

Interview with Doug Bryden (partner and head of risk and operational regulatory) and Heather Gagen (partner, dispute resolution)

What are your backgrounds in terms of advising and acting for clients on ESG-related risks?

Doug Bryden (DB): I have advised clients in relation to a broad spectrum of risks for many years, from environmental to business ethics (including modern slavery and human rights) and on related governance and boardroom responses. The prevailing trend now is to view these operational, reputational and legal issues through the lens of 'ESG'. The consolidation of these risks under a single banner is proving extremely useful in both explaining those risks to boards as well as streamlining a stronger, better considered management response. On one hand my job as an 'ESG lawyer' is to help clients promote ESG awareness within a business and to ensure compliance with an ever-increasing range of ESG regulatory obligations. However, this needs to be carefully balanced against the threat of novel legal risks that ESG programmes and associated public disclosures create. Much of my practice and Heather's is focused on achieving outcomes which sensibly protect an organisation from such legal risks, without undermining the real opportunities and progress that better ESG management creates.

Heather Gagen (HG): As a litigator, I've spent a lot of my career acting for clients in relation to claims which engage some of the novel issues of liability that we increasingly see in relation to ESG-related risk. Like Doug, I've seen this play out in a variety of contexts, such as in claims relating to alleged environmental damage and human rights abuses. In the UK, as in some other jurisdictions, this often takes the form of novel tortious claims – albeit very often pushing at the boundaries of (or overstepping) established liability frameworks. Over recent years, one particular area of focus for me has been so-called 'parent company liability' claims. These typify the innovative and rapidly evolving ESG-related litigation environment which is developing in the UK. In addition to advising clients in relation to litigation risk, I also work closely with Doug in providing forward-looking advice to clients, so that businesses can have a positive impact in relation to ESG while being mindful of the evolving risk landscape. These two things are not mutually exclusive.

What are the key ways in which client demand in this area has changed or grown more sophisticated over the last few years?



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Doug Bryden, Travers Smith

DB: There are huge benefits and opportunities that come from an increased corporate focus on ESG, which – in the work that Heather and I do – we both fully acknowledge and support. That said, it is increasingly evident that businesses can come under scrutiny and even attack (often unfairly) for their ESG-related efforts. As the market and claimant law firms

become more sophisticated, clients in turn need a more holistic approach to their ESG and risk strategies. This includes, dare I say it, a need for lawyers to have a more central role in an organisation's ESG programme. Short-term marketing gains need to be balanced against medium-to-longer term legal risk.

Historically, risks which would now be seen as ESG-related were often most closely associated with particular sectors and/or businesses – for example, oil and gas and multinationals with operations in challenging environments. However, a much broader range of clients now have ESG at the top of their business priorities as they realise that they cannot inoculate themselves (through corporate or supply chain structuring) against reputational, commercial and/or legal liabilities following an ESG event (even one that occurs outside their corporate group or in a distant part of a supply chain). As a result, we are seeing an increasing focus on ESG-related risks in the context of both transactional due diligence and our governance/risk management mandates. This is an entirely sensible development – the more the ESG-related risk landscape is understood in a business, the better and more effectively it can be managed and improvements made.

HG: One of the most fascinating aspects of ESG-related risk is how it can present across many different sectors and in a range of contexts globally – from potential ‘greenwashing’ claims, to the novel climate change litigation we are seeing in a range of jurisdictions, to the rise in negligence-based claims here in the UK which seek to impose liability on UK companies for alleged harms connected to other parts of the world entirely. These can include the ‘parent company liability’ claims which have been brought against a number of UK-based multinationals. They also encompass so-called ‘value chain’ claims which see UK-based defendants being sued in relation to the acts of third parties with whom they have an even more remote connection, for example through global contractual or supply networks. In turn this means that clients across a much wider range of sectors are having to think about ESG-related risk, and with a much broader lens, than they may have done in the recent past. This is all in the context of increased corporate activity in relation to ESG initiatives, and an understandable desire (and mandatory requirements) to make ESG disclosures.

Describe how your practice areas converge when advising on ESG matters.

HG: The combination of our regulatory and litigation capability, and the international nature of our experience, means that together we can offer pragmatic and proactive advice for clients facing a range of challenges. At the same time, we can help them identify and assess commercially where the ESG-related opportunities really are and how they can best be seized. This is such a fast-moving area, where the legal, policy and societal landscape



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is shifting all the time globally, that taking a joined-up approach to advising clients on ESG-related risk is really important. This approach also reflects the way our firm works – it’s born of our close-knit partnership, independent position in the market and very strong and collaborative culture, as well as from our complementary areas of specialism.

