Linklaters

Linklaters ESG Disputes Bulletin - April 2022 edition

Welcome to the Linklaters ESG Disputes Bulletin. In this spring edition, we cover some of the key developments in contentious ESG matters from Q1 2022.

To read our April general ESG Newsletter, covering developments from sustainable finance to human rights and everything in between, click here.

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Belgium

Does the ECB's quantitative easing programme fuel climate change? NGO ClientEarth goes back to court after the dismissal of its claims

As we reported in a previous post, the NGO ClientEarth filed a landmark legal action in Belgium on 13 April 2021 against the National Bank of Belgium's (the "**NBB**") implementation of the European Central Bank's (the "**ECB**") Corporate Sector Purchase Programme (the "**CSPP**") *"to stop 'quantitative easing' from European central banks flowing to fossil fuel companies and polluting firms that are exacerbating the climate crisis"*. The CSPP is a corporate bond purchase programme established by the ECB in 2016 to improve financing conditions for Eurozone businesses as a form of quantitative easing. This programme is implemented by the central banks of Belgium, Germany, France, Spain, Italy and Finland.

ClientEarth lodged a cease-and-desist action under the Belgian Environmental Protection Act, claiming before the Brussels French-speaking Court of First Instance that the ECB's decision to establish the CSPP in 2016 was invalid, and that the NBB's implementation of this decision was therefore illegal because the

ECB failed to assess the climate impact of buying corporate assets through the CSPP. ClientEarth requested that the Brussels court refer the matter to the Court of Justice of the European Union (the "**CJEU**") for a preliminary ruling.

The Brussels court rendered its decision on 1 December 2021, dismissing the NGO's claims. The court found ClientEarth's claims to be unfounded on the merits because it failed to establish that the asset purchases made by the NBB (insofar as they are based on an allegedly invalid decision of the ECB) would constitute a clear violation of directly applicable provisions of Belgian or EU law relating to the protection of the environment. In addition, the court noted that there would be no specific requirement for the ECB or the NBB to take environmental considerations into account in their decision-making processes. In the court's opinion, the purchase of assets by the NBB does not, in itself, harm the environment or directly contribute to global warming. The court found that NBB's purchases of bonds of polluting companies only indirectly impacts the environment, and such indirect impact is not sufficient to justify ClientEarth's cease-and-desist action.

On 31 January 2022, ClientEarth announced that it had appealed the first instance decision and maintains its request that the question of the validity of the CSPP be referred to the CJEU.

For further details on the case, read our latest post here.

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France

Claim filed against TotalEnergies for alleged deceptive marketing practices

Three NGOs (Greenpeace France, Les Amis de la Terre France and Notre Affaire à Tous) have announced that they have filed a claim on 2 March 2022 against TotalEnergies before the Paris Judicial Court for alleged deceptive marketing practices.

TotalEnergies initiated a new marketing campaign in May 2021 along with the change of name from Total to TotalEnergies. This campaign highlighted the company's commitment to reduce its carbon emissions and to achieve carbon neutrality by 2050. The NGOs argue that this is deceptive and that TotalEnergies actually plans to increase its production of hydrocarbons. The NGOs also raise TotalEnergies' portrayal of natural gas and biofuels as contributing to the reduction of carbon emissions.

This echoes the February publication by the French agency for the environment and energy (ADEME – Agence de l'environement et de la maîtrise de l'Energie) of "Transition(s) 2050", a report that stresses how the use of the term "carbon neutrality" is problematic and can mislead the public. It also resonates with the French government's publication of a draft regulation to regulate the use of the term "carbon neutrality" in the application of the new Climate & Resilience Law. The draft regulation has, however, been criticised by a number of NGOs which do not consider the definition of "carbon neutrality" sufficiently strict.

Claim filed against the French state in relation to biodiversity loss

Five NGOs (POLLINIS, Notre Affaire à Tous, ASPAS, ANPER-TOS and Biodiversité sous nos pieds) have announced that they have filed a claim on 10 January 2022 before the Administrative Court of Paris seeking recognition that the French state has failed to meet targets to protect and promote biodiversity. The NGOs request that the state take all necessary measures to protect living organisms and, consequently, updates the pesticide approval process, which they consider insufficient.

