International Symposium on Directors’ Liability for Climate Change Damages
Lady Margaret Hall, University of Oxford
8th June 2016
International Symposium on Directors’ Liability for Climate Change Damages

The Commonwealth Climate and Law Initiative (CCLI) is organizing a series of high-level international symposia on the legal exposures of company directors for climate change damages. The first symposium will be held at Lady Margaret Hall, a college within the University of Oxford, on the 8th June 2016. Each symposium will facilitate a cross-institutional and cross-jurisdictional exchange of legal thought leadership on director liability risks relevant to plaintiff and defence lawyers, regulators, investors, accountants, and insurers.

It is now clear that climate change presents material – if not unparalleled – economic risks and opportunities. The Bank of England’s Prudential Regulation Authority and others have recently warned of the potential liability exposure of company directors for i) their company’s contribution to anthropogenic climate change, ii) a failure to adequately manage the risks associated with climate change, and iii) inaccurate disclosure or reporting of these factors. These emerging exposures have implications for corporate governance in climate-risk exposed industries (from financial services to mining, infrastructure, agriculture, and beyond), and for the insurance sector (in terms of professional indemnity and directors’ and officers’ insurance). Despite these risks, there remains little in-depth analysis of how prevailing corporate governance laws and fiduciary duties facilitate – or constrain – the actions of company directors confronted with complex climate change challenges.

In light of this and related developments, CCLI has been established as a research, education, and outreach project by the University of Oxford’s Smith School of Enterprise and the Environment, HRH The Prince of Wales’s Accounting for Sustainability Project, and ClientEarth. CCLI is focused on four Commonwealth countries (Australia, Canada, South Africa, and the United Kingdom) and is examining the legal basis for directors in common law countries to take account of physical climate change risk and societal responses to climate change, under prevailing statutory and common (judge-made) laws.

Agenda

Wednesday, 8th June 2016

09:30 – 10:00 Arrival and Registration at Lady Margaret Hall, Oxford

10:00 – 10:15 Welcome and Opening Remarks

10:15 – 11:30 Session I: The financial and business implications of climate change
   Chair: Ben Caldecott, Director, Sustainable Finance Programme, Smith School, University of Oxford
   Panelists: Professor Myles Allen, Professor of Geosystem Science, University of Oxford
   Alex Bowen, Principal Research Fellow, Grantham Institute, London School of Economics
   Anthony Hobley, CEO, Carbon Tracker Initiative

11:30 – 12:45 Session II: Duty to adapt - company directors
   Chair: Alice Garton, Leader, Company and Financial Project, ClientEarth
   Panelists: David Drake, Barrister, Serle Court
   Philippe Joubert, Chair, The Prince of Wales’ Corporate Leaders Group
   Jeremy Marshall, Chief Investment Officer, Bentham Europe
12:45 – 13:45 **Lunch**
Keynote: James Thornton, CEO, ClientEarth

13:45 – 15:00 **Session III: Duty to adapt - investors**
Chair: Sarah Barker, Special Counsel, Minter Ellison and Trustee Director, ESS Super
Panelists:
Nico Aspinall, Head of UK DC Investment Consulting, Willis Towers Watson
Stephen Hockman QC, Head of Chambers at 6 Pump Court and former Chairman of the Bar of England & Wales
Ralph McClelland, Associate Director, Sackers

15:00 – 15:30 **Tea/Coffee**

15:30 – 16:45 **Session IV: Corporate disclosures and misrepresentation**
Chair: Jessica Fries, Executive Chairman, The Prince of Wales’s Accounting for Sustainability Project
Panelists:
David Cooke, Lawyer, Company and Financial Project, ClientEarth
Natasha Landell-Mills, Head of Stewardship, Sarasin & Partners
Robert Schuwerk, Senior Counsel, Carbon Tracker Initiative

16:45 – 18:00 **Session V: Insurance**
Chair: Rowan Douglas, Head, Capital Science and Policy Practice, Willis Towers Watson
Panelists:
Lindene Patton, former Head, Global Risk Hazard Product Development, CoreLogic and Chief Climate Product Officer, Zurich
Eleni Petros, Senior Vice President, Management Liability, Marsh FINPRO
Michael Sheren, Senior Advisor, Bank of England Prudential Regulation Authority

