

“If you’re in litigation,
you’ve failed.”



ROSEMARY MARTIN | GROUP GENERAL COUNSEL, VODAFONE

What has been the most notable shift in disputes facing Vodafone?

The last five years have seen a marked increase in patent litigation, driven by the arrival of non-practising entities. These organisations buy patent portfolios and persuade companies to take licences, often using litigation as a tool of persuasion. They were prevalent in the States about 15 years ago and are now active in European markets.

Are they difficult to deal with?

Yes, they are really difficult cases. Particularly in the telecoms industry, because you have systems that have to talk to each other, so you have what are called ‘standard essential patents’. The telecommunications system won’t work unless the patents can interconnect. In the early years of mobile telephony, it was agreed that patent licensing would be done on fair, reasonable and non-discriminatory terms – ‘FRAND’ terms. The difficulty is no one defined what FRAND terms were. The amounts involved are potentially huge – billions of dollars in damages and licence fees – and very complex.

What other trends are you seeing?

We try to limit the amount of litigation we do at Vodafone because it is usually better to resolve disputes without recourse to litigation. I was trying to work out if there is more or less litigation going through the business courts post-Covid and I just don’t know the answer. I get the impression Covid has dampened enthusiasm for taking things to court but that might be temporary.

Does Vodafone have a defined strategy of dealing with disputes?

We don’t prosecute much. We are litigating a little more in some areas now – challenging some regulatory decisions more than we used to, not necessarily in the UK. We don’t have a strategy as such. You have to approach every case with an open mind.

Will Covid-19 drive a lot of litigation?

My view is that for a time people will consider there is more important stuff in life going on and that rather than going through the courts, it’s more important to resolve it and move on. I would expect a dampening of cases and then, no doubt, it’ll pick up again. Litigation is very expensive. If you’re in litigation, you’ve failed.

Are costs still escalating? Disclosure costs are often cited.

I know the courts are trying to make the costs more manageable. Maybe technology will provide an effective answer eventually, but it’s a real issue. The cost of disclosure is a real issue for the administration of justice. So few people who should be able to access justice, can access it, because it is so expensive. That’s unfair.

“I don’t want to be funding interesting precedents – I’d rather get the right answer and move on.”

Where could reforms or cost-cutting be achieved?

I was involved in an initiative, that finished in 2019, about the disclosure rules for business cases. The rules were altered with the aim of reducing disclosure costs. A lot of work by people who know what they’re talking about went into refining those rules, but the pilot got a fairly high degree of push back from practitioners and the new procedures don’t seem to have made a huge difference yet. That shows how hard it is to change how the law works in this country. I think over time people will use new approaches for certain types of dispute – there’s a growth in online dispute resolution tools for SMEs, and that sort of thing possibly has some future.

London is associated with high costs, will the City hold its position for dispute resolution or will that be eroded by foreign rivals?

London needs to be careful, it is definitely at risk. The English courts are highly regarded around the world and that reputation will last for some time, but there are risks. Enforcement of judgments is a slightly unclear area post-Brexit and if that turns out to be a real problem, that will be a big issue for the London litigation market. The London firms need to keep on their toes.

How much of a challenge do you see from international hubs?

Singapore has what it takes to be a very real competitor, not least because there are a number of formerly UK-based judiciary there and it’s a relevant location for half the world. Singapore definitely and probably one or two European centres – maybe Paris, maybe the Netherlands – will take a bit from the UK.

What would you like to see from your advisers that you don’t get now?

It is nice when a law firm recommends alternatives to litigation. Law firms love the cases – partly because of the fees and partly because they are interesting to work on. One of my Vodafone colleagues said: “But this is going to be a fascinating case, it’s going to set a precedent.” I said, “I don’t want to be funding interesting precedents, I’d rather get the right answer and move on.”

Litigation is so slow. This is not just a comment about the UK courts – it’s about the whole legal system. It takes far too long for business disputes.

Some GCs have suggested law firms should advise on risk management and avoiding disputes. Is there mileage in that?

Absolutely. I really feel the law firms are giving up space to the Big Four. You don’t want to go into litigation, so if there are ways of avoiding it, you will invest in that. We are spending a lot of our time on regulatory matters, such as GDPR or consumer rights. There is an opportunity for law firms to help companies mitigate the likelihood of litigation, to help set up the right processes to ensure business operations are compliant with the myriad of applicable laws, to help us manage the risk not just sort out the mess when it goes wrong. That would be really helpful.

Will English law hold its currency for cross-border agreements post-Brexit?

I think so, but it depends. People will be watching. They will get to that clause and have a think, whereas previously they would have just gone, “Yes, English law and the jurisdiction of the English courts is fine.” It may erode over time. It will depend what happens in the courts over the next three, four or five years. If people feel it’s the same as it ever was, this is fine, enforcement hasn’t changed, then maybe it will continue its pre-eminence.

What are the big picture dynamics you see firing risk in the years ahead?

It is regulatory risk. We are seeing regulators being swayed by political needs in some countries. The biggest risk is regulation becoming more black and white. There's no di minimis any more, it's just, "You haven't done this and we're going to fine you huge amounts of money." That used to be the preserve of the financial services sector but not anymore. Privacy is an area where, you think, "Oh my, this is difficult," because the requirements are very difficult in practice. Also, activist shareholders using the threat of litigation in a rather cynical way, but I guess they've always done that.

How much impact do you expect litigation funding to have over the next five to 10 years?

They haven't taken off in the way I thought they would. We had two cases we were defending where they had litigation funding. It definitely adds a new dimension in how you have to think about the case.

How much scope do you see for radical change in the litigation environment?

It should be disrupted, but that disruption needs systemic change, which I think people are willing to make if they can work out what to do to make the difference. It's difficult, but there should be disruption. Do I think there will be?... Eventually... Maybe.

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.

© 2021 Holman Fenwick Willan LLP. All rights reserved. Ref: 002826

Americas | Europe | Middle East | Asia Pacific