D&O and Financial Institutions Predictions 2024

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1. Shareholder activists will find creative ways to generate publicity and further their climate agenda against corporations

Climate activists have received a significant setback with the High Court of England and Wales refusing ClientEarth (a minority shareholder in Shell Plc) permission to continue a derivative action against the directors of Shell, and permission to appeal that decision being denied. ClientEarth could not demonstrate that Shell's directors were mismanaging climate risks and offered no engagement on how the directors' alleged wrongful actions constituted an approach that no reasonable director could have adopted. The decision endorsed the UK courts' inherent unwillingness to interfere with the invariably difficult decisions directors must take when managing climate risks and carbon transition. While ultimately unsuccessful, publicity is second only to victory and the publicity generated by this litigation was invaluable. The activists' appetite to challenge corporate behaviour will not have waned and they will find creative ways to circumnavigate company law obstacles and continue their fight. Corporations remain firmly under the spotlight to embed climate change into their business strategies and evidence progress. It is important to implement climate change strategies now and mitigate the risk of litigation and reputational damage.

2. UK companies and directors will remain under the microscope for the activities of subsidiaries and their supply chains

While a parent company is not automatically liable for the wrongdoings of its subsidiary, a series of recent decisions in the Courts of England and Wales (culminating in the 2021 case of Okpabi v Royal Dutch Shell plc) have made it clear there are various circumstances where the parent company might inadvertently assume responsibility for its subsidiary. Companies are at the same time being required to monitor and address human rights and environmental risks along their supply chains. Last summer, the Dyson Group successfully resisted a novel and ground-breaking claim by Malaysian factory workers who accused Dyson of unjustly benefitting from forced labour conditions while they worked for a company manufacturing components in Dyson's supply chain. The High Court's finding that there was insufficient connection to England to allow the claim to continue will no doubt have come as a great relief for UK company directors, but unquestionably the obligations and responsibilities of parent companies are under intense scrutiny.

3. Litigation funding will innovate and find creative solutions

The litigation funding market, increasingly used by insolvency practitioners or other stakeholders to provide a 'fighting fund' for claims against directors, received a seismic blow last summer. In R (on the application of PACCAR Inc and others) (Appellants) v Competition Appeal Tribunal and others (Respondents), the Supreme Court held that litigation funding agreements (LFAs), where the funder receives a percentage of any damages recovered by the successful claimant, are unenforceable damages-based agreements (DBAs). Litigation funders had, until this judgment, proceeded on the basis that LFAs were not DBAs and did not need to comply with the statutory requirements for DBAs. The decision has unsettled the collective action landscape. Disputes have followed with claimants refusing to reimburse funders from damages successfully recovered on the basis their LFAs are unenforceable. Claimants are being challenged by opponents on the recoverability of costs that have been advanced pursuant to unenforceable LFAs and their ability to satisfy adverse costs orders. We have already seen funders successfully amending their LFAs (see Alex Neill v Sony Interactive Entertainment Europe Limited) to navigate the statutory obstacles. The current uncertainty dampening funding activity is therefore likely to be short-lived as greater clarity is provided from the courts or Parliament.

4. US style class actions are coming to the UK

The growth of group litigation in the UK continues to be exponential. Growth has been fuelled by a booming litigation funding market and greater judicial acceptance of 'opt out' group claims, where a representative brings the action on behalf of a class of claimants without seeking the consent of claimants within the class. Last March, the High Court ruled an 'opt out' representative claim could proceed despite differences in the claims and remedies sought by the claimants. The court clarified that the "same interest" test in CPR19.6 does not require identical claims or interests, but rather confirmation that the differences can be managed with litigation safeguards to avoid conflict or prejudicing the position of other claimants within the class. The decision was hailed as signifying a willingness by the courts to evolve the legal framework and find solutions which promote greater access to the representative action regime and allow more 'opt out' actions. With funders and claimant law firms working together to identify new opportunities for bringing mass claims, the risk of US-style class actions for corporations and their directors has never been greater.

5. Flexible working is here to stay: 2024 will see an increase in flexible and remote working claims

The number of remote working claims recorded by the UK Employment Tribunal has grown significantly since the start of the COVID-19 pandemic, rising from just 6 claims in 2019 to 27 in 2021 and 42 in 2022. Over the same period, there was a 52% increase in flexible working claims. These types of claims are predicted to hit a record high in 2024. Surveys of workers also suggest more people expect flexibility in their workplace as a day one right. These trends, coupled with the changes to flexible working laws in 2024 brought in by the Employment Relations (Flexible Working) Act, which will give workers greater rights to request variations in their work arrangements, will inevitably lead to more claims against businesses who do not embrace flexibility.

6. Financial institutions driving efficiency and productivity through automation must manage AI-vulnerabilities and the risk of consumer claims

AI has reshaped the financial services industry. It is widely used to interpret information, automate credit and loan decisions, detect and prevent fraud, and is said to drive operational efficiency and productivity, reducing human errors. But if AI learns from incomplete or imperfect data, there is a significant risk of unintended discrimination or unconscious bias and this might inadvertently affect a financial institution's approach. Customer privacy and moral considerations may also be overlooked. Unchecked reliance on AI could affect large communities within a customer base and ultimately lead to large claims for consumer redress. Financial institutions that carefully manage AI vulnerabilities, balancing the opportunities against systemic risks, will be less exposed than those who only focus on efficiencies and enhanced revenue. A more holistic approach could improve the quality of management information, spot anomalies or longer-term trends that currently go unnoticed, and avoid discriminatory decision-making.

7. While cryptocurrencies may become less volatile, investment firms must exercise caution to avoid investor claims

When interest rate rises are seen to have peaked and even begun to reverse, investment firms will look again at digital assets as an investment class. It is likely that sentiment will return so investment in cryptocurrencies is seen as a risky but likely rewarding venture. In a more benign financial environment, however, any investment firm taking this step for even moderately risk averse investors risks claims being made against it if further failures hit the crypto-market. Investors must understand that despite some forms of regulation, mostly around marketing to consumers, it remains largely unregulated and therefore inherently risky as an asset class.

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