trowers & hamlins

Thinking Business

Issue 15

Contents

Introduction

Welcome to issue 15 of Thinking Business, a Towers & Hamlins biannual publication in which we share our latest insights and commercial thinking to help businesses adapt, grow and be successful in a rapidly changing world.

In this edition, we look at different aspects of some of the key issues in the current ESG environment, including an exclusive interview with one of our partners.

Safeguarding your IP: The perils of leaving it to chance – As a business grows and focuses on other priorities, it is easy to overlook their intellectual property. However, if a company doesn't pay attention, they could lose their IP rights. What should businesses do to avoid this sticky situation?

Prioritising values in the workplace – As new generations come into the workforce and pandemic adjustments are now becoming the new norm, it can be difficult to accommodate for all, especially values. It is, however, becoming more significant, particularly in the younger generations, and we look at actions that businesses may need to take to recruit and attract talent, and importantly retain their employees.

Buy Women Built: Championing the efforts of female founders – In a Thinking Business first, one of our corporate partners, Alison Chivers sits down with Sahar Hashemi OBE, as they discuss Buy Women Built, what female entrepreneurs need and how it is now more important than ever to take risks and embrace innovation.

Anti-Greenwashing in the UK: Key Risks and Considerations for Businesses – With climate change becoming an ever more important issue for businesses and their service or products, it's crucial to get to get messages right about the environmental performance. As the regulatory landscape changes on a frequent basis, what can businesses do to not face significant penalties for greenwashing?

SAFEGUARDING YOUR IP:
THE PERILS OF LEAVING IT TO CHANCE

A company's intellectual property is often tricky to value and easy to overlook as businesses in growth mode focus on other priorities. But the perils of failing to adequately protect and document IP ownership – whether through trade marks, copyright, patents or other measures – are significant, and getting this right requires early consideration and close attention.

There are many war stories of businesses that have slipped up on IP protection and ended up with significant challenges down the line. For example, Trowers & Hamlins advised one company that had outsourced the development of a new product to a third party. The parties agreed at the outset that the client would own the IP in the product, a contract was produced, signed, and the product was developed.

When the client later wanted to commercialise the product internationally, believing they owned the rights, they went back to the developer only for it to transpire that they did not own the IP and, furthermore, that the scope of their rights under licence was uncertain, meaning that there was no clear right to commercialise internationally because the contractual terms were unclear.

To make matters worse, when they tried to "put things right" and confirm the assignment/ownership of such IP rights, the ship had unfortunately sailed. By this point, it was too late as the developer had since entered into exclusive licensing arrangements with other third parties in a number of overseas territories, which meant that solving the problem was far more complicated than simply transferring the IP ownership to the client.

Alice Stripe, Senior Associate in the IP team at Trowers, says:

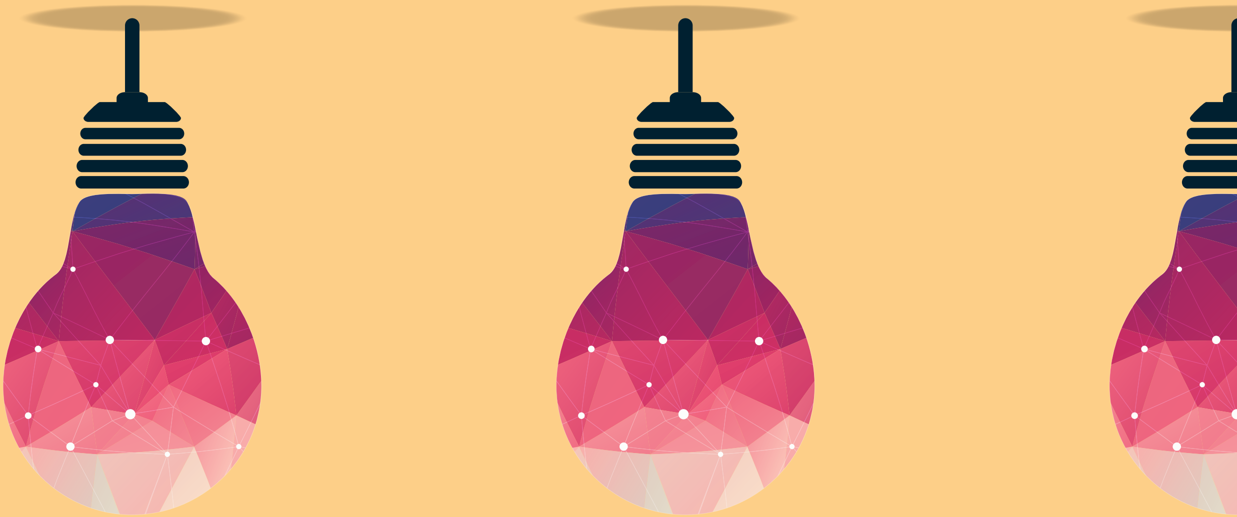
"The lesson here is being clear on the IP ownership position at the outset, carefully reading contracts and thinking through what all of that means for your business now and in the future is critical.

