Subject Matter of s.90/s.90A FSMA Claims

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Introduction

In a previous article, published here, we commented on the increase we expect to see in the number of claims being commenced in reliance on s.90 and s.90A[1] of the Financial Services and Markets Act 2000 ("FSMA"). In this article, we consider what we anticipate will be a broadening in the topics or issues for which claimants seek to hold companies liable using these provisions. In particular, we expect to see a growth in claims arising from the following areas:

- Greenwashing;
- Environmental, social and governance issues ("ESG");
- Bribery, corruption and compliance issues;
- Exposure to sanctions regulations; and
- Provisioning for risks in financial statements.

We discuss each of these areas in more detail below.

Greenwashing

The concept of greenwashing has become the subject of much debate in recent years and is generally understood to involve a company misrepresenting its environmentally friendly or "green" characteristics or credentials. For example, a company may falsely

[1] We refer to s.90A throughout for convenience, noting that much of the substance of s.90A now appears in Schedule 10A to FSMA.

convey the impression that its operations are environmentally friendly or falsely present its products as being environmentally sustainable.

There have not yet been any s.90 or s.90A claims on the basis of alleged greenwashing. However, we expect to see this changing as reporting requirements in respect of environmental and climate matters become more onerous, and investors become more focused on the green credentials of their investments.

The recent *Companies (Strategic Report) (Climate-related Financial Disclosure) Regulations 2022* have introduced amendments to the Companies Act 2006 requiring large and/or traded UK companies (including on AIM) to include sustainability-related information in their strategic reports. As we discussed in an earlier article here, those reports or other published statements by a company touting its green credentials could form the basis of a claim pursuant to s. 90A FSMA. Indeed, in the United States, there has already been federal securities class action litigation about statements as to the biodegradability of plastic-alternative products by the biopolymer manufacturer Danimer Scientific Inc.

ESG Issues

ESG issues also pose a likely topic of future claims because, like greenwashing, they are wrapped up in changing corporate disclosure requirements and increased investor focus. Aspects of ESG—such as modern slavery requirements and equalities legislation—carry with them the risk of regulatory investigations and fines and reputational damage which may give rise to securities claims in the future.

In a technical note published in December 2020 (TN/801.1 "Disclosures in relation to ESG matters, including climate change"), the FCA highlighted Article 6 of the UK Prospectus Regulation which provided that a prospectus for an IPO/listing must contain "*the necessary information which is material to an investor for making an informed assessment … of the issuer*". This may include, for example, company disclosures as to how it would meet the UK government's target of net-zero emissions by 2050.

Away from the "environmental" aspect of ESG, this may also extend to the reporting of "social" and "governance" obligations in areas like human rights, modern slavery, health and safety, diversity and inclusion, equal pay and stakeholder engagement to the extent that these are material to an investor making an informed assessment of the issuer. As such, the generally worded disclosure obligation under Article 6 of the UK Prospectus Regulation may provide a foothold for claimants to launch s.90 FSMA claims against issuers who fall short of appropriate disclosure in their prospectuses.

As is evident from the matters listed above, the scope of possible ESG issues is very broad. For example, courts in the United States are already seeing a rise in diversity and inclusion claims in which shareholders are alleging that proxy statements regarding a company's commitment to diversity and inclusion are misleading in light of the lack of visible diversity in company leadership. To date, these claims have typically been dismissed at an interlocutory stage, but the fact that they have been commenced at all shows a growth in this area.

ESG issues also bring into play the issues of group-wide policies and monitoring, which remain largely untested given the limited development of case law on ss. 90 and s.90A FSMA. Given the knowledge/intention element, particularly in s.90A, large factual investigations will become necessary to determine who knew what, and when, in future litigation. This is also an area which has obvious overlaps with claims in tort. Claimant firms are increasingly seeking to rely upon the existence of group-wide policies and public statements made in relation to the same in support of an argument that a parent company has assumed a duty to third parties who have suffered harm as a consequence of alleged breaches of those policies.

Bribery, Corruption and Compliance Issues

There are currently two s.90 and s.90A FSMA claims before the English courts on the basis of allegedly misleading or untrue statements about bribery and corruption.

Glencore

The Glencore proceedings concern allegedly untrue or misleading statements or omissions in Glencore's annual, half-yearly and other reports, and in listing particulars, about the prevalence of bribery, fraud and corruption and the consequences of those unlawful practices.

In the course of a number of investigations by regulators in jurisdictions including the United Kingdom, the United States, Brazil, Canada and Switzerland, Glencore and certain of its employees and subsidiaries allegedly admitted to what the claim form refers to as "unacceptable practices", including to charges of bribery. They entered into settlements and/or plea agreements in respect of that conduct.

The claim asserts that prior to the conclusion of the various investigations, Glencore issued two prospectuses that contained untrue or misleading statements regarding the conduct that had been the subject of the investigations and/or omitted information that was required to be included in the prospectuses.

