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WHITE PAPER

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From Aspiration to Execution—ESG Legal Risks in the UK Real Estate Sector

ESG issues are front and centre in many sectors and many boardrooms. The UK real estate sector is no exception. Unsurprisingly, the principal focus has been on the "E", with the environmental aspects of developing and operating buildings in the United Kingdom being the most prominent. That is not to suggest that companies and investors are unconcerned by social or governance issues in the sector, but there has been much more written on the environmental impacts of the built environment. However, litigation risks, often resulting from the gap between publicly announced aspirations and actual achievements, are as relevant to the UK real estate sector as in many other sectors, such as fossil fuels or chemicals, which tend to attract more attention.

This *White Paper* explores recent legal challenges to companies based on gaps between aspirations and achievements and applies them to the UK real estate sector. It also considers environmental and other ESG risks (and opportunities) in the UK real estate sector. As companies formulate their own aspirations and plans for the future, they should keep these issues in mind.

FERTILE GROUND FOR LITIGATION: THE GAP BETWEEN ASPIRATION AND EXECUTION

The lessons of broader climate change litigation are evident. Whether based on alleged damage to the environment or claims of "greenwashing", novel legal theories have been deployed to pressurise, challenge and seek redress from governments and, more recently, businesses. First to be targeted were entities from the oil and gas sector, but now we are seeing claims being brought against companies in various sectors such as pension funds, banks, automotive groups, consumer groups and chemical groups. The UK real estate sector is not immune and may well be next.

Where is the greatest risk for those involved in the UK real estate sector? It is probably not in the direct climate change claims faced by fossil fuel businesses elsewhere. But it may well emerge as a result of the often well-intentioned, and well-publicised, aims, aspirations or promises made by the real estate sector around sustainability.

There is a clear and, for many, long-overdue focus on sustainability within the wider economy and in the real estate sector. It is not as if environmental considerations are new to the real estate world—environmental impact assessments have been a feature of new developments in the United Kingdom since the late 1980s, for example, and, before that, building regulations have included limits on thermal energy performance since the 1960s. However, there is now an unprecedented level of attention on sustainability. Whether from regulators, third-party investors, consumers, tenants, shareholders or from within boardrooms, the emphasis on sustainability is everywhere. But with ESG litigation growing in many other jurisdictions, it is most definitely a case of "mind the gap"—any delta between words and deeds presents risk for those involved in the UK real estate sector.

So why does it matter if a company does not adhere to its own public ESG commitments? For companies listed in the United Kingdom, a good demonstration of this risk is the recent case of *Autonomy and others v Lynch and another* [2022] EWHC 1178. This involved a claim against two former executives indirectly made under section 90A of the United Kingdom's Financial Services and Markets Act 2000 ("FSMA"). This provision provides that, in certain situations, an issuer of securities is liable to pay compensation to an investor if they relied on published information containing untrue or misleading statements. There is no exclusion for ESG statements. The case was the first time the English High Court had considered this type of claim at a full trial. Whilst the case was not a direct ESG claim by shareholders (it was a post-closing M&A dispute brought by the relevant company itself), it illustrates the mechanism that shareholders could potentially use to seek redress for inaccurate ESG disclosures. Section 90 of the same Act, the sister provision to section 90A which applies to listing particulars, may also be used by such claimants to bring a cause of action. A detailed discussion on the requirements of FSMA is beyond the scope of this *White Paper*, but listed companies should take note. ESG litigation is not, though, restricted to just listed entities in the United Kingdom, as we explore further below.

The Gap Used as a Challenge to the Board

There have been two recent, and notable, ESG cases seeking to challenge boardrooms in the United Kingdom. In the event, neither was granted permission to proceed (though one case may still be appealed). Both serve as examples of the types of claims that may be brought against a board, and of the significant challenges claimants (or groups of claimants) will have to overcome in the United Kingdom to successfully make them.

