



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

12 May 2022

**| Andrea Arcangeli
| David Bridge
| Tristan Hall**

Presenting today



Moderator



Andrea Arcangeli
Partner | CMS Italy
CMS Funds Group
T +39 06 47815 1
E Andrea.arcangeli@cms-aacs.com

Speakers



David Bridge
Partner | CMS UK
Dispute Resolution
T +44 20 7367 3021
E david.bridge@cms-cmck.com



Tristan Hall
Partner | CMS UK
Dispute Resolution
T +44 20 7367 3105
E tristan.hall@cms-cmno.com

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

1

Liability

- Claims
- Investigations

2

Liberty

- Criminal
- Extradition

3

Livelihood

- Disqualification
- Reputation



Risk, Resilience
and Reputation

1

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

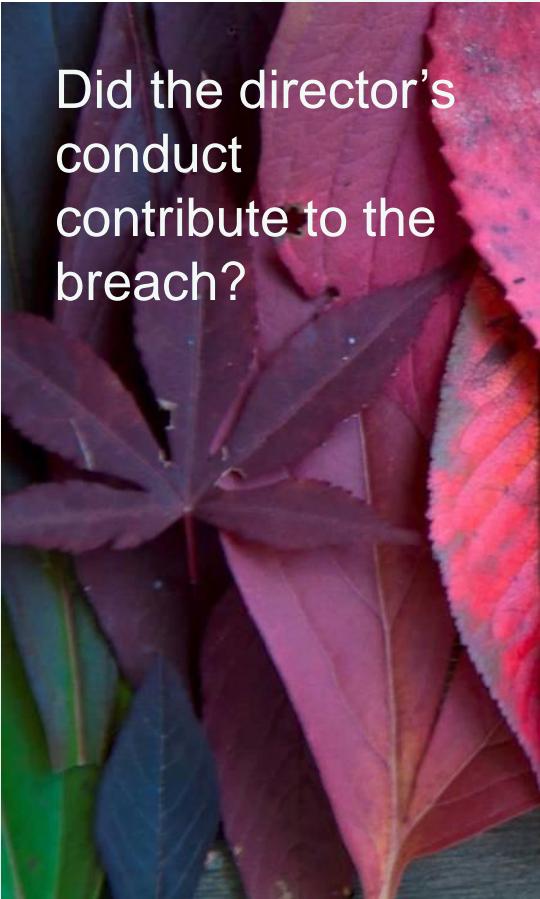
- Offences which can apply to directors include:
 - Offering, promising or giving a bribe
 - Requesting, agreeing to receive or accepting a bribe
 - Bribing a foreign public official to obtain or retain business



- 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?

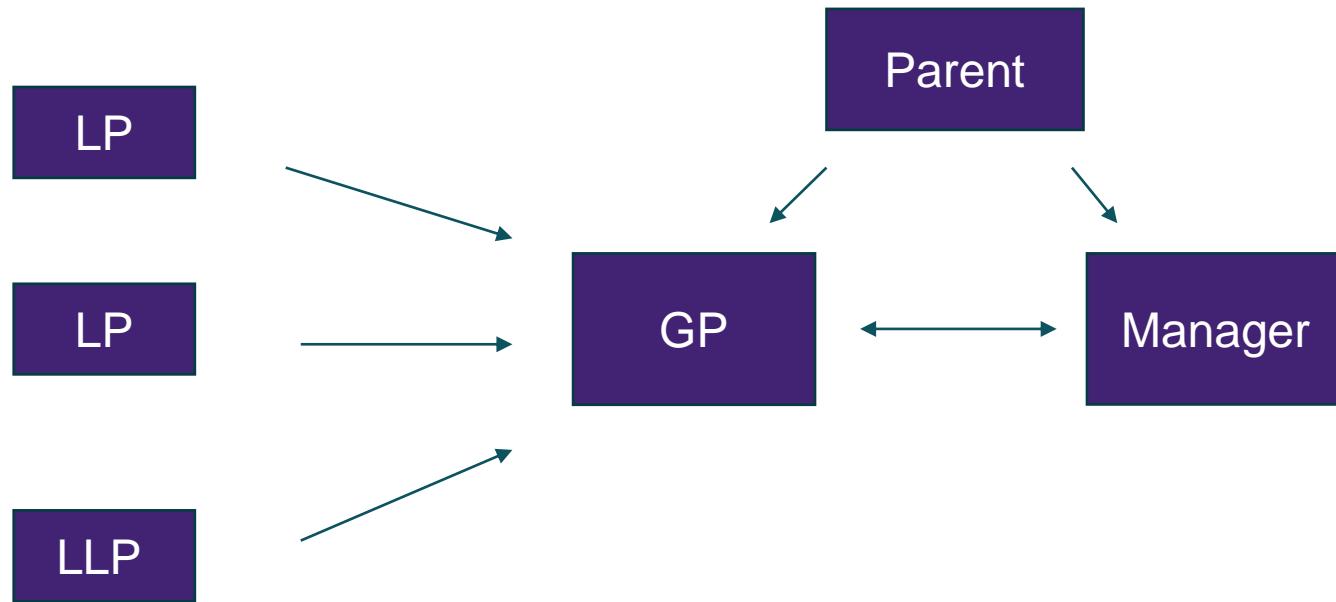
Did they take steps to prevent it?