In addition, the claimants allege that in other published information, such as annual reports, interim statements, trading updates and preliminary statements, Glencore made statements concerning its compliance with ESG-related industry standards and corporate governance rules which conveyed a misleading impression regarding Glencore's commitment to those standards and rules and the systems Glencore had in place for mitigating risk. Further, the claimants allege that the published information in question omitted or did not sufficiently disclose the misconduct which had been the subject of investigation.

Petrofac

In the Petrofac proceedings, the claims concern allegedly untrue or misleading statements or omissions regarding the existence of bribery and financial misconduct in respect of contracts pursued by Petrofac in the Middle East. Petrofac was the subject of an investigation in the United Kingdom by the Serious Fraud Office in respect of a number of these contracts, and on 1 October 2021 pleaded guilty to seven counts of failing to prevent bribery, contrary to the Bribery Act in respect of contracts secured between October 2011 and May 2017.

The claimants allege that prior to 1 October 2021, Petrofac had published information in a range of documents, including annual reports, interim statements, contract announcements, preliminary statements and other trading updates, and that the published information did not disclose, or did not adequately disclose: (i) the existence of the failures to prevent bribery; (ii) that Petrofac did not have adequate systems and processes in place to guard against the risk of bribery; and (iii) the true financial and business performance of Petrofac.

The claimants further alleged that the relevant published information contained statements which conveyed that no misconduct had taken place, that Petrofac had adequate systems and processes in place, and that Petrofac was unaware of the events of bribery.

Takeaways

Both the *Glencore* and *Petrofac* proceedings are notable in that the groups of claimants in each action include investment funds, sovereign wealth funds and pension funds—they are not proceedings commenced by a large group of individuals or by "activist" shareholders.

Both claims centre on similar issues—allegations that the defendant companies represented that they had adequate safeguards in place to mitigate the risk of bribery and corruption when in fact they did not.

These cases demonstrate the duality of potential liability for companies in respect of bribery, corruption and compliance issues. First, statements or omissions may be rendered untrue or misleading precisely because they fail to disclose bribery and corruption. Secondly, statements which expressly state that anti-bribery and corruption safeguards and policies are stringently followed could lead to claims if it turns out that that is not the case.

Exposure to Sanctions Regulations

As with issues concerning bribery and corruption above, we expect that market statements about a company's exposure to, and compliance with, sanctions regulations could lead to claims where non-compliance is later found.

Even if an issuer of securities is not a sanctioned entity, or related to a sanctioned entity, there are myriad ways in which the company's business may be, or become, exposed to sanctions risks. Examples include disruptions to supply chains, the inability to operate in specific jurisdictions and/or the loss of key clientele who have been put on sanctions lists. Given the frequent changes to sanctions lists, ensuring compliance and making adequate disclosures can be a large-scale, ongoing operation.

Again, there is a recent claim before the English courts dealing with this very issue—issued in early 2023 against Standard Chartered. The proceedings allege that in its annual and half yearly reports, and in listing particulars, Standard Chartered made untrue or misleading statements or omissions regarding having adequate systems for ensuring compliance with economic sanctions, anti-terrorist financing laws, detection of fraud and criminality and anti-bribery regulations. They further allege misleading or untrue statements and/or omissions in respect of Standard Chartered's lack of knowledge of any material noncompliance with relevant laws and regulations. As with the *Glencore* proceedings, the claimants pursuing the action are institutional investors—not individual shareholders.

Provisioning for Risk in Financial Statements

Aside from the quite specific examples cited above, it is possible that a failure to disclose general material risks may form the basis of future claims under s.90 and s.90A FSMA. For example, failing properly to disclose significant litigation risk which has the potential to result in a significant reputational or financial damage to the company could give rise to claims as creative claimants seek to take advantage of the limited guidance in this area.

Not all risks will be "bet the company", or existential, but those which could have a material effect on the value of the company, or a material effect on shareholders' investment decisions, will need to be considered carefully when it comes time to make any public disclosures. Likewise, companies will need to be particularly aware of making statements about the adequacy of any provisions they have set aside to cover these types of risks as those statements could themselves form the basis of a claim if it becomes apparent that they were untrue or misleading.

Conclusion

Although we expect to see a broader subject matter for claims under s.90 and s.90A, there remain some significant difficulties to claimants in establishing liability. We will be discussing these in a forthcoming update.

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Please do not hesitate to contact us with any questions.

Christopher Boyne
Partner, London
+44 20 7786 9194
cboyne@debevoise.com

Patrick Swain
Partner, London
+44 20 7786 9157
pswain@debevoise.com

Luke Duggan
Associate, London
+44 20 7786 9169
lduggan@debevoise.com

Emma Laurie-Rhodes
Associate, London
+44 20 7786 3027
elaurierhodes@debevoise.com

Darius Ng
Trainee Associate, London
+44 20 7786 9023
dng@debevoise.com

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