While they had agreed something about the IP at a high, informal level, it had never been fully thought through how that arrangement would work once the product was (successfully) developed, the different jurisdictions and the parties' business interests."

Trowers partner Caroline Hayward adds: "Often people assume these issues can be fixed later, but sometimes it is not possible. Plus of course the commercial impetus changes: at the outset, the developer is looking to win the development work and may be more willing to agree to less beneficial terms. Once the product has been made and proved successful, the negotiating position is very different and the bargaining power falls."

In another case, a group of companies operating in a sector where bespoke software was business-critical had all entered into agreements with software developers. All of the businesses believed they owned the copyright in the software, when in fact the actual position was that some of the contracts said that was the case, others said it wasn't, and a number were unclear. Each business needed to use the software and further develop it but the result of the contracts was that it was not clear who owned the software and who was allowed to do what with it.

"All of this came out when the business was going to be sold, because the software was key to both the operation and value of the business" says Hayward. "The work involved in trying to unpick these issues was absolutely huge and a large number of contracts were needed to solve the problem as far as it could be solved. All they needed was clarity over the software ownership and, to the extent that it was licensed rather than owned, clarity over what they were permitted to do, but they were not able to establish that from the contracts they had in place."



While copyright in the context of software is an area which companies tend to gloss over at their peril, another issue that companies need to pay close attention to is brands and marketing. The firm acted for a large multinational business that had commissioned a “brand refresh” meaning an existing brand was updated and relaunched. In order to do this, an external brand agency was used by the business and a new logo was created based in large part on the one that was already in place. Years later, in a dispute context, the company needed to prove that it owned the copyright in the logo but was unable to do so based on the existing contract which had been signed when the work was commissioned. The brand agency was able to argue that it still owned the copyright and seized the obvious commercial opportunity which this lack of clarity gave it.

“Many years later, our client found themselves in a situation where they needed to spend money buying rights which they thought they already had, because, by then, they had been successfully trading under that new logo for a long time,” says Stripe. “The brand agency could now demand a high price;

“it was a valuable lesson in making sure contracts are clear and unequivocal when it comes to all IP rights in house brands.

In a worst case scenario, a company could even have to rebrand, which is costly and can be a reputationally damaging position to be in.”

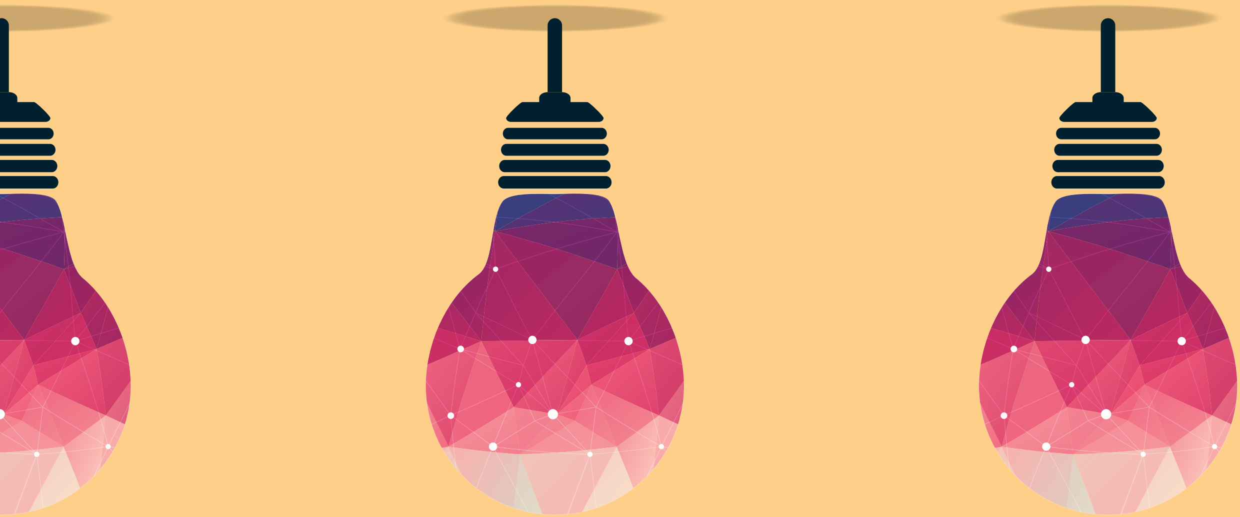
Similar issues can also arise in relation to trade marks. Trade mark portfolios are living and breathing assets that require a consistent level of oversight and management, not just in terms of renewals but also where third parties “trespass” onto owner’s rights or when owners need to expand their footprint into new product lines or markets. Again, this means trade mark ownership needs to be thought through early.

An example of what can go wrong is a case where a long-established business was split into separate ownership, divided according to what seemed to be clearly separate service offerings. They decided to share the trade mark portfolio, which was transferred into a special purpose vehicle that would look after it, and each of the two trading businesses had a trade mark licence.