DB: That’s absolutely right – Heather and I are both firm believers that we can provide the best advice to our clients by uniting our respective areas of expertise. It has always seemed artificial to us both, and especially in relation to

ESG-related risk, to operate separately in this space. Working together means that Heather can bring her ESG-related disputes experience to bear when we are providing forward-looking advice on ESG compliance and risk management. Clients are increasingly keen to understand the nature of these potential ESG litigation risks and take sensible steps to guard against it. Equally, I can assist clients who might already be facing claims to implement sensible boardroom and governance strategies in response to an underlying ESG event. Likewise, when we work together on transaction ESG due diligence, we are able to provide a far more

sophisticated, in-depth and ultimately better assessment of the relevant legal risks.

How do you see demand for ESG-related advice evolving over the next few years, especially in relation to managing risk? What are the key regulatory and litigation trends driving this in the UK and globally and how do you think they will shape strategy and demand?

DB: Behind the avalanche of ESG and sustainable finance disclosure and reporting regulations is an increasing public policy and societal focus on ESG. This will continue to drive developments in both the regulatory and litigation spaces (domestically and internationally). On the regulatory side,

even a flawed claim can provide a platform for those promoting particular issues, and this is a very powerful dynamic to have in mind when thinking about how ESG-related risk trends will develop.

One really interesting question will be how the courts eventually adjudicate, at trial and on the full suite of evidence, on ESG-related claims. Related to that question and given the uncertainty in how the law will develop, is the impact on businesses' appetite to promote ESG initiatives in their business if that brings with it an apparently open-ended litigation risk. At some point, aggressive litigation tactics could produce a chilling effect which in fact discourages businesses from being first-movers on ESG innovations. That would be a profoundly

HG: I think that we would both single out the various ESG-related group actions that we have respectively been involved in over the course of our careers as real highlights. The scale of those types of claims, and the novelty of the allegations often involved in them, present unique and interesting complexities. This is particularly so in ESG-related claims, which can involve allegations brought on behalf of tens, hundreds or even thousands of individuals. From a litigation perspective, they present unique challenges in understanding and testing evidentially the allegations made, and their scale means that they can present substantial reputational and financial challenges for defendants, even if the underlying allegations are fiercely contested, or the legal basis of the claims flawed. In addition, the allegations at the heart of these disputes frequently relate to foreign jurisdictions, and often complex and challenging environments, with their own societal, cultural and historic contexts. Grappling with these in the context of an English court room is difficult and fascinating.

DB: I completely agree. It's also worth saying that none of the most novel examples of these claims – notably the ESG-related 'parent company liability' disputes – have yet to come to trial, which means that the litigation environment is even more uncertain and fast-moving. One key area of focus for us is advising clients on how these types of litigation and ESG-related risks can be properly evaluated and better managed. This is challenging and cutting-edge work as the law and regulatory environment is so fast moving. That said, it certainly keeps the job interesting and there are plenty of young, talented lawyers keen to drive this area of practice forward.

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the shift from voluntary frameworks to a more mandatory approach will continue. In addition to corporate transparency, more aggressive regulation is starting to emerge. The EU's proposed mandatory Human Rights Due Diligence regime is a good example of this, with the potential for huge fines and the promotion of civil claims. This will all put an increasing focus on what corporates are doing in relation to ESG and what they are saying – and any discrepancy between the two is likely to become a key area of litigation risk. We are already seeing this in the types of litigation which are eventuating in the UK and globally. In addition, NGOs and activists are increasingly turning to litigation as means of furthering ESG agendas, and to expand the scope of corporate liability along global value chains and across international corporate groups. These trends are unlikely to abate any time soon, not least given the maturing litigation funding market here and abroad.

HG: The striking thing about the litigation trends we are seeing in relation to ESG is the appetite claimants have to bring highly novel claims which are by no means guaranteed ultimately to succeed. The very novelty of these claims is currently proving very important in keeping them alive at all through the early procedural stages of litigation. Nevertheless, bringing

counterproductive effect in terms of the benefits which a focus on ESG can bring, but it is evidently a real risk that will need to be carefully weighed in the balance as public policy approaches to ESG-related risk and liability evolve.

For example, many highly innovative climate change-related claims are being brought across a range of jurisdictions globally and many of them are failing – but they attract huge publicity which of itself can be one of the objectives of those bringing them. In addition, I think we are seeing an increasing interplay between different ESG issues which might historically have been looked at separately. A recent example of this is how the Dutch courts have expressly had regard to human rights frameworks and instruments in considering a climate change claim brought against Shell. All this means that, while the topic of climate change is obviously at the forefront of the ESG agenda, and while there is significant attention being given to climate change in relation to market disclosures and sustainable finance, we expect to see more businesses (both in the UK and globally) seeking advice on their potential exposure to climate change litigation.

What have been the most interesting and complex matters you have advised or acted on? What expertise did these require?

