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# 3 KEY DEVELOPMENTS

**June 2022:** This month's edition we have articles from David McIlroy, Iain Shipley, Jon Lester and Michael Phillis. This article will discuss Greenwashing, Crypto-related deal triggers and the Civil Justice Counsel Working Group.

## Does Pollution Pay? It might do unless we develop legal remedies for greenwashing

There has recently been an extraordinary surge in products and services labelling themselves as "green". From rebranded energy companies to car manufacturers and logistics companies, everyone appears to be jumping on the green bandwagon.

But how do customers know who is really green and who is not? And, if one catches a business faking their green credentials, what can one do to hold them legally accountable?

There is a growing concern about "greenwashing", the practice of making out that one's business is more environmentally friendly than it actually is. At its extreme, greenwashing involves fake investments, such as the Brazilian forestry scheme set up by two directors who were sentenced last week to 11 years in prison for fraud. Earlier this month, the chief executive of DWS Group, Deutsche Bank's asset management business, resigned after German police seized documents from its offices in connection with an investigation into allegations that it had misrepresented its investments as eco-friendly.

But what action can investors take in the civil courts? Some protection against greenwashing is offered by well-established claims for breach of contract, negligent or fraudulent misrepresentation, and in some cases consumer protection legislation-based remedies.

However, there are three fundamental difficulties with most of these claims when applied in this context.

The first is the lack of clarity that still plagues many green terms. Before you can prove that a description such as "eco friendly" or "made from recycled materials" or "working towards net zero" is false, you first need to prove what exactly a reasonable person would have understood that description to mean in context. Until the regulators step in and define those terms, that is not always an easy task. It is even more complicated where a company avoids making specific claims about its products, and merely uses creative branding to claim, in a very general sense, its ethics and processes are built on the values of sustainability.

The second is that most private law remedies require a claimant to prove individual loss before a court will intervene. This is relatively sensible for personal injury or defamation claims, as it keeps cases with no real significance from clogging up the court system. But it doesn't really work in environmental cases, which are "tragedy of the commons" situations, where the true scale of the loss is only understood when the effect on society as a whole is taken into account.

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The third problem is similar: most private law remedies are aimed at compensating the individual claimant for the loss that they have suffered. But a company prepared to damage the environment may well take the view that it can maximise its profits by continuing its dirty practices if it only has to compensate the small subset of individuals who claim, and only for their individual loss.

Better regulation is part of the answer, but regulators are under-resourced, over-stretched, and almost always behind the curve. Action by investors and others prepared to be green champions is going to be needed, but such green knights should beware. It will require a great deal of legal creativity to persuade the courts that innovative environmental claims brought by individuals should be taken seriously – along with appropriate remedies – to ensure that the pollution does not pay.

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## Will we see more disputes over crypto-related deal triggers?

Clauses which make certain conditions a trigger for immediate or optional termination of a merger or corporate transaction (Material Adverse Effect or "MAE" clauses) are a common feature of disputes over failed deals and mergers.

The leading case, *WEX v Travelport* [2020] EWHC 2670 (Comm), dealt with a question arising out of the effect of travel restrictions during the Covid-19 pandemic on payment processing in the context of a finance business which dealt with payments primarily in the travel industry. Mrs Justice Cockerill confirmed that there are no special rules of construction or requirements for MAEs, rejecting the suggestion of Travelport and another party that the commercial purpose of the MAE clause in that cause picked up a more restrictive meaning as may have applied in US authorities or commentary. In particular, questions of the significance of a material adverse effect would be governed by the meaning of the contract, and not a starting point of restrictive reading or *contra proferentem*.

Earlier this year, Bloomberg Law reported an increasing trend for searchable precedent M&A agreements to include terms relating to cryptocurrency and digital assets.[1]

Of particular interest in this respect are those which include MAE carve-outs which would permit the buyer to withdraw from a

[1] *Analysis: Crypto Drafting Trends Are Emerging in M&A Agreements* (17 February 2022)

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transaction if certain conditions were met. For example, one clause extracted by Bloomberg included each of the following:

> *"(xi) any change in the price or relative value of any digital currency or cryptocurrency, or any other blockchain-based tokens or assets, including Bitcoin or EOS; (xii) any change in existence or legality of any digital currency or cryptocurrency, or any other blockchain-based token or asset, or any halt or suspension in trading of any such digital currency or cryptocurrency on any exchange, in each case including Bitcoin or EOS (except that this clause (xii) shall not exclude any changes in existence, public availability, legality, or trading volume of any digital currency or cryptocurrency, or any other blockchain-based token or asset, or any halt or suspension in trading of any such digital currency or cryptocurrency on any exchange, in each case including Bitcoin or EOS, which, reasonably foreseeably result from actions taken by the Target Companies)"*

Taking this clause, the ordinary rules of interpretation would ask whether it was within the natural meaning of the contract and the intention of the parties that the Buyer effectively be given an option to exit at will. The consequences of this, which are of course case-specific and tend to be fought hard between parties, would effectively be the entire value of the given deal.