The SPV did not make money and the licences it had granted to the trading companies were royalty-free. The upshot was that the SPV was out of pocket in managing the trade mark portfolio and the trading companies contributed to the cost under what was, in effect, no more than a gentleman’s agreement. Tensions began to emerge between the SPV and one of the trading businesses. The SPV, which had very strong bargaining power as owner of the trade marks, started to agitate, alleging breach of licence and a right to terminate at every opportunity, in an attempt to force the trading business to renegotiate the licence on better terms for the SPV. Meanwhile, the prosperous trading business, which was a market leader and well-known under the trade mark name, was consistently threatened and had much to protect.

The result was an intense cold war that lasted for over 10 years, with huge amounts of money spent by the trading company in dealing with the defence of different allegations.

“Because IP is so technical, it is not uncommon for it to be used as a bargaining chip or a stick to beat people with,” says Hayward.



It is often when the prospect of international expansion arises that companies identify weaknesses in their IP rights. A business can be sitting pretty from a trade mark point of view in one jurisdiction only to find that someone else holds registered trade mark protection over the same trade mark in a country they wish to move into. A tiny company trading under a similar brand in another market or country can not look like a problem until you want to step into their market or country and a costly battle for IP rights may become necessary.

Licensing arrangements too, can also present cross-border issues if two licence holders operating on different sides of the world start expanding and treading on each other's toes in the same jurisdiction or market. This is not always the case but it can cause issues if one party holds the exclusive rights to such territory. "Exclusive" does not necessarily mean worldwide exclusivity and is often limited to certain territories only.

Finally, issues often arise in relation to marketing agencies when companies outsource things like websites, loyalty schemes and newsletters to external providers. Such arrangements can work really well until the two sides decide to part company and it becomes apparent that the agency actually owns everything, including domain names and email addresses, meaning that they can hold companies over a barrel as to the price they demand for full ownership of such IP.

What is clear is that companies need to give these issues careful and thorough consideration from day one, to put the right terms in place. Of course, businesses will often have competing priorities and limited resources, but IP ownership and the protection of IP should be prioritised more than it often is until it is too late. Hayward says:

"The most difficult decision for a young business in particular is how to prioritise resources. A growing company will not have the budget for everything and they don't want to spend money on IP rights. But if the entire business model depends on something, then you really need to protect it, whether that is your brand, your software or your product."

Stripe says: "The key thing is for a company to work out what is absolutely essential and what the business cannot function without, and then make sure the proper IP protections and contractual arrangements are in place to protect that. Prioritise, ensure you have the protections that you think you have, and then think ahead on how your business might evolve and what that might mean for your IP in the future."

There is much that can go wrong, but addressing IP rights early can put a business in good stead to avoid horror stories down the road.

Prioritising values in the workplace

As the conversation around responsible business continues to gather pace, it is clear that a growing proportion of the workforce is looking to employers for leadership around ethics and corporate values.

Values hold particular significance for Gen Z workers – those born between 1997 and 2012 – who are poised to represent over a third of the labour market by 2025. In a survey conducted by LinkedIn last year, a remarkable 87 percent of Gen Z workers said they'd be prepared to leave their current job if they found a company whose values more closely aligned with theirs.

The survey, conducted among more than 7,000 workers in the UK, France, Germany and Ireland, also showed that 60 percent of Millennials and Gen Z professionals now prioritise values when they are thinking about changing jobs, and 59 percent of all workers would strongly hesitate to accept a job offer if the company's values did not match their own.

"The number one challenge for employers today, across sectors, is recruitment and retention," says Trowers & Hamlins head of employment and pensions Rebecca McGuirk. "The war for talent is fierce, but the best businesses, with the best cultures,

really stand out. If your organisation is struggling to appeal, it may be time to look inward at your culture, your ethics, your responsible business agenda, your work on diversity, equity and inclusion, and your environmental practices.”

Talent shortages are impacting every sector of the UK economy right now, and while many industries are responding with pay wars, most businesses cannot afford to just add 15 percent to starting offers in order to attract hires. Instead, the new way to stand out may just be corporate values, as potential employees seek out a more impact-driven working environment.

“Values are a particular issue for Gen Z,” says Nicola Ihnatowicz, partner in the Trowers employment team. “But they are not the only ones that care. Millennials and Gen X also increasingly put great store in ethics and values and, perhaps empowered by Gen Z, are able to express that more explicitly. This is now an essential for running a good business, because attracting a diverse pool of talent is good for business and good for the bottom line.”

The actions that companies need to take will vary depending on where they are on their responsible business journey. For those that already have clear, positive and well-articulated values in place, the challenge is around communicating those beliefs to the market and making sure they remain embedded throughout the organisation.

"For those that are not so far along the journey, or are perhaps intimidated by what competitors are doing and don't know where to start, my advice would be not to get overwhelmed," says Ihnatowicz.

