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Insights

THE GREENWASHING TRAP IS SET FOR LANDLORDS AND TENANTS

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SUMMARY

Climate change presents a series of risks and opportunities for companies across the board. Increasingly they are being put on the spot to demonstrate that they have these things in hand and have a credible plan. Against this backdrop, the energy efficiency of buildings that companies own or occupy is an important area to have, and to be seen to have, a holistic strategy for. Dangers lurk for companies whose approach is found to be wanting.

Greenwashing risk

“Greenwashing” occurs where a claim is made relating to environmental matters that cannot be substantiated or is misleading.

The reputational and liability risks associated with greenwashing in corporate reporting and disclosures to investors, and in marketing materials aimed at customers or clients, are getting a lot of coverage at the moment, and rightly so. We are entering a period when companies are at their most susceptible to intentional or accidental greenwashing, and could pay a heavy price.

Why are companies susceptible right now? The answer is simple. Many do not currently have a proper understanding of the direct effect on their business of changing climate in particular, or the slew of regulatory measures that have emerged across multiple jurisdictions in very recent years aimed at the reduction of greenhouse gas emissions. However, that is not something that can easily be admitted to the outside world, which is increasingly demanding to know their environmental approach and impact as a precursor to making any key investment and purchasing decisions. In these circumstances, to sidestep the embarrassment of not having a proper grip of these things, there is obviously huge temptation for companies to disclose and report in a manner attractive to investors and customers before the data or other information supporting that disclosure or reporting is available.

The susceptibility is exacerbated by the increasingly prescriptive corporate reporting and disclosure requirements. Clarity of position is required, and clever words and hazy aspirational language increasingly do not ‘cut it’. The demand for clarity stems from things like the Taskforce on Climate-Related Financial Disclosures - “TCFD” – guidelines, under which all larger UK businesses must now report annually. These demand detailed consideration and clear responses and, in order to comply, large businesses are spreading the guideline requirements through their supply chains to smaller organisations.

Companies that are caught out can find themselves in trouble. Regulators like the FCA and advertising standards agency, and of course the press, are moving into a position where they will be able to reveal instances of companies making misleading environmental claims about their operations and products, with potentially embarrassing consequences.

Perhaps more worrying for companies is the prospect of greenwashing litigation by shareholders or customers complaining that they have been mis-sold/represented to and seeking damages as a result. Claimant law firms see potential in class actions based on perceived mis-selling and misreporting.

Greenwashing litigation might also be initiated against companies and their directors by climate action groups with small shareholdings for the predominant purpose not of obtaining damages but of exposing a company’s disclosed approach to climate change risk as sub-standard, or exposing to the outside world that what it is doing is not in line with its public statements, and ultimately focusing the company’s strategic and risk management approach to ensure climate related risks are fully considered. A legal action between ClientEarth and the Board of Directors of Shell, arguing that its failure to properly prepare the company for net zero puts them in breach of their legal duties, was brought to an end recently (pending the oral hearing), but this is very unlikely to deter others from bringing similar claims against other companies in future. For further commentary on this case, see our recent BCLP Insight.

Companies cannot assume that greenwashing litigation risks will be covered by insurance. Insurers are keeping a very close eye indeed on the development of greenwashing litigation. Many insurance lines could be impacted. Changes to insurance costs and conditions are being and will be made to respond to the threat.

Demands for information and data around environmental risks generally - and climate change risks and opportunities in particular - are only going to increase, and the responses matter. Potential difficulties are in store for those making greenwashing responses more than ever before. Given this clear direction of travel, companies should now be putting the structures in place that enable the business to be run with holistic knowledge and understanding of the risks and opportunities presented by environmental factors, in particular climate change, and that enable external disclosures and communications to be soundly based.

Real Estate

With the above in mind, we come to real estate.

The business of virtually all organisations in the UK will involve operations at buildings to some extent, some held freehold and some leasehold. For some, the ownership and letting of buildings is the core business.

The environmental performance of those buildings is an element of the environmental footprint of those organisations, and very often a key element.

As the UK heads for net zero in the face of climate change, companies will expect to have to disclose to shareholders, regulators and customers how they are behaving responsibly and managing the physical and transitional risks associated with the challenge. They will want to tell a good story if they can, and it will be difficult to avoid saying something about real estate.

For occupiers, one of the key commitments they might be tempted to make is that they will drive specific environmental efficiencies and savings from the buildings they occupy.

The content of any such commitment should be very carefully considered however, especially if the company might have to move to more efficient properties so that the commitment can be met. At present, there is a serious shortage of such properties, and they are commanding a premium. The move could turn out to be financially disadvantageous. However, if the move is not made, the efficiencies will not happen and the company might be accused of greenwashing by stakeholders.

For landlords, to demonstrate an appreciation of the laws promoting the construction of efficient buildings and occupier demand for the same, a key commitment might be to increase the portfolio of such buildings. But again, any such commitment has to be carefully considered against the many factors at play. A commitment that is not met could result in accusations of greenwashing.

Climate change and associated reporting is uncharted territory for most companies, but many will already have worked out the key importance of real estate. To report and disclose convincingly on climate change, and at the same time avoid the greenwashing trap, companies will need a firm grip as soon as possible on their real estate, and a sensible and realistic plan for managing it going forward.

RELATED PRACTICE AREAS

- Real Estate
- Real Estate Sector
- Planning & Zoning
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MEET THE TEAM

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