18:00 – 18:15 **Closing Remarks**
Professor Gordon Clark, Director, Smith School, University of Oxford

18:15 – 19:15 **Drinks Reception**

19:15 – 21:00 **Dinner**
Participants List

**Naomi Ages**, Climate Liability Project Lead, Greenpeace USA

**Marina Agiejew**, Project Assistant, Strategic Litigation Team, ClientEarth

**Myles Allen**, Professor of Geosystem Science, School of Geography and the Environment, University of Oxford

**Atif Ansar**, Programme Director, Saïd Business School, University of Oxford

**Nico Aspinall**, Head of UK DC Investment Consulting, Willis Towers Watson

**Sarah Barker**, Special Counsel, MinterEllison

**Victoria Barron**, Responsible Investment Analyst, Newton Investment Management

**Helena Bergstrom**, Senior Associate ESG Research, MSCI

**Alex Bowen**, Principal Research Fellow, Grantham Institute, London School of Economics

**Megan Bowman**, King’s College London

**Emily Bugden**, Tellus Mater Foundation

**Tom Burke**, Director, E3G

**Ben Caldecott**, Director, Sustainable Finance Programme, Smith School, University of Oxford

**Louisa Casson**, Office of Barry Gardiner, MP

**Gordon L. Clark**, Director and Professor, Smith School, University of Oxford

**Kelly Clark**, Tellus Mater Foundation

**Jessica Clark**, ShareAction

**Theodor Cojoianu**, Research Assistant, Sustainable Finance Programme, Smith School, University of Oxford

**Kate Cook**, Matrixlaw

**David Cooke**, Lawyer, Company and Financial Projects, ClientEarth

**Howard Covington**, Chairman, The Alan Turing Institute

**Edward Davey**, Senior Programme Manager, The Prince of Wales’s International Sustainability Unit

**Paul Davies**, Latham & Watkins

**Gerard Dericks**, Research Associate, Sustainable Finance Programme, Smith School, University of Oxford

**Paul Dickinson**, Executive Chairman, CDP

**Judith Donnelly**, Squire Patton Boggs

**Rowan Douglas**, Head, Capital Science and Policy Practice, Willis Towers Watson

**David Drake**, Barrister, Serle Court
Sophie Evans, Willis Towers Watson
Nick Flynn, Legal Director, Avaaz
Jessica Fries, Executive Chairman, The Prince's Accounting for Sustainability Project
Alice Garton, Leader, Company and Financial Projects, ClientEarth
Michael Green, Latham & Watkins
Ingrid Gubbay, Associate, Hausfeld
Rachel Haworth, Policy Officer, ShareAction
Isabel Hilton, Chief Executive Officer, China Dialogue Trust
Anthony Hobley, Chief Executive Officer, Carbon Tracker Initiative
Stephen Hockman QC, Six Pump Court
Ken Huestebeck, Lawyer, EU Energy and Coal, ClientEarth
James Hulse, Head of Investor Initiatives, DCDP
Josephine Ives, Research and Legal Project Coordinator, The Prince of Wales’s Accounting for Sustainability Project
Philippe Joubert, Chair, The Prince of Wales’s Corporate Leaders Group
Carsten Jung, Economist, International Directorate, Bank of England
Tim Kasim
Joel Kenrick, Senior Associate, Finance and Economics, European Climate Foundation
Zoe Knight, Head of Climate Change Research, HSBC
Ruth Knox, Associate, Linklaters LLP
Irem Kok, Research Assistant, Sustainable Finance Programme, Smith School, University of Oxford
Duncan MacDonald-Korth, Research Assistant, Sustainable Finance Programme, Smith School, University of Oxford
Muriel Moody Korol, Senior Attorney, Centre for International Environmental Law