"Start with looking at where your culture is today. Most of our clients don't have a bad culture, but that doesn't mean they can't do more on the environmental side, on the DE&I side, or on social mobility, for example."

She argues it is about getting a good picture of where the organisation currently sits and then identifying areas where it might be able to do better, which may mean working hard to address the progression of women or seeking to do more to support neurodiverse colleagues in the workplace.

"It's about finding a starting point first," says Ihnatowicz, "and in order to do that you need to make sure you have the engagement of senior people within the business. This becomes impossible without that."

Failings of corporate culture continue to hit the headlines as a reminder to business leaders of the perils of getting this wrong. Organisations as diverse as the Metropolitan Police, the Post Office, the Confederation of British Industry and the England & Wales Cricket Board have also suffered accusations of deep-rooted cultural issues in the last few years, with toxic corporate environments frequently cited as a contributing factor when businesses fail. Since the #MeToo movement took off in 2017, employees have become much more proactive in calling out inappropriate behaviour and corporate ethics have been pushed into the spotlight.

On the other hand, the positive drivers for companies to get better at enhancing their company cultures are also increasingly evident. "A good culture is really attractive to potential candidates and you will get the pick of the talent market if your values are clear and align with those of your employees," says McGuirk. "If your people are happy, they are your most powerful marketing tool."

With more generations working together in increasingly diverse workplaces, there are growing demands on leaders to take a more nuanced approach to management. It can be hard to oversee teams that include people of all different ages. Recent research from the London School of Economics and Political Science, in collaboration with consulting firm Protiviti, found employees who are much younger than their managers report lower productivity than those closer in age, due to a lack of collaboration between employees of different generations.

Another report from LinkedIn found that one in five Gen Z workers reported not having had a single conversation with someone over the age of 50 in their workplace within the last year.

Bringing people together is a key challenge for leaders today:

“If you are a manager, it certainly makes your life easier if you can engage and interact with everyone on your team in the same way,” says McGuirk. “But the reality today is that you have to take a more nuanced approach, and that requires more thought. Diversity brings many advantages, but it is not what many managers are used to.”

The need to tackle productivity and skills gaps in the UK employment market has been top of the agenda during the election campaign of 2024, and there is no doubt the new government will now prioritise efforts to galvanise workers into action.

Data suggests it will be those companies that are clear on their corporate values and put those into action on a daily basis that will get the most out of the employees of the future.

BUY WOMEN BUILT: CHAMPIONING THE EFFORTS OF FEMALE FOUNDERS

Sahar Hashemi OBE is a former lawyer who founded Coffee Republic, the UK's first US-style coffee chain, and built it into one of the most recognisable high street brands. She went on to launch Skinny Candy, a brand of sugar-free sweets, and has written two best-selling books on entrepreneurship.

Trowers & Hamlins corporate partner Alison Chivers interviewed Sahar, currently co-chair of the government's Scale Up Taskforce, to discuss her latest venture to showcase the successes of female entrepreneurs, plus what she has learned about encouraging an innovation culture.

Thanks so much for taking the time to talk to Thinking Business, Sahar. Can you start by telling us about Buy Women Built and why you are so passionate about it?

Yes, of course. I have always been an enthusiastic supporter of female entrepreneurship. I believe that entrepreneurship suits women because it plays to a lot of the strengths that women naturally exhibit, like resourcefulness, problem-solving and networking. If the consumer economy had a sex it would be female and 97% of the founders that Buy Women Built works with started their businesses because they were solving their own problem and wanted to become their own customer.

There is an astonishing statistic that when pollsters spoke to schoolchildren, 81% of 11 to 18-year-olds were unable to name a single female entrepreneur. Instead, the great British founders that spring to mind are people like Richard Branson, James Dyson and Peter Jones. Buy Women Built aims to change that, showcasing amazing brands built by women not only to raise the profile of great female founders but also to harness the power of consumer spending to create a stronger, fairer society.

According to the Rose Review of Female Entrepreneurship, only 5.6% of UK women run their own businesses, compared to 11.2% of men. What is special about how women start businesses, and what do female entrepreneurs need?

I do a lot of work around creativity and innovation, where everyone is looking for that holy grail of innovation and trying to encourage their teams to be more creative. The definition of innovation is really problem-solving and giving customers something that they don't even know they want.

What is extraordinary about female entrepreneurship is women start their businesses not because of a dream of building market share or a desire to get rich, but because they are solving a problem. Women tend to have a deep-rooted understanding of the customer psyche and so women-built businesses start from a customer point of view.

The problem that so many companies face as they grow and mature is that they start losing that close connection to customers, and yet that is where the revenues come from. Women-built businesses seem to have this amazing way of always maintaining that connection as their north star, but they have been hiding their light.

What the next generation of female entrepreneurs really need is role models, because I genuinely believe that if you can't see it, you can't be it. I'm in the female start-up community and when I started Buy Women Built I only knew 35 female founders – we now have 1,800 in our network.