The first case, filed in 2021, is *McGaughey and Others v Universities Superannuation Scheme Limited (USS) and Others*, in which a group of individuals sought permission from the court to bring an action against the board of a pension scheme for, amongst other allegations, a failure on the part of the directors to create a credible plan for disinvestment from fossil fuel-related asset classes.

In a judgement handed down on 24 May 2022, the High Court refused permission for the claim against USS to proceed on the basis that the claimants had not demonstrated (as an evidential matter) that USS has suffered any immediate financial loss as a result of the alleged failure to adopt an adequate plan for long-term divestment of investment in fossil fuels. The Court believed there was also a failure to show that the claimants themselves had suffered loss (a further evidential point). The Court further found that USS's adopted ambition of net zero by 2050, with policies for working with the companies in which it invests in the meantime, was "well within the discretion of the Company in exercising its powers of investment". The decision to dismiss the application for permission to continue

this claim as a derivative action was upheld by the Court of Appeal on 21 July 2023 (*McGaughey & Ors v Universities Superannuation Scheme Limited* [2023] EWCA Civ 873).

The second case, filed in 2023, was *ClientEarth v Shell Plc and others*, in which an environmental charity with shares in Shell sought the permission of the English court to bring a derivative action against the Shell board of directors for breach of directors' duties, claiming that the board were fundamentally mismanaging the physical and transitional impacts of climate change. In judgments handed down on 12 May and 24 July 2023, the High Court refused permission for the claim against Shell to proceed. The Court found that ClientEarth had not demonstrated a *prima facie* case against Shell's directors. The subjective nature of directors' duties was stressed; it was for the directors themselves (acting in good faith) to decide how best to promote the success of the company for the benefit of its members, and to decide how much weight to give to the factors they are required by statute to consider. It was further found that the directors did not have a duty necessarily implied to have a plan in place to meet specific climate targets. ClientEarth have indicated that they intend to seek permission to appeal this decision.

While the claims against both USS and Shell were refused permission to advance, both the USS claim and the ClientEarth action are examples of the types of actions activist (or concerned) shareholders may seek to bring against a company's board. ClientEarth, in particular, has been vocal and open as to their legal strategy. Others may seek to follow it.

Such shareholder actions are not irrelevant to real estate operators. They are based, in part, on the codified duties of directors as set out in the Companies Act 2006, which applies to English real estate companies (special purposes vehicles or otherwise) just as much as they do to companies like Shell. Those duties include an obligation, in the context of the duty to promote the success of the company, to have regard to "the likely consequences of any decision in the long term" and "the impact of the company's operations on the community and the environment". With the permission of the court, shareholders are entitled to bring a claim on behalf of the company against a board of directors that breaches its duties. A director of a real estate company should consider the outcome of these judicial challenges with particular interest. The court's treatment of them is likely to be relevant to those operating in the real estate sector too.

The Risk for UK Real Estate Companies Is Not Just in the United Kingdom

The ESG disclosure landscape is changing rapidly, both in the European Union and in the United Kingdom. That creates group-wide risk for businesses of a kind which crosses borders. The EU Sustainable Finance Disclosure Regulation ("SFDR") which, amongst other things, determines how funds are classified in mandated disclosures, came into effect (in part) in March 2021. Whilst the SFDR has not been adopted into UK law post-Brexit, there are a number of ways in which it could be relevant to UK firms, either as a requirement (for example, where funds are marketed into the European Union under national private placement regimes) or for practical reasons (such as investor pressure to comply). There is also further regulation on the horizon in the United Kingdom, such as the Sustainability Disclosure Requirements the UK Government is presently considering.

