Francis Kean an Executive Director in Willis’ FINEX Global is a regular blogger on WillisWire, sharing his expertise with readers.

Francis specialises in insurance for Directors’ and Officers of companies. He joined Willis in 2010 and has 25 years of experience as a leading litigation lawyer specialising in Professional Indemnity, Financial Institutions and Directors’ & Officers (D&O) Liability in the London insurance market.

We have pulled together Francis's blogs from the last quarter and put them in to this easy to read bulletin.

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U.K. COURT REACHES DIRECTORS OVERSEAS

We still hear a lot about long-arm jurisdiction being exercised by the United States—and rightly so. Rumours of its demise in the wake of the Supreme Court judgment in Morrison v National Bank of Australia have been way overdone. The U.S. Foreign Corrupt Practices Act is alive and kicking and FATCA, the Foreign Account Tax Compliance Act, has recently joined it on U.S. statute books.

U.K. EXTENDS ITS ARM

What about long-arm jurisdiction from the U.K. itself? With the notable exception of the Bribery Act the U.K. (in common with most other Western economies) has been much more circumspect than the U.S. in this area.

So I was interested to read a report of the Court of Appeal’s decision published on 30th June in the case of Dar Al Arkan Real Estate Development Co v Majid Al-Sayed Bader Hashim Al Refai and others.

In this case, Sheikh Abdulatif Al Shalash was a company director domiciled and resident in Saudi Arabia. The companies on whose boards he sat, although not incorporated in the U.K., had both commenced civil proceedings in the English Courts and therefore (naturally enough) submitted to the jurisdiction of these courts.

In the course of the litigation, the claimant companies had provided undertakings to the Court to preserve two hard drives and to deliver them to their solicitors. This they had failed to do.

Breaching an undertaking to the court is “contempt,” the penalty for which is committal to prison. The necessary committal proceeding had been served on Sheikh Abdulatif in Saudi Arabia. His defence was that the English Court had no power to commit him to prison because the relevant rules did not have extra territorial effect.

“...The Court reached Director overseas...

COURT REACHES DIRECTOR OVERSEAS

Whilst the Court of Appeal accepted that there was a presumption that the Civil Procedural Rules did not have extra territorial effect, it nevertheless rejected the Sheikh’s argument. The Court started from the proposition that although a company was a legal entity distinct from its members, it was only capable of acting by its agents. The Civil Procedure Rules represented a vehicle and mechanism for the exercise of the Court’s disciplinary powers over companies that were subject to the Court’s jurisdiction.

The overriding objective of the rules was to enable the Court to deal with these cases justly. That included enforcing compliance with rules, practice directions and orders. Since a company could only comply or not comply with a Court Order through the acts or omissions of its directors and officers, it was right in this case to extend the jurisdiction for the committal proceedings to a director resident overseas.

KEY LESSON FOR DIRECTORS

Whilst the decision seems an obvious victory for common sense it may nevertheless give company directors pause for thought. English law and English courts are often (and increasingly frequently) resorted to by foreign litigants to resolve international disputes. Many of these disputes have little or no factual connection to the U.K.

Company directors should note that there may be personal consequences for them of failures by the companies on whose boards they sit to comply with the orders of an English Court either (as here) during the conduct of the litigation itself or as a result of the Court’s final determination.

“The U.S. Foreign Corrupt Practices Act is alive and kicking and FATCA, the Foreign Account Tax Compliance Act, has recently joined it on U.S. statute books.”
Can You Insure Yourself Against Your Own Illegal Conduct?

You can’t insure yourself against your own illegal conduct, right? Well, it seems only up to a point.

In a recent case, a driver and passenger were both injured in a car accident in which prosecutors said the driver was “undoubtedly” under the influence of drugs. A large quantity of cannabis was found on the passenger after he was cut from the wreckage of his friend’s car.

The passenger subsequently claimed for insurance compensation from the Motor Insurers’ Bureau, a scheme backed by the UK’s Ministry of Transport for accidents involving uninsured drivers in the UK. Lawyers for the Ministry argued that the driver and passenger were involved in a “joint criminal enterprise” and that it would be against public policy for insurers to pay out.

Occasion vs. Cause of the Accident

Finding against the Ministry, the Court concluded that the claim was not barred on grounds of public policy because criminality was only the occasion and not the cause of the accident. The Judge said:

many readers may be wondering how it comes about that a drug dealer is entitled to compensation against Her Majesty’s Government in circumstances where he was injured during the course of a criminal joint enterprise. The understandable reaction might be that there must be some rule of public policy reflecting public revulsion which bars such a claim. The short answer is there is not.