I really think that if we shine the spotlight on how many fabulous female entrepreneurs we have already, then others will start to scale their businesses and that will encourage more women into the pipeline.

Plus networking and collaborating is so important to female entrepreneurs, so Buy Women Built is a networking group where people can share their experiences, talk about what they have done and interact with others that have overcome similar challenges to the ones that they are facing.

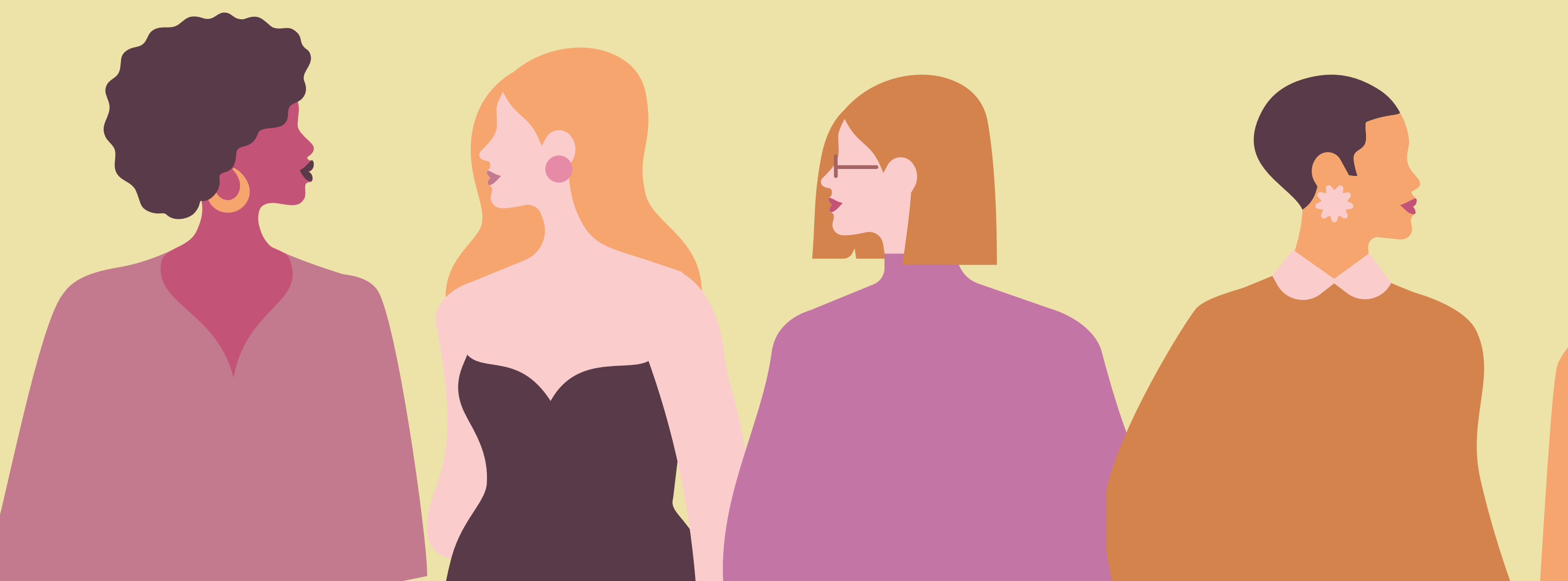
You've written two books: Anyone Can Do It, about building Coffee Republic from your kitchen table, and Start Up Forever, which looks at what big companies can do to maintain a start-up culture. What can established businesses learn from entrepreneurs?

In an environment where change is happening so fast, every business is thinking hard about how they can keep up and stay agile. The question is how can you build a culture in your company where everyone is working at the top of their game and is really responsive. It really comes down to having an entrepreneurial mindset.

The best founders are resourceful, they listen to their customers and they get out there and get things done without over-thinking. They find solutions, and if something doesn't work out, they try something else. That is what all of us have to do more of, and that means becoming much more customer-centric and making sure we don't stifle creativity as businesses grow.

In Start Up Forever, I talk about how you can encourage entrepreneurial behaviour in large organisations with 10 shifts in everyday approaches. These are simple, day-to-day changes that really encourage an entrepreneurial mindset:

- Don't depersonalise customers – become them instead
- Don't sit at your desk – get out
- Don't be too busy – attack bureaucracy
- Don't let your knowledge and expertise blind you – let go of what you know
- Don't suffocate curiosity – be a big kid
- Don't buy into the fairytale romance of the Big Idea – act on the small everyday ideas
- Don't let perfectionism slow you down – force the discipline of bootstrapping
- Don't be scared of failure – encourage it
- Don't think of a No as a stop sign – think of it as a badge of honour
- Don't put a work face on – be 100% yourself



The challenge we have seen a lot of businesses face over the last few years is a fear setting in, perhaps in the face of external pressure, which leads to paralysis. For fear of risk, they stop doing anything. Actually now it is more important than ever to take risks and embrace innovation, right?

