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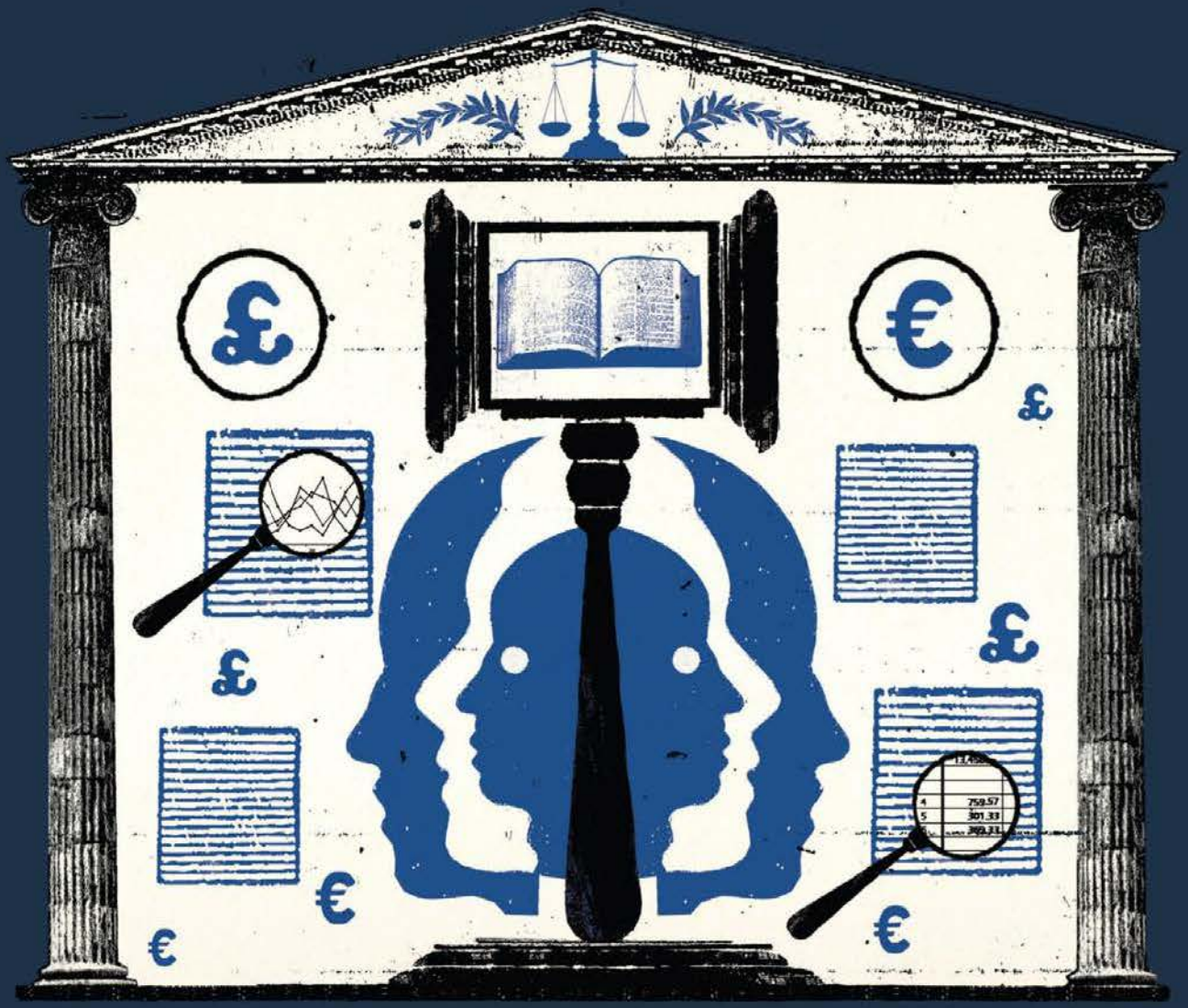

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CASE STUDY

Merseyside: Looking after one's own benefits the wider economy

BY BRENDAN MATON

The £10bn (€12bn) Merseyside Pension Fund has long been recognised as an active asset owner that takes its responsibilities as a shareholder seriously.

One major success in conjunction with other shareholders in Starbucks was to get the coffee company at the table with the Workers United trade union to discuss the right to collective bargaining. Merseyside and others had tabled a motion at Starbucks 2023 AGM that refusing employees the right to associate as a trade union conflicted with Starbucks' policy on human rights.

In a case brought against UK-listed pharmaceutical company, Indivior plc and its former parent, Reckitt Benckiser Group, Merseyside Pension Fund's administering authority, Wirral Council, is now leading the way by bringing novel representative legal action on behalf of hundreds of institutional investors which seeks to hold Indivior to account for a lack of transparency.

Unlike the Starbucks motion, the Indivior and Reckitt case is about responsible stewardship and shareholder redress, including financial compensation for damage to share value caused by failing to disclose serious wrongdoing to the market in a timely manner. Indivior and Reckitt have already paid huge fines and settlements in the US (including to regulatory authorities and US States) in relation to a fraudulent 'product hopping' scheme aimed at deceiving physicians and patients regarding Suboxone, a drug for treating opioid addiction. Indivior's share price crashed 74% following publication of the Grand Jury indictment in 2019 and approximately US$2bn was paid out by the companies. Indivior pleaded guilty to felony charges and its former CEO, Shaun Thaxter, went to prison for his part in the wrongdoing.

> "Once there has been a judgment establishing that the market has been misled, investors will likely feel more justified in seeking redress"
>
> CHARLIE MORRIS

So, as often is the case, shareholder litigation follows regulatory punishment.

Wirral Council is working with specialist shareholder collective redress business, Woodsford, to seek accountability and compensation. Owen Thorne, investment manager for Merseyside, described shareholder litigation as one more element in the stewardship toolbox.

Woodsford CIO, Charlie Morris, notes that such actions constitute an important and recognised form of collective escalated engagement by shareholders with their investee companies. As well as helping to fulfil the obligation of a responsible fiduciary to recover losses, Morris says that such actions are also an effective form of private regulation that promote good corporate behaviour, which is fundamental to a thriving economy.

The current dispute in Wirral vs Indivior and Reckitt is less about the amount of money to be reclaimed but rather whether such actions can be brought by one investor as a representative of others (rather than all investors having to be parties to the litigation).

There are various requirements for this kind of representative action, including that the representative and the represented persons have to have the 'same interest' in the outcome. A recent judgment, in Lloyd vs Google, found that this requirement is met where there are divergent interests among the represented persons so long as there is no actual conflict of interests between them. Reckitt and Indivior have conceded that the 'same interest' test has been met in Wirral's case but asked the court to dismiss the action on discretionary grounds.

In Wirral vs Indivior, Wirral is seeking in a first stage of proceedings to establish liability via a representative claim, to be followed by determination in a subsequent stage of whether the represented investors are individually entitled to compensation.

This is known in such litigation as bifurcation: common issues first; individual issues second. Morris describes bifurcation as cost-efficient as it avoids significant expense that would be wasted if spent prior to liability being established. Early determination of liability will also allow investors to make more informed decisions about whether to participate in such actions. "Once there has been a judgment establishing that the market has been misled, investors will likely feel more justified in seeking redress," says Morris.

In the Indivior and Reckitt case, unfortunately, the judge at first instance decided to dismiss Wirral's innovative approach, ruling instead that every investor should be a named claimant (in a group rather than representative action). In June, however, Wirral was given leave to appeal the verdict with the appeal due to be heard by the Court of Appeal this month (December 2024) with judgment likely to follow early 2025. ■

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