For more information, please contact:

Doug Bryden, partner and head of risk and operational regulatory
E: douglas.bryden@traverssmith.com

Heather Gagen, partner, dispute resolution
E: heather.gagen@traverssmith.com

Travers Smith
10 Snow Hill
London
EC1A 2AL
United Kingdom
T: +44 20 7295 3000

www.traverssmith.com

Travers Smith: ESG services overview

AT A GLANCE: ESG AT TRAVERS SMITH

Headcount:
15 partners across
11 different practice
areas form our ESG
leaders team

50+ lawyers throughout
the firm have worked on
ESG mandates over the
past 12 months

Ranked within the top 12
law firms globally for ESG
in the inaugural edition
of *Chambers and Partners
Crisis & Risk Management
Guide*

**Has advised on ESG for
over ten years** – one
of the first UK law firm
to provide dedicated
ESG legal due diligence
services

Structuring an ESG offering is a challenge for law firms, given the area is both broad in scope and deep in complexity. Travers Smith has met this challenge by developing genuine, embedded ESG expertise within each of the firm's practice areas, which combine to create a dedicated, multi-specialist ESG group.

This dedicated ESG group uses the firm's leading subject matter expertise to support clients and industry on a range of ESG regulatory compliance and risk management challenges. This long-standing ESG advisory function has subsequently enabled the firm to develop cutting-edge ESG transaction services.

This underlying expertise has also combined with the firm's strong dispute resolution team in Travers Smith's ESG and business and human rights litigation offering.

BUILDING BLOCKS TO AN ESG PRACTICE

To advise effectively on the legal aspects of ESG, deep subject matter expertise is fundamental. Travers Smith has leveraged its leading advisory and regulatory teams to drive its push into the ESG legal market. A good example of this is Travers Smith's highly regarded environment and climate change practice, which is widely recognised for its work on core ESG and sustainability areas such as emissions, environment and safety risks and crisis through to product-related ESG issues and supply chain transparency. Likewise, the firm's strong derivatives and trading practice, is well positioned to advise clients on existing and emergent regimes around carbon trading. The firm's trade and governance and employment teams provide the necessary expertise on the 'S' and 'G' aspects of the sustainability agenda.

Over the last year or so, however, it is the financial services and markets team that has been running hottest. Sustainable finance is a major area of focus currently as increasing regulatory pressure (notably the EU's SFDR and taxonomy), together with demand from investors, has promoted the incorporation of ESG factors into investment decision and portfolio management. Transparency and being able to market strong ESG credentials is now critical. As one of the leading firms in the City in the asset management sector, Travers Smith provides ESG advice to asset managers and financial intermediaries (particularly alternative asset managers), pension schemes and their sponsors and lenders. This work also extends to corporates and real estate investors, developers and landlords. Areas of focus include: impact investing, responsible investing, regulatory disclosure requirements, financial instruments, green bonds and green buildings.

ESG AND BUSINESS AND HUMAN RIGHTS LITIGATION

Businesses are, now more than ever, focused from an ethical and moral perspective on ESG. In addition, the legislative and

regulatory framework is increasingly forcing change upon the business community, with enhanced transparency obligations, and far-reaching legislative requirements aimed at enforcing a culture of respect for business ethics and human rights across the entirety of the company's operations, including its supply chain.

One of the early frontrunners in the City to provide a coherent Modern Slavery Act legal services offering, the Travers Smith team has advised clients ranging from leading private equity houses and banks through to global FTSE 100 companies on managing slavery and other human rights risks.

In addition to this regulatory and board room advisory expertise, the team has leading contentious capabilities in relation to ESG and, in particular, business and human rights. The past year has seen it advising on two significant human rights 'parent company liability' claims. There is an increasing focus in ESG-related litigation on international human rights frameworks and the team's 'coal face' litigation experience in this area marks it out.

In these types of dispute, Travers Smith's litigators bring to bear their expertise in cross-border litigation and ESG issues, as well as a close engagement with the historical, cultural and societal dynamics which can characterise these types of claim. This holistic and innovative approach includes a focus on UN Guiding Principles on Business and Human Rights, including grievance mechanisms. Beyond the confines of a particular dispute, the team can also advise businesses with a global footprint on how to achieve their ESG strategies effectively and to international standards, in a developing landscape of ESG-related risk and liability.

ESG TRANSACTION SERVICES

It is no surprise given Travers Smith's strong reputation for corporate and private equity deal doing that it has led the way in developing a range of ESG legal transaction services.

From an initial focus on helping clients develop and implement ESG due diligence playbooks, this has grown into a range of bespoke diligence products as well as increasingly sophisticated mechanisms in deal documents.

Work on an initial acquisition or investment is increasingly resulting in ongoing ESG mandates during the investment lifecycle, which in turn increases the depth of the firm's advisory expertise.

Given the increasing regulatory and market pressures on asset managers, investors and larger corporates, Travers Smith clearly see ESG as an area of significant growth in the coming years.