“When is Conduct Uninsurable?”

Francis has blogged in the past on the vexed question as to the type of conduct that is uninsurable on the grounds that it offends public policy. The general principle is that a court will not permit a person to enforce his rights under a contract of any kind if it is tainted by illegality.

In an insurance context, this principle gives rise to two linked rules:

1. The claim is unenforceable when the grant of relief for a plaintiff would enable him to benefit from his own criminal conduct; and
2. The claim is unenforceable when the claimant has founded his claim on a contract which is itself illegal.

In this case, the Court concluded that the passenger did not benefit from his own criminal conduct even though he happened to be transporting a large quantity of cannabis at the time of the accident.

The case serves as a good illustration of the reality that the application of any public policy rule is fact-sensitive.

All the more reason you might think why D&O liability insurers should wherever possible give the directors the benefit of any doubts in this area.

The Secretary for State for Transport has indicated an intention to appeal, so it will be interesting to see whether the appeal courts shine any more light on this question.
UK SUPREME COURT EXTENDS POOL OF WHISTLEBLOWERS

The cornerstone of protection for UK employees against discrimination based on whistleblowing is Section 2 of the UK Public Interest Disclosure Act 1998. This provides:

A worker has the right not to be subjected to any detriment by any act or any deliberate failure to act by his employer done on the ground that the worker has made a protected disclosure.

ARE PARTNERS "WORKERS"?

The question which was recently addressed by the Supreme Court was whether and to what extent this legislation protects lawyers, accountants, hedge fund managers and a host of other professionals whose status is that of partner or member of a limited liability partnership rather than as a more obvious class of employee.

In Bates van Winkelhof v Clyde & Co, the Supreme Court unanimously concluded that an equity member of a limited liability partnership was indeed a “worker” and thus entitled to bring a claim in the employment tribunal under the statutory provisions protecting whistle-blowers from being subjected to any alleged detriment for having made a protected disclosure.

WHISTLE-BLOWING AND PENSION RAMIFICATIONS

The Supreme Court’s decision is likely to breathe fresh life into whistle-blowing type claims, not least because (alongside race, sex and age discrimination) such claims are uncapped in employment tribunals and can be brought in a large number of circumstances. That fact will not be lost on disgruntled LLP members (and their legal advisers) as they exit or are removed from partnerships.

The case also creates other potential headaches and uncertainties for businesses structured in this way. This is because protection as “workers” under UK and EU legislation is not limited to whistle-blowing but also extends into other areas such as pension and employment rights.

Be that as is may, the Supreme Court evidently concluded that the public interest in ensuring a culture of compliance and transparency in which individual members are able to bring wrongdoing to their firm’s attention is of paramount importance.

WHITE COLLAR CRIME: BATTLE LINES ARE DRAWN

According to a report in The Times on Thursday 22nd May 2014, the number of senior prosecutors recruited by U.S. law firms in London has moved into double figures in the last three years. It seems there is no shortage of demand for the unique experience and perspective former prosecutors can provide to clients facing the full weight of a Serious Fraud Office (SFO) or Financial Conduct Authority (FCA) investigation.

Tax is another area in which there has been a considerable rise in the number of investigations and prosecutions. (The number of people being investigated by HM Revenue & Customs (HMRC) has doubled in one year. Figures disclosed under the Freedom of Information Act show HMRC made inquiries about the tax affairs of 237,215 people in 2013, compared with about 119,000 in 2011/12.)

Another aspect of this growth in investigations, (about which Francis has blogged in the past) is the potential for conflicts of interest arising between companies and their executives. This growth in potential conflicts is likely to lead to an increased demand for multiple legal representation.

WINNERS AND LOSERS IN THIS TEND

Whilst that might not be good news for D&O insurers who are asked to pick up the bill, it probably is welcome news for lawyers specialising in white-collar crime. It is a theme also picked up in the same Times article by Steven Parkinson, head of criminal and regulatory litigation group of law firm Kingsley Napley, who is quoted as saying:

at some point in the life of a criminal investigation of a company, individuals need representation either because directors or former directors are suspects or because the SFO or the FCA want to interview individuals under compulsion as witnesses. Then there is a potential conflict between the company and the individual.

