

# Adapting to a Changing World: Key Trends in Commercial Litigation

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The many challenges of 2022 – continued impacts of the Covid-19 pandemic and lockdowns; the war in Ukraine; global energy crisis; commodities shortages; rising inflation and interest rates – have continued into 2023, creating a perfect storm of financial pressures on companies and leading to an uptick in contractual disputes, insolvencies, and civil fraud claims. Disputes of this nature are core areas of expertise for commercial litigators in London, such that, despite concerns around the potential impact of Brexit, London remains a highly attractive forum for their resolution.

Added to the mix however are new issues for litigators to grapple with: disputes arising from the scrutiny of regulators and consumers alike in relation to ESG and competition issues (in the broadest sense), spurred on by increased political pressure and a burgeoning litigation funding market; and in the tech sphere, the law has had to adapt to accommodate disputes related to crypto assets (and inevitably soon generative AI). We summarise some recent developments and key trends in these areas.

## ESG

As the threat posed by climate change grows ever more apparent, so the legal focus on ESG

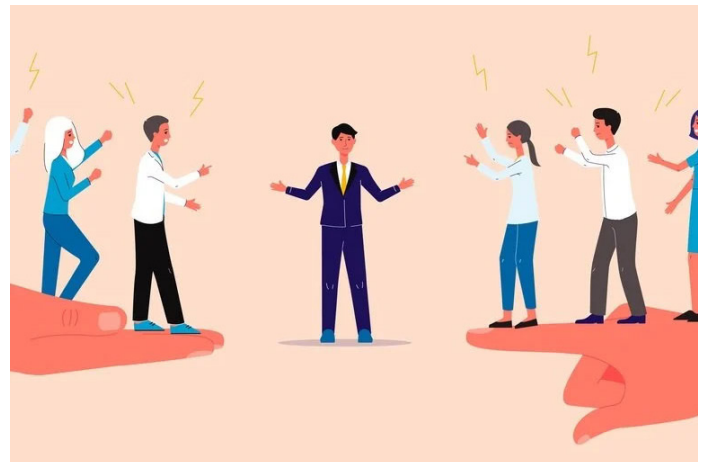


Illustration by sabelskaya

continues to increase, with climate change-related claims more than doubling in the past seven years. “Greenwashing” – where corporates are accused of misleading ESG disclosures – is a major focus of regulators including the FCA, the CMA and the ASA, and can also form the basis of investor claims including claims under s90 and s90A of the Financial Services and Markets Act 2000. Whilst nascent ESG claims under the FSMA route have failed or settled to date, it is likely that more claims will be brought on this basis, particularly following the helpful clarifications and guiding principles in *Autonomy* (addressing a s90A FSMA claim in a non-ESG context).

In addition, the English Courts have demonstrated their willingness to entertain claims against UK parent companies for ESG breaches by their foreign subsidiaries, in two recent

Supreme Court decisions. As against this, the High Court dismissed ClientEarth's novel derivative claim against Shell this week, on the basis that it had not made out a prima facie case for the relief sought. ClientEarth is entitled to ask for the decision to be reconsidered at an oral hearing; no doubt activist shareholders will be paying close attention to what happens next.

### **Crypto assets**

As disputes related to crypto assets increasingly find their way to the courts, English judges have had to contend with a number of novel legal issues: are crypto assets property (traditionally categorised only as choses in possession or choses in action)? What rights, if any, are owed to crypto asset holders by third parties? What remedies are available to holders who lose their assets?

A growing body of case law confirms that English law recognises crypto assets as property, capable of being the subject of a proprietary injunction; and the English Courts have been willing to order traditional asset preservation remedies, including freezing orders and Bankers Trust orders to parties whose crypto assets have been fraudulently misappropriated.

Whilst recognising that English law has proven to be sufficiently flexible to meet these new challenges, the Law Commission's 2022 consultation on digital assets is expected to result in proposals to ensure that crypto assets can be protected fully. Watch this space.

### **Collective actions**

Since the Supreme Court's landmark decision in *Merricks v Mastercard* significantly lowered the threshold for CPO certifications, there has been an explosion of new collective actions launched in the Competition Appeal Tribunal, the majority of which have been brought as opt-out claims alleging standalone abuse of dominance. These include several claims against "Big Tech", including claims against Meta; Alphabet; and two against Apple; and as well as Qualcomm and Sony, potentially reflecting the increased regulatory scrutiny in this area.

Whilst primarily argued through the lens of competition law in order to take advantage of the flexibility of the CAT's regime, many of these claims raise wider, novel legal issues, including in relation to data and consumer protection, but also extending to ESG and the crypto space. The regime is still in its infancy with no CPO having yet proceeded to trial, so it remains to be seen how the CAT will approach various issues from case management to settlement in these cases. The decision of the Supreme Court in *Paccar's* appeal could also be pivotal in terms of the way such cases are funded.

Suffice to say, the English Courts continue to demonstrate an ability to adapt to the evolving needs of parties whilst continuing to deliver the rigorous impartial justice that has long been a draw for international parties to this jurisdiction.

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