

CLIMATE CHANGE - IS IT A LEGAL ISSUE?

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Legal Briefings

With The Law Society for England & Wales set to guide solicitors on how to deal with climate change, we explore what it could mean for legal advice

The Law Society for England & Wales is soon expected to issue guidance to its solicitor members on how they should deal with climate change. It comes at a time when environmental search providers are beginning to extend their offering from contamination and flood risk reports to also include risk rankings for certain types of climate change impacts, and solicitors ordering them on behalf of clients will have to decide what to do with the new information they include. It follows a resolution on climate change already adopted by the Law Society that urges solicitors to engage in 'climate conscious legal practice'. But what does it all mean?

THE EXPECTED PRACTICE NOTE

Solicitors routinely obtain 'desktop' environmental and flood risk reports to indicate the potential for soil and groundwater contamination and for the property to be prone to flooding. These data sets form an optional part of the due diligence exercise. However, they help solicitors to identify risks and then to offer clients advice on the available protections, such as the possibility of obtaining insurance or making additional enquiries. The Law Society's expectations of solicitors in that regard are spelt out by existing practice notes of the kind that the Law Society is now understood to be considering issuing with regard to climate change. No date has been given for issue of the new practice note, nor any indication of whether it will first be made available as a draft for consultation, which it is to be hoped it will.

However, climate change is a rather unusual animal in this context:

- the impacts are widely predicted to occur unless radical action is taken to avert it, and

this may affect the continued ability to insure against property damage at an affordable premium;

- the seller of a property can't rationally be expected to offer protection in the sale contract against an issue which is of a future nature affecting property generally and hence not their fault; and
- there is no related legal regime allocating responsibility with regard to climate change impacts on property, on which solicitors would be best placed to advise.

WHAT IS EXPECTED?

What, therefore, is a solicitor supposed to do, other than simply pass through information to their client? What does 'engaging in climate conscious legal practice' entail in this regard? And if solicitors get it wrong, is there a possibility of them facing a negligence action from the disgruntled client who is unhappy with suffering loss due to climate change that was not properly explained before it signed the purchase contract?

Of note, the Law Society resolution urges solicitors to engage by:

- approaching any matter arising in the course of legal practice with regard to the likely impact of that matter upon the climate crisis;
- providing (whether themselves or through others) competent advice to their clients on:
 - how they can achieve their objectives in ways which mitigate the effects of the climate crisis and promote adaptation to climate change; and
 - the potential legal risks and liabilities that may arise from action or inaction that negatively contributes to the climate crisis; and
- advising clients, where applicable, about the benefits of disclosure of climate-related risks and opportunities related to their entire business operation (including supply chains) when reporting to regulators, investors, and stakeholders and on the assessment, monitoring, management, mitigation and reporting on such risks.

The most relevant parts to a commercial real estate purchase or lease would appear to be advising the buyer, tenant or lender (as the case may be) on how they should assess the climate risks associated with the asset, as the change of ownership itself is unlikely to make the climate risk any better or worse. The new practice note should (we hope) clarify how this expectation applies in the context of advising on real estate transactions, but as yet there is little indication that is publicly available of what shape that might take.

IS IT REALLY THE LAWYER'S JOB TO ADVISE ON THIS?

It would until recently have been viewed by many as fanciful that a solicitor's duty to a client buying real estate encompassed advising on climate change impacts. However, some respected voices at the environmental law Bar now believe there is a decent prospect that a judge presiding over a professional negligence action might decide that a solicitor who has failed to point out the climate change risks involved is negligent. Time to check the PI insurance cover.

Although it is quite easy to see how failing to pass on relevant information to one's client might be negligent, does the solicitor have to try to interpret the (technical) information for clients who might not technically be experts themselves? Obviously, the better the analysis that is provided in a search report, the better the solicitor will be able to accomplish this. The report providers can help this by being very explicit about what type of data is used to underpin their findings and the level of certainty associated with it, such that this can be drilled down into if required. Some of the data won't be very granular, but will apply in a generalised fashion across a wide geographical area. There will also be underlying assumptions made on climate change scenarios over time that depend on how the world responds to achieving the targets under the Paris Agreement on climate change, and whether that is keeping temperature increase below the 1.5 °C stretch target, to the 2°C threshold or against the currently predicted trajectory of 3°C and over.

