

The changing face of directors' duties



It's been a busy few months for NGOs, with each of the Commonwealth Climate & Law Initiative (CCLI) and Social Value International (SVI) commissioning independent legal opinions on the scope of directors' duties in the context of sustainability-related risk (SRR). While the opinions are not legally binding, they are authoritative and provide helpful recommendations to minimize risk.

In March 2024, the CCLI published an independent legal opinion penned by a group of eminent KCs, looking at the extent to which SRR forms part of a director's duties under the Companies Act 2006 (the Act).

Section 172 of the Act requires directors to "have regard" to the long term consequences of decisions, as well as the impact of the company's operations on the community and the environment. While paying lip service to these, boards have frequently side-lined such concerns in favour of short term profit.

The opinion grouped SRRs into two broad groups – one which looked at risks associated with a company's dependency on nature (eg clean water supply), and the other which looked at the risks associated with the impact of nature on a company (eg flooding, wildfires and infrastructure damage). It includes risks directly applicable today, as well as those on the horizon as a result of transitional change (eg shifting consumer demands and changing regulation).

The opinion concludes that SRR is not distinct from any other form of financial risk faced by a business, and boards which bump it to the bottom of the agenda are therefore at risk of failing to properly discharge their statutory duties under the Act (for which a director would be personally liable to make good any loss suffered by the company – potentially a very significant sum). The opinion recommended 5 actions to be taken by directors to minimise the risk of a claim, being:

- action to proactively identify the SRRs faced by the company;



- evaluating the potential impact of those risks;
- putting in place a framework to manage and mitigate the risks;
- considering the extent to disclose those risks in the company's reporting; and documenting each of the above steps to demonstrate due consideration had been given.

Another independent opinion was published by Social Value International in January 2024 and focused specifically on the impact of SRR in the context of financial reporting. The opinion was prepared by George Bompas KC, a leading company law barrister, and focused on the meaning of the phrase "true and fair" in the context of Chapter 4 of the Act (being the standard a director must apply when preparing a company's annual accounts).

This opinion concluded there was a positive duty on directors to consider whether to reflect SRR factors in their company's accounts. In order to discharge this duty, directors must be aware of the possible financial impacts of SRR on the business (including current risks, and probably or possible future risks). In order to demonstrate they are aware, directors should "take a diligent and intelligent" interest in SRR in order to:

- to understand them; and
- to apply that knowledge to the business "with an enquiring mind".

While not bound by these opinions, they are likely to be persuasive should the issue be litigated. Directors would be well advised to adopt the actions suggested to minimize the risk that theirs will be the test case...



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