**LEGAL OPINION ON DIRECTORS' DUTIES AND DISCLOSURE OBLIGATIONS UNDER MALAYSIAN LAW IN THE CONTEXT OF CLIMATE CHANGE RISKS AND CONSIDERATIONS**

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*The authors of the legal opinion would like to acknowledge all the contributions and efforts of Francine Ariel Paul (Senior Associate, Skrine), Kailash Kalaiarasu (Senior Associate, Skrine) and Tham Zhi Jun (Associate, Skrine)*.

## INTRODUCTION

1. We have been instructed by the Commonwealth Climate and Law Initiative to provide our legal opinion on the obligations of directors of for-profit organisations to have regard to climate change issues as part of their duties and obligations under the laws of Malaysia, both under the Companies Act 2016 ("**CA 2016**") and in common law.

2. The legal opinion will address:-

   a. Whether in the discharge of their fiduciary duty to exercise their powers for a proper purpose, in good faith in the best interests of the company, and their duty to act with reasonable care, skill and diligence, directors are legally required to consider the risks associated with climate change;

   b. Obligations of directors of companies, including those listed on Bursa Malaysia, to disclose climate change related risks.

3. In **Part 1**, we provide highlights of current scientific findings and commentaries on climate change and the prevailing climate crisis scenarios experienced in Malaysia and elsewhere in the world. We also describe the attendant climate change risks (i.e. physical, economic transition, financial and liability risks) relevant to companies and their activities.

4. **Part 2** sets out the specific regulatory framework including disclosure and other obligations imposed by regulators in Malaysia that are relevant to directors' duties on sustainability and climate change.

5. **Part 3** sets out the general scope and nature of directors' legal duties in Malaysia followed by our analysis of how this is applied in the context of climate change considerations. We also examine recent international cases that are setting the trend for stakeholders', including investors', response to the impact of companies' operations and board decisions on climate change and their potential influence on the courts in Malaysia. We conclude this Part with a discussion on the potential exposure to liabilities that Malaysian companies and directors may face arising from litigation, regulatory sanctions or enforcement actions for their failure to consider climate risks.

## PART 1: CLIMATE CHANGE AND ITS IMPACT

7. The 2021 Sixth Assessment Report[1] of the UN Intergovernmental Panel on Climate Change ("**IPCC**") cites irrefutable evidence of the link to human action of increasingly frequent catastrophic climate events, underlining the urgent need for us to be better stewards of our environment.

8. The last few years have also seen a marked change in the appreciation of climate change as a material risk to business, leading to a significant increase in the expectations of regulators, investors, employees and other stakeholders on the need for companies to have in place purpose driven, long-term goals for sustainability and strategic plans and actions to manage these risks.

### Section 1: Understanding climate change and Malaysia's commitment to tackle the effects of climate change

**A. What is climate change?**

9. At its simplest, climate change refers to long-term shifts in temperature and weather patterns.[2] The main driver of climate change is the greenhouse effect. Although greenhouse gas ("**GHGs**") emissions can occur naturally, human activities have caused the concentration of GHGs to exponentially increase in Earth's atmosphere[3], as amplified by the IPCC Sixth Assessment Report.[4] The IPCC expects, under all the emissions scenarios considered, that climate change related events will increase in all regions and that the global surface temperature will continue to rise until at least the mid-century. In this regard, a crucial aspect of the IPCC's second section to the Sixth Assessment Report is its finding that there is established a causal link between climate change and observed economic and non-economic losses and damages.[5] This may prove to be a positive development for stakeholders who wish to seek compensatory redress through climate-based litigation.

10. The Carbon Majors Database Report 2017[6] found that just 100 companies have been the source of more than 70% of the world's GHGs since 1988; and that the scale of historical emissions associated with fossil fuel producers is large enough to have contributed significantly to climate change.

11. The IPCC's third and final section of the comprehensive review of climate science issued on 4 April 2022 found that it was now almost inevitable that temperatures would rise above 1.5°C, the level above which many of the effects of climate breakdown will become irreversible. However, the IPCC also said it could be possible to bring them back down below the critical level by the

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[1] The Working Group I contribution to the IPCC Report, Climate Change 2021: The Physical Science Basis, here.

[2] United Nations: What is Climate Change? here.

[3] NOAA Climate.gov: Climate Change: Atmospheric Carbon Dioxide, 7 October 2021, here, Based on this analysis, the amount of carbon dioxide in the atmosphere has increased along with human emissions since the start of industrial revolution in 1750.

[4] The Working Group I contribution to the IPCC Report, Climate Change 2021: The Physical Science Basis, here.

[5] The Working Group II contribution to the IPCC Report, Climate Change 2021: Impacts, Adaptation and Vulnerability, here. Part B.1.

[6] The Carbon Majors Database Report 2017, CDP, July 2017, here.

end of this century if, amongst others, coal is effectively phased out, methane emissions reduced by a third and currently planned new fossil fuel infrastructure is reversed.[7]

## B. Malaysia's National Policies and International Commitments

12. Malaysia has declared it will become a carbon neutral country by 2050.[8] An independent study titled "Securing Our Future: Net Zero Pathways for Malaysia" by the World Wildlife Fund Malaysia ("**WWF-Malaysia**") and Boston Consulting Group ("**BCG**")[9], offers insights into practical pathways for Malaysia to achieve its target with its access to sustainable resources, extensive forest cover and cost competitive renewable energy and postulates that huge economic and job opportunities will be created through the growth of the green economy on the way to achieving net zero.

13. Malaysia has established national policies and made various commitments on climate change at the international level:

a. **National Policy on Climate Change**

Malaysia has since 2009 introduced a National Policy on Climate Change.[10] The Policy aims to bring climate change into the mainstream by introducing policies and strengthening the framework to address climate change impact in Malaysia, as well as to consolidate economic, social and environmental development goals based on the five (5) principles of development on a sustainable path by integrating climate change responses into national development plans, conservation of environment and natural resources, coordinated implementation, effective participation of all stakeholders and international involvement on climate change based on the principle of common but differentiated responsibilities and respective capabilities.

b. **National Renewable Energy Policy**

Malaysia also announced a National Renewable Energy Policy[11] in 2009 which aims to achieve 20% renewable energy capacity mix by 2025, with five (5) specific objectives:

i. To increase renewable energy contribution in the national power generation mix;

ii. To facilitate growth of the renewable energy industry;

iii. To ensure reasonable renewable energy generation costs;

iv. To conserve the environment for future generations; and

v. To enhance awareness on the role and importance of renewable energy.

c. **Twelfth Malaysia Plan**

The Twelfth Malaysia Plan 2021 to 2025 ("**12MP**") envisages the adoption of a circular economy model to address the challenge of balancing socio-economic development with environmental sustainability, encouraging both the public and private sectors to adopt and

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7 The Working Group III contribution to the Sixth Assessment IPCC Report, Climate Change 2022: Mitigation of Climate Change, here.

8 Channelnewsasia.com, 12th Malaysia Plan: What you need to know about the 2050 carbon neutral goal and other green measures, 28 September 2021, here.

9 WWF-Malaysia and BCG, Securing Our Future: Net Zero Pathways for Malaysia, 23 November 2021, here.

10 Prime Minister's Office of Malaysia Official Website: National Policy on Climate Change, 12 July 2019, here.

11 Sustainable Energy Development Authority: National Renewable Energy Policy, here.

integrate sustainable development goals and environmental, social and governance ("**ESG**") principles into their decision-making. The 12MP also aims to accelerate the transition to a low carbon economy by achieving 31% renewable energy generation of total installed capacity by 2025. A feasibility study will be conducted on carbon pricing and recommendations made on the most suitable carbon taxation system to incentivise the right behavioural changes.

Some of the targets established as benchmarks of success include:

i. a sustainable, low-carbon and resilient nation;

ii. reduced GHG emissions intensity to GDP of up to 45% by 2030 based on emissions intensity in 2005;

iii. increased recycling rate of household waste by 40% and scheduled waste by 35%;

iv. reduced incidence of pollution;

v. reduced dependency on natural resources and maintaining at least 50% forest cover;

vi. increased share of government green procurement to 25%; and

vii. increased green financing, investments, businesses and jobs.

d. **Malaysia's commitments under the Paris Agreement and COP 26**

The Paris Agreement (adopted at the 2015 United Nations Climate Change Conference or "**COP 21**") represented a watershed moment for climate justice. It sets a goal of limiting global warming to well below 2°C, and pursuing efforts to limit global warming to 1.5°C, compared to pre-industrial levels.[12] Malaysia[13] signed and ratified the Paris Agreement in 2016.[14]

At the meeting of the G20 just prior to the 2021 United Nations Climate Change Conference or "**COP 26**", all member states of the G20 agreed to cap global warming at the 1.5 °C level with the aim of achieving net zero carbon emissions by 2050, marking a breakthrough compared to past G20 commitments. Of note was HRH Prince Charles, The Prince of Wales' call to arms to correct "*misalignments*" across institutional, regulatory and legal frameworks.[15]

COP 26 culminated in the Glasgow Pact which resolved to pursue efforts to limit the global temperature increase to 1.5°C, acknowledging that *"rapid, deep and sustained reductions*

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12 United Nations Climate Change, The Paris Agreement, 2015, here. Article 2(1)(a) of the Paris Agreement provides as follows*: "This Agreement, in enhancing the implementation of the Convention, including its objective, aims to strengthen the global response to the threat of climate change, in the context of sustainable development and efforts to eradicate poverty, including by: (a) Holding the increase in the global average temperature to well below 2°C above pre-industrial levels, recognizing that this would significantly reduce the risks and impacts of climate change."*

13 United Nations Climate Change: What are Parties & non-Party stakeholders?, here. Malaysia is a Non-Annex I party, which is a category involving mostly developing countries recognised by the UNFCCC as being *"especially vulnerable to the adverse impacts of climate change."*

14 United Nations Climate Change: Parties, here. Malaysia signed the Paris Agreement on 22 April 2016 and ratified the same on 16 November 2016.

15 Geo News: Full text of HRH Prince Charles' speech at G20 Summit in Rome, 31 October 2021, here.

*in global greenhouse gas emissions"* are required if we are to achieve the net zero goals targeted for the middle of this century.[16]

Malaysia's national statement at COP 26 aspires for GHG emission reduction targets through its Nationally Determined Contribution ("**NDC**") updates and net-zero GHG emissions as early as 2050.[17] Malaysia updated its NDC in August 2021, with the stated intention of reducing its economy wide carbon intensity (against GDP) of 45% in 2030 compared to the 2005 level, marking an additional 10% reduction over the 2015 commitment of 35%.[18]

Malaysia was amongst the 141 nations which signed the Glasgow Leaders' Declaration on Forests and Land Use[19] at COP 26, committing to significantly increasing finance and investment to enable sustainable agriculture, sustainable forest management, forest conservation and restoration and supporting indigenous peoples and local communities.

Malaysia also agreed to participate in the Global Methane Pledge of COP 26 in which signatories committed to reducing global anthropogenic methane emissions across all sectors by at least 30% (below 2020 levels) by 2030. This has implications for a number of core Malaysian industries, including those producing or using fossil fuels, palm oil production, rice cultivation and livestock farming[20] which are significant contributors to methane emissions.[21]

14. Malaysia's stated commitments on climate change, both at the international and national levels, will have a bearing on corporate decisions and the exercise of duties by directors as they will likely lead to new policies, laws and regulations, as well as changes to supply chains and stakeholder expectations. These commitments stress that "misalignments" need to be corrected and that long-term steps to address climate change are required not only at the inter-governmental and national level, but also at the level of companies and individuals.

15. Boards of companies in Malaysia need to ensure that the strategy and plans they put in place and decisions made are consistent with the changes that can be expected from the institutional, regulatory and legal frameworks derived from these commitments and policies. Changes such as the emphasis on the circular economy and opportunities such as green financing must therefore be taken into account by boards in order to ensure that companies they lead are in step with climate goals and adaptation measures.[22]

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16 For the first time, COP 26 called upon the parties "to accelerate the development, deployment and dissemination of technologies, and the adoption of policies, to transition towards low-emission energy systems, including by rapidly scaling up the deployment of clean power generation and energy efficiency measures, including accelerating efforts towards the *phase-down* of unabated coal power and inefficient fossil fuel subsidies, recognizing the need for support towards a just transition". (Words in italics substituted in last minute verbal amendment at COP 26).

17 Thevibes: Decisions reached at COP 26 vital for Paris Agreement: Tuan Ibrahim, 14 November 2021, here.

18 UNFCCC, Intended NDC of the Government of Malaysia, here. The updated NDC also expanded the coverage to seven (7) greenhouse gases: *Carbon dioxide (CO2), Methane (CH4), Nitrous oxide (N2O), Hydrofluorocarbons (HFCs), Perfluorocarbon (PFCs), Sulphur hexafluoride (SF6) and Nitrogen trifluoride (NF3).*

19 UKCOP26: List of Countries endorsing the Glasgow Leaders' Declaration on Forests and Land Use, here.

20 United Nations Environment Programme: Global Methane Assessment, Benefits and Costs of Mitigating Methane Emissions, 2021, here. According to page 9 of the Global Methane Assessment 2021 by the UN Environment Programme, livestock emissions from manure and enteric fermentation represent roughly 32 per cent, and rice cultivation represents 8 per cent of global anthropogenic emissions.

21 The Edge Markets, COP 26: Malaysia focusing on climate ambitions, financing, carbon markets, 8 November 2021, here.

22 Prince Charles called upon everyone: "*Quite literally, it is the last chance saloon. We must now translate fine words into still finer actions*." Geo News: Full text of HRH Prince Charles' speech at G20 Summit in Rome, 31 October 2021, here.

16. Shifts in direction of governmental policies and regulatory focus will shape investor expectations on how companies are managed, and how decisions are made including on issues such as investments, the direct and indirect costs of carbon prices and carbon border adjustment mechanisms, stranded asset risk from write downs of asset values and reduced asset lives of high-emitting assets, changes to the value of plant & equipment from technology obsolescence, and the increased cost of capital as investors price in risks from high-emitting industries.

**Section 2: Climate related risks and their impact**

17. This section sets out a closer examination of the categories of risks associated with climate change.

## C. Climate Related Risks

18. The Taskforce on Climate-related Financial Disclosures ("**TCFD**") has divided climate related risks into two (2) major categories:[23] risks related to the physical impacts of climate change and risks related to the transition to a lower-carbon economy.

### C1. Physical risk

19. Studies on climate risks have shown that inaction equates to huge losses. Physical impacts from climate risks have a direct co-relation to financial risks for businesses. In Malaysia, erratic weather patterns including heatwaves, increased droughts, thunderstorms, unusually heavy flash floods and chronic impacts including rising sea levels can significantly affect key crops (such as palm oil – which accounts for about 3% of Malaysia's GDP and up to 38% of agricultural output)[24] and cause damage to infrastructure, widespread devastation of livelihoods and destruction of biodiversity.[25]

20. The impact on health, savings and productivity is likely to result in long-term economic harm to the country. Globally, wildfires in the Amazon, Australia and the United States have caused immense destruction of homes and vegetation and displaced thousands of people. Such severe weather phenomena and the frequency of its occurrence have led to significant increases in insurance premiums. By 2040, it is expected that climate risks will add as much as $183 billion to annual premiums for property insurance.[26] Rains which caused serious flooding and landslides in affected states in Malaysia in December 2021 - possibly the worst floods in four decades[27] - resulted in the loss of lives, homes and businesses,[28] which, according to environmental experts, *"exposed the reality of extreme weather patterns caused by climate change."*

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[23] TFCD, Final Report: Recommendations of the Task Force on Climate-related Financial Disclosures, page 5-6, (June 2017), here.

[24] Foreign Policy Research Institute, Palm Oil: Malaysian Economic Interests and Foreign Relations, 12 April 2021, here.

[25] United Nations Framework Convention on Climate Change: Malaysia's Third Biennial Update Report submitted to the United Nations Framework Convention on Climate Change, December 2020, here.

[26] Financial Times: 'Climate risks to add $183 bn to property insurance costs by 2040, Swiss Re predicts', 7 July 2021, here.

[27] Al Jazeera News: Death toll from Malaysia's worst floods in years rises to 27, 22 December 2021, here. BBC News: Malaysia hit by the worst floods in decades, 21 December 2021, here. The Guardian: Malaysia's worst flooding in years leaves 30,000 people displaced, 19 December 2021, here.

[28] The Star, Floods: Death toll at 48, five still missing, says IGP, 27 December 2021, here.

21. They underscore the urgent need to examine the causes of and put into immediate action measures to tackle such climate related occurrences which have only increased in intensity and frequency.

### C2. Economic Transition Risk

22. In the period before and after COP 26, there has been a marked shift in the attitudes of policy makers in announcing regulatory steps to address climate change as well as increasing pressure and expectations on companies – and therefore their boards – to have in place business strategies and plans that clearly spell out the steps that they are taking to adapt to economic transition risks or eliminate contribution to climate change.

23. As made clear by the IPPC Sixth Assessment Report, the levels of anthropogenically-linked GHGs have accumulated to the point where climate change is wreaking havoc,[29] leading scientists to conclude that many planned coal, oil and gas extraction projects will not be viable if we are to stay under the 1.5°C goal.[30]

24. In Malaysia, foreseeable economic transition risks include the shift in energy policy underscored by the National Policy on Climate Change.[31]

25. In this regard, the Malaysia Climate Change Action Council ("**MyCAC**"), charged with setting policy direction on climate change, outlined in April 2021 its six (6) main approaches to carbon reduction, including the Low Carbon Mobility Development Plan 2021-2030 (relating to the automobile sector)[32] and the National Low Carbon City Master Plan[33] (setting direction and guidance for local authorities).

26. Additionally, with the aim of transitioning to a low carbon economy, Malaysia has published the following plans:-

    a. Green Technology Masterplan 2030 (which includes targets for renewable energy capacity, reductions in energy consumption and increases in the proportion of private electric vehicles);

    b. Power Sector Development Plan 2021-2039 (which includes a target of 31% renewable energy installed capacity mix by 2025, consistent with Malaysia's NDC);

    c. National Automotive Policy 2020 (which aims to develop Malaysia as the regional automotive hub in electric vehicles and reduce carbon emissions from vehicles by improving fuel economy levels in Malaysia by 2025, in line with the ASEAN Fuel Economy Roadmap).[34]

27. Malaysia's Prime Minister Dato' Sri Ismail Sabri also announced during the tabling of the 12MP that Malaysia will become a carbon neutral country as early as 2050 and pledged that the

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29 IPCC: Climate Change 2021, The Physical Science Basis, Summary for Policymakers, October 2021, here. See Section A.3 of the IPCC Summary for Policymakers: "*Human-induced climate change is already affecting many weather and climate extremes in every region across the globe. Evidence of observed changes in extremes such as heatwaves, heavy precipitation, droughts, and tropical cyclones, and, in particular, their attribution to human influence, has strengthened*".

