SUSTAINABLE FINANCE PROGRAMME

SMITH SCHOOL OF ENTERPRISE AND THE ENVIRONMENT

UNIVERSITY OF OXFORD

# International Symposium on Directors' Liability for Climate Change Damages

Lady Margaret Hall, University of Oxford

8th June 2016

In Partnership with:

ClientEarth

THE PRINCE'S ACCOUNTING FOR SUSTAINABILITY PROJECT

MinterEllison

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# International Symposium on Directors' Liability for Climate Change Damages

The Commonwealth Climate and Law Initiative (CCLI) is organising 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

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| 12:45 – 13:45 | **Lunch**<br>**Keynote: James Thornton**, CEO, ClientEarth |
| 13:45 – 15:00 | **Session III: Duty to adapt - investors**<br>Chair: **Sarah Barker**, Special Counsel, Minter Ellison and Trustee Director, ESS Super<br>Panelists:<br>**Nico Aspinall**, Head of UK DC Investment Consulting, Willis Towers Watson<br>**Stephen Hockman QC**, Head of Chambers at 6 Pump Court and former Chairman of the Bar of England & Wales<br>**Ralph McClelland**, Associate Director, Sackers |
| 15:00 – 15:30 | **Tea/Coffee** |
| 15:30 – 16:45 | **Session IV: Corporate disclosures and misrepresentation**<br>Chair: **Jessica Fries**, Executive Chairman, The Prince of Wales's Accounting for Sustainability Project<br>Panelists:<br>**David Cooke**, Lawyer, Company and Financial Project, ClientEarth<br>**Natasha Landell-Mills**, Head of Stewardship, Sarasin & Partners<br>**Robert Schuwerk**, Senior Counsel, Carbon Tracker Initiative |
| 16:45 – 18:00 | **Session V: Insurance**<br>Chair: **Rowan Douglas**, Head, Capital Science and Policy Practice, Willis Towers Watson<br>Panelists:<br>**Lindene Patton**, former Head, Global Risk Hazard Product Development, CoreLogic and Chief Climate Product Officer, Zurich<br>**Eleni Petros**, Senior Vice President, Management Liability, Marsh FINPRO<br>**Michael Sheren**, Senior Advisor, Bank of England Prudential Regulation Authority |
| 18:00 – 18:15 | **Closing Remarks**<br>**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 Lucchese**, 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

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# CCLI Symposium

## CCLI Symposium panel discussion highlights:

### 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 D7O cover is available for pension trustees and asset managers.