Lucas Kruitwagen, Research Assistant, Sustainable Finance Programme, Smith School, University of Oxford
Natasha Landell-Mills, Head of Stewardship, Sarasin & Partners
Christina Larkin, Manager, Climate Change and Sustainability Services, Ernst & Young LLP
Dan Lashof, Chief Operations Officer, NextGen Climate America
Frances Lawson, Barrister, Six Pump Court
Geoff Lean
Nicola Leslie, Debevoise & Plimpton
Edite Ligere, Debevoise & Plimpton
Karina Litvack, Lawyer, Climate Litigation, Bridges Ventures
Gillian Lobo, Lawyer, Climate Damage, ClientEarth
Desiree Lucchesi, CDSB
Graham Mannion, Vice-President, Investment Division, Goldman Sachs
Sophie Marjanac, ClientEarth
Jeremy Marshall, Chief Investment Officer, Bentham Europe
Ralph McClelland, Associate Director, Sackers
Caitlin McElroy, Research Associate and Director of Executive Education, Smith School, University of Oxford
Ruth Mhlanga, Campaigns and Policy, Oxfam
Hattie Middleditch, Associate and Solicitor Advocate, Herbert Smith Freehills LLP
Alex Money, Director, Business Fellows Programme, Smith School, University of Oxford
Trude Myklebust, University of Oslo
Stephanie Neal, Investment Analyst, Mercer
Chris Norton, Baker Botts
Elspeth Owens, Senior Lawyer, ClientEarth
Lindene Patton, Zurich Financial Services
Nick Perks, Trust Secretary, Joseph Rowntree Charitable Trust
Miroslav Petkov, Director, Standard & Poor’s
Warren Pimm, Partner, Sustainable Development Capital LLP
Ellen Quigley, University of Cambridge
Amy Rose, Head of Strategic Litigation, ClientEarth
Louise Rouse, Investor Engagement Consultant, Rouse Research & Consulting
Kathy Ryan, Independent Consultant, Global Green Investments
Rob Ryan, Director, Development, ClientEarth
Olivier Salas, Associate, Hausfeld
Kirsty Schneeberger, Manager, Climate, Children’s Investment Fund Foundation
Robert Schuwerk, Senior Counsel, Carbon Tracker Initiative
Olivia Seddon-Daines, Senior Research Analyst, ET Index
Joana Setzer, London School of Economics
Susan Shaw, EU Energy and Coal Lawyer, ClientEarth
Michael Sheren, Senior Advisor, Bank of England Prudential Regulation Authority
Kaori Shigiya, Campaigns and Policy, Oxfam
Marina Shilo
Alex Skinner, Associate, Ashurst
Lauren Smart, Executive Director, Trucost
Natalie Smith, Lawyer, ClientEarth
Martin Stanley, Previous Trustee, Client Earth
Jane Stevenson, Task Force Engagement Director, CDP
Hamish Stewart, Senior Analyst, ET Index
Claire Stockwell, University of Oxford
Jasper Teulings, General Counsel & Advocate, Greenpeace International
Raj Thamotheram, Preventable Surprises
Ruth Thomas, Manager, Environment and Climate Change, International Council on Mining and Metals
James Thornton, Chief Executive Officer, ClientEarth
Sophia Tickell, Managing Partner, Meteos Ltd
Daniel Tulloch, Research Associate, Sustainable Finance Programme, Smith School, University of Oxford
Andy Waite, Consultant, Ashurst
Paul Watchman
Garth Watson, Director, Standards and Legal
Olivia Watson, Head, Social and Environmental Issues, UNPRI
Michael Wilkins, Managing Director, Infrastructure Ratings, S&P Global
Jessica Williams, Environmental and Climate Risk Research, S&P Global
Kurt Winter, Lawyer, Climate Litigation, ClientEarth
Farhana Yamin, Founder and Chief Executive Officer, Track 0
Michael Zimonyi, Senior Project Officer, Climate Disclosure Standards Board
Directors’ duties