30 Welsby, D., Price, J., Pye, S. *et al.* Unextractable fossil fuels in a 1.5 °C world. *Nature* **597,** 230–234 (2021); click here to access. Bianca Nogrady, 'Most fossil-fuel reserves must remain untapped to hit 1.5 °C warming goal'; *Nature* (8 September 2021), here.

31 Ministry of Natural Resources and Environment Malaysia, National Policy on Climate Change, 20 November 2009, here.

32 Malay Mail: Govt's approach to climate change issues outlined in MyCAC, says minister, 13 April 2021, here.

33 Ministry of Environment and Water, National Low Carbon Cities Masterplan, 2021, here.

34 Ministry of International Trade and Industry, National Automotive Policy 2020, 21 February 2020, here.

government will cease building coal-fired power plants and increase renewable energy generation from solar, biomass and gas to 31% of installed capacity by 2025.[35]

28. Economic and social risks arising from climate change will also manifest themselves as material financial impacts for companies.

29. A number of large financial institutions worldwide are already taking steps to reformulate their financing and investment portfolios in order to meet increasing demands of regulators and stakeholders to factor in climate risks.

30. In Malaysia, CIMB Group Holdings[36] and Malayan Banking Berhad[37] are amongst the financial institutions which have announced their intention to achieve carbon neutral portfolios by 2040 and 2050 respectively. Additionally, both banking groups have stated that they will stop investing in new coal initiatives.[38]

31. It should also be noted that the Equator Principles (4th Edition) contain requirements for banks to specifically consider climate-related impacts of projects from 1 July 2020.[39]

32. In December 2021, Bank Negara Malaysia ("**BNM**") issued a Climate Risk Management and Scenario Analysis Exposure Draft[40] which sets out guidance on climate risk management and scenario analysis, requiring insurance and takaful operators ("**ITOs**") to identify and assess the impact of climate-related risks, avoid under estimation and strengthen management of financial risks stemming from climate change.

33. The Exposure Draft requires ITOs to assess risk impacts such as the following:

    a. changes in weather patterns which might lead to increases in physical risks and affect claim incidences;

    b. higher liability insurance for directors and officers in the event of legal action;

    c. increase in mortality and morbidity risks due to climate driven health conditions which could significantly increase overall claims.

34. For companies, this could translate into additional costs of doing business and potential difficulties in obtaining financing or insurance.

35. More worrying is the possibility of climate-related risks being uninsurable. A 2021 study by AXA, the French multinational insurance company, found that 60% of risk managers fear that certain geographies or activities will become uninsurable in future due to the impact of climate change.[41] This may already be happening. According to a commentary by the Financial Times, the insurance market was badly hit by 9/11, Covid-19 pandemic and other disasters, with rising premiums in tow and is likely to suffer even more in the face of an existential crisis such as climate change.[42]

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35 New Straits Times, Malaysia to become carbon-neutral by 2050, 27 September 2021, here.
36 CIMB: CIMB makes Progress in its Journey towards a Low Carbon Economy, 8 December 2020, here.
37 Maybank: Maybank unveils M25 Plan to accelerate growth and drive sustainability, 6 May 2021, here.
38 CIMB: CIMB makes Progress in its Journey towards a Low Carbon Economy, 8 December 2020, here.
39 Equator Principles, Equator Principles 4 July 2020, here.
40 BNM: Exposure Draft on Climate Risk Management and Scenario Analysis, 27 Dec 2021, here.
41 Reinsurance News: Risk managers believe climate will make certain risks uninsurable: AXA, 16 Dec 2021, here.
42 Financial Times: Climate disasters are like another 9/11 for insurers, 7 February 2022, here.

36. Another significant development is the move by credit rating agencies to price in climate change risks in their rating process. As an example, Moody's has indicated that investment in low carbon technologies will become relevant to long-term credit quality of companies.[43]

### C3. Liability Risk

37. Companies and their directors must remain cognisant of the risks of litigation and liability for claims, losses and damages arising from their inaction.

38. In **Sections 3 and 4 of Part 3** below, we discuss the different types of actions that can be brought against companies and their directors for failing to adopt satisfactory climate adaptation practices.

## D. Effect of Climate Risks and Policies on Directors' Responsibilities

39. With the rising physical, economic and financial risks posed by climate change, boards must urgently incorporate sustainability practices and climate risks adaptation measures into their companies' strategies and operations. Companies which fail to do so will be severely disadvantaged, and boards of such companies could be ignoring important opportunities for their companies, potentially in breach of their duties. Boards must provide the stewardship necessary by integrating sustainability practices and seizing the opportunities and incentives that come with this shift. These include reduced carbon taxes for GHG emissions reduction, opportunities to earn revenue from carbon credit trading, and competitive advantages through increased use of green technology and switching to cleaner energy sources.

40. In addition, boards must be vigilant against the potential for climate related stranded assets. The oil and gas industry for example is under growing pressure to leave in the ground their as yet-to-be extracted oil and gas resources.[44]

41. Within the Malaysian private and institutional sector, the CEO Action Network ("**CAN**"), a peer-to-peer informal network of CEOs and board members, was formed in 2020 to focus on sustainability advocacy, capacity building, action and performance. In the lead up to COP 26, CAN announced its collective ESG commitments for 2023 as part of CAN's role in advocating and driving the development of solutions for a sustainable future and to assist the nation to achieve its net zero goals.

42. The Glasgow Financial Alliance for Net Zero ("**GFANZ**"), which counts CIMB Bank Berhad as a member, has pledged to achieve net zero emissions by 2050 or sooner. In addition, the global industry-led UN-convened Net-Zero Banking Alliance ("**Alliance**") (Malaysia included) representing over 40% of global banking assets, has committed to aligning their lending and investment portfolios with net-zero emissions by 2050. Signatory banks are setting intermediate targets for 2030 or sooner.

43. Large Malaysian institutional investors such as the Employees Provident Fund ("**EPF**") and Khazanah Nasional Berhad, both members of the Institutional Investors Council, became signatories to the United Nations supported Principles of Responsible Investment in 2019. This has become the impetus for the recognition of ESG as essential considerations in their investment decisions, stressing that climate change and lack of environmental protection and sustainability can lead to serious financial risks and adverse effects on investment portfolios held.

44. Another push by large institutional investors is Climate Action 100+, a coalition of global investors aimed at ensuring the businesses they own take the necessary action to mitigate systemic risks

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[43] Moody's: Moody's Approach to Assessing ESG in Credit Analysis, 2017, here.
[44] McKinsey & Co, Climate math: What a 1.5°C pathway would take, April 2020, here.

from climate change and have strategies in place to accelerate the transition to net-zero emissions by 2050. A report by DivestInvest states that about 1,500 investment institutions overseeing a combined $39.2 trillion of assets are now committed to divesting from fossil fuels.

45. The above are only a few examples emblematic of the change in tone and trend of investors requiring investee corporates to take into account ESG and climate change in their business strategies and decisions.

## PART 2: REGULATORY FRAMEWORK AND DISCLOSURE REQUIREMENTS

### Section 1: Directors' obligations in respect of sustainability considerations

46. Regulators in Malaysia have been at the forefront of the drive obligating boards to incorporate ESG into their decision-making process. They have done this by issuing best practice guides, codes of governance and sustainability guides. We highlight below some key elements on climate change and sustainability considerations from these codes and guides.

### A. Securities Commission Malaysia

### A1. Malaysian Code on Corporate Governance

47. The Malaysian Code on Corporate Governance ("**MCCG**") issued by the Securities Commission Malaysia ("**SC**") has been instrumental to the reform of corporate governance practices in Malaysia. The MCCG adopts an 'apply or explain' approach to globally accepted principles of corporate governance which go beyond the minimum required by statutes, regulations or those prescribed by Bursa Malaysia Securities Berhad ("**Bursa Malaysia**")'s Listing Requirements. The latest enunciation of the MCCG emphasises that effective board leadership requires *"the integration of sustainability considerations in corporate strategy, governance and decision-making, as sustainability and its underlying environmental, social as well as governance (ESG) issues become increasingly material to the ability of companies to create durable and sustainable value and maintain confidence of their stakeholders".*[45] In explaining how the board should address sustainability risks and opportunities in an integrated and strategic manner to support its long-term strategy and success, the MCCG states that sustainability issues include climate-related risks and opportunities.[46]

48. Although targeted at publicly listed companies ("**PLCs**"), non-listed entities and capital market intermediaries are encouraged to adopt the MCCG to enhance transparency, accountability and sustainability.[47]

49. The MCCG is based on three key principles of good corporate governance i.e. board leadership and effectiveness; effective audit and risk management; as well as integrity in corporate reporting and meaningful relationship with stakeholders.

50. In April 2021, the MCCG was revised to reflect strengthened governance considerations including the global move to promote wider adoption of sustainability practices amongst companies.

51. The MCCG states that the resilience of a company depends on its board taking a *"much more holistic view of the business coupled with proactive and effective measures to anticipate and address material ESG risks and opportunities."*[48] Companies with a *"clear plan on sustainability, including supporting the global transition to a net-zero economy"* will *"distinguish themselves by building the confidence of their stakeholders"*, whilst unprepared boards and companies may *"see*

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[45] Securities Commission Malaysia, Malaysian Code on Corporate Governance, (as at 28 April 2021), here, Principle A – Board Leadership and Effectiveness, on page 15

[46] Securities Commission Malaysia, Malaysian Code on Corporate Governance, (as at 28 April 2021), Practice 4.3, Principle A – Board Leadership and Effectiveness, on **page 26** here.

[47] Securities Commission Malaysia, Malaysian Code on Corporate Governance, (as at 28 April 2021), here. Para. 2.8. See also Securities Commission Malaysia, Frequently asked questions on The Malaysian Code on Corporate Governance, 30 April 2021, here. Para. 1.3.

[48] Securities Commission Malaysia, Malaysian Code on Corporate Governance, (as at 28 April 2021), here, Principle A – Board Leadership and Effectiveness, on page 15.

*their businesses suffer, as these same stakeholders lose confidence in the ability of the company to adapt to shifts and changes in the global landscape."*[49]

52. The MCCG's intended outcome is for companies to address sustainability risks and opportunities in an integrated and strategic manner to support their long-term strategy and success. In particular, the MCCG stipulates the following:

    a. The board together with management takes responsibility for the governance of sustainability in the company including setting the company's sustainability strategies, priorities and targets.[50]

    b. The board ensures that the company's sustainability strategies, priorities and targets as well as performance against these targets are communicated to its internal and external stakeholders.[51]

    c. The board takes appropriate action to ensure that they stay abreast of and understand the sustainability issues relevant to the company and its business, including climate related risks and opportunities.[52]

    d. Performance evaluations of the board and senior management include a review of their performance in addressing the company's material sustainability risks and opportunities.[53]

53. An additional "step-up" practice recommended is for the board to identify a designated person within management to provide dedicated focus to managing sustainability strategically (e.g. a chief sustainability officer) and integrating sustainability considerations into the operations of the company.[54] (See the discussion in **Part 3** below on the extent to which a board may rely on such a designated person when discharging its fiduciary duty.)

54. The MCCG also recommends that a company's risk management and internal control framework provide the board with *"reasonable assurance that adverse impact arising from a foreseeable future event or situation on the company's objectives is mitigated and managed."* In this regard, the board is required to disclose how key risk areas including sustainability are evaluated, what controls are in place to mitigate such risks and if the framework adopted is based on one that is internationally recognised.

## A2. Corporate Governance Strategic Priorities

55. The Corporate Governance Strategic Priorities for the years 2021-2023 ("**CG Strategic Priorities**")[55] issued by the SC are focused on supporting PLCs' responses to the rise of a stakeholder economy that calls for businesses to create value for a wider spectrum of stakeholders, including society, and to consciously consider their impact on the environment. The CG Strategic Priorities include a strengthening of ESG fitness of boards, capacity building to

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[49] Securities Commission Malaysia, Malaysian Code on Corporate Governance, (as at 28 April 2021), here. Principle A – Board Leadership and Effectiveness, on page 16.

[50] Securities Commission Malaysia, Malaysian Code on Corporate Governance, (as at 28 April 2021), here. Practice 4.1, on page 26.

[51] Securities Commission Malaysia, Malaysian Code on Corporate Governance, (as at 28 April 2021), here, Practice 4.2, on page 26, MCCG.

[52] Securities Commission Malaysia, Malaysian Code on Corporate Governance, (as at 28 April 2021), here. Practice 4.3, on page 26.

[53] Securities Commission Malaysia, Malaysian Code on Corporate Governance, (as at 28 April 2021), here. Practice 4.4, on page 26.

[54] Securities Commission Malaysia, Malaysian Code on Corporate Governance, (as at 28 April 2021), here. Page 27.

[55] Securities Commission Malaysia: Corporate Governance Strategic Priorities 2021-2023, here.

strengthen ESG leadership and enhancing the availability of information on PLC's sustainability practices.

56. A new onboarding program will be introduced to provide directors with foundational knowledge and practices to address sustainability effectively, focusing on climate action and transition. Discrepancies in ESG fitness of boards will be addressed by continuous capacity building on sustainability, particularly for SMEs. Enhanced sustainability reporting will be scheduled for roll out by Bursa Malaysia in the second half of 2022, which will include mechanisms for data capture from the sustainability disclosures of PLCs. This will enable the SC to use artificial intelligence ("**AI**") to cover sustainability disclosures and provide annual data and observations on sustainability of PLCs through the SC's annual CG Monitor report.

### A3. SC Guidelines on Conduct of Directors of Listed Corporations and their Subsidiaries

57. The Guidelines on Conduct of Directors of Listed Corporations and their Subsidiaries ("**SC PLC Guidelines**")[56] dated 30 July 2020 (revised 12 April 2021) was issued by the SC pursuant to Section 158(1) of the Securities Commission Malaysia Act 1993 ("**SCMA 1993**") and therefore has legal force.

58. The SC PLC Guidelines reinforce existing obligations of PLC directors to discharge their fiduciary duty to exercise their powers for a proper purpose and in good faith in the best interests of the company. PLC directors are also obligated to exercise reasonable care, skill and diligence in managing the business and affairs of the company, manage potential conflict of interest situations and cause proper accounting and other records to be kept.

59. The SC PLC Guidelines also require PLC directors to apply any additional knowledge, skill and experience which may reasonably be expected of a director having the same responsibilities, and keep abreast of current developments to ensure that they are able to discharge their duties and responsibilities effectively.[57]

60. The SC PLC Guidelines also impose responsibility for group governance on the board of a PLC. Para. 5.01 provides that a PLC and its directors must ensure there is an *"adequate group-wide framework for co-operation and communication between the listed corporation and its subsidiaries to enable it to discharge its responsibilities including oversight of group financial and non-financial performance, business strategy and priorities*, *risk management including material sustainability risks, and corporate governance policies and practices."*

61. Para. 5.02 requires a PLC and its directors to establish a group-wide framework on corporate governance and ensure that it includes policies on, amongst others, risk management including managing material sustainability risks.

62. Furthermore, Para. 1.03 of the SC PLC Guidelines provides that the Guidelines are in addition to, and not in derogation of the requirements under securities laws or other written law. It is worth noting that under the SCMA 1993, where a person to whom any written notices, circulars, conditions or guidelines apply has failed to give effect to such written notices, circulars, conditions or guidelines, the SC may, after giving such person a reasonable opportunity to be heard, take such action as the SC deems fit (Section 158(4) SCMA 1993).

63. The effect of the introduction of the SC PLC Guidelines is significant as it allows the SC to regulate the discharge by PLC directors of their fiduciary duties and the duty to exercise

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56 Securities Commission Malaysia: Guidelines on Conduct of Directors of Listed Corporations and their subsidiaries, 30 July 2020, here.

57 Securities Commission Malaysia: Guidelines on Conduct of Directors of Listed Corporations and their subsidiaries, 30 July 2020, here. Paras. 3.03 and 3.04(a).

reasonable care, skill and diligence. The SC PLC Guidelines also require directors to prepare for board meetings, to contribute constructively to board discussions and decision-making, to conduct due inquiry before approving a matter and to ensure key transactions or critical decisions are deliberated and decided on by the board in a meeting. It should be noted that "Directors" to whom the SC PLC Guidelines apply include chief executives, chief financial officers and any other person primarily responsible for the operations or financial management of PLCs and their subsidiaries.

64. Failure by directors to comply with the SC PLC Guidelines may lead to administrative sanctions issued by the SC against the directors personally. These Guidelines represent a milestone in the SC's efforts to strengthen the standards of corporate governance among PLCs by enabling the SC to set the standards required in the discharge of a director's fiduciary duty and to take enforcement action for breaches of such duty.

### A4. Sustainable and Responsible Investment Roadmap

65. The SC's Sustainable and Responsible Investment Roadmap ("**SRI Roadmap**") recognises the crucial role of capital markets in financing sustainable development needs.

66. To satisfy investor demand for clear articulation of long-term value creation strategy, companies must recognise sustainability issues as a critical component of the evaluation of its risk profile. In recognition of this, several measures have been undertaken to facilitate sustainability disclosures including the Global Reporting Initiative and the 2017 TCFD recommendations which have since been incorporated by Bursa Malaysia into the 2018 revision of its Sustainability Reporting Guide. Adopting global standards on disclosures will strengthen comparability and rigour of the sustainability information and data presented.

67. Boards on their part must recognise that good governance should intrinsically include the management of sustainability matters including climate risks and opportunities. Sustainability must be addressed with the same rigour as other matters deliberated by them, and their capacity to provide strategic guidance and oversight of sustainability-related matters must be enhanced to enable them to discharge their roles effectively.

## B. Bursa Malaysia

### B1. Main Market Listing Requirements

68. Bursa Malaysia's Main Market Listing Requirements ("**MMLR**")[58] set out the requirements that must be complied with by all PLCs and their subsidiaries as well as their respective directors, officers and advisers. The MMLR imposes mandatory requirements on PLCs to report on the incorporation of sustainability considerations and the management of environmental risks and opportunities into their business strategies.

#### a. Requirement to incorporate MCCG principles

Para. 15.25 of the MMLR sets out specific requirements on disclosure of a PLC's implementation of the principles and practices under the MCCG in its annual report:

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[58] Bursa Malaysia, Main Market Listing Requirements, 1 June 2020, here.

Para. 15.25(1): *“a listed issuer must ensure that its board of directors provides an overview of the application of the Principles set out in the MCCG, in its annual report.”*

Para. 15.25(2): *“In addition, the listed issuer must disclose the application of each Practice set out in the MCCG during the financial year to the Exchange in a prescribed format and announce the same together with the announcement of the annual report. The listed issuer must state in its annual report, the designated website link or address where such disclosure may be downloaded.”*

As discussed above, the MCCG has been revised recently with an increased emphasis on ESG issues, and requires, as part of effective board leadership, the integration of sustainability considerations into corporate strategy, business plans and risk management.

b. **Inclusion of Sustainability Statement in Annual Report**

Para. 9.25(1) of the MMLR, read together with Item 29, Part A, Appendix 9C of the MMLR, requires the inclusion in the annual report of a sustainability statement, which must also set out the management of environmental risks and opportunities.

