



Risk, Resilience  
and Reputation

## Focus on Funds | Risk, Resilience and Reputation

# What do you want from me? Understanding risks to directors and what is expected of them

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# Presenting today



## Moderator



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# What will we cover?

1. **Key risks** (Tristan Hall)
2. **Directors' duties – a recap** (David Bridge)
3. **Common types of claim against fund directors** (David Bridge)
4. **Remedies for breach of fiduciary duty** (David Bridge)
5. **Insurance and indemnities for directors** (Tristan Hall)
6. **Top tips** (Tristan Hall)



# Key Issues

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## Liability

- Claims
- Investigations

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## Liberty

- Criminal
- Extradition

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## Livelihood

- Disqualification
- Reputation



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# Directors' Duties – A recap

# Companies Act 2006

## Fiduciary Duties

Act within powers (section 171)

Promote the success of the company (section 172)

Exercise independent judgement (section 173)

Avoid (situational) conflicts (section 175)

Not accept benefits from third parties (section 176)

Declare interest in proposed transactions (section 177)

## Non-Fiduciary Duties

Exercise reasonable care, skill & diligence (section 174)

## Other Duties

File annual accounts, duty of confidence etc

# Bribery Act 2010

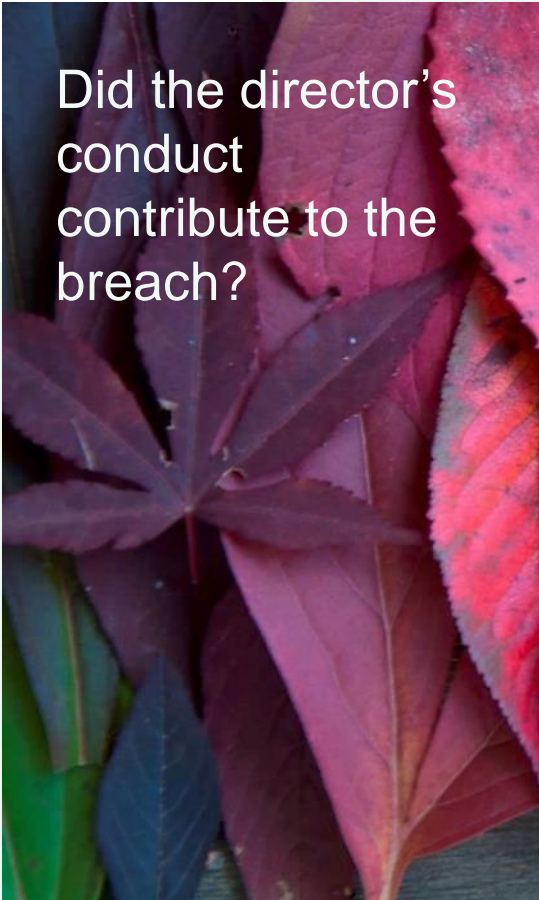
- Offences which can apply to directors include:
  - Offering, promising or giving a bribe
  - Requesting, agreeing to receive or accepting a bribe
  - Bribing a foreign public official to obtain or retain business



- Conviction can lead to disqualification for up to 15 years



# Company Directors Disqualification Act 1986



Did the director's conduct contribute to the breach?

Did they know of the breach or have reasonable grounds to suspect?

Did they take steps to prevent it?

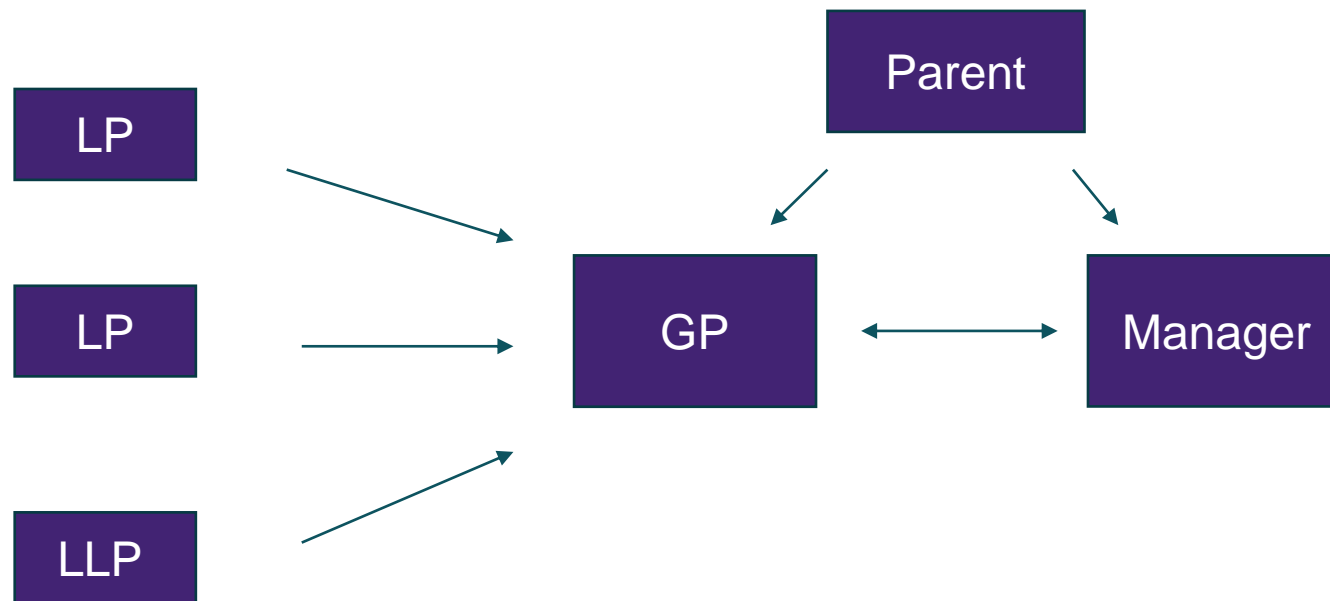
Is there any other conduct that the court should take into account?