Reporting aligned to the recommendation of the Task Force on Climate Related Financial Disclosures ("TCFD") adds to the burden of ESG reporting requirements and opens up new risks associated with accuracy of disclosures and the mitigation of physical and climate risks to corporate operations, including

real estate. In the United Kingdom, TCFD has gained traction as the UK government has committed to fully aligning climate-related reporting obligations with the TCFD regime. Therefore, it is expected that the UK regulators will, over time, require a combination of TCFD and the reporting requirements ultimately produced by the International Sustainability Standards Board. Currently, companies listed on the main market of the London Stock Exchange have been required to make TCFD-aligned reporting since January 2022 on a "comply or explain" basis. The TCFD disclosure requirement is being extended to additional companies (as well as large asset managers) over time. In addition, the outputs of the Transition Plan Taskforce, expected later in 2023, are likely to lead to more specific requirements for climate transition plans in the private sector, again increasing accountability for organisations to back up disclosures with action.

UK companies subject to reporting requirements in the United States will have additional, and sometimes varying, reporting obligations from the UK requirements. In March 2022, the U.S. Securities and Exchange Commission ("SEC") proposed rules that, if adopted as proposed, would require covered companies to provide specific climate-related information in their registration statements and periodic reports filed with or furnished to the SEC, including disclosures regarding direct (Scope 1), indirect (Scope 2) and, for certain companies (i.e., if material or if the company has set a related goal or target), up-and-downstream value chain (Scope 3) emissions. The SEC's proposed rules would depart from the SEC's historical regulation of SEC-reporting foreign private issuers (or "FPIs"), which has largely deferred to applicable home country rules and provided significant phase-in periods for FPIs, instead imposing specific disclosure obligations on foreign companies reporting in the United States.

Scope 3 emissions disclosure requirements under the SEC's proposed rules raise a number of issues for UK companies subject to reporting in the United States, including because: (i) such companies would be required to make a judgment call as to "materiality" under U.S. law that may not conform to other jurisdictions' legal frameworks; (ii) other frameworks and regulators may apply different, and potentially contradictory, emissions measurement and reporting standards; and (iii) UK companies are likely to face practical difficulties associated with accurately collecting information regarding their supply chain in accordance with the SEC proposed rules, since their third-party providers and other members of their value chain are less likely to be subject to U.S. securities laws and may not collect or report their own Scope 1 and 2 emissions data, necessary to calculate Scope 3 emissions.

Whilst not all underlying companies are subject to these regulations and requirements, they can create a waterfall effect, where a fund will look to the underlying companies and their assets (wherever based) in which it invests to help it meet the required characteristics. More directly, for companies with operations in the European Union, even if the corporate HQ is located elsewhere, new requirements are firmly on the horizon as part of the European Union's "Green Deal" package. These primarily take the form of the Corporate Sustainability Reporting Directive, or CSRD, set to phase in over the next several years (expanding the preexisting Non-Financial Reporting Directive to a materially greater number of large companies doing business in the European Union) and the Corporate Sustainability Due Diligence Directive ("CSD3D"), which will require in-scope companies to take certain steps, such as adopting a plan ensure that their business strategy is compatible with limiting global warming to 1.5°C in line with the Paris Agreement, adopting due diligence policies and taking more disruptive action such as ending contractual relationships where adverse impacts on the environment cannot be stopped or mitigated.

There is also a feedback loop for companies subject to both the EU and the SEC proposed rules, for example for a UK company with substantial continental European operations that also has listed securities or is a registered company in the United States. Upon being required to "adopt a plan" to align with the Paris Agreement under the CSD3D, such company would also in its U.S. filings (pursuant to the SEC's proposed rules) be required to provide significant disclosure regarding its plan, including the relevant metrics and targets used to identify and manage physical and transition risks.

These additional regulatory requirements will likely put increasing pressure on UK-based businesses to set out clearly their ESG policies and disclosures even if not caught directly. The CSD3D, for example, will (when in force) compel EU companies to seek contractual assurances from companies in their "value chain" (even if based outside of the European Union) that they will comply with the EU companies' code of conduct and due diligence policies. Walking the walk, though, is

different from talking the talk, and UK companies putting in place policies without appropriate oversight (or action) may create their own pitfalls.