Para. 9.25(1): *“A listed issuer must set out separately in its annual report, the items set out in Part A of Appendix 9C […]”*

Item 29, Part A, Appendix 9C: *“A narrative statement of the listed issuer’s management of material economic, environmental and social risks and opportunities (“Sustainability Statement”), in the manner as prescribed by the Exchange.”*

Read together with Para 6.2 of Practice Note 9 of the MMLR, PLCs are therefore required to disclose:

i. how sustainability issues are identified,

ii. why sustainability issues are important to the PLC and

iii. how sustainability issues are managed, including the policies, measures or actions taken to deal with material sustainability matters and how the PLC has performed in managing the sustainability issues.

c. **Management discussion and analysis (MD&A)**

As mentioned above, a PLC must set out in its annual report the items listed under Part A of Appendix 9C of the MMLR. This includes a statement containing the management discussion and analysis (“**MD&A**”) of the group’s business, operations and performance (including financial performance) during the financial year, which at a minimum, includes a forward-looking statement providing commentary on the group’s possible trend, outlook and sustainability of each of its principal business segment.

In the business and operations component of the MD&A, the PLC should include information on any significant changes to, inter alia, “*the legal, social, political and regulatory environments that influence the group*.” The MD&A should disclose and discuss financial and non-financial indicators used to measure the group performance; this would necessarily include any climate related targets and sustainability key performance indicators ("**KPIs**") set by the PLCs, as well as key factors such as "*significant features of regulatory, environmental, social and governance issues that could affect the performance of the group*".

Accordingly, directors of PLCs must carefully review financial statements of their companies before release to ensure that there has been careful identification of climate related risks and that the plans or strategies to mitigate these risks have been fully deliberated and considered by the board and management before inclusion in the financial statements.

The MMLR requires a PLC to appoint an audit committee from amongst its directors[59] to, amongst others, review the internal audit plan and financial statements of the PLC.[60] Practice 9.5 under Principle B of the MCCG emphasises the importance of an effective audit committee in bringing transparency, focus and independent judgement needed to oversee the financial reporting process and requires all audit committee members to *"undertake continuous professional development to keep themselves abreast of relevant developments in accounting and auditing standards, practices and rules".*

## B2. Corporate Governance Guide

69. The Corporate Governance Guide serves as a set of recommendations and guidelines for the implementation of the principles and practices under the MCCG.

70. The Guide advises board members to view their directorship as a "*journey of stewardship*", with responsibility not only to themselves but to the company, its shareholders and other stakeholders.[61] Furthermore, it is provided that *"good corporate governance calls for directors to walk down this path of enrichment in an ethical and sustainable manner."*[62]

71. The Guide also calls for stronger sustainability leadership and outlines some best practices and learning points to ensure boards are equipped with the practical know-how for oversight and strategic management of sustainability issues.

72. In the context of climate change, the Guide requires the audit committees of PLCs to explicitly consider climate impacts, monitor new climate change measures, ensure a comprehensive climate assessment is undertaken and reflect the outcomes in the financial statements.

## B3. Corporate Disclosure Guide

73. The Corporate Disclosure Guide[63] issued by Bursa Malaysia on 22 September 2011 ("**Corporate Disclosure Guide**"), which serves as a complementary guide to the disclosure requirements under the MMLR,[64] states that *"it is essential that members of the board are financially literate*

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59 Bursa Malaysia, Main Market Listing Requirements, 1 June 2020. here. Para. 15.09.
60 Bursa Malaysia, Main Market Listing Requirements, 1 June 2020. here. Para. 15.12.
61 Bursa Malaysia, Corporate Governance Guide, Pull-Out I (Guidance on Board Leadership and Effectiveness), 2020, here. Page 1, Introduction.
62 Bursa Malaysia, Corporate Governance Guide, Pull-Out I (Guidance on Board Leadership and Effectiveness), 2020, here. Page 1, Introduction.
63 Bursa Malaysia, Corporate Disclosure Guide, here.
64 Bursa Malaysia, Corporate Disclosure Guide, here.
The Corporate Disclosure Guide provides that disclosure requirements must be embraced in substance and not only in form in order to be meaningful (Para. 4, Introduction), and sets out to clarify and illustrate the application of the disclosure requirements under the MMLR through providing best practices, guidance and illustrations (Para. 8, Introduction).

*and continue to keep abreast of latest developments in financial reporting requirements and regulatory changes"*.[65]

74. The Corporate Disclosure Guide emphasises the requirement under the MMLR for boards to review and approve the annual sustainability statements which PLCs are required to include in their annual reports, and in doing so, the need to determine what is "material" by identifying and managing sustainability matters, including development of policies, processes and initiatives to address key sustainability risks and opportunities, measuring and tracking progress via KPIs and establishing KPI tracked remuneration for management staff.

### B4. Sustainability Reporting Guide

75. Bursa Malaysia first published in 2015 its Sustainability Reporting Guide (the "**Sustainability Reporting Guide**") to assist PLCs in their preparation of sustainability statements in view of the shift in focus by stakeholders on the need for companies to take into account economic, environmental and social ("**EES**") risks and opportunities and not only financial considerations, for the long-term benefit and continuity of the companies.

76. The Sustainability Reporting Guide[66] sets out the following examples of EES factors[67] which boards must take into consideration in deciding what is in the best interests of their companies:-

    a. *Economic:* An organisation's impacts on the economic conditions of its stakeholders and on economic systems at local, national and global levels, which may include the organisation's procurement practices or community investment.

    b. *Environmental:* An organisation's impact on living and non-living natural systems, including land, air, water and ecosystems, which may include the organisation's usage of energy and water, discharge of emissions or loss of biodiversity, etc.

    c. *Social:* The impact an organisation has on the social systems within which it operates, including the organisation's relationships with communities, employees and consumers.

77. The 2nd edition of the Sustainability Reporting Guide deals with the UN Sustainable Development Goals and the recommendations and guidance of the TCFD's recommendations and guidance on integrated reporting.

78. Notably, on 23 March 2022, Bursa Malaysia issued a consultation paper on the proposed amendments to the MMLR and ACE Market Listing Requirements to: (i) require disclosure of prescribed sustainability matters and indicators that are deemed material for listed issuers across all sectors; (ii) introduce climate change-related disclosures in line with the TCFD Recommendations (as defined under **Section 2 of Part 2** below); (iii) require disclosure of prescribed sustainability matters and indicators that are deemed material for PLCs in specified sectors; (iv) introduce enhanced disclosure requirements of the companies' quantitative information on material sustainability matters; and (v) require a statement on whether the sustainability statement (as discussed above under this **Section B**) has been internally reviewed and independently assured, and if so, the scope covered by the review or assurance. This increases even more the urgency for directors of PLCs to act on sustainability and climate change issues.

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65 Bursa Malaysia, Corporate Disclosure Guide, here. Para. 5.3, Quality of Financial Disclosures of the Corporate Disclosure Guide.

66 Bursa Malaysia: Sustainability Reporting Guide (2nd Edition), 28 December 2018, here, Page 7.

67 Bursa Malaysia: Sustainability Reporting Guide (2nd Edition), 28 December 2018, here, Page 7.

## C. BNM

79. BNM, the Central Bank of Malaysia, has also played a pivotal role in raising awareness of climate change risks within the financial sector.

80. A Joint Committee on Climate Change ("**JC3**") was formed on 27 September 2019 by both BNM and the SC to pursue collaborative action for building climate resilience in the financial sector in Malaysia.

### C1. Climate Change and Principles-based Taxonomy

81. The BNM Climate Change and Principle-based Taxonomy ("**BNM Taxonomy**")[68] is aimed at introducing guiding principles on climate objectives and providing a standardised classification and reporting of climate-related exposures to support risk assessment by financial institutions. It sets out how climate-related risks in the form of physical, transition and liability risks are transmitted to the financial system and requires financial institutions to incorporate climate considerations in their business strategy, risk management framework and product offerings and develop the tone from the top that will institutionalise the mindset and advocacy for sustainability throughout the organisation.

82. The BNM Taxonomy prescribes the adoption of a consistent and systematic classification of economic activities to facilitate and promote the channelling of financial flows to activities that support climate change and environmental objectives, based on five guiding principles:

    a. Climate change mitigation;

    b. Climate change adaptation;

    c. No significant harm to the environment;

    d. Remedial measures to transition; and

    e. Prohibited activities.

83. Structured around these guiding principles, economic activities are divided into the three (3) broad categories of "Climate Supporting", "Transitioning" and "Watchlist" activities.[69]

84. The BNM Taxonomy sets out BNM's expectation on the need for financial institutions to take into account climate change considerations when evaluating and making decisions on financing. The BNM Taxonomy's guiding principles are to be incorporated as part of the financial institutions' due diligence assessments on financing for existing and prospective customers, and for investment decisions in financial assets.

85. The criteria set out in the BNM Taxonomy will require customers of financial institutions themselves to be cognisant of the need to transition towards more sustainable practices in their own businesses in order to be able to obtain financing in the future.

### C2. BNM Policy Document on Corporate Governance

86. The Corporate Governance Policy Document issued by BNM on 3 August 2016 ("**BNM Corporate Governance Policy**") prescribes the adoption of sound governance standards and practices by financial institutions, acknowledging the important role of the board in setting the tone at the top for a corporate culture that reinforces ethical, prudent and professional behaviour.

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68 BNM: Climate Change and Principle-based Taxonomy document, 30 April 2021, here.

69 BNM: Climate Change and Principle-based Taxonomy document, 30 April 2021, here, Page 23.

87. Standard 8.3 of the BNM Corporate Governance Policy provides that the board has the overall responsibility for promoting sustainable growth and financial soundness of a financial institution, including a consideration of the long-term implications of the board's decisions on the financial institution and its customers, officers and the general public. It also provides that in fulfilling this role, the board has responsibility for promoting sustainability through appropriate ESG considerations in the financial institution's business strategies.

88. The BNM Corporate Governance Policy is issued pursuant to Sections 47(1) and 58(4) of the Financial Services Act 2013 ("**FSA 2013**") and Sections 29(2), 57(1) and 67(4) of the Islamic Financial Services Act 2013 ("**IFSA 2013**")[70] and financial institutions are legally required to comply with the standards set out in the policy document.

### C3. Exposure Draft on Climate Risk Management and Scenario Analysis

89. The BNM "Exposure Draft on Climate Risk Management and Scenario Analysis" ("**BNM Exposure Draft**")[71] recognises the material financial risks posed by climate change to the safety and soundness of financial institutions and in turn the stability of the financial system as a whole.

90. The BNM Exposure Draft states clearly that, upon it coming into force, financial institutions shall comply with the policy document at the entity and consolidated levels, that the requirements shall apply to both financial and non-financial subsidiaries of financial institutions and that the board of directors "*shall have the overall responsibility and accountability to safeguard the financial institution's resilience against the adverse impacts of climate change*" and "*shall evaluate the risks and opportunities arising from climate change on a periodic basis and consider these risks and opportunities in assessing and approving the financial institution's strategies and business plan.*"

91. The BNM Exposure Draft sets out proposed specific requirements and expectations of BNM "*to ensure that financial institutions strengthen the management of financial risks stemming from climate change to enhance the resilience of the financial sector against climate related risks and to facilitate an orderly transition to a low-carbon economy*". It requires financial institutions:

    a. through early action, to urgently implement changes towards building climate resilience;

    b. strategically, to account for how actions today affect future outcomes under a range of scenarios and time horizons over the long term;

    c. when strengthening the risk management frameworks, to comprehensively address financial risks from climate change by recognising that the elements of climate-related risks are far-reaching and foreseeable but highly complex due to uncertainty, non-linearity, irreversibility and dependency on short-term actions.

92. The role of directors of financial institutions in mitigating climate-related risks is set out in Section 8 of the BNM Exposure Draft which requires the board and senior management to:

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[70] BNM: Corporate Governance, 3 August 2016, here. It is also interesting to note Para. 1.4 of the BNM Corporate Governance Policy, which provides as follows: *"The Bank expects financial institutions to implement the minimum standards set out in this policy document and demonstrate that their governance arrangements are operating effectively and remain appropriate given their size, nature of business, complexity of activities, structure and systemic importance. Financial institutions should also strive to continuously enhance these arrangements to reflect changing conditions and emerging sound practices, as appropriate."*

[71] BNM, Exposure Draft on Climate Risk Management and Scenario Analysis, 27 December 2021 to be issued pursuant to Section 47, 143 and 266 of FSA 2013, Section 57, 155 and 299 IFSA, Section 41, 116 and 126 of the Development Financial Institution Act 2002, here.

a. exercise effective oversight of climate-related risks to safeguard the financial institution's resilience against the adverse impacts of climate change (Paras. 8.1 to 8.5);

b. ensure that they have a sound understanding of climate-related risks to inform the financial institution's business and risk management strategies (Paras. 8.6 to 8.8).

93. Although the BNM Exposure Draft stated that it is expected to come into force on 1 June 2022, it is not in force yet.

### C4. Effect of BNM Policies and Guidelines

94. Pursuant to Section 95 of the Central Bank of Malaysia Act 2009 ("**CBMA**"), BNM may issue such guidelines, by-laws, circulars, standards or notices as it considers necessary or expedient for the implementation of the CBMA or the carrying out of its functions. Financial institutions are therefore bound to comply with such guidelines, by-laws, circulars, standards or notices issued. Furthermore, Section 98(1) of the CBMA provides that BNM may, by regulations made under Section 94, impose administrative penalties on any person for any delay in complying with any directive, guideline, standard, circular, specification, order or notice issued by BNM in respect of any provision of the CBMA. Section 234(1)(d) of the FSA 2013 provides that a person commits a breach under the FSA 2013 if they fail to comply with or give effect to any standards, condition, restriction, specification, requirement or code which they are required to comply with. In such circumstances, BNM may take any one or more of the following actions: (a) an order requiring compliance with such standards, condition, restriction, specification, requirement or code (b) monetary penalty (c) written reprimand; (d) an order requiring steps to mitigate the breach and/or (d) an order requiring restitution to an aggrieved person specified in Section 234(3) of the FSA 2013 (equivalent section for Islamic financial institutions: Sections 245(1)(d) and 245(3) of the IFSA 2013).

95. It is therefore incumbent upon financial institutions to integrate ESG and climate change considerations into their financing and investment decision-making process, assess and classify economic activities which contribute to climate change mitigation and adaptation and ensure a deeper understanding of the impact of climate risks on their business. Boards must set the tone at the top and drive the development of a sustainability-focused culture that will deliver long-term sustainable outcomes, whilst identifying organisation-wide strategies and resources required to manage climate change risks.

96. Directors of companies seeking financing will have to ensure that climate change risk management strategies are in place to prepare for the inability of financial institutions to grant new or extended financing facilities for economic activities which contribute to GHGs and climatic events. As an example, CIMB Bank Berhad in 2020 announced its commitment to phase out coal from its portfolio by 2040, making it the first banking group in Malaysia to do so. Standard Chartered Malaysia meanwhile have said that they "*will only provide financial services to clients who are less than 5% dependant on thermal coal (based on revenue) by 2030*."[72]

## <u>Section 2: Adoption of TCFD Recommendations in Malaysia</u>

97. The TCFD was established by the G20 Financial Stability Board in December 2015 and comprises 32 members representing, *inter alia*, banks, insurance companies and credit rating agencies globally. In 2017, the TCFD introduced its recommendations for a voluntary global standardised framework for climate-related financial disclosures ("**TCFD Recommendations**").

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72 The Star: Green finance is red-hot, 15 January 2022, here.

98. The TCFD is focused on the need for a consistent framework for climate-related financial disclosures for use by companies to ensure transparency of their climate risk exposures. It seeks to make the disclosures more consistent and therefore more comparable. The TCFD believes that better information will enable companies to incorporate climate related risks and opportunities into their risk management, strategic planning and decision-making processes, and enable better pricing and capital allocation decisions by investors. The TCFD recommends that organisations undertake a forward-looking analysis when considering the potential financial impacts of climate change through the use of stress-testing and scenario planning.

99. The TCFD structured its recommendations around four (4) thematic areas that represent the *"core elements of how organizations operate"*: governance, strategy, risk management and metrics and targets. The four overarching recommendations are supported by recommended disclosures which will help investors and others understand how reporting organisations assess and manage climate-related risks and opportunities[73]

100. The TCFD Recommendations are to be included in the public annual financial filings of organisations and in accordance with their national disclosure requirements or other official company reports that are issued at least annually, widely distributed and subject to similar internal governance processes as for financial reporting.

101. As of October 2021, over 2,600 institutions from 89 countries including financial institutions, governments, regulators, credit rating agencies, NGOs and non-financial companies from a cross-spectrum of industries have expressed support for the TCFD Recommendations. In Malaysia, the TCFD signatories include the SC, Sunway Berhad, CIMB Group Holdings Berhad, Bursa Malaysia and Petroliam Nasional Berhad (PETRONAS).

102. Several jurisdictions including the European Union, United Kingdom, Singapore, Canada, Japan and South Africa have now adopted the recommendations as part of their regulatory framework.[74] A TCFD-aligned Application Guide for disclosures on climate-related risks by financial institutions was issued in March 2022 for public consultation and is a key part of the work done by JC3 to ensure financial institutions in Malaysia manage climate related risks and opportunities comprehensively. As an extension of this work, disclosure guides for businesses will also be developed. The JC3 supported the proposal for making mandatory TCFD-aligned climate-related financial risk disclosures for financial institutions from 2024. This means that financial institutions will, as a minimum, be required to adopt the basic recommendations in the Application Guide and are encouraged to apply the stretch recommendations in line with their climate risk exposure and complexity of operations.[75]

103. The BNM Exposure Draft on Climate Risk Management and Scenario Analysis includes requirements for financial institutions to make annual climate-related disclosures that are aligned with the TCFD Recommendations by 31 December 2024. Such annual disclosures are to be published together with the annual financial reports for financial years beginning on or after 1 January 2024. Financial institutions are required to separately address in the annual disclosures specific areas such as governance around climate-related risks and opportunities, and actual and potential impact of climate-related risks and opportunities on business, strategy and financial planning.

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[73] TFCD, Final Report: Recommendations of the Task Force on Climate-related Financial Disclosures, June 2017, here, page iv-v.

[74] Deloitte: What is the TCFD and why does it matter?, here.

[75] In addition, financial institutions regulated by BNM are expected to work towards adopting stretch recommendations that are fully aligned with TCFD disclosures by end 2024.