This legal action comes a few months after France was found liable in another case for its failure to meet national targets to reduce greenhouse gas emissions (Administrative Court of Paris, 14 October 2021, case n° 1904967. See our update on this in our ESG Disputes Bulletin of December 2021 here).

First Public Interest Judicial Agreement for an environmental matter

On 22 November 2021, a Public Interest Judicial Agreement (Convention Judiciaire d'Intérêt Public, a French deferred prosecution agreement) was concluded between the Prosecutor's office of the Judicial Court of Le Puy-en-Velay and a company operating a water treatment plant.

The concerned plant had leaked a polluting substance into a nearby stream and the company faced criminal charges. As per the Public Interest Judicial Agreement signed with the Prosecutor's office, the company will: (i) pay a fine of EUR5,000; (ii) adopt a technical measure to ensure compliance with environmental regulation; and (iii) pay environmental damages of EUR2,159 to two NGOs (Fédération départementale de la pêche de la Haute-Loire and Association agrée de pêche et de protection du milieu aquatique).

This is the first time that a Public Interest Judicial Agreement has been used in an environmental matter. A copy of the Public Interest Judicial Agreement proposal can be found here and its confirmation of acceptance can be found here.

Claim for failure to comply with the duty of vigilance is a matter for Judicial Courts

TotalEnergies is being accused by NGOs of not taking into account the social and environmental impacts of an oil project in the west of Uganda and the associated pipeline project. This case is the first filed on the grounds of the 2017 French law on the duty of vigilance, which requires multinationals to prevent social and environmental harm by foreign contractors or suppliers.

The legal debate before the French courts has so far centred on the issue of which court is competent to determine the claim. While TotalEnergies argued that only Commercial Courts were competent, the NGOs wanted Judicial Courts to hear the case. The NGOs generally consider that French Commercial Courts, because they are composed of non-career judges with a commercial background and elected by their peers, are not the most suitable or proper venue for these types of proceedings.

The French *Cour de cassation* ruled on 15 December 2021 that the case could be heard by the Judicial Courts, overturning the ruling of the Versailles Court of Appeal of 10 December 2020 (which we addressed in our ESG Disputes Bulletin of January 2021, available here). The next step is for the courts to address the substance of the dispute.

In line with this ruling, the French Parliament has subsequently adopted law n°2021-1729 of 22 December 2021, which provides that, going forward, claims

founded on the 2017 French law on the duty of vigilance must be filed with the Judicial Court of Paris.

A copy of the judgement can be found here.

***Grande-Synthe* – French municipality and NGOs announce their intention to enforce a judgment against the French state on the curbing of carbon emissions**

On 1 July 2021, the *Conseil d'Etat*, France's supreme administrative court, ordered the French state to take all necessary measures to curb carbon emissions and reach the objectives of the 2015 Paris Agreement. The French state was given until 31 March 2022 to implement the measures. This order was the result of a claim filed by the municipality of Grande-Synthe and was supported by a group of NGOs which had brought a different claim against the French state in the *Affaire du siècle* case (addressed in our ESG Disputes Bulletin of December 2021, available here).

On 31 March 2022, the municipality of Grande-Synthe and the NGOs announced that they intended to file a new claim to obtain recognition that the French state has not complied with the *Conseil d'Etat's* judgment of 1 July 2021 and to require the French state to pay a penalty.

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Portugal

Environmental associations initiate judicial proceedings to stop the construction of a new international airport in Montijo

Eight Portuguese environmental associations, supported by NGO ClientEarth, have brought proceedings against the Portuguese state before the administrative courts, to prevent the progression of a project to relocate Lisbon's international airport to Montijo. The proceedings were based on the adverse impacts that the project would have on the Tagus River estuary. The environmental associations claim that the environmental impact of the new airport construction is not being properly assessed and that the strategic environmental assessment was not properly conducted and is not suitable to determine the environmental viability of the project.