With the advent of the Bribery Act and a number of prosecutions thought to be in the SFO’s pipeline and no sign of any diminished appetite by the U.S. Department of Justice for bringing Foreign Corrupt Practices Act prosecutions, this trend towards battle readiness among UK law firms is likely to accelerate.
NEW RULES AFFECT RACE, AGE AND SEX DISCRIMINATION CLAIMS AGAINST DIRECTORS

Some important reforms to the employment tribunal system in the UK were introduced on 6th April 2014. These include a new discretionary power for employment tribunals to impose a financial penalty on an employer if they find that it has breached a worker’s rights and the employer’s behaviour involved one or more ‘aggravating features’. We don’t yet know what these aggravating features will be, but guidance notes say they may include matters such as deliberate, malicious, or repeated conduct.

Whilst of more obvious relevance to companies as employers, the reforms also have an impact on directors who not infrequently become embroiled in employment disputes especially where allegations of race, sex or age discrimination are made.

CONCILIATION STRONGLY ENcouraged

“...as soon as they receive a perhaps innocuous-looking communication from ACAS, they will be in possession of what their insurers may well regard as a “claim” for policy purposes”

Perhaps the most striking reform is that with effect from May 6 2014, virtually all potential claimants will first have to register their complaints with the Advisory, Conciliation and Arbitration Service (ACAS).

The Government’s aim here is to encourage parties to work out their differences without having to resort to litigation.

In essence, potential claimants will not be able to issue proceedings without first obtaining a certificate from ACAS to the effect that there was no reasonable possibility of settlement. This will only generally be issued after a period of at least a month during which time ACAS will have made contact with the respondent employer (and/or directors) in an attempt to negotiate a compromise.

This new procedure ‘stops the clock’ on the time limit for filing a claim before the employment tribunal. Indeed, the claimant will always have at least one month from issue of the conciliation certificate to submit his or her claim. Further information on the early conciliation regime is available on the Acas website.

ACAS COMMUNICATION MAY BE CONSIDERED A CLAIM

The insurance coverage point which directors and risk managers need to be alive to here is that as soon as they receive a perhaps innocuous-looking communication from ACAS, they will be in possession of what their insurers may well regard as a “claim” for policy purposes, even though it doesn’t bear the obvious characteristics of such.

Many D&O and employment practices liability (EPL) policies contain provisions requiring insureds to notify claims “as soon as practicable”. Failure to do so may allow the insurer to deny the “claim” despite the absence of any prejudice they may have suffered as a result of such “late notice”.

Even where that is not the case on the particular wording, failure to notify the conciliation request could lead to coverage disputes in the event a compromise is reached before the insurers are given an opportunity to consent.

The old saying: “If in doubt, notify” seems appropriate here.
The Status of Directors Under D&O Insurance Policies

Questions arise from time to time as to the status of the individual insureds under a D&O policy:
— Are they co-insureds with the policyholder or are they simply third parties to the contract between the insurer and the company?
— Do they have enforceable rights against the insurer?
— Are they entitled to a copy of the D&O policy?
— Are they able to circumvent the policyholder when making claims under the policy?
— What are the rights and duties of an insurance broker in respect of the individual directors?

These legal issues, many of which have important practical consequences, crop up more often than you might think.

There are no easy answers and the lawyer’s usual refuge: “It depends on the exact nature and content of each contract”, certainly applies. (For what it is worth, my rule of thumb is that in most cases directors probably do have enforceable rights against insurers under a D&O policy).

What is more, there is at least some authority for the proposition that brokers may owe contractual and non-contractual duties of care to directors in circumstances where the company is or was their client. (See for example: Crowson v HSBC Insurance Brokers Limited 2010).

New Controversy

A new related controversy has recently arisen in the case of R (Bluefin Insurance Services Ltd) v Financial Ombudsman Service Ltd.

The case concerned a referral by a director of a claim against an insurance broker to the Financial Services Ombudsman. His claim related to an alleged failure by Bluefin Insurance Services to notify his claim under a D&O policy in respect of his previous company.

A threshold question relating to the issue as to whether the Ombudsman had jurisdiction to rule on the complaint, was whether Mr Lockner, as the director concerned, was a “consumer” for the purposes of the FCA handbook rules.

The Ombudsman concluded that he did indeed have jurisdiction and ruled against Bluefin, but that decision was later made the subject of a judicial review application by the brokers.

At first, permission to bring judicial review proceedings was refused but on 12th February 2104, Mr Justice Blair gave permission for the review proceedings to go ahead. In doing so he concluded that the proposition that a D&O policy is not a consumer contract—at least in the context of the facts of this case—were at least arguable.