## PART 3: RELATIONSHIP BETWEEN DIRECTORS' DUTIES AND CLIMATE CHANGE CONSIDERATIONS

104. We now examine directors' duties under Malaysian law in relation to climate change.

### Section 1: The general law and principles of directors' duties in Malaysia

105. In Malaysia, the law on directors' duties comprise (i) statutory duties – set out in the CA 2016 – which are a codification of the duties and principles developed at common law; and (ii) common law principles as pronounced in cases decided by the courts in Malaysia. In this regard, case law from other Commonwealth jurisdictions are persuasive (but not binding) and aid the Malaysian courts' interpretation of an area of law where no written law or prior Malaysian judicial precedent exists.

106. Section 213 of the CA 2016 provides for two broad categories of duties that directors[76] owe to their companies, namely the fiduciary duty to act for a proper purpose and in good faith in the best interests of the company and a duty of care, skill and diligence. In our view, it is significant that these duties are separate as it emphasises the distinct nature and scope of each type of duty.

### A. Fiduciary Duty

107. In the first category of directors' duties under Section 213 (1) of the CA 2016, a director of a company is under a fiduciary duty to, at all times, (i) exercise his powers for a proper purpose and (ii) such powers must be exercised in good faith in the best interest of the company.

108. What constitutes a "proper purpose" is not statutorily defined in the CA 2016. The legal definition has therefore been left to be determined by the courts.

109. In the Court of Appeal of Malaysia decision in *Pioneer Haven Sdn. Bhd. v Ho Hup Construction Co Bhd & Anor and other appeals,*[77] it was held that if directors exercised their powers for some ulterior purpose or its exercise were to be carried out in an improper manner, such an exercise of powers could be set aside.

110. The decision in *Pioneer Haven* also approved of principles drawn from Australian case law relating to the exercise of a director's powers for a proper purpose,[78] elaborating that "*in considering whether the actions of directors were bona fide in the best interests of the company as a whole, the court is not obliged to look at the company as in some way disembodied from its members*" and that "*the **court can look at the declared intentions of directors in order to test their assertions** (which will often be self-protective) **against the assessment by the court of what, objectively, was in the best interests of the company** at the relevant time*" (emphasis added).

111. The UK Supreme Court, in *Eclairs Group Ltd v JKX Oil & Gas Plc*,[79] considered that the role of the proper purpose rule is "*one of the main means by which equity enforces the proper conduct of directors. It is also fundamental to the constitutional distinction between the respective domains*

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[76] Under Section 210 CA 2016, a 'director' includes chief executive officer, chief financial officer, chief operating officer or any other person primarily responsible for the management of the company.

[77] *Pioneer Haven Sdn. Bhd. v Ho Hup Construction Co Bhd & Anor and other appeals* [2012] 3 MLJ 616.

[78] See *Pioneer Haven* [2012] 3 MLJ 616, at [262] approving *dicta* from the judgment of Kirby P in *Darvall v North Sydney Brick and Tile Co* (1989) 16 NSWLR 260 at pp 281–282.

[79] *Eclairs Group Ltd v JKX Oil & Gas Plc* [2015] UKSC 71.

*of the board and the shareholders. These considerations are particularly important when the company is in play between competing groups seeking to control or influence its affairs."*[80]

112. The Federal Court of Malaysia in *Tengku Dato' Ibrahim Petra bin Tengku Indra Petra v Petra Perdana Bhd and another appeal* ("***Petra Perdana***")[81] examined what it means for a director to act in good faith and in the best interest of the company. The Court held that the correct test combines both subjective and objective elements. The test is subjective in the sense that the breach of the duty is assessed based on the director's state of mind, in that, the issue is whether the director (and not the court) considers that the exercise of discretion is in the best interest of the company; whilst the test is objective in that the director's assessment of the company's best interest is gauged against an objective review or examination by the courts.

113. When elaborating on this objective element, the Federal Court affirmed the principles adopted by the Court of Appeal in *Pioneer Haven*.[82] A director will be in breach of his duty if the act or decision is shown to be one which no intelligent and honest man in the position of the director of the company concerned could, in the whole of the existing circumstances, have reasonably believed that the impugned transactions were for the benefit of the company.[83]

114. The judicial discussion on a director's fiduciary duty thus emphasises that a director's subjective belief alone cannot be determinative of a claim that he has not breached his fiduciary duty.

115. As statutory duties under the CA 2016 are in addition to the general duties found under other written laws,[84] the scope of a director's fiduciary duty can be further elucidated by reference to case law:

a. A director of a company is precluded from bringing his personal interest into conflict with that of the company.[85] Directors can be regarded as trustees and are subject to strict fiduciary principles that ensure certain minimum standards of behaviour with potentially severe penalties in the event of breach.[86]

b. The company is entitled to the single-minded loyalty of its directors. The defining characteristic of a fiduciary is that he must act in good faith; he must not make a profit out of his trust; he must not place himself in a position where his duty and his interest may conflict; he may not act for his own benefit or the benefit of a third person without the informed consent of his principal.[87]

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80 [2015] UKSC 71, Lord Sumption's judgment at [37].

81 *Tengku Dato' Ibrahim Petra bin Tengku Indra Petra v Petra Perdana Bhd and another appeal* [2018] 2 MLJ 177 *(The Federal Court of Malaysia)* [166-167].

82 *Petra Perdana* [176] – [178].

83 *Petra Perdana* [172] – [173]: *"One of the important principles of law that can be distilled from the case of Charterbridge Corporation Ltd v Lloyds Bank Ltd [(1970) 1 Ch 62] was that the test for breach of duty of a director and acting in 'the interest of the company' has an objective element: **whether an honest and intelligent man in the position of a director of the company concerned could, in the whole of the existing circumstances, have reasonably believed that the transaction was for the benefit of the company**. This principle has come to be known as the '**Charterbridge Principle**' (per Zainun Ali JCA (as Her Ladyship then was) in Pioneer Haven Sdn Bhd v Ho Hup Construction Co Bhd & Anor and other appeals)"* (emphasis added).

84 Section 220 CA 2016.

85 *Avel Consultants Sdn Bhd & Anor v Mohd Zain Yusuff & Ors* [1985] 2 MLJ 209 (Supreme Court of Malaysia) at p. 210.

86 *Dato' Abul Hasan bin Mohamed Rashid v Multi-Code Electronics Industries & Anor* [2012] 5 MLJ 176 (Court of Appeal of Malaysia) at [24] – [26].

87 See the Federal Court of Malaysia in the case of *The Board of Trustees of the Sabah Foundation & Ors v Datuk Syed Kechik bin Syed Mohamed & Anor* [2008] 5 MLJ 469 citing the passage by Millet LJ in the English case of *Bristol and West Building Society v Mothew* [1998] Ch 1.

c. A director must act *bona fide* in the interests of the company and must not exercise his or her powers for any collateral purpose. A director who, by using the position, makes a profit is liable to account for that profit. Where a director finds himself or herself in a position where the duty to the company and the director's personal interest conflict, any contract entered is voidable at the instance of the company.[88]

d. A director must never act in any manner that would put the company in harm's way.[89]

## B. Duty of Care

### B1. Section 213(2) CA 2016: The duty to exercise reasonable care, skill and diligence (i.e. the duty of care)

116. Section 213(2) of the CA 2016 requires a director to exercise reasonable care, skill and diligence. A director's exercise of this duty of care will be assessed based on:

a. Firstly, the knowledge, skill and experience *which may be reasonably expected of a director* having the same responsibilities. This is assessed using an objective test; and

b. Secondly, the additional knowledge, skill and experience *which the director in fact has.* This is assessed using a subjective test.

117. If a director professes to have qualifications or experience in a specialised area of knowledge, he is expected to use such specialised knowledge where it is pertinent to the company's activities. In such instances, although the second limb under Section 213(2) CA 2016 is described as a subjective test, the director is adjudged against the standard of skill commensurate with the director's professed level of qualification or experience in the area of knowledge.[90]

118. As with a director's fiduciary duty, developments at common law are relevant to determine the scope and content of a director's duty of care.

## C. The evolving duty and standard of care

119. As the climate crisis becomes more acute in the face of inadequate action, it is expected that a director's duty and standard of care will evolve to even higher standards. The categories of foreseeable risks to Malaysian companies will increase as the connection between climate change and catastrophic events is strengthened with empirical evidence. As discussed above in **Part 2**, extensive climate-related provisions, regulations and guidelines have been made available to directors of Malaysian companies. This vast amount of material is expected to be

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88 *Dato' Abul Hasan bin Mohamed Rashid v Multi-Code Electronics Industries & Anor* [2012] 5 MLJ 176 (Court of Appeal of Malaysia) at [24].

89 *Zaharen bin Hj Zakaria v Redmax Sdn Bhd and other appeals* [2016] 5 MLJ 91 (Court of Appeal of Malaysia), at [60].

90 See *Abdul Ghani bin Tahir v Public Prosecutor* [2017] SGHC 125. This is a landmark case in Singapore which led to the imprisonment of a company director for neglecting his duty of care which contributed to the company committing money laundering offences under the Singapore Corruption, Drug Trafficking And Other Serious Crimes (Confiscation Of Benefits) Act. It is also the first reported case of a director being imprisoned for failure to exercise reasonable diligence under section 157(1) of the Singapore Companies Act. In that case, the director was a chartered accountant and provided corporate secretarial services on behalf of foreign nationals whose impugned companies were involved in illicit activities and money laundering. The Singapore High Court found that the standard of care and diligence that was required of the director was raised in this instance because of the skills and experience that the director possessed, that is, as a chartered accountant providing corporate secretarial services and his extensive experience as a Singaporean resident director. It should be noted here that the director was found liable and sentenced not based on a finding that he actively participated in the wrongdoing but because of his neglect as a director.

grounds upon which Malaysian courts can 'reasonably expect' a director to have sufficient knowledge, skill and experience about climate change and its related risks to companies for purposes of the objective test under section 213(2) CA 2016.

120. It is pertinent to note here that the UK Companies Act 2006 expressly provides that a director must have regard to *"the impact of the company's operations on the community and the environment"* when promoting the success of the company for the benefit of its members as a whole.[91] While Section 213 CA 2016 does not contain this provision, in our view, a similar requirement may be drawn in respect of the duties owed by directors of Malaysian companies. A director's failure to consider his company's operations in relation to the causes and effects of climate change is a failure to consider material risks to the company. This would pose risks to the company's financial performance, and may be construed as a failure by a director to exercise reasonable care, skill and diligence, or a failure to act in good faith in the best interest of the company. Further, the prevailing emphasis by regulators, investors, employees and other stakeholders on the importance of climate change and ESG considerations shifts the dynamics of the business environment in which companies and directors operate and creates a tangible intersection between the interests of companies with the interests of the environment, stakeholders and communities at large.

121. Also, a director's duty of care owed to the company under section 213 CA 2016 and the requisite standard of care this entails may continue to evolve in parallel with the evolving standard of care and public policy requirements under other areas of Malaysian law by which companies and directors could be obligated to take heed of climate risks and the potential consequences of their company's business to other parties.

122. For example, the general test at common law for imposing a tortious duty of care (i.e. the '3-stage *Caparo* test',[92] which has been adopted in Malaysia[93]) is a flexible test that embeds a public policy element within it.[94] In this context, the Federal Court of Malaysia's decision in *Tenaga Nasional Malaysia v Batu Kemas Industri Sdn Bhd* has observed that the *Caparo* test is one where the question of *responsibility for negligence may be argued in an almost unlimited range of circumstances* and a court may take all kinds of considerations into account in deciding whether a duty ought to be owed. However, this does not mean that the question is entirely at large or that every new decision is no more than an ad hoc determination of policy. Core concerns of policy include: "*(i) promoting autonomy — the law draws a distinction between positive acts and failures to do so; (ii) preventing indeterminable liability; (iii) protecting the vulnerable; and (iv) maintaining coherence in the legal system"* namely that — "*a duty of care should fit coherently into an overall scheme of rights and responsibilities or, in other words, it should be consistent with other legal rules and principles"* .[95]

123. The Federal Court's observation in *Tenaga Nasional Malaysia* on maintaining a coherent legal system that fits with the overall scheme of rights and responsibilities is also important in the light

91 Section 172(1)(d), UK Companies Act 2006.

92 Briefly described, under the 'Caparo' test the plaintiff must establish: that harm was reasonably foreseeable; that there was a relationship of proximity; and that it is fair, just and reasonable to impose a duty of care.

93 See the Federal Court of Malaysia decision in *Tenaga Nasional Malaysia v Batu Kemas Industri Sdn Bhd and another appeal* [2018] 5 MLJ 561, at [58]. The Federal Court also referred to the Federal Court case of *Majlis Perbandaran Ampang Jaya v Steven Phoa Cheng Loon & Ors* [2006] 2 MLJ 389 to state that it is possible for courts to impose a duty of care where it is fair, just and reasonable in the presence of public policy concerns. The question posed in that case was whether it was fair, just and reasonable to impose a liability on a local authority for its failure to come up with and implement a promised plan or to stabilise a hill slope on neighbouring land to ensure that a collapse of a residential building would not recur to similar buildings.

94 Namely whether it is "fair, just, and reasonable" to impose a duty of care.

95 See *Tenaga Nasional Malaysia v Batu Kemas Industri Sdn Bhd and another appeal* [2018] 5 MLJ 561 (Federal Court of Malaysia), at [52].

of the climate-related rules and regulatory guidance directed at Malaysian companies. These extensive rules and regulatory guidance would prevent companies from claiming that climate-related risks were not foreseeable or that the losses caused by such risks materialising were too remote.

## D. The evolving standard of knowledge

124. As highlighted in **Part 2**, regulators in Malaysia have strongly emphasised the need for directors to stay abreast with recent and relevant developments so as to discharge their duties properly. This includes having a sufficient understanding of sustainability issues relevant to the company and its business, as well as climate-related risks and opportunities.

125. This is relevant when courts employ existing legal tools to scrutinise a director's state of knowledge and to impute actual knowledge where necessary. For example, the doctrine of wilful blindness, which although has its origins in criminal law, is of use where the court imputes knowledge to an accused person who has his suspicion aroused to the point where he sees the need to inquire further, but deliberately chooses not to make those inquiries. It can conceivably be argued that directors are taken to know or are deemed to have known about climate risks where it is shown that they reasonably suspected the fact and realised its probability, but they refrained from obtaining the final confirmation because they wanted to be able to deny knowledge.[96] In other words, directors who "*behave like an ostrich with [their] head buried in the sand*" will rightfully invite criticism of wilful blindness and voluntary ignorance.[97]

## E. Relevant factors to be considered in the context of directors' duties

126. The latest scientific evidence presented in the IPPC Sixth Assessment Report and other studies has led to a seismic shift in the overall expectations of investors, regulators and the public in regard to the role of companies in contributing to GHGs and climate change. This is accompanied by a marked acceleration in the issuance of guidance, recommendations and requirements by regulators such as the SC, Bursa Malaysia and BNM on responsibility of directors to assess, deal with and make disclosures of climate change risks, ESG and sustainability issues.

127. In our opinion, there is no way that boards can deny their obligation to take into account climate change risks in discharging their duties. Indeed the Malaysian courts have observed that a "*director cannot now be viewed as mere sentinel who may occasionally doze off at his post.*

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[96] See *Azmi bin Osman v Public Prosecutor and another appeal* [2016] 3 MLJ 98 (Court of Appeal of Malaysia) at [36]: *"The doctrine of wilful blindness imputes knowledge to an accused person who has his suspicion aroused to the point where he sees the need to inquire further, but he deliberately chooses not to make those inquiries. Professor Glanville Williams has succinctly described such a situation as follows: 'He suspected the fact; he realised its probability but he refrained from obtaining the final confirmation because he wanted in the event to be able to deny knowledge. This, and this alone is wilful blindness'. (Glanville Williams, Criminal Law (2nd Ed, 1961) at p 157). Indeed, in the context of anti-money-laundering regime, feigning blindness, deliberate ignorance or willful ignorance is no longer bliss. It is no longer a viable option. It manifests criminal intent."*

[97] See *Overseas Realty Sdn Bhd v Wong Yau Choy & Ors; Tetuan Tay Ibrahim & Partners (Third Party)* [2014] 8 CLJ 107 (High Court of Malaya) at [37]: *"Coming back to the facts in the instant case, with the knowledge that the second defendant had acquired property from a bankrupt, it was incumbent upon the third defendant bank to at least make inquiries as to how the bankrupt first defendant had come to acquire the said property. After all, a bankrupt is deemed to be a person who is unable to manage his financial affairs because of his debts. A bankrupt may well have acquired property as a gift or through inheritance but if that was not the case, it would be prudent and reasonable to make inquiries as to how such property came to be acquired. It is my respectful view that once you have such knowledge of bankruptcy, you cannot behave like an ostrich with its head buried in the sand as this will rightfully invite criticism of wilful blindness and voluntary ignorance."*

*Directors are officers who must remain alert and watchful at the helm. Directors ought to have an inquiring, though not necessarily suspicious, mind in discharging their supervisory function*"[98] and that "*directors have, both collectively and individually, a continuing duty to acquire and maintain sufficient knowledge and understanding of the company's business to enable them properly to discharge their duties as director.*"[99]

128. The abundance of regulators' guidance, particularly the explicit agenda advanced by the MCCG, SC PLC Guidelines and the CG Strategic Priorities impose upon boards and in particular the audit and risk committees the obligation to incorporate climate-change considerations in their decision-making process.

129. In other words, directors risk acting in breach of their duties if they do not inform themselves of climate risks, incorporate a broader sustainability agenda in their companies' operating and decision-making processes and take the required steps to address these issues.

130. This is particularly relevant with respect to a company's "social licence to operate",[100] a concept first mooted in reference to the mining and extractive industries but now considered "*de rigueur*" for most companies given the importance that shareholders and stakeholders attach to companies taking climate risks and other ESG considerations seriously.

131. As stakeholders become increasingly aware of the impact of businesses on the environment, the economy and the community, added pressure will be brought to bear on companies to take responsibility for such impact. Companies must ensure that strategic plans to support long term value creation incorporate sustainability considerations. Relevant economic, environmental and social considerations must be embedded in their business strategies and operations. Failure to do so would impact a company's "*risk profile, potential liabilities, reputation and overall value.*"[101]

132. The World Economic Forum White Paper published in 2020 titled "Integrated Corporate Governance: A Practical Guide to Stakeholder Capitalism for Boards of Directors" called upon corporate directors to transcend the "*traditional segmentation of shareholder and stakeholder considerations by integrating them*."[102] This translates into a broadened corporate governance approach which systematically incorporates ESG considerations into the strategy, allocation of resources, risk management, reporting and performance evaluation as opposed to a traditional narrow profit-focused short-term approach.[103]

133. Legal commentators in other common law jurisdictions have opined[104] that companies ought to also take steps to assess the following:-

a. Impacts on their business if global warming increases by more than 1.5ºC (in the next 5 years) due to absence of decarbonisation efforts;

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98 See *Ravichanthiran a/l Ganesan v Percetakan Wawasan Maju Sdn Bhd & Ors* [2008] 8 MLJ 450 at [55], quoting from the Singapore Court of Appeal's decision in *Planassure Pac formerly known as Patrick Lee Pac v Gaelic Inns Pte Ltd* [2007] SGCA 41; [2007] 4 SLR 513.

