2022] EWHC 1776 (Comm). The High Court determined that to admit evidence of the findings of fact of another person, regardless of how distinguished or how thorough and competent their examination of the issues may have been, risks the decision being made, at least in part, on evidence other than the evidence that the trial judge has heard and in reliance on the opinion of someone who is neither the relevant decision maker nor an expert in any relevant discipline, of which decision-making is not one. The opinion of someone who is not the trial judge, therefore, as a matter of law, is irrelevant and not one to which they ought to have regard.

[40] In Consumers' Association v. Qualcomm Incorporated [2023] CAT 9, the CAT held that it was not bound by the Hollington v. Hewthorn rule, although, in that instance, it nevertheless adopted the same principles and ruled in favour of a strike-out application in relation to various references to findings in judgments and decisions of foreign courts and regulators.

[41] Pursuant to ss.58 and 58A of the Competition Act 1998, decisions and findings of fact by the CMA are binding on English courts once the infringement decision becomes final.

[42] European Commission decisions made before 31 December 2020 are binding on English courts. Post-Brexit, courts 'may have regard' to decisions made after that date.

[43] [2020] EWCA Civ 1475.

[44] See also this guide's chapter on the production of information to authorities.

[45] This is reflected in the case management power conferred on the courts under CPR 3.1(2)(f) to stay the whole or part of any proceedings either generally or until a specified day or event.

[46] R v. Panel on Takeovers and Mergers ex parte Fayed [1992] BCC 524.

[47] Akciné Bendrové Bankas Snoras v. Antonov & Anor [2013] EWHC 131 (Comm) (Bankas Snoras v. Antonov & Anor), citing Panton v. Financial Institutions Services Limited [2003] UKPC 86.

[48] Such as imposing additional confidentiality restrictions on materials shared or generated in the litigation.

[49] Bankas Snoras v. Antonov & Anor.

[50] See the comments of Gabriel Moss QC (sitting as a deputy High Court judge) at para. 139 of Polonskiy v. Alexander Dobrovinsky & Partners LLP & Ors [2016] EWHC 1114 (Ch).

[51] See also this guide's chapter on witness interviews in internal investigations from the UK perspective.

[52] See also this guide's chapter on privilege from the UK perspective.

[53] See also this guide's chapter on whistleblowers from the UK perspective.

[54] See also this guide's chapter on employee rights from the UK perspective.

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