

## ESG: Environmental Social Governance A load of old greenwash?



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Transition to net zero in the UK and in many other jurisdictions relies heavily upon consumer and investor pressure, combined with Environmental Social Governance (“ESG”) disclosure requirements.

While there are some sectors of the economy which are well placed to deliver in this regard, the development sector being one, there is a Wild West elsewhere, without mature taxonomies for either setting or achieving ESG goals. This gives rise to significant commercial pressure, risk and the potential for fraud.

### Introduction

Mission Zero, the recent Independent Review of Net Zero, reports some fabulously encouraging statistics, such as: “Half of the world’s leading institutions and 40% of companies have made net zero pledges” ().

But fine words and noble aims need to translate into action if climate change is to be addressed. The Government’s commitment to cut greenhouse gas (“GHG”) emissions to net zero by 2050 requires the actual decarbonisation of the UK economy. What we are seeing in the UK, in common with other jurisdictions, is evolving company law requirements in relation to disclosure/reporting. A tightening regulatory regime for businesses may very well follow, although well publicised cases already underway in other countries, such as the BNP Paribas fossil fuel finance litigation in France, might suggest that the process of disclosure itself is sufficient to found mechanisms for enforcement through the courts. In short, what is in prospect is substantial reliance on individual companies to drive change towards net zero, at least initially by the establishment of disclosure requirements.

The achievement of net zero is the core focus of environmental work, one pillar of Environmental Social Governance (“ESG”). ESG can be understood to relate to sustainability more broadly too though, per the United Nations Brundtland Commission definition, “meeting the needs of the present without compromising the ability of future generations to meet their own needs” (). In this article, the implications of the changing pressures on commercial actors, e.g. funds, investors, and development companies are explored. We consider the scope for the development industry to deliver measurable benefits against ESG

goals; and conversely, identify the potential for greenwashing and fraud arising from those self-same ESG objectives.

### **The UK development industry: a mature market in which ESG objectives can be realised**

In the UK planning context, it is important to be aware of the opportunities arising from current reporting requirements. Large companies in all sectors of the economy must make disclosures relating to GHG emissions.[1] The Government's Transition Plan Taskforce consultation document dealing with Implementation Guidance indicates that it is intended to make publication of "transition plans" mandatory for companies.[2] Those plans are likely to consist of a requirement to make public an entity's plan "to contribute to and prepare for a rapid global transition towards a low GHG emissions economy", i.e. what it intends to do in order to get to net zero. It will be apparent that there is increased pressure on commercial entities, investors probably foremost amongst them, to improve their environmental performance.

The planning system has been identified as a potential barrier to action on cutting emissions, in a recent review of net zero delivery (see the Independent Review of Net Zero commissioned in September 2022 & published in February 2023 ), but in fact, the planning process can and should be harnessed in support of climate change goals. Subject to scheme viability, development schemes are well capable of alignment with corporate environmental and social objectives in particular. In that schemes prioritising sustainability are often more expensive to deliver, and may not recoup all that spending in receipts, that choice requires proper commercial justification. There is such justification now, and it seems likely to become more compelling over time, in that delivering against ESG goals is a commercial driver in its own right, bearing in mind disclosure requirements and thus the availability of public and investor scrutiny.

A major advantage of investing in development in the UK: in England and Wales in particular, is the availability of tried and tested mechanisms for securing tangible, measurable environmental and social benefits as part of development schemes, with excellent data sets covering often extremely complex supply chains. Good examples relevant to environmental metrics include the use of planning permission conditions to e.g. require the reuse of materials in the construction of new buildings, that they hit accredited sustainability standards in their design, and/or that they use a particular proportion of renewable energy. Social objectives can be addressed in a variety of ways, most obviously through provision of affordable housing, community centres, health facilities, playspace and the like, as part of major development schemes. Again, the mechanism for securing delivery is well settled, planning obligations under section 106 of the Town and Country Planning Act 1990 bind the land the subject of the planning permission and can be enforced if need be. The planning system also delivers an important win-win here, which increases the attractiveness of funding development to investors, in that commitments secured via condition/section 106 planning obligation which exceed the demands of the statutory development plan, national policy and building regulations, are capable of attracting material positive weight in the "planning balance" inherent in the statutory methodology for planning decision making. In short: offering ESG benefits makes it more likely that a scheme will get planning permission and can therefore be built, serving to reduce the risk inherent in making a planning application. In terms of securing investment, development projects which promise acceptable financial returns and hit ESG goals will be well placed to compete for funding from investors with their own ESG targets and disclosure requirements. As an asset, modern environmentally friendly buildings will attract businesses serious about their ESG credentials.