99 See *Ravichanthiran a/l Ganesan v Percetakan Wawasan Maju Sdn Bhd & Ors* [2008] 8 MLJ 450 at [56], quoting from the English Court of Appeal in *Re Barings Plc (No 5)* [2000] 1 BCLC 523.

100 Investopedia: Social Licence to Operate (SLO), 31 May 2021, here. The phrase "social licence to operate" generally refers to the ongoing acceptance of a company or industry's standard business practices and operating procedures by its employees, stakeholders and the general public, and is typically used in association with sustainability issues.

101 Bursa Malaysia, Corporate Governance Guide (4th edition), 13 December 2021, here. Page 26.

102 World Economic Forum, Integrated Corporate Governance: A Practical Guide to Stakeholder Capitalism for Boards of Directors, June 2020, 7, here.

103 Bursa Malaysia, Corporate Governance Guide (4th edition), 13 December 2021, here. Page 107.

104 Centre for Policy Development, Further Supplementary Memorandum Of Opinion by Mr Noel Hutley SC and Mr Sebastian Hartford Davis, 23 April 2021, here.

b. Short-term or medium-term steps necessary in order to predict, influence and respond to unprecedented decarbonisation transition efforts required to avert global warming of 1.5ºC especially for the energy, transport and resource sectors; and

c. Impact from climate change physical risks occurring.

134. Active consideration of climate change risks and ESG factors in business decisions and operations is no longer just desirable, it has become a necessity to ensure that businesses are run sustainably and do not suffer from closure of market access.

## F. European Commission (EU) Sustainable Governance Initiative (EU SG Initiative)

135. In this regard, of particular note is the EU SG Initiative which could have wide implications for companies in Malaysia doing business in or with businesses in the EU. This initiative proposes to require certain categories of limited liability companies "not to do harm" in relation to certain sustainability factors and to empower corporate directors to incorporate wider interests into directors' decision-making by requiring companies to integrate into corporate governance structures measures to take into account and address adverse sustainability impacts. These include climate change and harm to environmental and human rights[105] (including workers and child labour), not only in these companies' own operations but also in the value chain. The EU SG Initiative imposes a due diligence duty on companies (and their directors) to identify and prevent relevant risks and mitigate negative impacts.[106]

136. The EU SG Initiative cites a July 2020 study conducted by the Directorate-General for Justice and Consumers (European Commission) and Ernst & Young which revealed that the pressure faced by many companies, in particular those listed on regulated markets, to generate financial return in a short timeframe and redistribute a large part of the income generated to shareholders, may be to the detriment of the long-term development and sustainability of these companies. This study also observed that a short-term focus in corporate directors' remuneration incentivises share price performance, but that corporate income distribution patterns across the EU show a strong trend towards declining investment and could hamper investment crucial for sustainability transition, innovation, upskilling or retraining of employees.

## G. Implications for directors

137. The preceding analysis of directors' duties, the proliferation of regulators' guidance and requirements and the reports on scientific evidence of climate change effects along with its economic consequences affirm our view that directors of companies in Malaysia can no longer hide behind the shield of not having knowledge of the impact of climate change and the importance of incorporating such impact into their actions.

138. As succinctly put by the Court of Appeal of Malaysia,[107] directors of a company have to give their all to serve in the best interest of the company of which they are a director – a company should

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105 From a human rights perspective, environmental protection serves to secure fundamental rights such as the right to life, health, right to private life, and property of individuals. This was recently recognised by the UN Human Rights Council in the form of a resolution (co-sponsored by the Malaysian delegation) declaring the right to a safe, clean, healthy, and sustainable environment as a human right that is important for the enjoyment of human rights. See the UN resolution here.

106 European Commission, About the Sustainable Corporate Governance Initiative, here.

107 See *Zaharen bin Hj Zakaria v Redmax Sdn Bhd and other appeals* [2016] 5 MLJ 91 (Court of Appeal of Malaysia), at [62]: "*In other words, a director of a company has to give his all to serve in the best interest of*

expect nothing less from its directors. Gone are the days when a company director can be heard to say that he was a sleeping director and expect to escape liability. His duty may appear onerous but that is to be expected as he is a fiduciary and part of the alter ego of the company.

139. Consequently, not considering primary climate risks in the form of physical risks and economic transition risks also creates additional liability risks in the form of exposure to litigation instituted personally against directors. Directors should thus be aware of the following additional instances where they face potential liabilities in relation to a failure to consider climate related risks.

## H. Directors' duties under specific legislation

140. In addition to the duties imposed under the CA 2016 and under common law, directors also have statutory duties imposed on them under various other legislation which carry penal sanctions.

141. The Environmental Quality Act ("**EQA 1974**") and its underlying regulations serve to regulate and specify the acceptable conditions for the emission, discharge or deposit of environmentally hazardous substances, pollutants or wastes. Section 22(1) of the EQA 1974 provides that no person shall, unless licensed, emit or discharge any environmentally hazardous substances, pollutants or wastes into the atmosphere in contravention of the acceptable conditions specified under Section 21 of the EQA 1974.

142. The Environmental Quality (Clean Air) Regulations 2014 regulate the emission of air pollutants from, *inter alia*, industrial activities and fuel burning activities. The phrase "air pollutants" includes smoke, cinders, solid particles of any kind, gases, fumes, mists, odours and radioactive substances.

143. The Environmental Quality (Prescribed Activities) (Environmental Impact Assessment) Order 2015 prescribes the activities that require an environmental impact assessment report to be submitted and to obtain approval before carrying out those activities. These prescribed activities are categorised into broad areas such as land reclamation, developments in a coastal, hill and slope areas, housing development and industrial estate development.

144. The Environmental Quality (Prohibition on the Use of Chlorofluorocarbons and Other Gases As Propellants and Blowing Agents) Order 1993, the Environmental Quality (Halon Management) Regulations 1999 and the Environmental Quality (Refrigerant Management) Regulations 2020 were enacted as part of Malaysia's obligations to reduce ozone-depleting substances under the Montreal Protocol and deal specifically with the emission of substances typically regarded as being of an ozone depleting nature ("**Montreal Protocol Regulations**").

145. While the EQA 1974 and its subsidiary legislation do not tackle carbon emissions in general (other than the Montreal Protocol Regulations which only have a limited prohibition against GHGs emissions from specific uses as propellants and blowing agents and refrigerants), directors need to take action to ensure that their companies do not breach these environmental protection requirements as a minimum threshold.

146. Directors also have an obligation to exercise due diligence to prevent the occurrence of offences under the EQA 1974 by their companies by putting in place a system to prevent the occurrence of the offences, as they can also be held personally liable for offences committed under the EQA 1974 and its regulations. Section 43 of the EQA 1974 provides that, in the case of an offence

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*the company of which he is a director. As a fiduciary, the company is backed up by the statutory provision to expect nothing less from its directors. Gone are the days when a company director can be heard to say that he was a sleeping director and expect to escape liability. His duty may appear onerous but that is to be expected as he is part of the alter ego of the company. He is a fiduciary, a trustee. It is not his business to act like a rogue, much less to act to the detriment of the company*."

committed by a company, any person who at the time of the commission of the offence was a director, chief executive officer, manager or other similar officer or a partner of the company, firm, society or other body of persons or was purporting to act in such capacity, shall be deemed to be guilty of that offence unless he proves that the offence was committed without his consent or connivance and that he had exercised all such diligence to prevent the commission of the offence as he ought to have exercised, having regard to the nature of his functions in that capacity and to all the circumstances.

147. There are currently no statutorily imposed targets for climate change reductions or GHG emissions reductions targets in Malaysia. However, it is to be noted that the Ministry of Environment and Water of Malaysia ("**MEWA**") has proposed a draft Climate Change Act which could require directors to incorporate climate change considerations into their decision-making process and introduce mandatory disclosure requirements for companies. On 20 January 2022, the Minister of Environment and Water announced that MEWA had completed the climate change legal framework in December 2021, which included provisions on the institutional framework on climate change in Malaysia and the establishment of a climate change committee to ensure that climate change adaptation can be implemented to reduce the impact of floods and other climate related events.[108]

## Section 2: Potential defences for breach of duties

### A. Business judgment rule

148. The "business judgment rule" is a legal principle that offers recourse to directors who seek to defend their actions when faced with claims for breach of duty. We examine below whether a director will be able to rely on this defence for failure to exercise his duty to take reasonable care, skill and diligence (under Section 213(2) CA 2016) in the context of climate risks.

149. Under Section 214 CA 2016, a director who makes a business judgment is deemed to meet the requirements of the duty of care under Section 213(2) CA 2016 and the equivalent duties under common law and in equity if the director:–

    a. makes the business judgment for a proper purpose and in good faith;

    b. does not have a material personal interest in the subject matter of the business judgment;

    c. is informed about the subject matter of the business judgment to the extent he reasonably believes to be appropriate under the circumstances; and

    d. reasonably believes that the business judgment is in the best interest of the company.

150. A "business judgment" refers to any decision on whether or not to take action in respect of a matter relevant to the business of the company.[109]

151. It should also be noted here that whilst Section 214 CA 2016 uses the phrase "reasonably believes", it has been held by the High Court of Malaya that this by definition alludes to a decision based on reason or logic.[110] A director's business judgment will thus be assessed by the courts

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[108] The Star: Climate Change bill legal framework completed, says Tuan Ibrahim, 20 January 2022, here.

[109] Section 214(2) of the CA 2016.

[110] See *Petra Perdana Bhd v Tengku Dato' Ibrahim Petra bin Tengku Indra Petra & Ors* [2014] 11 MLJ 1 (High Court of Malaya), at [367] – [368]: *"In the Australian case of Australian Securities and Investments Commission v Rich (2009) 75 ACSR 1 ('the Rich's case') the enquiry related to the managing director Rich and the finance director, Silberman's failure to advise the board of directors that the company was insolvent.*

on the basis of whether it was a decision premised on logic, sense and a rational basis. This is especially pertinent amidst the mounting empirical evidence and scientific consensus (most emphatically stated by the IPCC in their Sixth Assessment Report) about the ways in which human activities contribute to climate change and the losses and damages thereby caused. In our view, it would be difficult for a director, whose business judgment is being scrutinised by the courts on grounds of rationality or reasonableness, to ignore this scientific evidence.

152. It has also been observed that the business judgment rule protects only directors who *take decisions*, that is, it applies to directors who 'make a business judgment'. Those who fail to act are not normally protected by the business judgment rule – unless the decision made is a considered one not to act.[111] Thus, in a situation where the board has totally neglected to consider the effects and risks of climate change in the discharge of their duties, it is conceivable that the business judgment rule is *prima facie* not available as a defence to a claim that the director has breached the duty owed to the company.

153. Further, the rationale behind the business judgment rule elucidates another link between directors' duties and the need to consider climate change impacts. The courts' reluctance to interfere with the business decisions of directors is based on the premise that the commercial realities are such that risk-taking is an unavoidable element for profits;[112] and the business judgment rule exists to permit management to make honest decisions without needing to worry excessively about being in breach of their duties to the company.[113] This is consistent with the broader rationale at law that a company provides a vehicle for limited liability and facilitates the assumption and distribution of commercial risk and that undue legal interference will dampen, if not stifle, the appetite for commercial risk and entrepreneurship.[114]

154. Considering therefore that climate risks pose a real and legitimate threat to a company, our view is that the ability of any director to rely on the business judgment rule must first be premised on the ability to demonstrate that such climate risks have been considered in their decision-making process. A failure to do so would be tantamount to a failure to act which, as discussed above, will not avail the director of the business judgment defence.

155. Therefore, in reviewing a director's business judgment, the court is entitled to do so on the basis of whether a director has considered all relevant factors and has not taken into account irrelevant factors when arriving at a decision. This approach does not offend the courts' general reluctance to interfere in the *merits* of a director's decision relating to the business and management of the company.

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*It should be highlighted that the statutory Australian provision equivalent to s 132(1B) is similar to our provision save for the use of the words 'rationally believes' rather than reasonably believes' in our section. While it has been argued by the American Law Institute that 'rationally believe' is considerably wider than 'reasonably believe' I am unable to subscribe entirely to that construction. Rational by definition alludes to a decision based on reason or logic. Reasonable as a word has much the same effect, namely a decision premised on logic or sense. The distinction does not therefore appear to be as wide as is suggested. In the Rich's case, Austin J set out a compendium of requirements that need to be satisfied in or order to satisfy this requirement of 'rational' belief. As 'rational' is not entirely dissimilar to 'reasonable' it appears that the criteria set out in Rich's case are applicable under s 132(1B). Austin J held there that reasonableness should be assessed by reference to: (a) the importance of the business judgment that is to be made; (b) the time available for obtaining information; (c)the costs related to obtaining information; (d) the director's confidence in exploring the matter; (e) the state of the company's business at that time and the nature of the competing demands on the board's attention; and (f) whether or not the information is available to the director."*

111 Davies, Paul; *Introduction to Company Law (2nd Edition)*; Oxford University Press (2010); pg. 169.

112 *Petra Perdana* [183]. *Also see Davies, Paul; Introduction to Company Law (2nd Edition); Oxford University Press (2010); pg. 169.*

113 *Petra Perdana* [183].

114 *Petra Perdana* [186].

156. There is, however, a further avenue by which the courts may assess the quality of a director's evaluation of risks in the context of climate change considerations. This turns on, *inter alia*, the requirement that the director has to be adequately informed on the subject matter of the decision to avail himself of the business judgment defence. For example, if the ESG aspects of a project are only cursorily mentioned in a brief board paper but not genuinely studied and considered, that may not be adequate for the director to show that he "*is informed about the subject matter of the business judgment to the extent the director reasonably believes to be appropriate under the circumstances*" as required by Section 214 CA 2016.[115] On the other hand, directors who make climate-conscious decisions which may in the short term be less financially beneficial (such as investment in a lower emission asset with a longer term profit horizon) could be protected by the business judgment rule as having acted in the best interest of the company.

157. The ability of a director to rely on the business judgment rule is expected to change with the evolving standard of care and level of knowledge that may reasonably be expected of a director today. This is especially so given the fast-moving environment in which regulators are issuing a plethora of guidelines and directives on climate change risks and measures to be taken by boards to deal with them as well as scientific studies on the effects of climate change and recommendations by international bodies such as the TCFD.[116]

### B. Reliance on Professional or Expert Advice

158. In exercising his duties as a director, Section 215(1) CA 2016 permits the director to rely on information, professional or expert advice, opinions, reports or statements including financial statements and other financial data prepared, presented or made by:–

a. any officer of the company whom he believes on reasonable grounds to be reliable and competent on the matters concerned;

b. any other person retained by the company on matters involving skills or expertise which the director believes on reasonable grounds to be within the person's professional or expert competence;

c. another director in relation to matters within the other director's authority; or

d. any board committee on which the director did not serve in relation to matters within such committee's authority.

115 In *Australian Securities and Investments Commission (ASIC) v Rich* (2009) 236 FLR 1; 75 ACSR 1; [2009] NSWSC 1229 at [7283], Austin J drew upon the American Law Institute precedent and stated that the reasonableness of the belief for the purposes of the statutory business judgment rule in Australian law should be assessed by reference to: the importance of the business judgment to be made; the time available for obtaining information; the costs related to obtaining information; the director's or officer's confidence in those exploring the matter; the state of the company's business at that time and the nature of competing demands on the board's attention; and whether or not material information is reasonably available to the director.

116 In *ASIC v Rich* (supra) at [7272] – [7276], Austin J stated that decisions to enter into transactions for financial purposes are business judgments, as are matters of planning, budgeting and forecasting. His Honour observed that the statutory language in the Australian statutory business judgment rule — "*in respect of a matter relevant to the business operations*" — is broad, and that a matter may be relevant to the business operations even if it is not itself a business operational matter.

159. Whether or not the director has relied upon information, professional or expert advice, opinions, reports or statements relevant to the decision on the subject matter is an important factor when examining the exercise of the director's duties.[117]

160. In addition, the director's reliance under Section 215(1) CA 2016 is deemed to be made on reasonable grounds if it was made and only if made[118]:–

    a. in good faith; and

    b. after the director has made an independent assessment of the information or advice, opinions, reports or statements, including financial statements and other financial data, having regard to such director's knowledge of the company and the complexity of the structure and operation of the company.

161. In this regard, the High Court of Malaya in *Petra Perdana Berhad v Tengku Dato' Ibrahim Petra Bin Tengku Indra Petra & Ors*[119] took into consideration the defendant directors' background, qualifications and professional experience, and held that reliance by the directors (who were non-executive directors with no accounting background) on the financial manager in relation to financial matters *"is not unusual, particularly in a large public listed company, where financial data is frequently complex and requires the expert attention of specially trained personnel."* The Court decided that the defendants "*did not, and cannot be expected to have a full working knowledge of the day to day operations and finances of the plaintiff, a large public listed company*" and concluded that Section 132(1C) of the (now repealed) Companies Act 1965 (the equivalent of Section 215 CA 2016) allowed the directors to rely on the financial manager for financial data. The High Court's decision was later upheld by the Federal Court of Malaysia.[120]

162. Boards can and should pursue the support of external ESG experts and advisors to strengthen their ESG competency, as highlighted in the Bursa Malaysia Corporate Governance Guide.[121] Having said that, boards must exercise caution in taking a simplistic approach of just placing wholesale reliance on the opinions of ESG experts without taking heed of the regulators' increasing emphasis (as outlined under **Part 2**) for directors to build on their own ESG knowledge and competency such as to apply the same to the specific situations and risks faced by their companies. Directors should not be quick to draw analogies from the *Petra Perdana* case and presume that the business judgment rule defence is easily available to them.[122] On the contrary, as stated in s 215(2) CA 2016, it is incumbent on directors to make an independent assessment of the sustainability and climate-related information or advice, opinions, reports or statements, having regard to their knowledge of the company's activities, structure and operations if they are to successfully avail themselves of the business judgment rule defence.

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[117] The MCCG also encourages the engagement of independent experts (having no connection with the company, directors or major shareholders) by Large Companies at least every three years to facilitate objective and candid board evaluations (see Para. 6.1, Page 38 of the MCCG). "Large Companies" are defined in the MCCG as companies on the FTSE Bursa Malaysia Top 100 Index or with market capitalisation of RM2 billion and above, in each case at the start of the companies' financial year (see Para. 2.7, Page 3 of the MCCG).

[118] Section 215(2) of the CA 2016.

[119] [2014] 11 MLJ 1.

[120] *Petra Perdana* at [195].

[121] Bursa Malaysia, Corporate Governance Guide (4th edition), 13 December 2021, here. Page 132.