Absolutely. And you don't have to risk the whole house, just encourage your people to start trying out new things and perhaps take little risks. The real shift is to focus on growth and speaking to customers. Instead, people go down the track of prioritising busyness and bureaucracy when they should be making sure they are consistently agile.

One thing I would say is that customer empathy has to be evident in your advisory team too. You need your professional advisers to be dotting the i's and crossing the t's, but they need to really get under the skin of your business and be open to understanding and connecting. Working with Trowers I find they really speak the same language as our founders, and that empowers founders to make the right decisions and overcome challenges.

That is really good to hear. We've been partnered with Buy Women Built since its inception and it's been fantastic to see the community as it grows. We've been able to help some great businesses and we're excited to see them going from strength to strength. The work you are doing to showcase female founders is really interesting.

There are 30% fewer female entrepreneurs in the UK than the US, and only 3% of funded British businesses are female founded. If women started businesses at the same rate as in other developed countries, that could add an additional £200 billion to our economy. So by shopping more women-built brands, we believe we can work together to unleash the powerful contribution these businesses can make to our economy, our future and our communities.

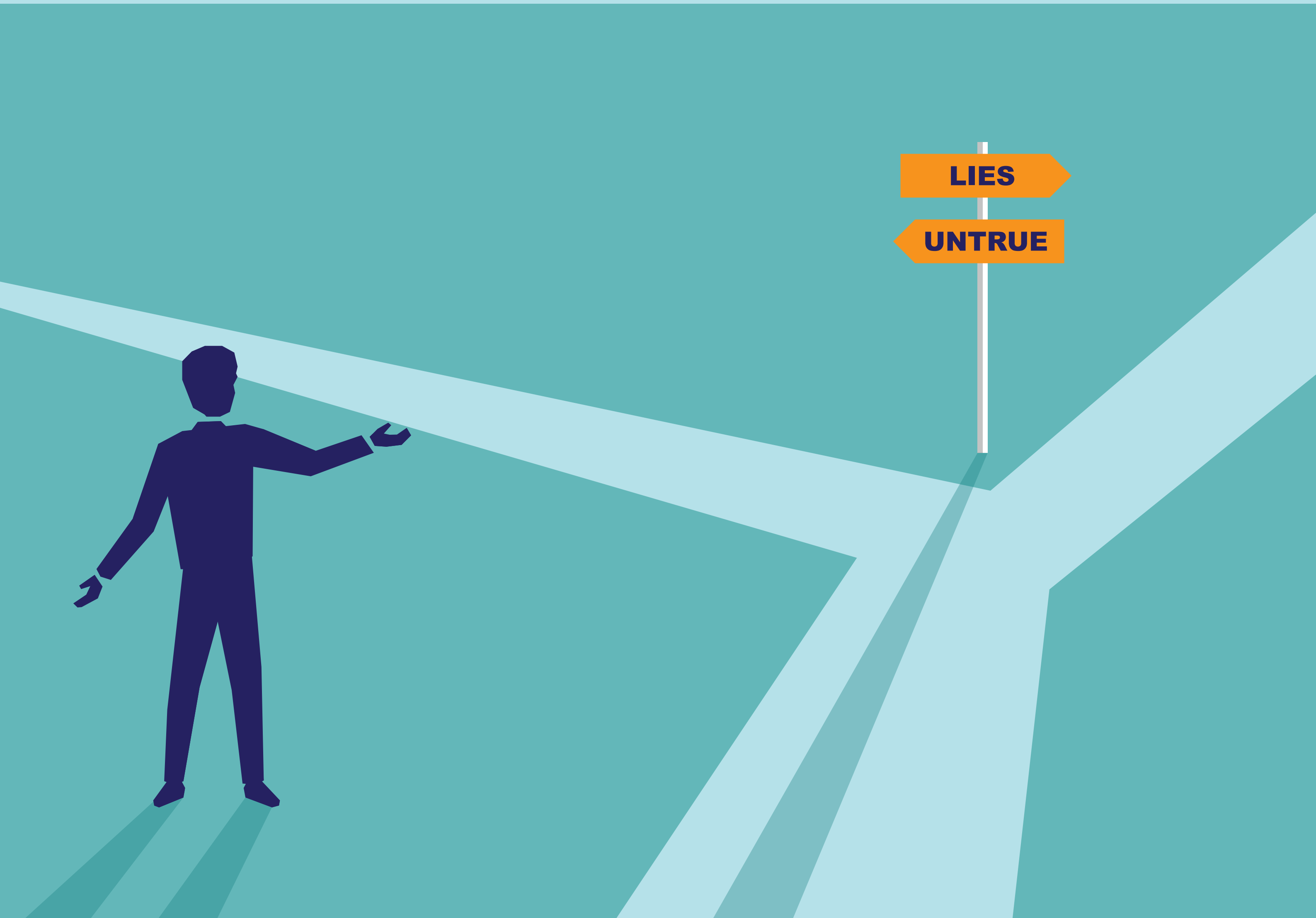
Absolutely. Thank you, Sahar.

