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.