[122] The *Petra Perdana* case involved the director's reliance on a financial expert for the analysis of complex financial data that layman directors may not be qualified to analyse.

### C. Reliance on Board Committee's Recommendation

163. Directors may delegate any power of the board to any committee of the board but in such a case, the directors are responsible for the exercise of the power by the delegatee as if the power had been exercised by the directors themselves (Section 216(2) CA 2016). The directors are however absolved from responsibility if they believed on reasonable grounds:

    a. that the delegatee would exercise the power in conformity with the duties imposed under the CA 2016 and the constitution of the company; and

    b. in good faith and after making a proper inquiry if the circumstances indicated such need, that the delegatee was reliable and competent in relation to the power delegated.

164. Hence, notwithstanding that a director claims to have relied on a board committee's recommendation in making his decision, if the board committee does not have the expertise and qualifications required on the issues at hand, such as on climate related risks, the director will not be in a position to avail himself of the defence under Section 216(3).

165. Directors are thus advised to be aware that even if the task of overseeing and managing climate related risks has been delegated to a board committee, the ultimate responsibility still lies with the directors.[123] A director is also not entitled to put the blame on his subordinates for a bad decision or judgment made as it is the director who owes the fiduciary duty to the company and he alone is vested with the authority to make the decision.[124]

## <u>Section 3: Liability for False or Misleading Financial Statements and 'Greenwashing'</u>

166. Regulators in Malaysia have proactively issued guidelines and requirements setting out clear expectations on companies to mitigate climate risks and lower their contribution to climate change. As mentioned above in **Section A3** of **Part 2 Section 1**, the SC introduced guidelines setting out its expectations on how directors of public companies discharge their duties. The above is in keeping with the global trend of public regulatory enforcement mechanisms being the next wave of climate litigation. It is expected that in Malaysia, statements in annual reports, annual sustainability disclosures, corporate governance reports or information memoranda and prospectuses will also be increasingly scrutinised by the regulators, and regulatory action imposed in the case of misrepresentation or misstatements if such statements are inaccurate, misleading, contain omissions or are likely to mislead the investing public.

### A. Liability under CMSA 2007

167. The SC has wide powers under section 369 of the Capital Markets and Services Act 2007 ("**CMSA 2007**") to charge directors and officers, particularly those in the position of CEO and CFO of listed companies, with making false statements in the companies' financial reports and providing false information to Bursa Malaysia.

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[123] Bursa Malaysia, Corporate Governance Guide (4th edition), 13 December 2021, here, Page 142.

[124] See *Soh Chee Gee v Syn Tai Hung Trading Sdn Bhd* [2019] 6 CLJ 516 (Court of Appeal of Malaysia) at [60]: "*The defendant attempted to blame his subordinates for not checking the supporting documents properly before passing the forms to him for approval and in addition, requested the court to draw an adverse inference against the plaintiff for not calling his subordinates, the then Managing Director and the Credit Manager, to give evidence*. *However, a Director is not entitled to put the blame on his subordinates for his bad business judgment as he is the one who owes the company a fiduciary duty to act in the best interests of the company. He may and did delegate the checking of supporting documents to his subordinates but ultimately, as the person who granted approval, the blame for extending the credit term and credit limit Cosmo lies at his feet because it was a decision which he alone had the authority to make*."

168. Section 177 of the CMSA 2007 makes it an offence for a person to make a statement or disseminate information, that is false or misleading in a material particular and is likely to induce the sale or purchase of securities by other persons or is likely to have the effect of raising, lowering, maintaining or stabilising the market price of securities if, when he makes the statement or disseminates the information (a) he does not care whether the statement or information is true or false; or (b) he knows or ought reasonably to have known that the statement or information is false or misleading in a material particular.

169. In an example of litigation that may be brought for violation of laws similar to the CMSA provision above, the Commonwealth of Massachusetts brought an action in the Superior Court against Exxon Mobil Corporation ("**ExxonMobil**")[125] for, *inter alia*, misrepresentation and failure to disclose material facts regarding systemic climate change risks. The State, represented by the Office of the Attorney General, was of the view that these systemic misrepresentations and omissions are misleading to investors and are material to investors' decisions on the purchase, sale, retention and pricing of ExxonMobil securities and misleadingly overstate the value of ExxonMobil's securities to investors in violation of the relevant laws and regulations in Massachusetts.

170. Section 178(1) of the CMSA 2007 deals with the offence of inducing or attempting to induce a person to deal in securities by *inter alia* making or publishing any statement, promise or forecast that he knows to be misleading, false or deceptive; by any dishonest concealment of material facts or by the reckless making or publishing, dishonestly or otherwise, of any statement, promise or forecast that is misleading, false or deceptive.

171. In a separate case against ExxonMobil in the State of New York, the Attorney General brought an action against ExxonMobil largely predicated upon the proposition that ExxonMobil's disclosures to the public on its GHG cost assumptions for future projects were materially false and misleading. While the Court in this case found that the Attorney General failed to establish that the disclosure violated the relevant securities laws in respect of public disclosures due to the absence of certain evidence required in order to prove the claim, this represents another example of the type of enforcement action that could be taken in respect of forecasts made on the basis set out in Section 178(1).[126]

172. Under Section 200 of the CMSA 2007, where it appears to the SC that any person has contravened amongst others Section 177, the SC may institute civil proceedings against that person, whether or not that person has been charged with an offence in respect of the contravention or whether or not a contravention has been proved in a prosecution.

173. Section 369 of the CMSA 2007 provides that a person who:

    a. with intent to deceive, makes, furnishes or lodges; or

    b. knowingly causes, authorises or permits the making, furnishing or lodging of, any statement, information or document that is false or misleading, to the SC, a stock exchange, a derivatives exchange or an approved clearing house relating to-

        i. dealings in securities or derivatives;

        ii. the affairs of a listed corporation;

        iii. any matter or thing required by the SC for the due administration of the Act;

        iv. any requirement imposed by the SC under any guideline, practice note, written notice or term and condition; or

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125 See *Commonwealth of Massachusetts v Exxon Mobil Corporation*, Superior Court Civil Act No. 19 -3333.
126 See *People of the State of New York v Exxon Mobil Corporation* Case Index No. 452044/2018.

v. any requirement under the rules of a stock exchange, derivatives exchange or approved clearing house,

shall be liable to imprisonment for a term not exceeding ten (10) years and a fine not exceeding RM3 million.

174. Although the powers cited above have yet to be used by the SC against directors or companies specifically in connection with a failure to adequately disclose climate related risks (such as the overinflation of asset value or profits forecasts), it is open to the SC to deploy these powers as an extension of the SC's regulatory action for false or misleading financial statements.

175. In this regard, it should be noted that the SC has instituted actions against directors for the following offences, which could be potential precedents for future actions in relation to climate change such as inadequate or non-disclosure of climate risks or overinflation of the value of assets at risk:-

a. **False or misleading statements:** The High Court in *Securities Commission v Datuk Ishak Ismail*[127] stated that "*under s. 360 CMSA, the plaintiff as the regulating body of the securities industry is given express authority to come to court and seek a variety of orders to ensure compliance with the relevant requirement of the securities laws and to prevent contravention at the expense of unsuspecting investing public*." "*…the CMSA, and in particular s.360 (and seen in the light of the functions to be carried by the plaintiff), is drafted with the intention, among others, of protecting the investing public from unscrupulous market players and to ensure that improper gains or avoidance from any trading in securities that contravenes the securities law and the Stock Exchange Rules are accounted for*."[128]

The Court of Appeal decision in *Maybank Trustees Berhad v Amtrustee Berhad & Ors*[129] discusses the importance of ensuring that representations and statements made by a company to investors are accurate and true without any material omissions.[130] In that case, the issuer company and Maybank Investment Bank Bhd, as the lead arranger and primary subscriber, were found to be liable for material non-disclosure in an Information Memorandum ("**IM**") issued. The information contained in the IM was found to be false and misleading as the bond programme was not what it was depicted to be in the IM. Maybank Trustees Bhd ("**MTB**") was found to be secondarily liable for the material non-disclosure in the IM, particularly given that it was a professional trustee corporation which owed a fiduciary duty to the bondholders. The Court held that if MTB had performed its duties and

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127 [2011] 6 CLJ 596.

128 Although the High Court of Malaya's judgment was overruled by the Federal Court of Malaysia in *Securities Commission v Datuk Ishak Ismail* [2016] 3 CLJ 19 (on different grounds), the High Court's discussion on s 360 CMSA remains relevant here. In the Federal Court decision, it was held that the Court of Appeal (which affirmed the judgment of the High Court with some variation) had erred in allowing the application by the SC for the disclosure of the statements made under Section 134 of the SCMA 1993, given the confidential nature of the statements.

129 *Maybank Trustees Berhad v Amtrustee Berhad & Ors* [2020] 4 MLJ 405.

130 See *Maybank Trustees Berhad v Amtrustee Berhad & Ors* [2020] 4 MLJ 405, per Nallini Pathmanathan JCA (as she then was) at [154] – [155]: "*The bulwark underlying the SCA 1993 and now the CMSA 2007 is the adequate, accurate and timely disclosure of information. This requirement is prevalent in all jurisdictions in order to ensure that capital markets operate fairly and efficiently. It is essential for market confidence and the proper functioning of the markets in an economy. Disclosure is necessary as the prospective issuer and its agents or advisers possess information that is not available to the prospective investors. The underlying rationale is to bridge this gap in terms of knowledge, such that investors have access to all material information. They are then in a position to make an informed decision. Such disclosure is not intended to insure investors against the risks inherent in any investment. It exists to ensure that the requisite material information is made available to potential investors, and that such material information is true and accurate, not only at the time of its issuance but throughout the tenure of the security.*"

obligations under the trust deed, the losses suffered by the bondholders would have been limited or lessened.

b. **Non-recognition of outstanding liabilities**: Reprimands were issued by the SC against the former chairman, managing director, non-independent non-executive vice chairman, chief financial officer and executive director of a foreign company listed on Bursa Malaysia for knowingly permitting the furnishing to Bursa Malaysia of financial statements that were false or misleading due to non-disclosure of litigation and non-recognition of outstanding liabilities, a breach of Sections 354(1)(a), 246(1)(a), 369(b)(B) CMSA 2007.[131]

c. **Alleged irregularities in submitting false statements**: the SC charged a PLC and its director and officers for submitting a false statement to Bursa Malaysia under Section 369(a)(B) of the CMSA 2007[132] in relation to the revenue figure contained in its quarterly financial report.

d. **Fictitious sales**: The Court of Appeal upheld a 6 month jail term of two former directors of a PLC for authorising the furnishing of misleading statements to Bursa Malaysia in relation to the company's reported revenue of RM73.4 million which contained over RM30 million of fictitious sales, breaching the equivalent of Section 369 CMSA 2007 and emphasised that knowingly furnishing misleading information to the stock exchange is a serious offence as potential investors rely on such information in making investment decisions.[133]

e. **Action against fund manager**: the executive director and licensed fund manager of an asset management company was convicted for authorising misleading statements provided to the SC regarding the amount of funds managed by the company, a breach of the equivalent of Section 369 CMSA 2007.[134]

176. In its 2021 Annual Report, a total of 136 administrative sanctions were imposed by the SC for various misconduct and breaches of securities laws, where investigations on corporate misconduct emerged as having recorded the second-highest percentage of active investigations that were carried out by the SC in 2021. As at 31 December 2021, there were 46 active investigations.[135]

177. Distinct from regulatory enforcement, securities regulators are also increasing engagement with issuers on climate change issues through comment letters and other 'light' enforcement options:

a. The US Securities and Exchange Commission has become increasingly active in issuing comment letters to issuers regarding climate change disclosures. As well as the sample letter[136] to issuers it published on its website, which outlines the issues in which it is interested, the number of comment letters which it has sent to issuers on climate change has increased significantly over the past year (14 last year, the largest number since 2010 and 2011, following the publication of its guidance on climate change).

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[131] Securities Commission Malaysia: Administrative Actions in 2021, here. Items 18-24.

[132] Securities Commission Malaysia: SC Charges Serba Dinamik, its directors and officers for false information in its financial statement, 28 December 2021, here.

[133] *Ooi Boon Leong v PP & Another Appeal* [2011] 1 LNS 1955

[134] Securities Commission Malaysia, The Reporter Compendium 2008-2018, here. Page 54, Court of Appeal of Malaysia convicts Mohamed Abdul Wahab for misleading disclosure to the SC.

[135] Securities Commission Malaysia, 2021 Annual Report, here. See also, The Edge Markets: SC concludes 22 investigations in 2021, 28 March 2022, here.

[136] U.S. Securities and Exchange Commission: Sample Letter to Companies Regarding Climate Change Disclosure, here.

b. The Australian Securities and Information Commission has intervened[137] in an energy company's IPO to seek clarification and amendment on net zero statements which the company wished to make in its offering documents.

178. Given the trend above, it is likely that the SC will also take similar steps to actively review climate risks and other ESG disclosures by PLCs to ensure compliance with its requirements.

### B. Liability under the MMLR: Effect of breach of MMLR

179. A breach of the MMLR is legally enforceable. Para 2.04(1) of the MMLR provides that a PLC, by virtue of its admission to the Official List,[138] is bound by the MMLR. Pursuant to Para. 2.04(2)(a) a PLC and its directors, officers or advisers must comply with the MMLR for so long as the PLC or its securities remain listed on the Official List.

180. A director falls within the meaning of a "Controlling Person."[139] The Controlling Person is required under Para. 2.22(1) of the MMLR to sign and submit a written undertaking in the prescribed form under Appendix 2B, Chapter 2 of the MMLR, that it shall comply with the requirements of the MMLR.

181. Chapter 16 of the MMLR contains the powers of Bursa Malaysia with regards to trading halt, suspension and delisting of a listed issue and the enforcement of the MMLR.

182. Para 16.13(b) provides that a director must not permit, either knowingly or where he had reasonable means of obtaining such knowledge, a listed company of which they are a director to commit a breach of the MMLR. Para 16.19(1), Chapter 16 stipulates the types of sanctions that can be taken by Bursa Malaysia including the issuance of a caution letter, a private reprimand and/or fine not exceeding RM 1 million. Bursa Malaysia also has the power to suspend the trading of the securities of the companies in breach.

183. Para 16.02 of the MMLR provides that Bursa Malaysia may at any time suspend the trading of listed securities upon notice by the SC to Bursa Malaysia that in its opinion a listed issuer, has breached or failed to comply with any provision of the CMSA, the Securities Industry (Central Depositories) Act 1991, the SCMA 1993 or the SC's guidelines or that it is necessary or expedient in the public interest and for the protection of investors.

184. Furthermore, Para. 16.11(1) of the MMLR provides that Bursa Malaysia may at any time, subject to consultation with the SC, de-list[140] a PLC or any listed securities from the Official List under a set of prescribed circumstances, which include, amongst others, the PLC's failure to comply with the MMLR. We also note finally that Para. 16.30 of the MMLR provides that Bursa Malaysia needs to only find an allegation proven on the balance of probabilities.

185. In the recent decision of *Bursa Malaysia Securities Berhad v Mohd Afrizan bin Husain*,[141] the Federal Court of Malaysia had to consider the interpretation of the MMLR and the legal relationship created therefrom. The Federal Court in its judgment stated that the relationship between the PLC, its directors and/or Controlling Person, with Bursa Malaysia is both a statutory

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[137] Australian Securities & Investments Commission: Corporate Finance Update, September 2021, here.

[138] Bursa Malaysia, Main Market Listing Requirements, 1 June 2020, here, A list specifying all securities listed on the Main Market of Bursa Malaysia, as defined under Para. 1.01 of the MMLR.

[139] As defined under Para. 2.22(1) of the MMLR, "controlling person" is "a person, pursuant to a Court order or otherwise, appointed to take possession or control over all or major assets of, or becomes responsible for the management of a PLC".

[140] In *PP v Gan Boon Aun* [2017] 4 CLJ 41, the directors of Transmile Group Bhd were charged for making misleading statements in a material particular in Transmile Group Bhd's report. The company was subsequently classified as a Practice Note 17 company and its securities were subsequently delisted.

[141] *Bursa Malaysia Securities Bhd v Mohd Afrizan bin Husain* [2022] 3 MLJ 450.

relationship and an independent contractual relationship.[142] The decision therefore provides an additional basis for Bursa Malaysia to de-list a PLC for breaches of the MMLR on the basis of a breach of the PLC's contractual obligations as a member of the stock exchange.

## C. Liability under CA 2016

186. Directors are obliged under the CA 2016 to prepare annual financial statements which must give a true and fair view of the financial position of the company as at the end of the financial year.[143] Directors must also approve the financial statements,[144] sign a statutory declaration as to the correctness of the financial statements[145] and declare that in their opinion the financial statements give a true and fair view of the financial position and financial performance of the company.[146]

187. The directors are also required to prepare a directors' report for each financial year to be attached to the financial statements,[147] which shall contain, *inter alia*, a statement as to *"whether at the date of the report the directors are aware of any circumstances not otherwise dealt with in the report or accounts which would render any amount stated in the accounts misleading."* [148]

188. Furthermore, the directors' report may include a "business review" containing the information set out in Part II of the Fifth Schedule, which includes, *inter alia*, *"information about environmental matters, including the impact of the company's business on the environment."* If any of these are not included, the review must state which of the information it does not contain.

189. A company and every officer who contravene these provisions shall, on conviction, be liable to a fine not exceeding RM500,000 or imprisonment not exceeding one (1) year or to both.[149]

190. Substantive penalties are also provided by Section 591(1) of the CA 2016 where a company or its officer makes or authorizes the making of a statement false or misleading in any material particular knowing it to be false or misleading or intentionally omits or authorizes the omission of any matter which makes a return, report, certificate financial statements or other document circulated misleading in a material respect.

191. Similarly, Section 592(1) of the CA 2016 provides that an officer[150] of a corporation who, with an intent to deceive, makes or furnishes or knowingly and wilfully authorizes or permits the making or furnishing of, any false or misleading statement or report to, amongst others, a stock exchange whether in or outside Malaysia or the SC, relating to the affairs of the corporation, shall be liable

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[142] The Edge Markets: High Court strikes out Serba Dinamik's bid to stop Bursa Malaysia from compelling company to release fact-finding update, 10 February 2022, here. The High Court of Malaya in dismissing Serba Dinamik Holdings Berhad's application for an injunction against Bursa Malaysia to prohibit them from forcing the company to release the auditor's factual findings update stated that Serba Dinamik Holding Berhad's application to seek an injunction is not defensible and factually not supported, given the undertaking the company has with regards to contractual obligations with Bursa Malaysia, citing the Federal Court's decision in *Bursa Malaysia Securities Berhad v Mohd Afrizan bin Husain* in arriving at the decision.

[143] Section 249 CA 2016.

[144] Section 251(1)(a) CA 2016.

[145] Section 251(1)(b) CA 2016.

[146] Section 251(2) CA 2016.