Given the recent tumult in the crypto markets and relatively low confidence in the space, two kinds of dispute are immediately foreseeable: contractual disputes which test the validity and scope of MAE clauses, and claims against third parties (such as an exchange which through some difficulty in breach of its terms of service causes a trigger event.

Much of the focus on current or upcoming crypto litigation and regulation has been on the role of promoters in misrepresenting the nature of investments, or the poor practices of exchanges vis-à-vis the value of cryptocurrency or assets as such. Less attention has been paid to the effects of the crypto space operating like a proper market with secondary transactions, which track crypto trading but may have a significantly longer tail, especially when one considers onward effects in the VC space.

It is also foreseeable that where MAE clauses are drawn so broadly that (e.g.) unusual trading in a closely-held token, such as a proprietary token of the target company, could be incited by the Buyer in an attempt to trigger its own MAE option, in which case there are likely to be considerable forensic questions.

It is trite that those acting for parties in crypto-related deals will need to have an eye to market factors and typically overseas law, however the possible onward effects of an action which causes an MAE clause to trigger may be entirely opaque to the actor. How courts approach questions of causation and remoteness in MAE clauses in the relatively volatile crypto is likely to be a point of considerable interest in future.

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## Civil Justice Council Costs Working Group begins consultation

A Civil Justice Council (CJC) Working Group has now begun a consultation on costs in civil proceedings.

A consultation paper released in June 2022 seeks feedback on a number of issues falling under four categories: (1) costs budgeting (2) guideline hourly rates (3) costs under pre-action protocols/portals and the (4) the consequences of the extension of fixed recoverable costs.

As the consultation itself recounts, Sir Geoffrey Vos, Master of the Rolls, asked the CJC to "take a strategic and holistic look at costs, particularly given the ongoing transformation of civil justice into a digital justice system (see Lord Justice Birss' speech to the Online Dispute Resolution Forum of 03 May 2022)". This article looks at the first two topics of costs budgets and guideline hourly rates.

The introduction of the Cost Budgeting regime in April 2013, along with the redefinition of the Overriding Objective to include dealing with cases "at proportionate cost", represented one of the biggest changes to civil litigation since the CPR themselves. As the CJC acknowledges, the Costs Budgeting regime was and is not without its detractors. To be sure, the early days were filled with uncertainty about how and on what basis the budget should be prepared and how a Judge should approach an assessment of a party's budget. The youngest cohort of litigators have never known anything different but those of a certain age will remember the anarchy of a time before Precedent Rs, before the guidance annexed to Practice Direction 3E, before years of case law had amassed, and before successive amendments to Practice Direction 3E had all brought a sense of relative clarity. Added to this was the terror of the catastrophic sanction imposed for failing to file a budget when required.

The message from Lord Justice Jackson was that growing pains were to be expected and that costs budgeting might be a difficult burden for a time, but once practitioners and the judiciary had got the hang of it, it would prove an invaluable tool in the efficient management of civil litigation, but it would take time.

As we near the 10th anniversary of the implementation of the regime, time has been taken, and the CJC is taking stock on whether costs budgeting has delivered on its promises. Respondents to the consultation are invited to give their views on the following questions: (1) is costs budgeting useful? (2) what if any changes should be made to the existing regime? (3) should costs budgeting be abandoned? (4) if costs budgeting is retained, should it be on a "default on" or "default off" basis? and (5) for cases that continue within the costs budgeting regime, are there any high-level changes to the procedural requirements or general approach that should be made?

No doubt forceful arguments can and will be made for both yes and no answers to these questions.

The familiar Guideline hourly rates (GHRs) for solicitors are used as a starting point in assessments of costs inter-partes and were finally updated just last year. So, "the task of this Working Group is not a review of the GHRs themselves. Rather it is to consider two broad questions. First, what is the purpose

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and effect of GHRs in the current interlocking landscape; and second, if there is a place for GHRs in the future, what is the right approach to reviewing GHRs over time".

The questions for the consultation are (1) what is or should be the purpose of GHRs? (2) do or should GHRs have a broader role than their current role as a starting point in costs assessments? (3) what would be the wider impact of abandoning GHRs? (4) should GHRs be adjusted over time and if so how? (5) are there alternatives to the current GHR methodology?

GHRs are particularly relevant when the Court is assessing inter-partes costs which are not covered by an effective budget, such as cases where the budgeting regime does not apply at all or interlocutory application hearings either before budgets are filed or which are not accounted for in the budget. In those cases, the GHRs act as a guide to what a reasonable hourly rate is for the receiving party to pay, having regard to the type and location of the solicitor they have instructed.

A Judge will often use the applicable guideline hourly rate instead of the rate actually paid by the receiving party to assess costs. But why should the receiving party have his costs reduced in this way when the costs budgeting regime by contrast deliberately avoids any assessment of hourly rates in favour assessing whether the total cost is reasonable and proportionate in the round? What justifies there being two different approaches to reasonableness and proportionality? And how often should the GHRs be reviewed to ensure they are not out-of-touch with the actual market? Answers may be forthcoming.

Responses to the consultation are due by 12:00pm on 30 September 2022.

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