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Netherlands

Shell submits a statement of appeal in the Milieudefensie climate case

On 22 March 2022, Shell filed its statement of appeal (*Memorie van Grieven*) with the Hague Court of Appeal in the landmark case against Milieudefensie handed down in May last year, in which the District Court of The Hague ordered Shell to reduce the group's greenhouse gas emissions (including Scope 3 emissions from the fossil fuel it sells) by 45% by the end of 2030 compared with 2019 levels (for further discussion see our ESG Disputes Bulletin of August 2021, available here). In terms of next steps, Milieudefensie will file its statement of defence by 18 October

2022 and an oral hearing is likely to take place in early 2023 or, if Milieudefensie files a cross-appeal, in early 2024.

NGO Milieudefensie writes to 30 major companies in relation to their climate action plans

In January 2022, the NGO that won the case against Shell in the Dutch courts referred to in the above update (Milieudefensie/Friends of the Earth Netherlands) sent a letter to 30 large companies and financial firms which it claims have "*control over and influence on a substantial amount of CO2 emissions*". The letter calls on these firms to publish, by 15 April, a climate action plan which shows how they intend to reduce their CO2 emissions (including Scope 3 emissions) by at least 45% by 2030.

Although the letter says that Milieudefensie does not wish to engage in legal battles with all the recipients of the letter, it has indicated elsewhere in the press that it is "*prepared and willing*" to take other companies to court if these fail to take sufficient action and that an "*avalanche*" of copycat cases against oil companies, banks, insurers, car manufacturers and other industries can be expected. Milieudefensie has indicated that it will publish a 'ranking' in June 2022.

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UK

The use of the derivative claim

The first quarter of 2022 has shone a spotlight on how the derivative claim might be used in an ESG context.

> ***(i) English court allows a derivative action to proceed against the Universities Superannuation Scheme concerning its fossil fuel related investments***

As noted in our ESG Disputes Bulletin of December 2021 (available here), two members of the Universities Superannuation Scheme Limited (the "**USS**") are seeking to bring a "derivative action" (i.e. a claim brought by the members of a company in the name of the company) against the directors of the USS on the basis that the directors breached their statutory and/or fiduciary duties in a number of ways, including by failing to divest their fossil fuel investments. For a derivative claim to proceed, claimants are required to apply to the court for permission.

Although the application was initially dismissed on paper, on 28 February 2022, the High Court set aside this order as it was satisfied that there was at least a *prima facie* case to answer and allowed the claim to go to an *inter partes* hearing. The issue of permission will be decided at this next stage.

> ***(ii) NGO ClientEarth announces intended derivative action against Shell's board of directors in respect of the company's transition strategy***

On 15 March 2022, NGO ClientEarth sent Shell plc's executive and non-executive directors in the UK a pre-action letter of claim alleging that the board has failed to effectively manage the climate change risks facing Shell and failed to prepare

properly for the transition to net zero carbon emissions, thereby eroding the long-term value of the company and of its assets.

ClientEarth has indicated that it will base its potential claim on duties under sections 172 and 174 of the UK Companies Act 2006. These provisions require the directors to act in a way that promotes the success of the company with regard to stakeholders and other factors, such as the environment, and to act with reasonable care, skill and diligence. As a shareholder, ClientEarth is entitled to bring a "derivative" claim on behalf of Shell as a company, although (as mentioned in the above update) claims of this type can only proceed if the court first gives permission to make the claim and they remain rare. ClientEarth has indicated it would seek such permission from the High Court should the board not adequately address the pre-action letter and its concerns.

These proposed actions are some of the first known instances which look to hold a company board personally liable for perceived failings relating to a company's management of climate-related risks and are in line with a growing shareholder focus on ESG. Not only the outcome of any proceedings, but also the fact that proceedings are being threatened, are therefore likely to have a significant impact on the trajectory of ESG in corporate governance and strategy.

Employees of a former supplier to Dyson send a letter before action to Dyson in relation to working conditions and alleged forced labour

A group of ten individuals who worked in a Malaysian factory owned by ATA Industrial, manufacturing products primarily for Dyson, have sent a letter before action to Dyson. The group allege forced labour, including: (i) the retention of passports and non-renewal of visas; (ii) poor living conditions, with employee movements restricted by security guards; and (iii) excessive working hours with forced overtime. They allege that Dyson knew, or should have known, of the conditions and is liable for breaches of their legal rights. The letter before action seeks a compensation payment from Dyson, failing which the group says the case will progress to the courts. It is reported that Dyson terminated its contract with ATA Industrial in November 2021 and denies any wrongdoing.