[147] Section 252(1) CA 2016.

[148] See the Fifth Schedule Item 1(m) read together with s253(1)(c) CA 2016.

[149] Section 251(4) CA 2016.

[150] Note that an "officer" is defined under Section 2 of the CA 2016 to include a director, and in the specific context of Section 592(1) of the CA 2016, also includes a person who at the time the offence was committed is a director of the corporation, i.e. hence directors who have since ceased their positions at the company will not be able to escape liability under this provision (see Section 592(2) of the CA 2016).

to imprisonment for a term not exceeding ten (10) years or a fine not exceeding RM3 million or to both.

## D. Greenwashing

192. Many companies are publishing their goals to achieve "net zero" or to be "carbon neutral" by a certain time (e.g. by 2050). Sustainability statements and annual reports also include disclosures as to a company's risks or exposure to climate change impacts. However, in the absence of specific measures and action points in the company's business strategy and the allocation of resources, the mere disclosures of climate risks may not be sufficient for directors to discharge their fiduciary duty.

193. Inaccurate climate-related statements can be tantamount to "greenwashing" and expose directors and their companies to litigation for being misleading or deceptive or making such statements without reasonable basis.

194. Legal commentators have opined that a company and its directors could be found to have engaged in misleading or deceptive conduct by not having reasonable grounds to support the express and implied representations contained within its net zero commitments and that companies must have a genuine intention to follow through their net zero commitments with "*reasonable strategic efforts and commitment of resources as may reasonably be expected to fulfil the intent implied by the announced target*".[151]

195. Another area of concern is the pace of green bond issuance where questions have emerged on the standards for asset selection and the sustainability objectives of the issuers where for example an issuer of a green bond was embroiled in controversy for water pollution and destruction of the surrounding ecosystem, leading to calls for the harmonisation of international and domestic guidelines and standards.[152] In this context, the ASEAN Green Bond Standards launched in 2017 were developed based on the Green Bond Principles of the International Capital Markets Association and are to be used for issuers and projects in the region. The Standards specifically exclude fossil fuel related projects.[153]

## E. Role of auditors in reporting non-compliances with securities laws

196. The Audit Oversight Board ("**AOB**") was established by the SC through an amendment of the SCMA 1993 to oversee the auditors of public-interest entities (including PLCs) and to protect the interests of investors by promoting confidence in the quality and reliability of audited financial statements.

197. The AOB has urged[154] auditors to be more vigilant and diligent in the execution of their duties, verify and challenge the appropriateness of going concern assumptions, as well as the adequacy of related disclosures, a pertinent reminder of the auditor's duty to ensure proper and adequate disclosures in financial statements, including on climate risks.

198. Section 320(1) of the CMSA 2007 imposes a mandatory duty on an auditor of a listed corporation, to report to the SC and the stock exchange what, in his professional opinion, is a breach or non-

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151 Centre for Policy Development, Further Supplementary Memorandum Of Opinion by Mr Noel Hutley SC and Mr Sebastian Hartford Davis, 23 April 2021, here. Item 38 and Item 39.

152 DownToEarth, Green bonds: Is it green finance or green-washing?, 11 August 2020, here.

153 Securities Commission Malaysia: Capital Market Regulators launch ASEAN Green Bond Standards SC Media, 8 Nov 2017, here.

154 Securities Commission Malaysia: SC's AOB urges auditors to heighten diligence and professional scepticism, 29 July 2021, here.

performance of any requirement of securities laws, a breach of any of the rules of the stock exchange or any matter which may adversely affect to a material extent the financial position of the listed corporation. The auditor who makes such a report in good faith in the course of performing his duty is not liable to be sued in court.

199. Directors should also note that the SC has powers under the CMSA 2007 to request the auditor to submit any additional information relating to the audit or to enlarge the scope of such audit.

**E1. Examples of cases where auditors have been liable for misleading or fraudulent statements**

200. Auditors can be held liable for making misleading or fraudulent statements if these are incorporated into their audit reports on the financial statements of their audit client.

201. Under Section 369(b)(B) of the CMSA 2007 (previously Section 122B(b)(bb) of the Securities Industry Act 1983 ("**SIA 1983**")), a person who knowingly causes, authorises or permits the making, furnishing or lodging of any statement that is false or misleading to SC relating to the affairs of a listed corporation, commits an offence.

   a. In October 2021, the SC charged the former group accountant of Asia Media Group Berhad ("**AMGB**"), for furnishing a false statement relating to AMGB's revenue to Bursa Malaysia, an offence under Section 369(b)(B) of the CMSA 2007.[155]

   b. In the first case where the SC brought action against an auditor for abetting a PLC in making a false and misleading statement to Bursa Malaysia under the previous SIA 1983, a licensed audit partner was found guilty for making a misleading statement to Bursa Malaysia in relation to an audit[156] resulting in inflation of about 26% of the PLC's reported profit before tax that year. The audit partner was sentenced by the Sessions Court to one year's jail and a fine of RM 400,000.[157]

202. Pursuant to Section 276(1) of the CMSA, an auditor of a borrower shall send the balance sheets and reports to every trustee for the holders of debentures of the borrower and is required by Section 276(3) of the CMSA to immediately report to the SC if the auditor becomes aware of any matter which in his professional opinion may constitute a contravention of any provision of the CMSA or of any irregularities that may have a material effect on the ability of the borrower to repay any amount under the debenture.

203. The SC[158] brought action under Section 276(3) of the CMSA against the auditors of state fund 1Malaysia Development Berhad (1MDB), Deloitte PLT, for failure to report irregularities in audited financial statements and another action under Section 276(1) for failure to provide copies of relevant audited financial statements to the trustee of the 1MDB Sukuk Programme. Deloitte PLT received a reprimand and was imposed with total fines of RM 2.2 million for four separate breaches.[159]

204. Given the potential impact of climate issues on the financial statements of a company, auditors must consider climate-related disclosures to ensure no omission of information or material misstatement has occurred. Audit should be leveraged *as a solid bridge between climate-related risks and corporate financial reporting*.[160] In this regard, whilst the International Financial

155 For the full announcement, please see here.
156 *Yue Chi Kin v PP* [2020] 11 MLJ 758.
157 The Edge markets: Ex-United U-Li auditor found guilty, 22 October 2015, here.
158 Securities Commission Malaysia, Administrative Actions in 2019, here. Item 37.
159 The audit firm filed a review application but the sanctions were affirmed by the SC.
160 CAP: The Role of Accounting and Auditing in Addressing Climate Change, 1 March 2021, here.

Reporting Standards ("**IFRS**") do not explicitly feature climate change in phrase, the IFRS' commentary and educational materials make it clear that companies *must* consider climate-related matters in applying the IFRS when the effect of those matters is material in the context of the financial statements taken as a whole.[161] Malaysian PLCs are required to use the Malaysian Financial Reporting Standards ("**MFRS**"),[162] which are identical to the IFRS.[163]

**<u>Section 4: Investors' rights to enforce directors' duties directly</u>**

### A. General principles on bringing civil actions against directors for breach of their duties

205. Since directors owe their fiduciary duty and duty of care to the company, and as the assets of a company belong to the company, any act or omission by a director constituting a breach of their duties generally results in a loss suffered by the company. On this premise, the company is the proper party to bring an action against the directors (i.e. "*the proper plaintiff rule*"). In addition, there is a general principle that shareholders are generally bound by the decision of the majority shareholders (i.e. "*the majority rule*").[164] Both rules are encapsulated in the seminal English decision, *Foss v Harbottle* and thus came to be known as 'the rule in *Foss v Harbottle'*. The two principles coupled with the general reluctance of the courts to interfere in business and management decisions, resulted in minority shareholders historically having little direct recourse for breaches by the directors or the oppressive acts of the majority detrimental to the minority shareholders. There are, however, certain exceptions to the rule in *Foss v Harbottle* which allow an aggrieved minority shareholder to either bring a derivative action or a personal action against directors. These exceptions are discussed further below.

### B. Climate Litigation

206. It is pertinent to first appreciate the general backdrop of litigation in this area and the rising trend of climate-related actions being brought.

207. A report prepared by the Grantham Research Institute on Climate Change and the Environment and Centre for Climate Change Economics and Policy, London School of Economics and Political Science, found that the cumulative number of climate change-related cases across the globe has more than doubled since 2015. Just over 800 cases were filed between 1986 and 2014, while over 1,000 cases have been brought between 2015 and 2021.[165]

208. The cases are based on a wide range of causes of action including the tort of misrepresentation, securities fraud, breach of statutory obligations, tort of negligence or breach of a person's fundamental right to a clean healthy living environment.

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[161] IFRS, 'Effects of climate-related matters on financial statements', November 2020, here; and Nick Anderson, 'IFRS Standards and climate-related disclosures', November 2019, here.

[162] Financial Reporting Foundation (FRF) / Malaysian Accounting Standards Board (MASB), 'MASB Approved Accounting Standards for Entities Other than Private Entities', here.

[163] IFRS, 'Who uses IFRS Standards?: Malaysia', here.

[164] See *Auspicious Journey Sdn Bhd v Ebony Ritz Sdn Bhd & Ors* [2021] 3 MLJ 549 (The Federal Court of Malaysia), at [69]: "*Majority rule supports the position that it is legitimate for a majority of the shareholders to control the company through the appointment of directors, who in turn, have the responsibility of running the business of the company. If the majority are unhappy with the directors then they oust them. If they are prepared to overlook the wrong, then the majority principle dictates that it is not for the court to interfere with that decision of the majority"*.

[165] Setzer J and Higham C (2021) Global trends in climate change litigation: 2021 snapshot. London: Grantham Research Institute on Climate Change and the Environment and Centre for Climate Change Economics and Policy, London School of Economics and Political Science. For the full report, please click here.

209. While some of these cases are from civil law jurisdictions that would not traditionally be persuasive or binding in a common law jurisdiction such as Malaysia, the cases as a whole show that climate litigants are meeting the judicial threshold required to produce rational legal arguments backed by credible, empirical evidence. This represents a growing judicial consensus on the justiciability of climate change issues and the causal links between human activity and the effects of climate change, which is expected to become matters of judicial notice, not unlike the scientific consensus achieved through the IPCC, the political consensus achieved through the COP 26, and the growing economic consensus mirrored in the financial and regulatory sector. The efficacy of the relief sought and granted in these cases is commensurate with the role of the law in shaping and controlling human behaviour such as to positively address climate change considerations.

210. The trend of climate-based litigation and the growing swell of knowledge on climate change, amplified by Malaysia's international commitments and the benchmarks set by Malaysian regulators[166] for directors' obligations on climate change, are likely to feed into a company's responsibility for maintaining its social licence to operate and the increased risks of climate-based litigation for Malaysian companies and directors. Cases from Australia and the UK, in particular, are of persuasive authority in the Malaysian courts.[167] A high-level analysis of these climate litigation actions is set out below.

### B1. Breach of duty of due diligence and to act in best interests of company and shareholders

***ClientEarth's Shareholder Claim against Shell UK's Board* [15 March 2022]**

211. Very recently, ClientEarth, an NGO, sent a pre-action letter against directors of Shell in the UK for a shareholder derivative action against the company. The claim is in relation to alleged breaches of duties by its board of directors under the UK Companies Act for alleged failures to assess, disclose and manage material climate risks to the company. The action seeks to hold Shell's board of directors personally liable for failing to properly prepare for the net zero transition and to require the board to take certain steps in its management of the company, such as to "truly align" the company's strategy with the goals of the Paris Agreement. ClientEarth will review the company's response before formally filing papers in the High Court of England and Wales asking for the Court's permission to bring the claim.[168]

***ClientEarth v Enea, District Court of Poznań* [31 July 2019]**

212. In another case, ClientEarth brought shareholder proceedings in the Polish Poznan District Court against Enea to declare a company resolution null and void on the basis that, among other reasons, it risked breaching the board's duty of due diligence and duty to act in the best interests of the company by failing to consider the material economic transition risks posed by climate change in relation to the decision to proceed with the construction of the €1.2 billion Ostrołęka C coal-fired power plant. The board's decision was notwithstanding Fitch Ratings' issue of a warning that Enea would face a credit rating downgrade if it proceeded with the construction of

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166 Journal of the Malaysian Judiciary, July 2021, JMJ 24, page 53, at [91] – [93], here.

167 Journal of Malaysian and Comparative Law, Dr. Tie Fatt Hee, Modernisation and Reform of Corporate Law Amidst the Influence of Globalisation and Development in Information Technology, 2002, here. The Companies Act 1965 of Malaysia (the predecessor to the CA 2016) was largely based on the Companies Act 1961 of Victoria, Australia. A substantial part of corporate law reform in Malaysia has also relied on the experience of the United Kingdom and Australia.

168 ClientEarth shareholder litigation against Shell's Board, FAQs, March 2022, here.

the plant. Five major institutional investors had also written to Enea expressing '*serious concerns* about the project.

213. ClientEarth's case was that "*the proposed resolution, and the Management Board's proposal of that resolution, was clearly and obviously harmful to the interests of Enea and its shareholders*" and "*risk breaching board members' fiduciary duties of due diligence and to act in the best interests of the company and its shareholders*".[169]

214. The Court delivered a landmark decision on 31 July 2019 finding in ClientEarth's favour that the board resolution approving the power plant was legally invalid under company law. Enea and the project proponents had to totally write down the project, construction of which was suspended midway.[170]

## B2. Breach of duty of care and failure to provide information

### *McVeigh v REST* NSD1333/2018

215. *McVeigh v REST* is a notable example where an Australian pension fund member, Mark McVeigh ("**McVeigh**"), had filed a suit against the Retail Employees Superannuation Trust ("**REST**") alleging that the fund violated the Australian Corporations Act 2001 by failing to provide information related to climate change business risks and on plans to address those risks.[171] McVeigh's complaint was that the information provided pursuant to his request for information from REST under the Australian Corporations Act 2001 regarding "*REST's knowledge of Climate Change Business Risks, opinion of Climate Change, and all its associated risks and actions in response to those risks"* was inadequate.

216. Subsequently McVeigh's complaint was amended to add that REST had violated the Australian Superannuation Industry (Supervision) Act 1993 (which requires trustees to act with care, skill and diligence and to perform their duties and exercise their powers in the best interests of their beneficiaries) and that REST should have ensured its processes for managing investments and disclosing climate change business risks to beneficiaries complied with TCFD Recommendations.

217. On 2 November 2020, the parties reached a settlement where the Australian pension fund agreed to incorporate climate change financial risk management in its investment activity and implement a net-zero by 2050 carbon footprint goal.[172]

## B3. Breach of fiduciary duty and securities fraud

218. In the U.S., ExxonMobil and its officers were sued for breach of fiduciary duty and securities fraud in a class action brought by Pedro Ramirez, the lead plaintiff, based on allegations of materially false and misleading statements concerning climate change risks.[173] The claim passed a key hurdle in 2018 when the Northern District of Texas Court allowed the case regarding the liability of the company and that of individual officers and directors to proceed. The Court held that the plaintiffs' allegations supported a strong inference that the defendants had actual awareness or knowledge that ExxonMobil had materially misrepresented the value of its assets. On 31 March

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169 See ClientEarth Ostrołęka C: Energa's and Enea's Board Members' Fiduciary Duties to the Companies and Shareholders, 24 September 2018, here.

170 ClientEarth: PLN 1bn hit for companies as Poland's newest coal project becomes stranded asset, 20 May 2020, here.

171 *McVeigh v REST NSD1333/2018*, here.

172 REST: Statement from REST (Media Release), 2 November 2020, here.

173 *Ramirez v ExxonMobil (3:16-cv-3111)*, here.

2022, the Federal District Court for the Northern District of Texas denied a motion by ExxonMobil and former ExxonMobil officials to reconsider the 2018 decision on the basis of the dismissal in 2019 of the New York Attorney General's enforcement action. The Court did not include the reasoning for its decision.

### B4. Breach of standard of care

***Milieudefensie et al v Royal Dutch Shell* (decided by the District Court of The Hague on 26 May 2021)**

219. In a case considered to be the first major climate change litigation ruling against a corporation, enforcing compliance with the Paris Climate Agreement, the District Court of The Hague made an order that Royal Dutch Shell plc (**RDS**) must reduce $CO_2$ emissions of the Shell group by 45% by 2030, relative to 2019 levels by implementation of a group corporate policy that is in compliance with the order.

220. The Court found that Shell's sustainability policy was insufficiently "concrete" and agreed with the plaintiffs' argument that by failing to change its business model to invest more in renewable energy and reducing emissions by 45% by 2030, Shell had failed to uphold the unwritten standard of care set out in the Dutch Civil Code not to cause harm to Dutch citizens. Shell is appealing the decision.

### B5. Claim against governments for failure to protect human health & environment

221. In September 2021, in response to a claim brought by an NGO, the Coalition for the Clean Air Initiative, the Central Jakarta District Court's three-man panel ordered Indonesia's President Joko "Jokowi" Widodo and 6 other Indonesian Government officials to improve poor air quality in Jakarta by tightening national air quality standards such that they are "*sufficient to protect human health, the environment and ecosystems, including the health of sensitive populations, based on science and technology*".[174]

222. The UN Special Rapporteur for Human Rights commented after the decision that the levels of fine particulate matter in Jakarta were well above national and regional standards as well as WHO recommended limits. Protecting people from the harmful effects of air pollution is a constitutional and legislative obligation of the Indonesian Government.

### B6. Legal requirement by shareholder for investment information

***Guy Abrahams and Kim Abrahams as trustees for the Guy & Kim Abrahams Family Trust v Commonwealth Bank of Australia,* NSD864/2021**

223. A family trust brought a claim against the Commonwealth Bank of Australia ("**CBA**") requesting books and records relating to seven carbon intensive investments made by CBA, including a requirement for CBA to implement the 2019 Paris-aligned financing commitments and for its Board to take into consideration CBA's own 2021 climate commitments.

224. On 4 November 2021, the Federal Court of Australia made orders by consent which required CBA to permit the plaintiff shareholders to inspect and make copies of books and records that document CBA's decision to finance a number of oil and gas projects.

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[174] ABC News: Indonesian court rules president negligent over pollution, 17 September 2021, here.

### B7. Misrepresentation in information memorandum

***O'Donnell v Commonwealth,* VID482/2020**

225. This is a claim filed in the Federal Court of Australia on behalf of a retail purchaser of Commonwealth sovereign bonds, alleging that investor information statements and memoranda in relation to the bonds were misleading or deceptive due to their failure to provide information to investors on the susceptibility of the bonds to climate change risks, which can have a material impact on the fiscal position of the sovereign in terms of fiscal policy, international relations and bond yield and the investment performance of the sovereign bonds.

226. A declaration of breach and an injunction prohibiting the Commonwealth of Australia from further promoting exchange-traded government bonds that do not contain the information about material climate-related financial risks was sought.[175] The case is pending determination.

