

“For every company that folds because of Covid, someone is going to start litigation to take something from the ashes.”



GAVIN DAVIS | HEAD OF LITIGATION AND REGULATORY INVESTIGATIONS, STANDARD LIFE ABERDEEN

What kind of disputes has Standard Life Aberdeen been seeing in recent years?

My team spends a huge amount of time assessing security litigation claims. This is where the share price has dropped and law firms are telling us as an asset manager we should seek reimbursement for our clients. A huge amount of our time would be looking at claims of that kind – some credible, some less so.

Insurance litigation has been another big one whereby if we consider that we are entitled to a claim under our policy, we're going to look to our insurers to recover. Then you have normal commercial claims where you disagree with a counterparty. We are seeing a trend towards arbitration rather than litigation, because a lot of companies our size would rather avoid the public domain. We have a huge portfolio of property, so there's a lot of general property litigation as well.

There's been talk for years of securities disputes migrating from the US, so that's already a fact of life?

It's not just the UK – it's every jurisdiction in Europe. We've had law firms from Belgium, the Netherlands and Denmark contacting us. There is a trend for companies to push the Netherlands because there are procedures there that make group actions appear attractive, but most of the firms in London who do this work are looking to make London a focus for securities litigation. If they can get past the jurisdiction issue, I can see a lot of litigation starting. It's not been particularly successful so far. RBS was never finally tested because it settled and the Lloyds case didn't go anywhere. There's a lot still in the pipeline because these things take a while to get a critical mass of investors to make it worthwhile for the law firms, and to that end there's a huge amount of book builders out there.

Has SLA's style of handling disputes evolved much in recent years?

We've become a bit more familiar with disputes. We were spun out of a life insurer – as a more nimble asset management company, we scrutinize much more the potential of litigation, as the impact can have a much greater impact on the bottom line. Historically we were reticent to get involved in litigation and rightly still are, but now we've had examples where the business has been prepared to say, “OK, we'll go for this.”

What kind of disputes concern you the most?

The securities litigation concerns me. I remember being in a meeting with one of the law firms trying to push securities litigation in the UK, and one of the attendees made the point that if they were unsuccessful in pursuing the company at fault, they would look to the asset manager who had made the investment. That culture of pursuing every dispute where there's a drop in the share price is worrying. If a stock on the FTSE index drops by 5% on Friday, I'll be called Monday morning by a law firm telling me the money I can make for my clients by starting that litigation.

“The problem with legal tech is that most of it doesn’t work.”

What will dominate the dispute environment in the next three years?

In my world, perhaps unsurprisingly, it's all going to be securities litigation. There are going to be many companies facing Covid-related issues and there may be issues about if they were properly disclosing the impact. For every company that folds, someone is going to start litigation to take something from the ashes. In 2008, when the last crash happened, the mindset of organisations started to change. With a big market move like that, people think: “How can I get my money back?” I saw a huge uptick in every type of litigation. I would predict the same thing is going to happen again. There's going to be a general uptick in litigation as there are so many distressed companies out there – they'll look at their advisers when they have no money, they'll look at subcontractors. People are going to jump to look to litigation.

Will London hold its position for dispute resolution in the years ahead?

It will by default. Most counterparty disputes, the jurisdiction is already in the contract. Until there is a drafting trend where there's a different forum, that will continue. I can see there will be a bigger trend towards arbitration, but again, with the high quality of the Bar, London is an attractive forum for arbitration. Jurisdiction issues with Brexit will have to be surmounted, but that's one of the things we'll have to look at more generally.

Will Brexit trigger disputes?

In terms of the market, I think it's priced in already. Uncertainty can result in disputes, but we've been working hard for so long to ensure we are adequately prepared. Perhaps it's more that disputes that may have come to London may not because of jurisdiction issues.

You mentioned arbitration, do you see a broader shift from litigation in that direction?

I see a shift in drafting arbitration into contracts. People prefer not to air their dirty linen in public and arbitration gives that. For most of the insurance contracts, it's all arbitration now.

Because of reputation concerns?

Exactly. People are so much more concerned now about reputation. They don't want to be arguing in public.

How do you feel about alternative billing or risk sharing?

We've done it sometimes – it tends to be in the securities litigation. We had a case recently with seriously discounted fees but if they were successful, they went back up.

Litigation funders have grown a lot in the last decade, do you see that continuing?

I think some may struggle. There's not enough big cases to make enough money. London is a big jurisdiction but I just can't see it. When I speak to peers there's a general antipathy towards funders – if they want to use them at all, it's a necessary evil. It could go either way, but there's probably too many people trying to make money out of too small a pie.

How much scope is there for radical change in commercial disputes?

It will be interesting to see whether the courts embrace technology. They certainly need to – the courts are way behind where they should be. We have seen through this pandemic the opportunities for video conferencing and sharing data. Courts have been doing a lot more around virtual hearings – they need to make sure they don't go backwards.

Are the law firms investing enough in technology and new service lines?

I think they do, because cost is going to be an issue – a lot of companies are not going to have as much money as they had. The problem with legal tech is that most of it doesn't work. On a daily basis I am getting phone calls from legal tech companies saying: "We've got this great solution," but actually they don't – they are looking for a partner to experiment with. When someone gets this working properly, they'll make a lot of money, but no-one has really done it yet.

This is part of a series of 30 interviews with senior in-house counsel and other leading figures from across the global disputes industry. You can find the other interviews, as well as insights from our expert litigators, at:

www.hfw.com/litigation

HFW LITIGATION

HFW has one of the most active disputes practices in the market, covering litigation, international arbitration and alternative forms of dispute resolution.

We have more than 350 specialist disputes lawyers across the Americas, Europe, the Middle East and Asia-Pacific, handling high-value, complex, multi-party and multi-jurisdictional disputes, including fraud and asset recovery, insolvency, class actions, and enforcement actions.

Our expert lawyers frequently litigate on behalf of clients in courts around the world.

To find out more about our leading disputes offering, contact:

NOEL CAMPBELL

Global Head of Litigation

T +852 3983 7757

M +44 (0)7774 964184/+852 6113 9280

E noel.campbell@hfw.com

NICOLA GARE

Disputes PSL

T +44 (0)20 7264 8158

M +44 (0)7795 612270

E nicola.gare@hfw.com

DAMIAN HONEY

Head of International Arbitration

T +44 (0)20 7264 8354

M +44 (0)7976 916412

E damian.honey@hfw.com

SEAN TWOMEY

Director of Business Development

T +44 (0)20 7264 8546

M +44 (0)7976 282592

E sean.twomey@hfw.com

Find us on LinkedIn at www.linkedin.com/company/hfw or search for #HFWlitigation.