A flurry of judicial review proceedings

The first quarter of 2022 delivered a number of new climate-related judicial review proceedings and some interesting judgments in ongoing cases, with mixed results for those seeking to challenge the UK government's actions in environmental matters.

(i) Attempted judicial review of the government's climate policies fails in court

Environmental campaigner and charity Plan B Earth and four individuals were refused permission to proceed with judicial review of the policies of the UK government relating to climate change. The claimants made the case that the government has failed to produce a coherent plan for addressing the climate emergency and that the policies currently in place (which include supporting coal and financing fossil fuel projects overseas) are a violation of their human rights under the Human Rights Act 1999, the UK Climate Change Act 2008 and the Paris Agreement. The claimants sought an order that the UK government urgently implement a legislative and administrative framework sufficient to uphold its Paris Agreement commitments.

Permission to proceed had initially been refused on the papers in September 2021. At the renewed application hearing in December 2021, permission was refused

again on the basis that it was not arguable that there had been breaches of sections 13 or 58 of the Climate Change Act 2008 or of ECHR article 2 (right to life) or article 8 (right to respect for private and family life).

(ii) A judicial review of the government's support for a LNG project in Mozambique fails, but will be taken to the Court of Appeal

On 15 March 2022, the High Court delivered its judgment in judicial review proceedings brought by the NGO Friends of the Earth against the UK government. Friends of the Earth had sought to challenge a decision by the Secretary of State for International Trade and/or UK Export Finance ("**UKEF**") to provide up to USD1.15bn in export finance and support in relation to a liquefied natural gas project in Mozambique. This was on the basis that the decision was incompatible with the UK's commitments under the Paris Agreement.

The case was heard by two judges, who reached opposing conclusions on the legal arguments. On the one hand, Stuart-Smith LJ found in favour of the government on the basis that the obligations imposed by the Paris Agreement in this context were not at all clear and that UKEF's approach to assessing the impact of the project was reasonable in the circumstances (and that it was not necessary for UKEF to quantify the project's Scope 3 emissions in order properly to assess the impact of the project). On the other hand, Thornton J determined that one could identify clear obligations imposed by the Paris Agreement and (whilst Thornton J agreed with Stuart-Smith LJ that the court must accord considerable respect to the UKEF's decision making) concluded that UKEF's assessment of the impact of the project was unreasonable for its failure properly to assess Scope 3 emissions.

A split decision meant that the claim failed, but permission to appeal was granted and Friends of the Earth has indicated that the case will now be taken to the Court of Appeal.

(iii) UK government's Net Zero Strategy to be challenged in court

In January 2022, three NGOs (ClientEarth, Good Law Project and Friends of the Earth) commenced separate judicial review proceedings in relation to the government's Net Zero Strategy. In summary, the NGOs allege (amongst other matters) that the Net Zero Strategy is inadequate because it fails properly to detail and quantify the emissions reductions which its proposals are expected to achieve. It is argued that these failings breach the government's duties under the Climate Change Act 2008.

In March 2022, the High Court determined that the claims were arguable and merited a full hearing, so permission was granted for the claims to proceed on a combined basis. It is expected that the claims will be determined at a single hearing to take place later in 2022.

We will continue to monitor the judicial review landscape and provide updates on the claims included as part of this update, as well as any new claims being threatened or commenced (which we expect to see more of during the course of the year).

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United States

SEC Update – new climate change disclosure rules, focus on greenwashing and climate-related shareholder proposals

The U.S. Securities and Exchange Commission (the "**SEC**") continues to be active in pushing forward its climate and ESG agenda. Most recently, on 21 March 2022, the SEC released its long-awaited proposed rules regarding climate disclosure. Under the proposal, covered companies would be required to make extensive climate-related disclosures, including with respect to: (i) oversight and governance of climate-related risks; processes to identify, assess, and manage climate-related risks; and climate-related targets or goals; (ii) any material impacts of identified climate-related risks; (iii) various greenhouse gas emission metrics, including, in some cases, Scope 3 emissions; and (iv) the impact of climate-related events (severe weather events and other natural conditions) and transition activities on the line items of its consolidated financial statements.