The recent case of *Lungowe v Vedanta* is illustrative. This case saw the residents of a Zambian town bring a claim against the English parent of a Zambian mining subsidiary. That subsidiary owned a copper mine which allegedly polluted local water sources. That pollution, it was alleged, harmed the health and property of the residents of the nearby town. The Supreme Court in England and Wales recognised (at the jurisdiction stage) the *potential* for the parent company to owe a tortious duty of care in respect of environmental and/or human rights harms arising out of the activities of its overseas subsidiaries, based on the degree of supervision, control and intervention exercised by the parent company over those activities.

This case underlined the principle that under English law, a parent company *can* (in theory) be liable for a subsidiary's actions—in certain circumstances. In *Lungowe*, circumstances giving rise to a sufficiently arguable case (in the context of a jurisdiction challenge) that the parent company had assumed a duty of care to the claimants were found, in that (amongst other things):

- The parent had published a report titled "Embedding Sustainability" which stressed that: (i) the parent had oversight of its subsidiaries and (ii) directly referenced the environmental issues later to be the subject of the claim;
- The parent had established group-wide environmental control and sustainability standards which applied to each of its subsidiaries; and
- The parent had implemented training for the subsidiary's staff on implementation of environmental control and subsidiary standards.

While these policies were not the sole factors in the court's reasoning, the case established the principle that group-wide policies and interventionist management can mean that attempts to restrict liability to a subsidiary may be challenged. The case was not decided on the merits (it has since settled), and the English courts may well have more to say on the principle when they do consider the issues following a fully argued trial.

As matters stand, though, the principle behind the *Lungowe* case may well have application to the real estate sector. It is common practice for real estate assets to be owned by special purpose vehicles ("SPVs"). While often the motivation for this is driven by tax structuring and/or to facilitate future corporate transactions, SPVs have also allowed real estate operators to contain liability in respect of the ownership or control of an asset to the specific SPV that owns it.

To the extent the principle set out in *Lungowe* develops, business groups should be aware that parent companies *may* face claims arising out of the failures of their subsidiaries to abide by their group-wide policies. This does not mean parent companies should cease issuing policies on the environment, sustainability or governance (or any other related subject), as this is likely to be unacceptable to the public or their investors, but they should be wary of drafting a policy and then failing to implement it. Failures to ensure subsidiaries do abide by such policies may ultimately lead to liability in unexpected places.

ESG AND THE REAL ESTATE SECTOR

"Green" Buildings and "Green" Leases

Turning first to direct environmental considerations, the built environment has been said to account for around 25-30% of the United Kingdom's greenhouse gas emissions, and the real estate industry has a hugely significant role to play in efforts to tackle climate change. While new design and construction of commercial buildings is increasingly green, it is estimated that 80% of the building stock that will exist in 2050 has already been built. In this context, the role of owners and occupiers of commercial buildings, and the relationship between the same, will have a key role in the substantial carbon reductions required from the real estate sector.

Since the 1990s and 2000s, ESG strategies have become increasingly ambitious as the scale of the problem and the urgency of the need for a solution became apparent. Green leasing has been part of that trend. In 2013, Better Buildings Partnership, a collaboration of the United Kingdom's leading commercial property owners, updated their green lease toolkit to enable owners and occupiers of commercial buildings to work together to reduce the environmental impact of their

buildings. Likewise, the Chancery Lane Project ("TCLP"), a collaborative network of international lawyers, has created a glossary of model climate clauses that can be used for drafting climate-conscious and net-zero defined terms into contracts. This toolkit is currently under revision for a major update, slated for release in 2023; CBRE are contributing to this effort with a number of other industry partners.

The drive to use green leasing is, in part, a consequence of the continued demand and expectation from investors and occupiers for higher standards of sustainability and environmental performance within buildings, which has increased the use of certification schemes such as BREEAM, LEED certification or some other standard (the disclosure taxonomies referred to above may also bring pressure to bear on landlords to achieve these certifications). GRESB is a widely used ESG benchmark in the real estate investment industry, which assesses reporting entities on 14 aspects of sustainability. The use of green building certifications, energy consumption, and greenhouse gas emissions are among the highest weighted aspects in the assessment. GRESB aggregates performance data and benchmarks the participant's real estate portfolio against industry peers. The assessment also rewards improvement in energy and greenhouse gas performance and tracks net zero operation targets and construction projects. By providing a global platform for reporting and validating ESG performance, GRESB encourages asset managers to allocate capital expenditure to continually improve sustainability performance.

