



WHAT LAWYERS CAN DO ABOUT CLIMATE CHANGE

A4ID/KCL Workshop Briefing Paper

On 2th November 2016, The Dickson Poon School of Law hosted a joint A4ID/KCL workshop on ‘What Lawyers can do about Climate Change’. The workshop was motivated by the developing reality that ‘climate change law’ is now extending beyond high-level international negotiations, environmental frameworks and legal campaigning to infiltrate daily legal practice and adjudicatory proceedings through a variety of legal sub-disciplines. Climate change is increasingly becoming a fundamental legal disruptor or ‘whole of legal system’ problem. The roundtable workshop brought together legal practitioners, academics and NGOs to discuss and debate how climate change is becoming, or should become, part of everyday legal practice. Specifically, the workshop focused on two aspects of legal practice: climate change in non-contentious legal practice; and climate change litigation.

Climate Change in Non-Contentious Legal Practice

The main objective of this first session was to explore how environmental, corporate and government lawyers are advising clients and how that role will evolve in future. This session was chaired by Dr Megan Bowman (The Dickson Poon School of Law, King’s College London), who has undertaken extensive empirical research into the regulatory levers and limits of private sector financial institutions in addressing climate change. To contextualise the discussion, Dr Bowman identified two recent developments as having a major effect on the business world:

- (i) the Paris Agreement, negotiated at the 2015 United Nations Climate Change Conference (the Paris Agreement) which came into force on 4th November 2016; and
- (ii) two interventions by the Governor of the Bank of England, Mark Carney, stating that climate change is not only a systemic risk to financial stability but also a potential opportunity.¹

The framing issue for this session was how, as a result of these interventions, we are beginning to see business practices changing or preparing to change across a range of sectors, including energy, finance, transport, planning government, and whether and to what extent those changes necessarily affect the ways transactional lawyers advise clients and the way clients instruct their lawyers. Participants saw the role of climate change in legal practice as being fundamentally driven by client’s instructions and expectations, on the one side, and lawyers’ sense of their role and remit, on the other. Importantly,

¹ Mark Carney, *Speech: Breaking the Tragedy of the Horizon – climate change and financial stability* (Bank of England 2015), available at <http://www.fsb.org/wp-content/uploads/Breaking-the-Tragedy-of-the-Horizon-%E2%80%93-climate-change-and->

however, participants identified the importance of disaggregating different lawyer types (government, private, public) as well as the different sectors they advise (such as oil and gas, finance, renewable energy) in order to better understand responses and requirements in transactional legal practice.

Key issues that arose in discussion concerned:

- the remit of practising lawyers when advising clients;
- what climate change ‘looks like’ as a legal or business issue; and
- how lawyers should be advising clients on climate-related risks and potential liabilities, opportunities, and policies in a variety of sectors going forward.

In terms of client expectations, attitudes towards climate change risk vary significantly from sector to sector and some sectors have been more responsive to climate change than others. Often clients want lawyers to advise them on risks that will have immediate financial consequences; they are less interested in advice relating to the more long-term risks. In some sectors, however, such as the pensions industry and broader institutional investment, long-term thinking is part of their fiduciary duty and clients in that area are much more interested in how climate change is becoming a material financial risk in terms of portfolio value and asset valuations. Moreover, participants debated the notion of “cost” as going beyond direct quantitative financial costs to include potential reputational costs of socially unacceptable investments or corporate behaviour that can also (albeit indirectly) affect the bottom line. The insurance sector was identified as a sector that is directly engaged in raising awareness around climate change risks, but there remains limited awareness about climate change law and policy and a tendency to focus reactively on disaster response. Yet participants discussed how the insurance industry can play a proactive role in helping to mitigate climate change risks, for example by investing premiums in renewables and seeking out ways of partnering with local governments and promoting green industries.

In relation to the remit of lawyers, participants noted there was a real tension between the precise instructions given to lawyers requiring a reactive response, and the type of advice that climate change can require or imply which often demands a more proactive or prescient approach. Lawyers are typically asked to carry out a specific task and this does not always afford scope for offering broader advice about climate change risks or opportunities. If a lawyer has a more general retainer, there may be a wider duty – and greater opportunity – to advise about risks such as those posed by climate change (although satisfying such a duty could be an almost impossible task). While lawyers can send out client updates that highlight developments in climate change law and policy, they generally do not see this level of proactivity as part of their remit when directly advising clients. This perception was challenged in discussion, given that every advisory actor has a responsibility to advise on all relevant financial and regulatory risks faced by their clients, including those relating to climate change. Moreover, there are ethical dimensions concerning the lawyer’s remit in giving advice, which only exacerbate concerns that climate change issues are falling through the gaps in the chain of professional responsibility. Participants thus considered whether there is a point beyond which it ceases to be acceptable for business leaders and their advisors to disclaim their responsibility to confront climate change by asserting they were not aware of the risks it posed.