We will have to await the judgment in due course. If the Court decides that D&O policies are consumer contracts and therefore subject to the same rules and regulations as general classes of insurance, this could have considerable implications—not least in relation to the forthcoming law reforms relating to insurance contract formation, which draw important distinctions between consumer and other types of insurance contract albeit in a different context.

More “Watch This Space” I fear.
HUNGARY DISPENSES WITH CORPORATE VEIL OF PROTECTION FOR DIRECTORS

Every now and then a country which hasn’t historically featured strongly (or at all) on the D&O liability risk register emerges blinking into the hot sunshine. Last month it was the turn of Hungary, which on March 15th 2014 introduced a radically new civil code – in effect, a new Companies Act regime. It applies to companies domiciled in Hungary, and for such companies it seems to drive a coach and horses through the corporate veil. That’s sounds dramatic but read on!

Generally, in developed and developing economies the concept of protection from third-party liability for a company’s directors and officers who comply with their duties vis-a-vis the companies on whose boards they sit is universally respected. Special rules often apply in the case of insolvency or in the dangerous twilight zone when a company is teetering on the brink of insolvency. So for example in the UK we have the Wrongful Trading laws under the Insolvency Act. But with that important exception the corporate veil is a well-recognised concept.

NEW HUNGARIAN CIVIL CODE
Download tax law firm CMS’s overview of the implications of Hungary’s new civil code.

Under the new Hungarian Civil Code, if a third party can prove damage as a result of corporate activity, the directors are jointly and severally liable for that damage alongside the company itself. In other words, the third party can elect to sue the directors either with the company or even instead of the company if they can establish damage in a non-contract based scenario.

The only statutory defence to the claim for directors appears to be that they have taken all steps to avoid or eliminate the possibility of loss arising in the first place or that it was otherwise unforeseeable.

The previous Civil Code regime in Hungary was much closer to the developed economies norm under which directors would only be liable to third parties in exceptional cases.

Although I do not know this for certain I would be surprised if this new law was not a reflection of the severe economic difficulties with which Hungary along with many other countries has had to grapple over recent years.

“The previous Civil Code regime in Hungary was much closer to the developed economies norm under which directors would only be liable to third parties in exceptional cases.”

DOES ANY OF THIS MAKE A DIFFERENCE?

So does any of this make a difference to the type of D&O insurance needed for Hungarian companies and their directors?

On the face the answer is no. After all, if a claim is made by a third party it would seem to fall squarely within the scope of cover. Here are a couple of thoughts though:

— The first and most obvious point is that it may increase the appetite for this type of protection in terms both of breadth of cover and limits.

— Secondly, given that directors are now likely to feature far more frequently as co-defendants with the company, interesting questions of allocation are likely to arise. In other words carriers are likely to argue that they should only be liable to pay a percentage of the loss and defence costs on the basis that the company is not an insured under the D&O policy for this purpose.

— In light of the increased risk of mixed entity and individual claims, perhaps it would be wise to consider either broadening out the entity cover or providing 100% pre-determined allocation at least in respect of defence costs.

It will be interesting to see how quickly litigants avail themselves of these new rights to sue individual directors.
4) Compensatory Orders

Perhaps most radically, the government proposes that the Secretary of State be given powers to apply to court for compensatory orders to be made against a director who has been disqualified, in circumstances where that director's actions have caused identifiable loss either to specific creditors or to creditors generally.

It is not yet clear how this new regime will sit with the existing framework of wrongful trading proceedings but it seems likely that, if enacted, these powers will represent a powerful supplement to the weapons in the hands of a liquidator which could be turned against directors of insolvent companies. That's because the categories of misconduct justifying disqualification are themselves to be considerably reshaped and relaxed (see above).

5) Third-Party Involvement

As previously reported when the discussion paper was first published, the government also intends to allow insolvency office holders to sell or assign to third parties causes of action that arise on insolvency (including those for fraudulent or wrongful trading).

When?

The big question is when all this will hit the statute books. Although the government has said it will implement the changes as soon as parliamentary time allows, the need for primary as well as secondary legislation leaves open the question as to whether this can happen before the next general election.

Having said that, it is perhaps unlikely in the current political climate that changes aimed at increasing director accountability will be left on the back burner too long whatever the complexion of the next government.

