Nature-related risks and directors' duties under the law of England and Wales

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Opinion – Executive Summary

11 March 2024

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1. In our Opinion dated 11 March 2024, we analyse the relevance of nature-related risks to directors' duties under English law.[1]

2. Nature-related risks are the potential threats posed to an organisation that arise from its dependencies and impacts on nature.[2] They include but are not limited to climate related risks. A company's dependencies and impacts on nature can have significant effects on a company's ability to operate successfully. A company which is dependent on nature in its operations and /or its supply chain will suffer where the underlying ecosystem on which the company depends is interrupted. Company operations that result in negative impacts on nature can cause the company financial loss, as well as damaging its reputation, goodwill and ultimately its share price. Financial institutions may face increased exposure where borrower companies suffer these types of losses.

3. Nature-related risks can arise in myriad factual scenarios with a wide range of direct and indirect effects on a company. It is increasingly important that directors are aware of relevant risks and factor them into their decision-making processes. A series of recommendations were published in September 2023 by the Taskforce on Nature-Related Financial Disclosures ("**TNFD**") which capture these points and are likely to result in further scrutiny of directors' responses to nature-related risks.

4. Against that backdrop, we have analysed in the Opinion the relevance of nature-related risks to three distinct aspects of the role of directors in this jurisdiction:

    4.1. The duty to promote the success of the company for the benefit of the members as a whole (s.172 CA 2006);

    4.2. The duty to act with reasonable care, skill and diligence (s.174 CA 2006); and

    4.3. The obligations on directors to disclose information about the company in its narrative reports.

5. The duty to promote the success of the company under s.172 CA 2006 is a duty of loyalty which is broad and flexible. Section 172 contains a non-exhaustive list of factors to

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1 This Executive Summary is not intended to replace any of the analysis contained in our Opinion, nor to be relied upon as legal advice, whether with respect to any specific factual scenario or director or company or at all. The terms set out at paragraph 6 of the Opinion apply equally to this Executive Summary.

2 Nature-related risks are defined by reference to the recommendations of the Taskforce on Nature-related Financial Disclosures.

which a director should have regard when determining how to promote the success of the company. These factors are intended to reflect a concept of 'enlightened shareholder value', which focuses on long-term success for the benefit of members as a whole, and extends beyond mere financial considerations. The list of factors in s.172 expressly states that a director should have regard to "*the impact of the company's operations on … the environment*" which we consider encompasses nature-related risks.

6. The standard applied in s.172 is ordinarily a subjective one; whether the director honestly believed that the relevant act or omission was in the interests of the company. However, a director who gives no consideration to whether specific actions or omissions promote the success of the company risks being held to a higher, objective standard.

7. The duty to act with reasonable care, skill and diligence under s.174 CA 2006 is an objective one. Further, a director will be judged by a higher standard if their own general knowledge, skill and experience is higher than that of a reasonable director in their position.

8. We consider that nature-related risks fall within the category of risks to which a director ought to have regard when discharging their duties under s.172 and 174. Although the relevance of nature-related risks to a company is a fact sensitive question, it is easy to envisage circumstances where the success and best interests of a company (whether in the short or long term) can be affected by nature-related dependencies or impacts to which the company is exposed.

9. In our opinion, it would be prudent for directors to identify the nature-related risks facing their company; assess which of those risks are relevant and non-trivial; take expert advice where appropriate; decide in good faith whether a course of action is appropriate to mitigate those risks and take such steps accordingly; and record their decision making process in writing. Directors who fail to give consideration to relevant non-trivial nature-related risks, and take appropriate steps to mitigate them, may be exposed to claims that they have acted in breach of duty.

Disclosure Requirements

10. In relation to disclosure of information by the company in its narrative reports, the English disclosure framework is highly complex and fact-sensitive. The rules are contained in legislation (both national and, for some companies, at an EU level),

regulatory guidance and accounting standards. The scope of a company's precise reporting obligations depends on several factors, such as the company's size, the character of its business and whether it is public or private. Directors should therefore seek expert advice from legal and accounting professionals as to what must be disclosed as a matter of law.

11. The current disclosure regime is largely focussed on climate-related matters, reflecting the implementation of the Taskforce on Climate-Related Financial Disclosures (TCFD) Recommendations. The TNFD recommendations were only released recently and have not yet been formally adopted into the disclosure regime.

12. Nonetheless, under the current regime, certain companies are required to disclose environmental matters which are necessary for understanding the development, performance or position of the company's business. We consider that this includes types of nature-related risks as set out in Sections C to E of our Opinion. Recently published regulatory guidance suggests that such disclosure should encompass not only matters which are financially material to the company but also matters where the company has a material impact on nature.

13. Directors are given a degree of protection in relation to deficient disclosure and liability under the regime is not easy to establish. However, a serious failure to comply with an obligation of disclosure is likely to have reputational consequences for a company, given the increasing public scrutiny in this area.

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11 March 2024