### B8. Consumer claim on misleading advertisement

227. In 2020, ClientEarth brought a complaint to the OECD UK contact point in which it was alleged that BP plc ("**BP**")'s advertising campaign was misleading, giving the impression of its focus on clean energy investments when in reality 96% of its annual spend was on oil and gas.[176]

228. Similarly, in 2021, the Australasian Centre for Corporate Responsibility brought a claim against the Australian oil and gas company Santos, on the basis that Santos' statements that natural gas is "*clean fuel*" that provides "*clean energy*", misrepresent the true effect of natural gas on the climate and that its statements on having a clear and credible plan to achieve net zero emissions by 2040 are misleading and violate Australian consumer protection and corporations laws.[177]

## C. Exceptions to the Rule in *Foss vs Harbottle*

229. The climate litigation described above may have a persuasive influence on the approach of the Malaysian judiciary with regards to litigation against companies and directors for failure to act on climate risks. Additionally, there are certain statutory and common law exceptions which could be drawn upon as the basis for climate change litigation by shareholders against directors.[178] In this section, we discuss the possible avenues which allow a shareholder to institute civil action directly against directors for breach of their duties.

230. As a starting point, whilst it is recognised that a company is capable of having an interest of its own as a legal person and that therefore the directors' duties are generally owed to the company as an entity and not to its members,[179] Malaysian case law has also shown that where the acts or proposals of directors affect the company as an entity but the interest at stake is that of its

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175 *Kathleen O'Donnell v Commonwealth of Australia*, VID882/2020, here and here.
176 ClientEarth: BP pulls advertising campaign just months after our legal complaint, 14 February 2020, here.
177 ACCR, Australasian Centre for Corporate Responsibility files landmark case against Santos in Federal Court, 26 August 2021, here.
178 For a discussion of the relevant legal history and general principles, see *Auspicious Journey Sdn Bhd v Ebony Ritz Sdn Bhd & Ors* [2021] 3 MLJ 549 (The Federal Court of Malaysia), at [68] to [71].
179 For a further discussion on the relationship between the primacy of the company's interest and the interests of its members, see Loh Siew Cheang; *Corporate Powers Accountability (Third Edition)*; Lexis Nexis (2018), at [7.22] – [7-28].

members as a whole, the "best interest of the company" refers to the general body of the members of the company.[180]

231. By comparison, the position in English law under the current provision in section 172 of the UK Companies Act 2006 makes it clear that the duty of the directors is to 'promote the success of the company for the benefit of its members'.[181] In Australia, the courts have also held that directors must consider the interests of existing members because they are proprietors of the company who have risked their capital in the hope of gain.[182] The High Court of Australia observed in *Pilmer v Duke Group Ltd (in liq)* that "*[i]t may be readily accepted that directors and other officers of a company must act in the interests of the company as a whole and that this will usually require those persons to have close regard to how their actions will affect shareholders.*" [183]

## C1. Statutory actions

232. Under the CA 2016, shareholders can avail themselves of certain remedies, including the right for a management review, where members may pass resolutions on matters affecting the management of the company or more drastic measures such as the ability to vote and remove directors from the Board.[184]

233. From a litigation standpoint, shareholders can commence derivative proceedings on behalf of the company (i.e. as an exception to the rule in *Foss v Harbottle*) against directors who are alleged to have breached the duties owed to the company.[185] There are two main requirements to satisfy under the statutory derivative action found in Section 347 CA 2016. Firstly, whether the applicant is acting in good faith. In determining this, the court has to be satisfied that there must be honest belief or good faith on the part of the applicant and that the action is not brought for a collateral purpose.[186] Secondly, the derivative action must *prima facie* be in the best interests of the company. The relevant factors in determining this are not only the traditional considerations

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180 See the Malaysian Court of Appeal decision in *Pioneer Haven Sdn. Bhd. v Ho Hup Construction Co Bhd & Anor and other appeals* [2012] 3 MLJ 616, at [234] – [236]: *"It is also recognised that the duty to act in the best interest of the company means different things, depending on the factual circumstances. Consequentially, depending on the type of dispute or issue, the directors must place a higher priority on the interest of the persons who are truly affected. In these appeals, who are the persons truly affected by the actions of the directors? In view of Ho Hup's imminent de-listing, it stands to reason that the directors were motivated to rescue Ho Hup from being de-listed. Thus in this scenario, the shareholders are most affected, not so much the company. As such, the directors must act for the best interest of the shareholders."*

181 See section 172(1) UK Companies Act 2006; and see Davies, Paul; *Introduction to Company Law (2nd Edition)*; Oxford University Press (2010); pg. 171.

182 See Ford, Austin and Ramsay's Principles of Corporations Law (17th Edn), [8.095.3]. See also *Pilmer and Others v Duke Group Ltd (in liq) and Others* (2001) 207 CLR 165; 38 ACSR 122; [2001] HCA 31 at [18] – [19]: *"It may also be readily accepted that shareholders, as a group, can be said to own the company. But the company is a separate legal entity and the question raised in this matter is what damage (if any) did it suffer by issuing new shares. […] Next, it is important to understand the nature of a share in the capital of a company. Once issued, a share comprises "a collection of rights and obligations relating to an interest in a company of an economic and proprietary character, but not constituting a debt".*

183 (Supra), at [18].

184 Section 206, CA 2016. Focus Malaysia: The current twists and turns of NWP Holdings Bhd, 31 May 2021, here. NWP Holdings Bhd has received extraordinary general meeting requisition from its shareholders to remove its executive director from its board. See also, Reuters: Engine No. 1 extends gains with a third seat on Exxon board, 3 June 2021, here. Exxon Mobil Corp's shareholders elected a third director nominated by hedge fund Engine No. 1 to the oil company's board, extending the firm's upset victory at one of America's top energy corporations.

185 Section 347, CA 2016.

186 See *Celcom (M) Bhd v Mohd Shuaib Ishak* [2011] 3 MLJ 636 (Court of Appeal of Malaysia), at [15].

regarding the company's commercial or profit-loss interests but can also extend to situations where (for example) the company does not wish to be exposed to negative publicity.[187]

234. Section 346 CA 2016 also provides a remedy to any member of a company to bring oppressive conduct to an end. Generally, it must be shown that the affairs of the company are being conducted or that the powers of the directors are being exercised, in a manner with disregard to the interests of the member and which unfairly discriminate or is prejudicial to the interests of the member.[188] Whilst the crux of the oppression remedy is to put to an end or to prevent the oppressive or prejudicial conduct against the members, the Malaysian courts are not restricted in doing that alone. The Federal Court of Malaysia has afforded a liberal interpretation to the scope of relief available under this remedy and held that a court may also impose sanctions or personal liability (i.e. compensatory relief awards) directly against third parties, including directors of the company, who have perpetrated the acts giving rise to the oppressive or prejudicial conduct.[189]

### C2. Common law & personal actions

235. Recent cases have also offered support to the proposition that directors are liable not only through the prism of the company's best interest and the remedies accruing to the company but may also be sued by shareholders for the directors' own actions in their personal capacity. Some examples from common law jurisdictions (which are persuasive in the Malaysian courts) are discussed below:

   a. The Singapore High Court decision in *Tai Kim San & Anor v Lim Cher Kia*[190] recognised that, in particular or special circumstances, a fiduciary duty may arise directly between directors and shareholders (i.e. not through the company). This is where a special relationship exists between the directors and the shareholders or in situations where shareholders have to necessarily rely on what the directors say or do.

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187 See *Celcom (M) Bhd v Mohd Shuaib Ishak* [2011] 3 MLJ 636 (Court of Appeal of Malaysia) at [28], citing with approval the passage from the Singapore Court of Appeal decision in *Pang Yong Hock and Another v PKS Contracts Services Pte Ltd* [2004] SGCA 18 [2004] 3 SLR 1: "*Having established that an applicant is acting in good faith and that a claim appears genuine, the court must nevertheless weigh all the circumstances and decide whether the claim ought to be pursued. Whether the company stands 'to gain substantially in money or in money's worth' (per Choo JC in Agus Irawan) relates more to the issue of whether it is in the interests of the company to pursue the claim rather than whether the claim is meritorious or not. A $100 claim may be meritorious but it may not be expedient to commence an action for it.* ***The company may have genuine commercial consideration for not wanting to pursue certain claims. Perhaps it does not want to damage a good, long-term, profitable relationship. It could also be that it does not wish to generate bad publicity for itself because of some important negotiations which are underway****.* (Emphasis supplied by the Court of Appeal of Malaysia.)

188 Section 346(1), CA 2016 (previously Section 181(1), CA 1965).

189 *Auspicious Journey Sdn Bhd v Ebony Ritz Sdn Bhd & Ors* [2021] 3 MLJ 549 (The Federal Court of Malaysia), at [81] – [82]. Also see at [126]: *"it is open to the courts in this jurisdiction to impose liability against directors or third parties provided there is a sufficiently close nexus between the oppressive or unfairly discriminatory conduct, or disregard of the minority's interests or otherwise prejudicial conduct and that party. It requires something more than the mere fact of their being directors who had conduct of the affairs of the company at the material time. It requires deliberate involvement in the impugned transactions, or a sufficiently close nexus, participation or connection to warrant the imposition of liability to directors or third parties."* Cf. Note, however, that the court may also be equally unprepared to grant such relief envisaged under *Auspicious Journey* where a court is of the opinion that "*a claimant has the power to stop the allegedly oppressive acts and/or possesses the power to exercise self-help*" per the High Court decision of *The Bank of Nova Scotia Bhd & Anor v Lion Dri Sdn Bhd & Ors* [2021] 9 MLJ 473.

190 [2001] 1 SLR 607.

The Singapore Court also stated that any opinion or belief expressed by the director must be shown to be expressed honestly upon reasonable grounds, failing which such expression of opinion or belief can amount to a misrepresentation. Similarly, where an opinion is stated as a fact (for instance where a company publishes a forecast of an expert as if it was a positive fact) then such publication constitutes a representation, which if relied upon and is shown to be incorrect, will give rise to a cause of action by a shareholder who can show that he reasonably relied on it and was induced to act as he did.

b. The Ontario Court of Appeal's decision in *Tran et al. v Bloorston Farms Ltd*[191] clarified that one of the exceptions to the rule in *Foss v Harbottle* is that a shareholder has the right to bring a claim in their personal capacity for the diminution in share value to the company where only the shareholder, and not the company, has a right to sue the defendant. The Court of Appeal discussed the rationale for the rule in *Foss v Harbottle* and found that it was intended to respect the separate legal identity of corporations and avoid a multiplicity of actions and not to preclude shareholders from suing for wrongs done directly to them.

236. In summary, shareholders would be able to institute legal action (either statutory, derivative or personal) directly against directors if they can demonstrate that the directors have acted in a manner prejudicial to their interests by failing to consider, mitigate or prevent climate risks or by failing to incorporate a climate-positive agenda in the company's decisions. It follows therefore that directors who fail to comprehensively consider and address risks to the company, including climate risks, expose themselves to attendant litigation.

## D. Tortious obligations

237. A duty of care of directors in respect of environmental and social impacts of their subsidiary companies has been recognised at common law by the UK's apex court in *Vedanta Resources PLC and another (Appellants) v Lungowe and others (Respondents),*[192] subsequently affirmed by the UK Supreme Court in *Okpabi and others (Appellants) v Royal Dutch Shell Plc and another (Respondents)*.[193]

238. The *Vedanta* decision ruled that, *inter alia*, a parent company could be liable in tort for its own actions and those of its subsidiaries overseas. The decision has implications on how multinational companies influence the operations and management decisions of their subsidiaries, especially where such operations and decisions relate to environmental and social risks arising from the company's business and impact. Other conclusions to be drawn from *Vedanta* and *Okpabi* that are relevant to a director's duty to consider climate risks are as follows:[194]

a. A parent company may owe a duty of care towards anyone damaged or injured by its actions and those of its subsidiaries. In this regard, *Vedanta* and *Okpabi* clarify that the circumstances and categories in which a parent company may owe a duty of care to third parties who are victims of a tort committed by the parent company or its subsidiaries is not a closed list and that a more contextual approach is to be adopted.

b. The cases present a strong reminder to directors of Malaysian (parent) companies not to have the false comfort of assuming that acts done 'out of sight' in overseas subsidiaries or by omitting to consider risks beyond their immediate proximity – such as risks of potential

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191 2020 ONCA 440.
192 [2019] UKSC 20.
193 [2021] UKSC 3.
194 OpinioJuris: In association with the International Commission of Jurists: *Vedanta v Lungowe* Symposium: Duty of Care of Parent Companies, 18 April 2019, here; Corporate Justice Coalition: Okpabi v Shell And Lungowe v Vedanta Dispel Three Myths, 30 March 2021; here.

breaches of foreign laws – cannot be traced back to their decision-making processes in their personal capacities as directors. Instead, such an omission may be scrutinised by the court and potentially found as an actionable abdication of responsibility.

239. The UK Supreme Court in *Vedanta* pointed to the fact that the statements and disclosures made in Vedanta's annual report and other public statements "*may fairly be said to have asserted its own assumption of responsibility for the maintenance of proper standards of environmental control over the activities of its subsidiaries*." In other words, the representations and statements made by the board and the company to its members, investors and third parties may prove to be relevant in determining whether a duty of care exists.

240. The UK Supreme Court in *Okpabi* also emphasised the significance of the defendant group company, Royal Dutch Shell, being organised along "*Business and Functional lines rather than simply according to corporate status*". This was relevant for the Court to suggest that the officers and the executive committee at the top of the group company "*have a wide range of responsibilities, including for the safe condition and environmentally responsible operation of Shell's facilities and assets.*" The appellants argued that Shell's 'Control Framework' was effectively its organisational constitution which created a structure where control was exercised over the group companies by its directors at the parent company level.[195] The Court accepted that Shell's organisational structure could arguably be analogous to that of a single commercial undertaking.[196]

241. Whilst *Vedanta* and *Okpabi* are helpful starting points from a common law perspective, the Dutch case of *Milieudefensie et al v Royal Dutch Shell* (as discussed in **Section 4, Part B4** above) provides a fuller account of how tortious actions may be pursued against companies for their inaction in the light of climate change and its associated risks to third parties. It should be noted, however, that decisions from civil law jurisdictions are not of persuasive authority in Malaysian courts.

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[195] *Okpabi* at [135].
[196] *Okpabi* at [157].

## **CONCLUSION**

242. It is apparent from legal and regulatory developments that directors are duty bound to proactively and urgently apprise themselves of all aspects of climate change that can affect their companies, take action to manage the full spectrum of climate related risks by integrating them into their corporate strategies, plans and actions, and ensure proper disclosure of such risks. The MCCG makes it abundantly clear that sustainability considerations have become increasingly material to the ability of companies to create and sustain value and maintain the confidence of their stakeholders.

243. Companies that resist change will find stakeholders including their shareholders agitating for a shift in direction, bringing pressure to bear on boards to respond to growing concerns about the climate crisis.

244. Fundamentally, directors are legally required to incorporate climate change considerations into their decision-making process. Failure to do so is a violation of their fiduciary duty and their duty of care, skill and diligence.

245. Pressure, as we have seen from the plethora of cases filed, comes not just from the regulators but also from shareholders, NGOs and activist environmentalists, based on a wide range of causes of action from misrepresentation and negligence to securities fraud, breach of statutory obligations and violation of the human rights of citizens not to be harmed.

246. While no climate litigation has yet been initiated in Malaysia, over the recent years we have seen examples of shareholder activism with resolutions on re-election of directors being voted against in several cases. Shareholders are becoming increasingly proactive in their oversight of boards and will not hesitate to show their displeasure with unsatisfactory standards of corporate governance, resulting in their rejection of directors up for re-election. In this regard, in the last couple of years, shareholders have, in one case, voted against the re-election of directors for perceived conflict of interest and, in another, for alleged non-compliance of human rights of workers.

247. These shareholder actions demonstrate the strong concerns on the part of shareholders on governance and sustainability, increasingly measuring the impact of their investments along ESG dimensions to help better determine the future financial performance of the companies they invest in. The focus on quality and composition of boards indicate shareholders' inclination to hold boards accountable for company performance and for adding value in the long term.

248. This is inevitable as large institutional investors and asset owners such as pension funds are taking a long-term view given their long-term liabilities for retirement benefits. In fact some asset owners including high net worth individuals are increasingly focused on non-financials in efforts to ensure their investments will make the world a better place.[197]

249. In June 2021, the Asia Securities Industry and Financial Markets Association ("**ASIFMA**") published research on investor decision-making in Asia[198] which found that investors are expected to integrate ESG factors, including climate change, into their investment decisions, and that companies should identify key ESG issues and take action to manage them.

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[197] The Investor Revolution, HBR From the Magazine (May-June 2019).

[198] Asifma: Investor ESG Expectations: An Asian Perspective, June 2021, here.

250. This has translated into investor climate concerns being increasingly played out in proxy voting. For instance, investors and large proxy advisors such as ISS[199] and Glass Lewis[200] are increasingly voting in favour of activist shareholder resolutions that seek corporate disclosure of net zero emissions strategies or shareholder resolutions in favour of increased disclosures or action on climate change. As an example, Engine No.1, a minority shareholder in Exxon Mobil Corporation, proposed a resolution which successfully replaced some of Exxon's existing directors with new directors with experience in energy transition.[201]

251. Companies targeted by investors go beyond the heaviest emitters in the fossil fuel sector and extend to sectors as diverse as pharmaceuticals and financial services. For example, following investor engagement, HSBC passed a director-backed shareholder resolution to set a sustainability strategy which included supporting its customers through a net zero transition.[202]

252. These developments demonstrate that it is no longer possible for directors to ignore climate change considerations as part of their fiduciary duty to act for a proper purpose in the best interest of the company and in their discharge of their duty of care, skill and diligence.[203]

Dated this 22nd day of July 2022

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Chairman
Institute of Corporate Directors Malaysia

**To' Puan Janet Looi**
Senior Partner
Skrine

199 ISS, International Climate Proxy Voting Guidelines, 2022 Policy Recommendations, 19 January 2022, here.
200 Glass Lewis, Proxy Season Review 2021: Shareholder Proposals, here.
201 United States, Securities and Exchange Commission, 26 May 2021, here. For Exxon Mobil Corporation's Form 8-K (filed on 2 June 2021).
202 HSBC Holdings plc, Poll results of 2021 Annual General Meeting and Changes to Board and Committee Composition, 28 May 2021, here.
203 This Opinion is provided to the Commonwealth Climate and Law Initiative for the purposes of guidance and reference at a general level, and for publication if deemed appropriate. However, the Opinion is not provided to any third party and should not be relied upon as containing legal or regulatory advice to any third party or in the context of any specific case or factual situation. Any third party wishing to obtain legal or regulatory advice on the subject-matter contained in the Opinion should obtain their own such advice from a professional legal adviser. This Opinion is provided on the basis that the authors will not incur any liability to any person(s) in respect of its contents.