A further question is whether a solicitor would be failing in their duty by not commissioning a specialist report where insufficient information has been proactively disclosed by the seller? If so, solicitors will need to understand what products are available and how to select what is appropriate in the circumstances. So, for example, a real estate investor client who typically sells assets on within five years is unlikely to be bothered by climate change impacts that are predicted to materialise after 30 years. Whereas a pension fund may hold the asset for the longer term and be hoping for growth in capital value, rather than receipt of rental income alone. For them, a reduction in asset value due to subsidence, threat of coastal erosion or storm damage due global warming in 30 years' time be material to a decision to purchase.

WHAT WOULD THE CLIMATE RISK REPORT TELL US?

There is only so far such a report can go in terms of informing the likely impacts on a specific property. This may depend on how it is constructed or the materials that have been used and whether adaptations have been included in the design that might reduce the damage suffered. You may be forgiven for thinking that this sounds like fertile territory for the architects and surveyors, but one in which the lawyer will dabble at their peril!

There is also the issue of overlap with other reports routinely obtained, such as flood risk reports and surveyors' reports, and the ability of the client to prove that it relied on one adviser's report over another's in the event of error. There will, however, be subtle differences of emphasis between the reports; for example, flood risk reports speak to the risk at the date of the report based on historical experience of flood occurrences without predicting the future, while a climate change risk report is likely to be forward-looking – as to how the position today is expected to change over a period of years.

Other physical risks of climate change which will likely be included are subsidence, heat stress and coastal erosion. However, these are only a subset of the wider risks and exclude 'transition' risks through the adoption of new regulation, for example, mandatory energy efficiency improvements, or phasing out of fossil fuel heating systems, etc.

Will such reports also present the associated opportunities that may flow from adapting the property to address climate change risks? Commercial buyers who are committed to external (or internal) reporting on the climate change risks facing their whole business may need to identify both the threats and the opportunities regarding a new acquisition in order to feed that information into their central risk reporting processes. That presents a challenge for report providers, because there are varying standards to which corporates are signed up.

HOW WILL THE CLIENT USE THE REPORT?

Ideally, a climate change risk search would involve not only a visit to the actual property (to couch it in reality of understanding the building in its particular location) but also interpretation of the findings by qualified real estate professionals. However, in practice, this is likely to make it a more expensive proposition and one which might go beyond what a particular client requires for reaching an investment decision.

If reports merely identify risks without making recommendations for the steps which could reduce or compensate for the risk itself, then the effect will likely be to drive purchasers towards buying properties with better climate change risk scores. If sufficiently marked, this trend could presumably increase the purchase values of those properties compared to their more poorly performing competitors on the market. This in turn could produce investment opportunities to retrofit buildings and hence increase their capital value. A developer might be looking for just that sort of (currently) poorly performing asset to improve.

These market drivers flowing from greater understanding of climate risk may also apply to the rental market. Rental values in buildings providing accommodation and workplaces that are more comfortable for use, or that require less energy to heat or cool become more attractive to tenants, as well as landlords footing the energy bill for the common parts. A particularly good climate change risk report might, in that respect, be a useful marketing tool.

WHAT IF OBTAINING A CLIMATE CHANGE REPORT WERE A REQUIREMENT FOR MARKETING?

Given the incentives for retrofitting of existing buildings that transparency on climate risk could bring, it is not difficult to foresee it being made mandatory for sellers to obtain one in order to put a property on the market. This would sit alongside the requirement to obtain an energy performance certificate.

Producing a simplified climate change risk rating allowing one property's risk level to be easily compared to another may, however, not be so easy, as it would require a consistent underlying methodology to be agreed. Report providers might also call for the accreditation of providers in order to ensure a level playing field among them and ensure the trust of report users. Of course, under this scenario it is likely to fall to estate agents, who are usually instructed before solicitors, to ensure that the climate change risk report is obtained.

FINAL THOUGHTS

So while we wait for news of the Law Society practice note, there is much to ponder on what it may mean in practice. Solicitors have become used to ordering contaminated land and flood reports, and hence ordering a further report to help discharge this new aspect of their duties is fairly easy and may quickly become the norm. Some are ideologically in favour of this move as a way to accelerate the pace at which the real estate sector responds to climate change threats. Others may be rather more concerned about not being able to match the risks identified in climate change reports with recommendations for how their client can mitigate the risk, other than simply not proceeding with the transaction. This leaves the solicitor in the invidious position of being the deal-breaker, somewhere none of us wants to go.

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KEY CONTACTS

If you have any questions, or would like to know how this might affect your business, phone, or email these key contacts.



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