Speaking for myself, it is the combination of the proposal to assign rights of action against directors on a contingency fee basis coupled with a new flexible regime of fault-based compensation orders which would be the biggest cause of future interrupted sleep if I were a company director.
OBLIGATION TO ADVISE ON TAX AVOIDANCE REVISITED

In July 2013 I highlighted the case of Mehjoo v Harben Barker in which the High Court concluded that a firm of accountants was obliged to advise its clients about the availability of sophisticated tax avoidance schemes. This case sent mixed messages about the propriety of tax avoidance more generally; a subject which continues to generate controversy for UK PLC. Now, The Court of Appeal has unanimously overturned the High Court’s judgment.

MEHJOO’S CHIEF COMPLAINT

It will be remembered that Mr Mehjoo’s chief complaint was that his accountant had not advised him of the possibility that he might have avoided a capital gains tax liability of around £800,000 if he had first succeeded in establishing that he was non-domiciled for UK tax purposes. If his case had stopped there it would have been unremarkable and would probably not have been appealed. The trouble with Mr Mehjoo’s case was that it was not only dependent on establishing that he was non-domiciled but also required proof that he would (and could) have successfully established a sophisticated bearer warrant tax avoidance scheme through an offshore trust company.

COURT OF APPEAL’S CONCLUSION

In essence, the Court of Appeal concluded that an accountant retained by a client to deal with his personal affairs (including tax) was not necessarily required to direct that client towards specialist tax planning advisers. As Francis Kean stated in an early blog, there were big and interesting legal and moral questions at stake as to the extent of tax avoidance which is legitimate either for individuals or for large corporations. One wonders to what extent these issues may have been present in the minds of the Court of Appeal judges in concluding that it was not reasonable for non-specialist accountants either to know about such schemes or to advise their clients to seek specialist non-domiciled tax advice.

The Court of Appeal decision will be of some comfort to professional advisers but may also resonate further with those who do indeed offer specialist tax advice.

“The Court of Appeal decision will be of some comfort to professional advisers but may also resonate further with those who do indeed offer specialist tax advice.”
IN PENSION BENEFITS, WHAT CAN AN EMPLOYEE “REASONABLY EXPECT” FROM HIS EMPLOYER?

The surprise answer to this question from the High Court: Perhaps more than the employer wants to offer.

Anyway this was the question with which the English High Court recently had to grapple in a mammoth and no-doubt extremely expensive piece of litigation involving IBM and its pension trustees. In an exhaustive 435-page judgment, it was IBM’s employees who prevailed.

Although Francis Kean has blogged before about pension trustee liability, we don’t tend to see too many of these cases in the UK (much less ones in which employers’ rights are successfully challenged.) The case comes at a time when many employers are either engaged in or have recently completed employee pension restructurings usually aimed at closing defined benefit schemes and restricting employees’ pension rights and benefits to save costs.

PENSION AGREEMENTS BREACHED EMPLOYER’S DUTIES

Whilst the case does not make new law, it applies the existing law in a way which has not previously been applied to a large company pension restructuring. In essence, the court held that the restructuring of IBM’s pension arrangements breached the employer’s duties of trust and confidence and its duty of good faith.

The case should be of concern not just to trustees of company pension funds but to also to company directors in general. The duties (now codified under the Companies Act 2006) owed by all directors to the companies on whose boards they sit include a specific one to have due regard in the decision making process to the interest of the company’s employees.

WHAT A REASONABLE EMPLOYER WOULD DO

In his judgment, the judge undertook a meticulous examination of the nature of the duties owed by employers to employees. He concluded that these were not absolute duties and that the threshold for breach was in fact quite high: “…was there evidence that the employer had acted with ‘irrationality and perversity’”. In other words, if no reasonable employer would have acted in the same way, the duty would be breached.

So what was it about IBM’s behaviour that led the judge to conclude that no other reasonable employer would have restructured their pension scheme in this way? You might be expecting some lurid and egregious conduct, but what’s interesting about the case is quite how (relatively) run of the mill the restructuring was.

It involved an array of cost-cutting measures not that unusual from many other company pension scheme restructurings. For example, the defined benefits scheme was substantially closed and members had to agree that future pay increases would not be pensionable and to a curtailment of enhanced early-retirement benefits.

“What a reasonable employer would do”

The interesting question which now arises in the case is what the effect of IBM’s breach of duty will be.

In other words, the judge concluded that, seen against the previous conduct of IBM in the form of these communications, it was a breach of IBM’s duty to its employees to adopt the restructuring which it did. IBM’s employees were entitled to expect that the curtailment of their benefits would not occur in the manner in which it did based on actual and implied assurances as to the nature of those benefits given previously by IBM.