Substantively, the workshop considered the myriad ways in which climate change is starting to manifest as a legal, financial and reputational issue for clients in practice. Climate change is not only directly relevant to areas such as renewable energy projects and emissions trading and reporting, but is manifesting through dispersed or secondary effects and implications in areas such as planning and administrative law, energy law, public procurement, trust law, and corporate law. On this final point, there was robust discussion about the forms of climate-related corporate liability that trustees, directors, and companies are now facing. Increasingly, there are suggestions that corporate directors can be liable for failure to adequately assess, disclose and adapt to climate risks that might impact shareholder value,²

² For Australian company directors, see The Centre for Policy Development and the Future Business Council, *Climate Change and Director’s Duties: Memorandum of Opinion*, Noel Hutley SC and Sebastian Hartford-Davis (7 October 2016), available at

and that they might even be stopped from resiling from public representations as to their financial and climate risks as well as their asserted ‘green’ efforts.³ In light of these legal developments, the participants discussed how climate change risks are becoming far from ‘ethereal’, purely ‘long-term’ or ‘high level’ for corporate clients.

In terms of transactional practice, it was also suggested that there was a misperception among clients that the Paris Agreement was a state-to-state agreement that would not directly affect private operators, rather than seeing it as a potentially game-changing legal development that will influence incentives, investment, and regulation across many sectors. The discussion emphasised that the Paris Agreement will be implemented by industries within each country as motivated by national laws and transnational practice. Transactional lawyers should thus be focusing on the opportunities the Agreement offers, for example through the increasing use of green bonds to support project development. In this respect, there are very tangible opportunities for lawyers working in corporate law, project finance, commercial law and finance, and other relevant practice areas. In this context, there was acknowledgement that lawyers may have a role in instigating and shaping tipping points for business change.

Climate Change Litigation

This second session was chaired by Dr Eloise Scotford (The Dickson Poon School of Law, King’s College London), who has written on the topic of climate change adjudication and the disruptive impact of climate change on established legal orders and adjudication frameworks across jurisdictions.⁴ The session built on the previous conference held at King’s on *Adjudicating the Future* in September 2015, which explored the myriad ways in which climate change is resonating in climate change adjudication around the world and the challenges this raises for adjudicative practice. To introduce the session, Dr Scotford noted that there is now a burgeoning climate justice movement, with courts globally being asked to hold governments and companies to account for their role in contributing or responding to climate change.⁵ Whilst this is a growing area of legal activity, the body of high profile cases concerning climate change is also highly differentiated, varying greatly in terms of the area of law under which the claims have been brought and the nature of the claim. Furthermore, beyond high profile campaigning climate change cases, there are many ‘boring’ or everyday cases that have not received significant media attention but that are nevertheless an important part of the legal response to, and accommodation of, climate change. In short, there is no typical ‘climate change case’ and no natural jurisdiction for climate change claims. This level of legal differentiation raises questions about the type of expertise that is required in order to bring litigation relating to climate change.

Key questions raised for discussion in this session were:

- What do ‘climate change’ cases look like?
- How do you ensure that they do not undermine a stable legal order?
- Are climate change cases transferable across jurisdictions?

<http://cpd.org.au/wp-content/uploads/2016/10/Legal-Opinion-on-Climate-Change-and-Directors-Duties.pdf>. See also Centre for Policy Development Media Release: ‘Australian company directors must consider and disclose climate change risks to escape liability for breach of duty’ (31 October 2016), available at <http://cpd.org.au/wp-content/uploads/2016/10/Media-Release-New-Legal-Opinion-on-Directors-Duties-and-Climate-Risks-CPD-FBC.pdf>. For UK Trustees, see Keith Bryant QC and James Rickard, *In The matter of: The Legal Duties of Pension Fund Trustees in Relation to Climate Change, abridged joint opinion* (25 November 2016), available at <http://www.documents.clientearth.org/wp-content/uploads/library/2016-12-02-the-legal-duties-of-pension-fund-trustees-abridged-opinion-ext-en.pdf>. See also ClientEarth, *Pension trustees could face legal challenge for ignoring climate risk – leading QC confirms* (2 December 2016), available at <http://www.clientearth.org/pension-trustees-face-legal-challenge-ignoring-climate-risk-leading-qc-confirms/>.