With thanks to Sahar Hashemi, Co-founder of Buy Women Built.

ANTI-GREENWASHING IN THE UK:

KEY RISKS AND CONSIDERATIONS FOR BUSINESSES

Ever since the UK and other nations around the world began setting targets to reduce carbon emissions, greenwashing has been on the agenda from a regulatory perspective. The United Nations has said that, in order to limit climate change and preserve a liveable planet, greenhouse gas emissions need to be cut in half by 2030 and reduced to net zero by 2050, with greenwashing identified as a global problem that undermines efforts to combat the climate crisis via credible solutions.



Greenwashing can be defined as the use of untrue or misleading statements about the environmental performance or impact of a business, product or service. It can include misleading statements made in marketing materials, annual reports or communications to clients, for example, while in advertising it occurs any time untrue or misleading environmental claims are made about goods and services.

"For most businesses, greenwashing is inadvertent," says Alex Sharples, a partner in Towers & Hamlins' commercial litigation department. "It tends to be down to a misunderstanding of how to promote genuine sustainability achievements in line with consumer protection rules. But the message is that,

"if you're selling green products or services, this is a growing concern for regulators and you need to have genuine accountability for any green claims that you are making."

The regulatory landscape is changing on a frequent basis, both at EU and UK level, with businesses potentially facing significant penalties for failing to take greenwashing seriously.

Ginny Butcher, an associate in Towers & Hamlins' commercial litigation department, says: "Just recently we have seen a number of updates and changes to how anti-greenwashing efforts are being enforced. Businesses need to care about this, not just because of the climate crisis and because their customers care, but increasingly because they will face penalties if they fall foul of anti-greenwashing laws."

Sharples says: "There is a real reputational point here. Being green is now a real positive for a business, but that intrinsically means that businesses want to leverage their green credentials to drive sales and revenues. That creates a risk because if you are saying something is green you now really have to be able to evidence it."

In March 2024, in Europe, the EU's Empowering Consumers Directive came into force, which prohibits businesses from making misleading or unclear environmental claims to consumers and introduces definitions for green claims. Member states have two years to transpose the directive into national law, and then businesses will have six months to adapt to the new rules before they begin to apply in September 2026.

Meanwhile, in the UK, the Consumer Protection from Unfair Trading Regulations 2008 ban unfair or aggressive commercial practices and make misleading acts and omissions illegal. In 2021, the Competition and Markets Authority (CMA) also introduced its Green Claims Code (the Code), which says that environmental claims must: be truthful and accurate; be clear and unambiguous; not omit or hide important information; compare goods and services in a fair and meaningful way; consider the full life cycle of a product or service; and be substantiated. The Code is not legally binding, however.

Last year, the CMA conducted a review of environmental claims in the fast-moving consumer goods sector and found problematic claims that included the use of vague and broad eco-statements, misleading claims about the use of recycled materials and the incorrect branding of entire ranges as 'sustainable'.

In May of this year, the Digital Markets, Competition and Consumer Act 2024 became law, giving the CMA new direct enforcement powers in relation to breaches of consumer protection rules.

Sharples says: "The Act gives the CMA new teeth via direct powers to fine businesses or impose restrictions. The fines are significant – up to 10 percent of a business's global annual turnover if the CMA issues an infringement notice finding a breach of consumer law. Regulatory bodies are being given the tools to tackle greenwashing, having previously only been able to rely on optional guidance that they wanted businesses to follow."

Outside of consumer goods, efforts to tackle greenwashing are increasingly evident across other industry sectors. In financial services, for example, there are now an estimated $18.4 trillion of ESG-oriented assets being managed globally, and the UK's Financial Conduct Authority (FCA) recently introduced the Sustainability Disclosure Requirements and investment labelling regime (the Regime). Starting with an anti-greenwashing rule which came into force on 31 May 2024, all authorised firms will need to get up to speed on this. Over the next 18 months, the Regime will ultimately bring in a suite of rules surrounding investment labels, disclosure and naming and marketing rules, which will impact FCA-authorised firms, UK asset managers and potentially portfolio management services.

The aviation industry is another segment of the economy grappling with greenwashing issues. With a focus on transitioning away from fossil fuels in favour of sustainable alternatives, there has been intense scrutiny of the green credentials surrounding the growing use of sustainable aviation fuels. At the same time, voluntary carbon offsetting schemes fronted by airlines are becoming increasingly widespread as a way for consumers to pay more in order to support environmental projects that reduce or cut greenhouse gas emissions.

Various cases have arisen across the EU accusing airlines of making misleading comments about the sustainability of their fuels, the offsetting of their negative impact on the environment and their efforts to reduce emissions.