### **ESG: reporting requirements and practical consequences**

It will be apparent from what has been said here that there is method in the introduction of ESG reporting

requirements (see Jonathan Welch's June 2022 blog post ): the achievement of net zero and a more socially and environmentally sustainable future depends to a significant extent upon what we are investing in and building now. The statutory mechanisms available within the planning system, which secure promised benefits as part of development schemes, provide the means by which the development sector can avoid the greenwashing allegations which seem likely to beset other industries.

### **How can lawyers with environmental/planning experience help?**

The experience won by those who help clients navigate the planning system is crucial in the ESG context. The evaluation of climate change commitments and their fulfilment will depend on the interrogation of highly technical expert material. That is the sort of assessment routinely undertaken as part of the planning process. It forms the basis of cross examination in public inquiries, and the subject of detailed forensic analysis in planning/environmental law litigation. With experience of a highly regulated environment capable of securing ESG benefits, it is all too apparent where there are regulation gaps: seeing what is not there is sometimes vital. These skills will be needed in a future in which ESG plays an important part.

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Are you doing enough to transition to net zero? Are you Green enough? Are you financing activity which may later be judged to be harmful? That these questions require to be considered is significant. It reflects pressure, among consumers and investors, for companies to be Green. For companies to promise more, do more, to set net zero objectives and fulfil them; and to avoid financing activities which contribute to climate change, even where those activities are needed in the short to medium term.

Outside highly regulated industries, driving operational efficiency and increasing profit may stand in direct opposition to public ESG commitments. Bearing in mind increasing pressure on companies to present themselves as sustainable; and that there are requirements in place now in many countries to disclose their performance, there is motive to mislead. While taxonomies for setting and assessing ESG goals are emerging, in the United States, China and the EU, they are often focused on objectives, which are high-level and need industry specific interpretation and application. Hence the clear potential for "greenwashing", or making untrue or misleading statement relating to ESG objectives and achievements.

Greenwashing may give rise to a recognised litigation cause of action, even without the regulatory environment tightening, as seems inevitable. So far in the UK, examples of greenwashing litigation are few and far between: the ClientEarth derivative action against Shell being one to watch (see the ClientEarth ). The most high profile examples have involved fines and investigations by the advertising standards agency, rather than legal claims.

We expect the current situation to change significantly over the coming years as the sustainability disclosure obligations kick in for large companies. This could lead to a raft of litigation based on misleading disclosures in published materials.

The stakes are high therefore: the risks are not limited to reputation, but also potentially fines and litigation. As to the latter, thought leaders in the now overlapping fields of environmental and company law recognise the likelihood of growth in this area. For example, the Chancellor of the High Court, Sir Julian Flaux delivered a lecture to the Commercial Bar Association recently in which he said, "Climate or green washing litigation may be used to try to enforce action to achieve net zero commitments made to the public or to prevent entities from trumpeting their greenness when they are not really green at all... Climate change is a potentially major crisis and we cannot expect the law to be exempt from its effects. It will be, I hope, another example of the common law rising to the challenge of providing certainty and

justice in an ever-changing world.” (Full text .) It is evident that commercial litigators and fraud specialists are entering a new arena, one which demands a proper understanding of complex environmental effects. Those who know a load of old greenwash when they see it will be well placed to advise!

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This blog piece has also been published on the Peters & Peters .

[1] Companies Act 2006 (as amended most recently in 2022).

[2] This is consistent with the then Chancellor’s COP 26 speech commitment (.