The proposed rules are subject to a comment period and are likely to be the subject of court challenges from various parties that have expressed opposition to the SEC's climate and ESG agenda. If implemented, disclosures could serve as a basis for liability under various provisions of the federal securities laws (except in the case of certain disclosures which are subject to a safe harbour provision). For more information, see Linklaters' recent piece on the SEC's proposal here.

Additionally, the SEC has continued to signal its willingness to step up enforcement in this area. In March 2022, prompted by concerns over the marketing of funds as "green" or "sustainable", SEC Chair Gary Gensler asked SEC staff to consider recommendations as to whether fund managers should disclose the criteria and underlying data they use in ESG investing. The SEC's Division of Examinations has indicated that its priorities for 2022 will include whether: (i) registered investment advisers and registered funds are accurately disclosing their ESG investing approaches and have adopted and implemented appropriate policies, procedures, and practices in connection with their ESG-related disclosures, including their portfolio management processes and practices; (ii) the voting of client securities aligns with their ESG-related disclosures and mandates; and (iii) there are misrepresentations of the ESG factors considered or incorporated into portfolio selection. The SEC has also recently ruled against a number of companies seeking to challenge shareholder resolutions pertaining to climate-related resolutions during this upcoming proxy season.

Government and private actors remain focused on greenwashing claims

Both government and private claimants continue to raise concerns about greenwashing in a variety of forums and under various theories of liability. To provide a few recent examples:

- in February 2022, an NGO filed a complaint with the Federal Trade Commission requesting that the agency investigate the vendors, manufacturers and marketers of artificial turf based on allegedly misleading marketing claims relating to the product's recyclability;
- in March 2022, it was reported that a major multinational financial institution agreed to extend a prior deferred prosecution agreement with the U.S. Department of Justice after the financial institution failed to timely flag a whistleblower's complaint about greenwashing allegations (pertaining to the use of ESG investment metrics) in violation of the deferred prosecution agreement; and
- in March 2022, a Californian federal court denied a motion to dismiss a "greenwashing" case brought against a major food manufacturer relating to

allegedly misleading sustainability-related claims on chocolate packaging. The case was brought under California's consumer protection laws and raised a number of issues relating to alleged forced labour in the supply chains for cocoa.

U.S. Supreme Court hears oral arguments on the U.S. Environmental Protection Agency's authority to regulate greenhouse gas emissions

In February 2022, the U.S. Supreme Court heard oral arguments in *West Virginia v. Environmental Protection Agency*. The claimants, 19 state attorneys general and two coal companies, sought to restrict the U.S. Environmental Protection Agency's (the "**EPA**") power to regulate greenhouse gas emissions from power plants under the Clean Air Act.

During the Obama administration, the EPA adopted and enforced the Clean Power Plan, which established carbon dioxide emission guidelines for existing power plants. The EPA under the Trump administration repealed the Clean Power Plan and replaced it with the less stringent Affordable Clean Energy ("**ACE**") rule. Both rules were adopted under Section 111(d) of the Clean Air Act. In January 2021, the D.C. Circuit struck down the ACE rule and remanded it to the EPA under the Biden administration to "*consider the question afresh*."

The West Virginia State Attorney General and other Republican state attorney generals challenged the D.C. Circuit's ruling and requested that the U.S. Supreme Court review the decision. Oral arguments focused on the scope of the Clean Air Act as well as the Major Questions Doctrine, which requires that questions with substantial political and economic significance be decided by Congress.

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Australia

Federal Court dismisses government's 'duty of care' to protect young people from climate change

On 15 March 2022, the full Federal Court of Australia overturned the landmark *Sharma* decision by Justice Bromberg which established a new duty of care of the government to protect young people from climate change when assessing projects that would produce greenhouse gases. The original case was brought by eight schoolchildren and a nun seeking an injunction to prevent the Federal Environment Minister from approving the extension of a coal mine in New South Wales. Despite refusing the injunction on technical grounds, Justice Bromberg agreed that: (i) the Minister had a duty to protect young people from climate change; (ii) climate change would cause catastrophic harm to young people; and (iii) approving the coal mine extension would increase the chance of that harm.