# Typical fund management

- Ultimate responsibility for management rests with the board of directors
- Often delegated to an investment management company that is regulated (e.g. by the FCA)
- Investment manager is responsible for the administrative and company secretarial functions
- Most investment trust boards are comprised of non-executive directors and often include representatives of the investment manager

# Typical limited partnership fund structure





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## Common types of claim against directors



# Breach of duty claims

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## ***Weaving (2011)***

- Directors liable for fund's losses
- Lack of engagement & wilful neglect/default
- Must take an active role in supervising the fund's affairs and its business.
- Must apply minds and independent judgement to decisions made and documents the fund's service providers ask to be signed

## ***BTI –v- Sequana (2019)***

- Common law duty to have regard to creditors' interests
- Can be triggered before actual insolvency
- Where directors knew/should have known company was likely to become insolvent





# Breach of duty claims

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## ***AMT Coffee (2019)* – examples of unfair prejudice**

- Paying excessive remuneration without authorisation
- Using reserves to pay bonuses and make personal loans instead of dividends
- Providing long-term interest free loans

## ***Austin Waldron v Patrick Waldron (2019)***

- Breaching an agreement to consult can be unfair prejudice
- Relief is discretionary
- Court may decline if claimants have acquiesced in the contract

# Criminal claims

## Deferred prosecution agreements

- To fix a company with fraud:
  - Requires the conviction of a senior executive or “directing mind”
  - That person must have acted illegally and dishonestly
- SFO prosecution of Tesco directors failed
- They remain named in the DPA...



## • Private prosecutions against directors

- Recent rise in number
- R (DAS UK Holdings) v Asplin – largest private prosecution case to date



# Investor class actions

- S.90 FSMA - remedy for misstatements/omissions in prospectuses or LPs
- Liability for any untrue or misleading statement
- In the news: investor litigation in Woodford fund



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## Remedies for breach of fiduciary duty



# Remedies for breach of fiduciary duty

Injunction

Setting aside a transaction (at company's request)

Restitution and account of profits

Equitable compensation

Constructive trust

Rescission

Damages

Derivative actions



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# Insurance and indemnities for directors

# Deeds of indemnity for directors

Ability to indemnify

Do not rely on indemnity provisions in Articles

No “standard form”

Precise scope of indemnity depends on how it has been drafted

Issues we have seen:

- No obligation to advance defence costs
- Expensive dispute resolution provisions

Not a complete solution in practice

# D&O insurance

- Three key elements of cover:
  - Director when not indemnified by company
  - Company when indemnifying director
  - Company in respect of “Securities Claims”
- “Composite” - each director is treated as having his/her own policy
  - Broader protection than deeds of indemnity
  - Mitigation costs, internal investigations
    - Limited exclusions, but cannot cover everything:
    - Wilful conduct/dishonesty
    - Regulatory and criminal fines
- Not all D&O policies are created equal!



# Practical pointers on D&O insurance

- The policy limit is **not** allocated equally between directors
- Never underestimate how expensive it can be to defend claims
- Pre-planning is important:
  - Conflicts of interest
  - Pre-agreed consent for “panel” solicitors to act for directors
  - Engage with those solicitors before a claim, particularly on billing
  - Provide information to the board

# Top tips



**Check your deeds of indemnity**



**Critically analyse the amount of D&O cover required**



**Pre-plan for a D&O claim**



**Understand your duties**



**Document factors contributing to decisions**



**Something “not quite right”? Never ignore it**

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