"There is far more demand for transparency and accountability around sustainability claims than there ever used to be," says Butcher. "The Advertising Standards Authority (ASA) has also demonstrated its willingness to pursue advertisers accused of greenwashing, and the Companies Act 2006 means that individual company directors can be held accountable for failures to comply with green commitments."

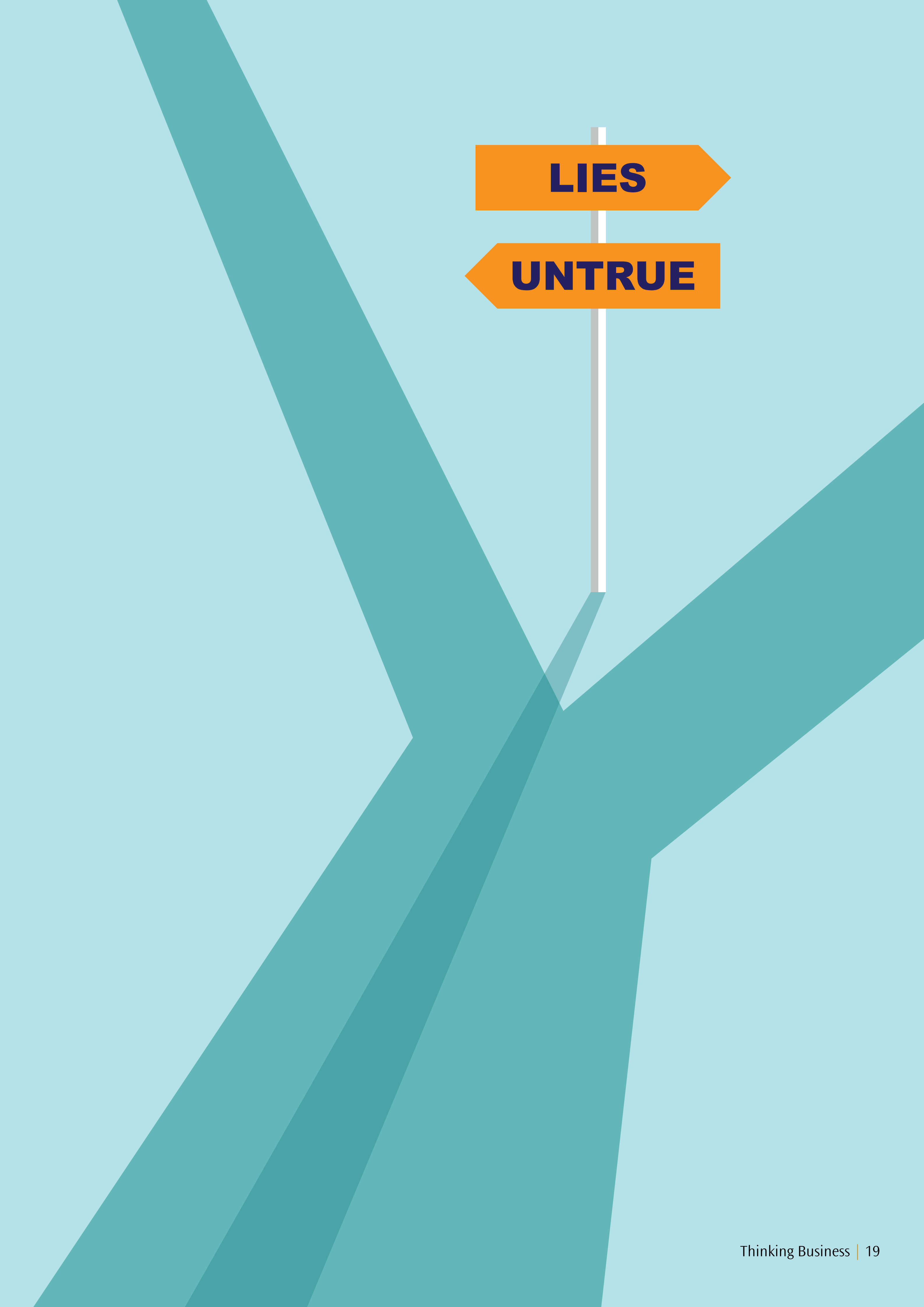
In both the energy industry and the finance sector, there is a growing trend of shareholder activism as shareholders collaborate to take issue with the conduct or decision-making of company directors.

"Business leaders really need a clear understanding of the regulatory landscape out there," says Sharples.

"If companies are going to make claims about their sustainability efforts, they need to be able to substantiate them and that needs to drive marketing strategies and underpin any information that is put out there."

Butcher concludes: "Today, corporate bodies of any size have to fully grasp the impact that their operations are having on the environment. You can't properly communicate about your impact with consumers unless you know what it is, which will often mean bringing a sustainability officer into the business and making this a genuine C-suite issue."

Critically, having individuals within the business that fully understand the efforts being made by the CMA, the FCA, the ASA and others to crack down on greenwashing is now a key requirement as companies strive to remain appealing to consumers and compliant with fast-moving law.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