The full Federal Court unanimously accepted the Minister's appeal against that decision, finding that the posited duty of care should not be imposed. However, each of the three judges gave different reasons for reaching that conclusion. Chief Justice Allsop found that the relationship between the government and governed lacked "*relevant nearness and proximity*" for the imposition of such a duty of care, as demonstrated by the "*lack of control over the harm (as opposed to the tiny contribution to the risk), the conduct of countless others around the world, the lack of any special vulnerability, and lack of reliance*".

See here for relevant press coverage and here for the various judgments.

Challenge against Woodside Scarborough gas development rejected by the Supreme Court of Western Australia

The Conservation Council of Western Australia (the "**CCWA**") was unsuccessful in its Supreme Court challenge against the validity of environmental approvals granted for Woodside Petroleum Ltd's AUD 16 billion Scarborough offshore gas project.

In 2019, Australia's Environmental Protections Authority (the "**AEPA**") granted Woodside approvals to transfer gas to its Karratha plant using the proposed Pluto North West Shelf Interconnector Pipeline and/or the existing pipeline systems, stating that "*no additional or different environmental effects*" were likely. Justice Allanson rejected the CCWA's claim that the AEPA chair did not personally engage in the requisite "*intellectual process*" to form his opinion, stating that it had not established that the chair did not consider the possible impacts. Justice Allanson also refused leave for judicial review on the basis of the "*excessive and unwarrantable*" delay of the challenge, which was launched around 16 months after the CCWA became aware of the AEPA's decision and 10 months after the expiration of the limitation for judicial review. The CCWA has initiated separate Supreme Court proceedings to challenge Woodside's Pluto Train 2 project works approval, though a hearing date had not yet been set in that matter.

See more here for relevant press coverage and here for the judgment.

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South Korea

Tiwi Islanders apply for an injunction in South Korea to prevent funding of offshore gas development

In March 2022, Tiwi Islanders applied for an injunction in South Korea against two South Korean government export credit agencies, the Export-Import Bank of Korea (**Kexim**) and the Korea Trade Insurance Corp (**K-Sure**) in order to prevent the funding of the Barossa offshore gas development owned by Australian energy company, Santos. It is reported that Kexim and K-Sure are lending substantial amounts to fund the Barossa project. The Tiwi Islanders claim that Santos had not consulted them on building a 300km pipeline through the Tiwi Sea north of Australia, leading from the offshore Barossa gas field to a liquefied natural gas processing plant in Darwin. The proposed Barossa pipeline would run through a habitat protection zone near the Tiwi Islands and the claimants argue this will have a detrimental environmental impact on sea life, particularly on the turtle population, which is culturally significant to the Tiwi people.

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South Africa

South Africa sees a rise in ESG related litigation

Climate change and ESG related litigation is increasing in South Africa, as highlighted by the following recent cases:

- On 28 December 2021 in the case of *Sustaining the Wild Coast NPC and Others v Minister of Mineral Resources and Energy*, the High Court banned Shell from conducting seismic survey operations on the South African coast. In February 2022, the Minister and Shell sought leave to appeal the interdiction, but this was not granted.
- On 8 December 2021, the Minister of Mineral Resources and Energy gave notice that he would oppose an application by various environmental groups to stop the procurement of a 1,500 MW new coal-fired power capacity. The Minister was permitted to file a record of the decision and reasons on 20 January 2022 however to date, there have not been any updates on the progress of the matter.

In light of this trend, companies operating in South Africa will have to adopt a more detailed approach to their own climate change related commitments and those of South Africa in order to mitigate the risk of climate change related litigation.

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Key contacts

Vanessa Havard-Williams
Partner, London
Tel: +442074564280
Email

Rachel Barrett
Partner, London
Tel: +442074565414
Email

Satindar Dogra
Partner, London
Tel: +442074564316
Email

Rebecca Burton
Managing Associate, London
Tel: +442074565870
Email

David Thomas
Managing Associate, London
Tel: +442074563059
Email

Rebecca James
Managing Associate, London
Tel: +442074563905
Email