³ Daniel Attenborough, ‘An Estoppel-Based Approach to Enforcing Corporate Environmental Responsibilities’ (2016) 28(2) *JEL* 275.

⁴ Elizabeth Fisher, Eloise Scotford & Emily Barritt, ‘Climate Change and Legal Disruption’ (2017) 80(2) *Modern Law Review* (in press).

⁵ See for example, *Urgenda Foundation v State of the Netherlands* (2015) ECLI:NL:RBDHA:2015:7196 (Hague District Court); and various Our Children’s Trust cases proceeding before US federal and state courts, <https://www.ourchildrenstrust.org/press-releases/>.

Participants considered whether it was better to consider the application of existing law to climate change rather than to write new laws to litigate the risks of climate change. Some participants were of the view that there is now a ‘Grotian Moment’ requiring judges to act in order to fill a gap left by politicians. This is because climate change is fundamentally different from other social challenges in terms of its scale and intergenerational impact, and its legal implications cannot be avoided in light of the Paris Agreement. Other participants noted that existing legal frameworks already include some powerful instruments for litigating on climate change issues and there is simply not enough time to rewrite laws. Furthermore, there are opportunities for dealing with climate change through the creative use of existing legal doctrines – for example, reviving the concept of the public trust – and importing legal concepts from other jurisdictions. However, it was recognised that any such innovations need to be accommodated within existing legal frameworks and cultures and there is a fundamental need to maintain a stable and predictable legal order within legal systems. Other participants emphasised that even cases at the ‘boring end’ of the spectrum should not be dismissed as insignificant. Important progress in pursuing climate goals might be made by taking a bottom-up approach to climate litigation in areas such as competition law, public procurement law and state aid law. It was noted that there is no shortage of lawyers looking to activate those levers, but there can be a lack of money to fund climate change cases, and philanthropy might be a significant avenue of support in this respect.

In terms of substantive legal claims, the discussion considered possibilities for litigation in private law (focusing on the tort of negligence and company law) and public law in an English law context, and briefly considered dispute resolution in international law. The workshop focused primarily on the UK context to highlight and recognise the fact that legal claims are fundamentally jurisdiction-based. In terms of English negligence liability, the nature of the remedy available was a focus for discussion, as this will be instrumentally important for many motivated to bring tort-based ‘climate litigation’. Whilst injunctions are less common in negligence claims, these should not be dismissed as impossible in a climate change context. A significant barrier to bringing negligence claims against governments or corporate actors however is the fact that tort defendants generally owe no positive obligation to prevent something from happening. It would therefore be necessary to show that certain policies or activities that a defendant government or company is pursuing, for example the allocation of subsidies or other deliberate activities, have caused harm. In relation to corporate law, it was noted that ClientEarth had recently submitted regulatory complaints to the Financial Reporting Council against Cairn Energy PLC and SOCO International PLC alleging that these two oil and gas companies had failed to adequately disclose climate-related risks to investors. More generally, corporate law actions are procedurally limited by standing rules that privilege shareholder claims, but there are interesting prospects for suing directors for breach of their fiduciary duties to promote the success of the company for the benefit of all members when paying insufficient attention to climate risks.

In relation to English public law claims, it was noted that there are some very positive prospects for this kind of litigation relating to climate change. This is particularly due to procedural access to justice rules and the existence of the Climate Change Act 2008 (CCA). However, there are also some barriers to public law climate change litigation. In particular, it is not clear whether the CCA is justiciable and litigants have been reluctant to test this to date. Moreover, there was debate about the role of judges where this might look like legal activism (making law as opposed to interpreting and applying it) and the potential for exaggerated expectations about what judges can do to fill the void left by politicians within the legal culture of the UK. Some participants noted that doctrinal obstacles to legal claims are not always insurmountable, provided one is willing to persist and fight for a good legal argument. This is particularly salient where EU jurisprudence exists to support new directions of legal reasoning, although the prospects of future doctrinal development in English law along these lines is uncertain in light of the UK’s vote to leave the EU.

Finally, in international law, there was discussion about whether the lack of a discrete international forum for adjudicating environmental disputes presented a fundamental institutional obstacle to hearing international climate-related claims. The International Court of Justice has significant jurisdictional limitations and there is no immediate prospect of an international environmental tribunal being established. However, investment treaty arbitration cases appear to be constituting an increasingly

salient body of law related to climate change disputes, which involve state-to-state treaties in which private investors are also involved. In this context, the workshop discussion focused on the (state) 'right to regulate' versus (investor) 'legitimate expectations', both of which might be triggered by new regulation intended to pursue climate change objectives but which detrimentally impacts foreign direct investment or revenue streams.