Change is also being driven by policy and development strategies at a city or regional level, such as The London Plan requiring all new major developments to be net-zero carbon in operation by design. This trajectory is set to continue as a focus on sustainability in the design, construction and use of buildings becomes the norm.

Traditionally, landlord and tenant relationships have often been adversarial and the subject of significant negotiation on both sides. However, common ground on ESG objectives offers an opportunity for a shift in that relationship (see box). A collaborative approach will be necessary to successfully navigate the implementation of green leasing.

Green Leases

One of the challenges to green leasing has been that often the first time anything "green" is proposed is at the final lease agreement stage. Landlords should preface in the head of terms, or ideally at the start of a negotiation, that the lease will contain agreements on maintaining a minimum EPC rating, collaborating on data sharing and improving the environmental performance of the building where possible. Sustainability imperatives should be embedded throughout each stage of a building's life cycle (construction, occupation, alteration, refurbishment, demolition), so a clear understanding and ambition is there from the start and consistent throughout. Which of these stages will be relevant to a "green lease" will depend on its term length.

Many traditional lease stakeholders can lack experience of key sustainability issues, and there is considerable scope to engage agents, solicitors, property and estates managers and asset managers. An effective green lease process needs to engage with all stakeholders and appropriately inform on best practices.

Long payback periods may be a barrier to making investment in sustainable technology, such as solar PV installation and insulation upgrades, which can have a payback period of around 10 years. There may also be a split incentive between landlord and tenant, where the tenant may receive the cost-saving benefit of the landlord's investment. Effective green leasing clauses can help overcome this challenge by aligning the costs and benefits of sustainable investments for both parties in an equitable way.

Another potentially key area of focus is dilapidations, where the traditional focus on tenant strip-out can be at odds with broader sustainability objectives. "Aatmay's Clause", developed by TCLP (TCLP name their clauses after children to remind users, they say, of the importance of proposed changes to future generations), encourages landlords and tenants to include sustainable and circular economy provisions in the repair, alteration, yielding up and decoration covenants in a lease, which requires landlords and tenants to prioritise the use of reclaimed, reused or recycled goods or materials wherever possible. Also from TCLP, "Rosie's Clause" stipulates that landlords must act reasonably in allowing alterations or improvements that will have a positive climate or environmental impact, which is also necessary to encourage a shift towards a more collaborative landlord–tenant relationship.

How Might ESG Impact on Landlords Specifically?

The efforts described above to reduce the environmental impact of the built environment have been accompanied by increasing regulation. The minimum energy efficiency standards that private rented properties in England and Wales must reach is one commonly cited example. CBRE has written about the challenges of achieving future MEES standards *here* and Jones Day has written previously in a broader EU context on some of the wider regulatory changes relevant to "green buildings" (see our *White Paper* on green buildings, responsible investing, ESG disclosure requirements and financial incentives). A detailed exploration of real estate regulation is beyond the scope of this *White Paper*, but we have set out below some comments on certain recent developments and perhaps less commonly considered issues.

One of those issues is that landlords may potentially find themselves in difficulty because of the actions of their tenants. Two recent cases illustrate this possibility.

The first is *R v Leonardo Viscomi*, a 2019 case, which saw a landlord prosecuted by a local authority for knowing or suspecting that his property was being used for criminal activity, despite taking no part in the criminal activity himself. The criminal activity in question, the sale of illicit tobacco and alcohol, was repeatedly brought to the attention of the landlord by Trading Standards. Despite these warnings, he continued to accept rent payments and took no action to prevent the criminal activity taking place. Also noteworthy is the 2018 case *Fouladi v Darout Ltd & Ors*, which stands for the proposition that a landlord can be liable for a tenant's nuisance if they have authorised or participated in the nuisance.