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

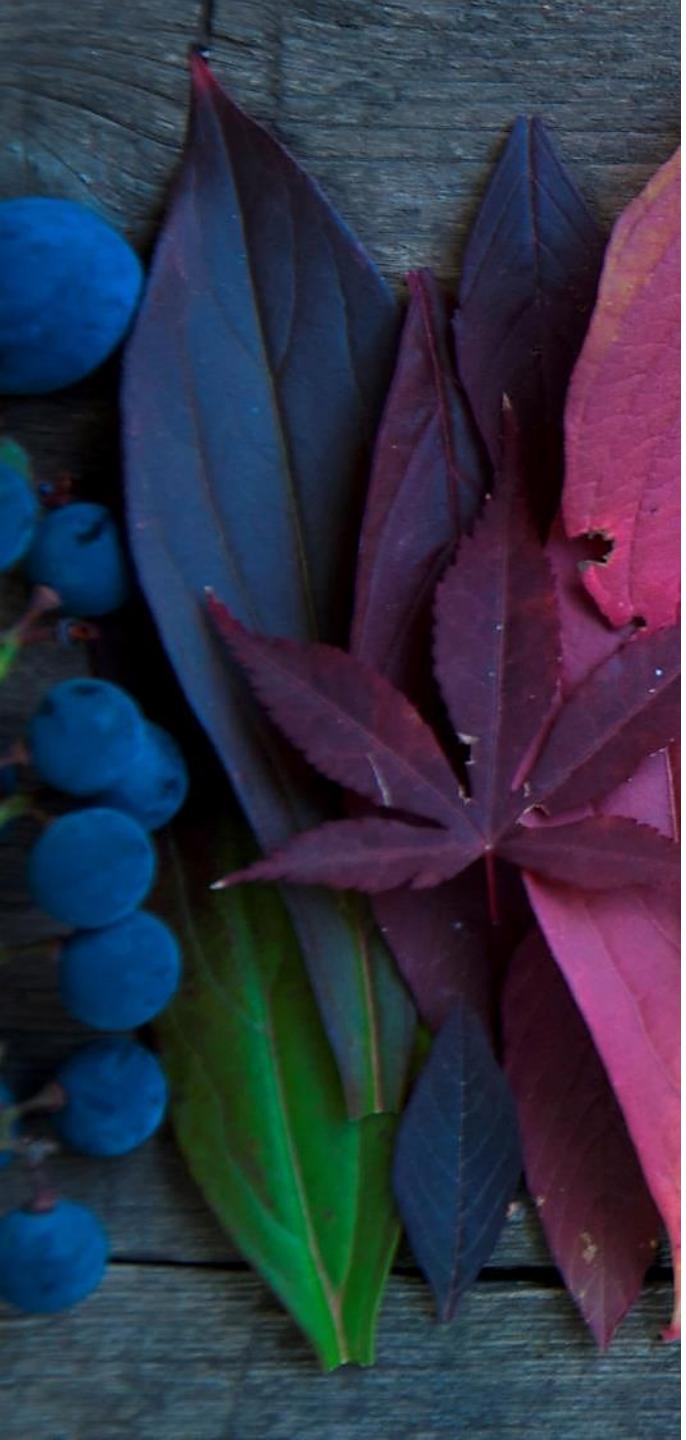




Risk, Resilience
and Reputation

2

Common types of claim against directors



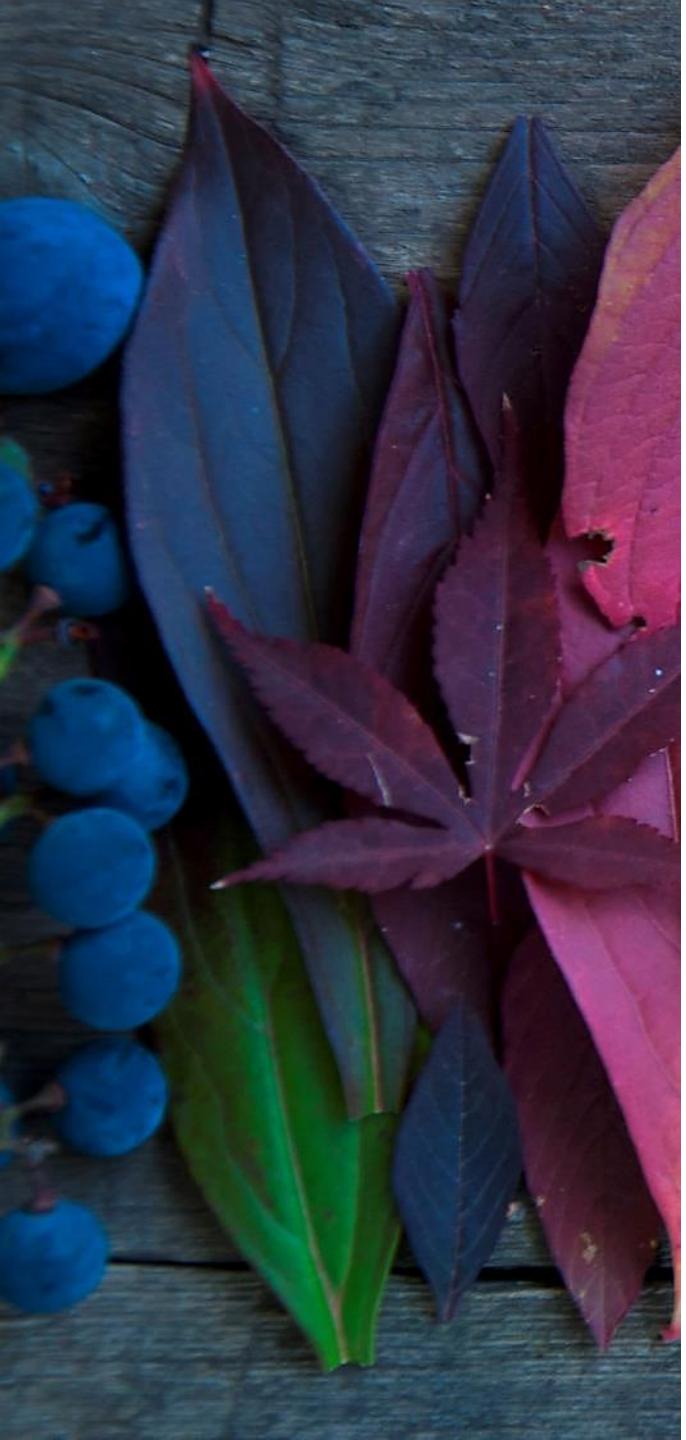
Breach of duty claims

Weavering (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

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 Aspin – 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