WHAT EFFECT?

The interesting question which now arises in the case is what the effect of IBM’s breach of duty will be.

The court has deferred until a later date the question as to the appropriate remedies. In the meantime company directors (to say nothing of trustees of company pension funds) would do well to grab a cold towel or two and/or secure the services of lawyers and other professional advisers on the question of an employee’s “reasonable expectations” before implementing the next large pension restructuring.

Indeed it may not be too far-fetched to suppose that employee groups may be studying the judgment to see if there is scope for challenge to restructurings that have already been completed.

“The interesting question which now arises in the case is what the effect of IBM’s breach of duty will be.”
DEFERRED PROSECUTION AGREEMENTS IN THE UK: SHOULD DIRECTORS Worry?

Should directors worry about deferred prosecution agreements, or are DPAs just another instance of facing the right enemy but in the wrong direction?

At the start of the Second World War the Germans avoided the defensive Maginot Line and invaded France through Belgium. In 1942 the Japanese invaded Singapore from land rather than from the sea where the British guns were trained. What has this to do with the arrival in the UK of deferred prosecution agreements (DPAs) (a subject about which Francis Kean has written before)?

The relevant legislation has only very recently been introduced under provisions of the Crime and Courts Act 2013, which came into force on 24th February 2014. Perhaps that’s why questions are again being raised as to whether there is a significantly increased risk of criminal prosecution for directors. The short answer to this is “No.” But more interesting issue is whether that is even the right question, or is this instead another example of a more insidious risk for directors and executives in the UK, which is that they become caught in a prosecutorial crossfire involving the company.

DEFERRED PROSECUTION AGREEMENTS

Let’s deal with DPAs first. DPAs are agreements between prosecutors and companies under which criminal charges will be filed but not proceeded with, provided there is compliance by the company with an agreed set of terms and conditions such as payment of potential fines and the implementation of mediation and/or monitoring programmes. The new regime only applies to corporates and not to individuals. It is also entirely voluntary. In other words there is no obligation on companies to accept the prosecutor’s proposal of a DPA.

WHY A COMPANY MIGHT NOT ACCEPT

Companies may consider there is a lack of incentive on them to go down the DPA route in the absence of any guarantees by the prosecution authorities that there will eventually be no prosecution and given the fact that the fines and other remedial action agreed to may be substantial. Companies may also have concerns as to the use to which the prosecutors may seek to put all the information and evidence volunteered by the company throughout the deferred prosecution agreement negotiations.

LIMITED OPPORTUNITY TO OFFER DPAS

So how likely are we to see them? As things stand, only the Serious Fraud Office and the Crown Prosecution Service have the ability to use DPAs and then only in relation to a limited class of specific financial services offences as well as more general fraud and corruption offences including under the Bribery Act. The Financial Conduct Authority does not (yet) have this ability.

More significantly, there is, in the UK, a high threshold for corporate criminal liability for offences involving intent or dishonesty. Prosecutors are required to produce evidence of senior management’s knowledge and involvement in the offence as “the directing mind and will” of the company. This is different from the position elsewhere and notably in the USA where lower thresholds apply.

Given that UK prosecutors must reasonably suspect that the company has committed an offence and have a reasonable belief in a reasonable prospect of conviction before considering deferred prosecution agreements, we are unlikely to see many in the near future. (A more dangerous development would be the implementation of proposals to lower the threshold for corporate criminal prosecutions in the case of fraud.

WHEN INTERESTS DIVERGE

So far so good—and indeed, you might be wondering what possible relevance any of this could have for directors (or their insurers).

As we have seen, DPAs do not involve individual directors. The same may also be said, for example, of the Corporate Manslaughter and Corporate Homicide Act, which is often cited in D&O policies.

It’s not that cases involving serious accidents or corruption often present a direct threat to directors. It is more that these incidents provide a fertile seedbed in which the interests of the company and those of its directors and senior managers may diverge in subtle and unpredictable ways with the potential for significantly adverse implications for the individuals concerned some way down the road.

The risk in any of these disaster-type scenarios is that directors and senior managers who are involved at the heart of these crises will often need (perhaps without even realising it) separate legal representation; the company’s agenda being quite different.

It is therefore not just a question of ensuring adequate cover under D&O insurance (whatever that may look like) but also of focusing on what happens when the interests of a company and its senior executives (or some of them) begin to diverge and how to deal with that. Perhaps the subject for another day!

“There is no obligation on companies to accept the prosecutor’s proposal of a DPA.”