Taken together, these cases demonstrate that landlords can, in certain circumstances, be held to account by the courts for the actions of their tenants. This reasoning can readily be extended to landlords as the legal obligations connected to ESG issues increase. Consider, for example, the movement globally towards effective anti-modern slavery laws. With 18,000 victims of human trafficking identified in the United Kingdom alone last year, landlords should be aware that a failure to investigate trafficking or slavery concerns brought to their attention may present a risk of challenge. Equally, a tenant who fails to pay his workers minimum wage or a tenant who knowingly releases pollution into a river *could* give rise to a challenge against a landlord if it participated in these failings or took no action when informed of them.

Landlords should also give thought to their own supply chains. Section 54 of the Modern Slavery Act 2015 requires large commercial organisations with a global turnover above £36 million to publish a slavery and human trafficking statement in each financial year. Those statements must disclose what steps the organisation has taken to ensure that human trafficking is not taking place in any of its supply chains or business. While the current Modern Slavery Act lacks the ability to impose monetary penalties for failures, many large real estate businesses will be subject to this requirement and should comply with stated policies.

Other regulatory changes are on the horizon or have just arrived. There are a number recently introduced by the Building Safety Act 2022 that deserve particular mention. Building owners should be giving this Act close consideration; it represents probably the most significant regulatory change in the UK real estate sector for more than 40 years. It is relevant to both governance and social issues, compelling high-rise residential building owners to assess and prevent building safety risks, in particular the spread of fire or structural failure. Residents of tall buildings will rightly want to know that they are safe, being a requirement that does not lend itself to compromise, although real estate companies do face

competing demands to ensure buildings are also "green" as discussed above. See the box below for an example of such a conflict in the case of air conditioning gases. Another example is the use of wood in the structure of large buildings, which is naturally flammable, but which, encased and/or treated in an appropriate way, has been advanced by manufacturers as a safe way to increase a building's sustainability or reduce its carbon emissions. Building owners will need to carefully consider these issues.

Air conditioning has not changed substantially since it was invented at the turn of the 20th century. Few modern office buildings are without it, but it can have a material environmental impact. This impact comes not just from the significant energy consumed in cooling living and work spaces, food, data centres and freezers, but also from the hydrofluorocarbon, or HFC, refrigerants that most cooling units still use. These are (if released into the atmosphere) generally regarded as more potent than CO_2 as a greenhouse gas.

Potential alternatives include R32, propane, and CO_2 itself. Flammability concerns impact the uptake of propane—R32 and CO_2 are becoming increasingly common for commercial environments. CO_2 is ultra-low impact compared to typical refrigerants, and despite numerous challenges to its use in retrofits, looks to be becoming more feasible in many applications.

The point here is that landlords should give thought to the systems they use and their environmental impact. A sole focus on cost, and on meeting the bare minimum legal requirement, may prove short-sighted and, in the long run, expensive.

CONCLUSIONS

- ESG considerations are relevant to the discharge of UK companies' directors' duties. That applies to directors of real estate companies, including special purpose vehicles, as much as it applies to any other company.
- There is both growing pressure on and incentives for companies in the real estate sector to publicly set out how they propose to meet ESG challenges, be that for their messaging to the general public/their customers or to help investor funds meet desired SFDR classifications.
- Parent companies are not always immune from challenges from interested stakeholders just because they operate through subsidiaries, particularly in relation to failures to follow and/or implement published ESG strategies.
- The built environment accounts for around 30% of the United Kingdom's greenhouse gas emissions, and the real estate industry has a significant role to play in efforts to tackle climate change.
- "Green" lease clauses can help with these efforts. Early engagement by both landlords and tenants with these issues can help in finding common ground.
- The rise in ESG regulation increases risk for building owners, both in terms of direct regulation, but also for potential exposure to a tenant's breaches (where landlords are aware of them and do nothing to stop them).

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