Risk, Resilience
and Reputation

3

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



Risk, Resilience
and Reputation

4

Insurance and indemnities for directors

Deeds of indemnity for directors

Ability to indemnity

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

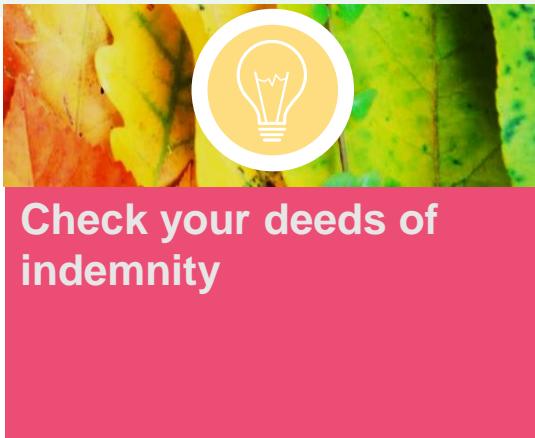
D&O insurance

- 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



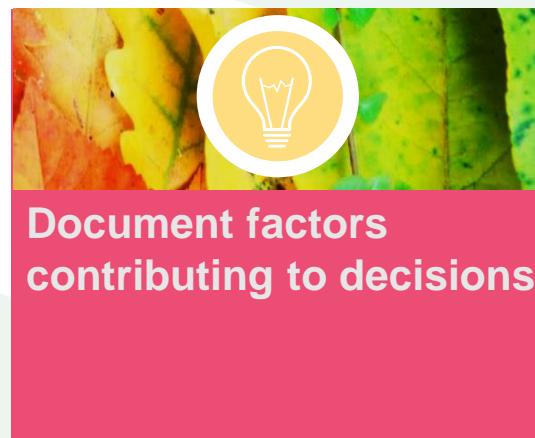
Critically analyse the amount of D&O cover required



Pre-plan for a D&O claim



Understand your duties



Document factors contributing to decisions



Something “not quite right”? Never ignore it

Presenting today



Moderator



Andrea Arcangeli
Partner | CMS Italy
CMS Funds Group
T +39 06 47815 1
E Andrea.arcangeli@cms-aacs.com

Speakers



David Bridge
Partner | CMS UK
Dispute Resolution
T +44 20 7367 3021
E david.bridge@cms-cmck.com



Tristan Hall
Partner | CMS UK
Dispute Resolution
T +44 20 7367 3105
E tristan.hall@cms-cmno.com



Your free online legal information service.

A subscription service for legal articles on a variety of topics delivered by email.

cms-lawnow.com

The information held in this publication is for general purposes and guidance only and does not purport to constitute legal or professional advice. It was prepared in co-operation with local attorneys.

CMS Legal Services EEIG (CMS EEIG) is a European Economic Interest Grouping that coordinates an organisation of independent law firms. CMS EEIG provides no client services. Such services are solely provided by CMS EEIG's member firms in their respective jurisdictions. CMS EEIG and each of its member firms are separate and legally distinct entities, and no such entity has any authority to bind any other. CMS EEIG and each member firm are liable only for their own acts or omissions and not those of each other. The brand name "CMS" and the term "firm" are used to refer to some or all of the member firms or their offices; details can be found under "legal information" in the footer of cms.law.

CMS locations:

Aberdeen, Abu Dhabi, Algiers, Amsterdam, Antwerp, Barcelona, Beijing, Beirut, Belgrade, Bergen, Berlin, Bogotá, Bratislava, Bristol, Brussels, Bucharest, Budapest, Casablanca, Cologne, Dubai, Duesseldorf, Edinburgh, Frankfurt, Funchal, Geneva, Glasgow, Hamburg, Hong Kong, Istanbul, Johannesburg, Kyiv, Leipzig, Lima, Lisbon, Liverpool, Ljubljana, London, Luanda, Luxembourg, Lyon, Madrid, Manchester, Mexico City, Milan, Mombasa, Monaco, Moscow, Munich, Muscat, Nairobi, Oslo, Paris, Podgorica, Poznan, Prague, Reading, Rio de Janeiro, Rome, Santiago de Chile, Sarajevo, Shanghai, Sheffield, Singapore, Skopje, Sofia, Stavanger, Strasbourg, Stuttgart, Tel Aviv, Tirana, Utrecht, Vienna, Warsaw, Zagreb and Zurich.

cms.law