- 2015 represented a tipping point for corporate action on climate change, with many corporate boards committing their companies to concrete action. It is no longer possible to be a sceptic (even if one remains a cynic). The boundaries of what is reasonable and expected of the prudent company director are changing in the post-Paris Agreement context.
- Prudent boards must manage a range of climate risks in a number of areas, including:
  - the supply chain;
  - arising from resource constraints;
  - stranded assets;
  - risks to reputation and licence to operate;
  - a failure to attract and retain talent;
  - the price of externalities; and
  - finance risk.
- Omissions (being a failure to consider relevant matters, to inform oneself in relation to relevant matters, or to request and receive appropriate advice) may also constitute a breach of a directors’ duties.
- Evidence that directors have acted contrary to the companies’ own policies and procedures, or disclosures to investors, may provide evidence of a breach of their legal duties.
- Remuneration structures that incentivise board behaviour that is contrary to the best interests of the company could give rise to allegations of a conflict of interest.
- Whistleblowers may provide evidence of fraudulent or negligent conduct on the part of boards, and are more likely to play a role as societal norms shift.
- Negligent misrepresentations to investors made in prospectus documentation is actionable by investors in the UK, and fraudulent misrepresentations in mandatory disclosures are also actionable. Investors will be motivated to take action when they feel misled.

Investors

- Climate risk doesn’t typically feature as a concern for trustees or asset managers. Trustees and asset managers often lack knowledge and understanding of the potential impact of climate risk on investment portfolios. This is especially so for trustees in small pension funds.
- Trustees delegate day-to-day investment duties to fund managers. Trustees, however, do retain strategic and oversight responsibilities (both of which are non-delegable) and should, therefore, be considering climate risk given its potential to impact the investment
portfolio as a whole. Trustees could also set benchmarks for fund managers to ensure they consider climate risk when exercising day-to-day investment duties.

- Investment consultants have enormous influence in this sector given their advisory role to trustees on investments and manager selection.
- The question as to whether climate risk should form part of the investment decision-making process ultimately falls on expert evidence, not the law (since the law as it stands is more than capable of dealing with such a question).
- The judiciary may be influenced by emerging cases from the US such as Arch Coal but most likely only in "extreme cases" involving a claim for damages where there is a demonstrable link between the imprudent investment behaviour of trustees and loss to beneficiaries. Where damages are not sought, seeking declaratory relief/judicial opinion is a viable approach in the UK.
- Climate change is a risk-management issue and requires an understanding of what is expected to occur in the long-term. Yet, the process of risk management is often backward looking (i.e. seeking to learn from past performance) and such an approach is ill equipped to deal with the risks and opportunities presented by climate change.
- Defined contribution schemes tend to be preoccupied with liquidity, with the current situation being such that "all assets could be traded tomorrow". With DC schemes being constituted by younger members, there is a misalignment between this short-term approach and member needs (i.e. long-term retirement planning).

Corporate reporting

- Investigations around the world are actually setting the disclosure standards for the industry (in the US in particular).
- Prudence and capital maintenance sits at the heart of company law and the Companies Act—reporting on capital in the market as well as risks on the horizon underpins trust in the market and market integrity and stability.
- The law on corporate reporting is fit for purpose. The major issue is one of enforcement.
- Misrepresentations occur when investors do not have a fair and balanced view of their investments – companies need to be more conservative in their reporting assumptions.
- The law demands that companies report climate risk in a range of ways, both in terms of how the business impacts upon the environment and how climate change impacts upon the business (heads of argument).
- The key question is when policy and the law (transitional risks) will bite. This is likely to be through price. Companies need to feed that analysis back into their corporate processes and reporting. They need to reflect upon whether their reserves will be economically recoverable as the price starts to reflect regulatory change.

Insurance

- Bank of England report entitled “The Impact of climate change on the UK insurance sector” published in 2015 identified three risk factors:
- Physical;
- Transition; and
- Liability

Generally insurers have a good understanding of the need to manage the physical risk of climate change, but there is a limited recognition of either transition or liability risks.

There are too few tools to help Directors assess climate risks and consequently a need for these and consistent methodologies and best practices to emerge.

Climate liability represents a big ‘tail risk’, in theory allowing insurers time to alter their model or ‘turn off the tap’.

Currently insurance companies require limited or no disclosure of risks as part of the Director and Officer (D&O) insurance cover application process but this might change as the industry rethinks its approach to risk management on climate change.

The widespread availability of cheap and comprehensive D&O cover on joint and several basis (and with exceptions only for fraud) might induce complacency on the part of insurers and Directors on developing best practice risk management approaches to climate change.

Indemnity insurance cover, on a similar basis to D&O cover is available for pension trustees and asset managers.