Groundsure
LOCATION INTELLIGENCE

Meeting the Challenge of Climate Risk Guidance

A summary of the key points from the 2022 Conveyancing Climate Change Conference

Introduction

Climate change is already having significant impacts on how lenders, insurers and other stakeholders view risk through the transaction. Financial regulatory compliance and ESG considerations are now material factors in how clients should be advised as to how climate change could affect them – as well as the potential future risk of law firms being sued for failing to alert clients.

In June 2022, Groundsure hosted its inaugural Conveyancing Climate Change Conference at The Law Society. It was the first time that experts, practitioners and policy makers from conveyancing, lending/valuation and environmental law came together with climate scientists and commentators to look down the track and grasp what needs to be done to safeguard clients' transactions, improve compliance and support more sustainable thinking.

This white paper summarises the key points made by our expert speakers at the conference, emphasising the scale of the climate emergency that we face as individuals, communities and as a nation. It reviews the policy and thinking on how we got here, both in terms of UK policy, but also due diligence across property transactions.

It considers whether current guidance is fit for purpose and what is likely to change in terms of lender requirements of residential conveyancing and commercial real estate teams. It also reviews how by not flagging available climate information in searches during the transaction, this may become a more material compliance consideration for partners and heads of departments.

The number of properties in England and Wales affected by pluvial (surface) flooding

Short term

1.8 Million

By 2070

3 Million

166%

increase

A view from the climate front line

Roger Harrabin – Former BBC Energy and Environment Analyst

Climate change until now could have been viewed as a tangential topic for the legal industry. But across all business sectors and our wider society, its acceptance and realisation of its effects has now become normalised. Unfortunately, the time for action was back in 1990 when it was first taken seriously as a matter of policy direction by Margaret Thatcher who identified that it would take “statecraft of a rare order” to manage globally.

Unfortunately, in the three decades that have followed, only small incremental steps have been made through the Rio Summit, Kyoto Protocol and a whole series of COPs. Not until Glasgow in 2021, were specific reduction commitments made, not matter how watered down.

We are already in the most dangerous phase of climate change. Governments don’t want to be alarmist but the facts are stark. In a recent meeting I had with one of the most eminent climate scientists in the world, her first words to me were “scary, isn’t it?” – We have the highest levels of CO2 in the atmosphere ever right now. The last time they were appreciably this high was back in prehistoric times when sea levels were ten metres higher than they are today. While fossil fuels are generally reducing, there are geopolitical and energy security risks that are forcing rethinks across the world. And the oil and gas producers are looking at controversial technologies and carbon offsetting schemes that may not be all they seem in the fight to reduce emissions.

Lytton, British Columbia, Canada saw last year’s jaw dropping moment for climate scientists. A heat dome settled across the area, smashing the all-time temperature record by a staggering 5C. This has, of course, been brought home to us with this summer’s heatwave raising our all-time record by nearly 2C.

And this heat is now all-pervasive and global. India and Pakistan have reached 50C, Australia continues to be battered by floods, bush fires and heatwaves. We are continually running to catch up with little success. The 1.5C global temperature rise above pre-industrial levels will be breached in the next few years and there are no serious climate scientists who believe it will stay at this level. Even with significant interventions, it is likely to be between 1.5C and 2.8C; by pursuing current policies, it will be between 3 and 4C.

The number of properties in England and Wales affected by coastal erosion (with no active intervention)

Short term

10,800

By 2070

97,000

881%
increase

A view from the climate front line *(continued)*

COP26 in Glasgow at least saw commitments to “scale down” coal, so we are moving in the right direction, and we should support anything that takes a few tenths of a degree centigrade off the figure.

There are plenty of words and ambition from the UK government, but it is blindly optimistic. The pronouncements of 50 GW of renewable energy from wind power and 8 new nuclear power stations just aren’t going to happen. We don’t have the raw materials to build these to keep up with our wider carbon reduction commitments.

We have designed our houses to be better insulated for the winter but made them stifling in summer heatwaves. Experts continue to be baffled by policy that is yet to address retrofitting and improving building performance. Embedded emissions are a big deal: steel, concrete, plastics, aluminium, and wood/paper are major contributors to emissions, way more than cars and planes.

These all feed into construction and we have to speed up the implementation of new technologies to achieve low or carbon-free materials for our new build homes and commercial buildings. In my 35 years at the BBC, soon coming to an end, I have seen some extraordinary weather events that underscore the exponential pace of climate change. But I’m afraid that I fear for our children’s future given the speed that we are not moving on the issue. I want to be more positive and there are encouraging signs, but we need to wake up to the stark realities of what this will mean for our communities now and in the future.

What the future could hold for us all

Tyrone Dunbar – Climate Knowledge Integration Manager - The Met Office

Global temperatures have accelerated rapidly in the last 20 years, relative to the previous century, driven by greenhouse gas emissions from human activity. It has altered rainfall patterns, increased sea level rise and enable extreme weather events such as the extraordinary 2021 German floods, as well as those the UK experienced in 2020.

Tipping point events are what climate scientists focus on. These include the rapidly melting polar ice caps that contribute to sea level rise, but also a cooling of the ocean currents, such as the gulf stream. That could have dramatic cooling effects on our latitude, have an impact on storm tracks across the Atlantic and make our winters more like those in Canada. The rate of deforestation in the Amazon has a major bearing on the amount of carbon that can be stored from the atmosphere. But this is not solely determined by felling for grazing land, it could also become too dry and hot across Brazil for the forest to exist naturally.

The rate of permafrost melt could also accelerate methane release to supercharge emissions and the feedback loop which disproportionate warms the arctic and creates more ice melt. And we could also face biodiversity extinction through warmer seas affecting our coral reefs.

The Met Office produces a regular decadal climate prediction and our last one hit the headlines. We declared that in the next 5 years, there is a 50/50 chance that we would breach the global 1.5C above pre-industrial level threshold for temperature rise, suggesting the pace of change is growing ever faster.

To perhaps illustrate this in the starkest terms possible, at the Groundsure Conference, I presented a Met Office weather forecast for 22nd July 2050, which recorded a daytime high of 43C in Worcester and a sticky night-time minimum of 24C. It was scarily prophetic, when not one month later, just a few days short of that same date – we hit 40C plus for the first time, with a night-time low of 26C, with the same Red Heat Health Warning Alert that I described. Almost exactly the same forecast, just a generation earlier.

The number of properties in England and Wales at risk of coastal (tidal) flooding

Short term

151,000

By 2070

652,000

432%

increase

What the future could hold for us all *(continued)*

For our communities, these forward impacts are clear. We are modelling scenarios at 1.5C, 2C and 4C above pre-industrial levels. Today, there are about 20-30 days a year where the daily maximum temperature are 25C or above. At the extreme 4C scenario, there could be 80 days plus, effectively the whole of the summer. Even at the medium projection, this will place far greater heat stress both on communities and buildings and require significant rethinks about how these are designed and how we live our lives.

Across the whole of the UK, there will be an average 20-30% increase in rainfall if we take the medium projection, charging our water courses more and leading to greater flooding. At the extreme scenario range this could be as much as 40-50% more in Scotland, which is already far wetter and along the south coast of England.

Rainfall deficit will also lead to more prolonged drought periods, especially so in the east and southeast of England, whose clay-based soils will lead to greater shrink-swell subsidence.

If governments follow through on their emissions pledges, we are in touching distance of reaching our climate target limiting global temperature rise to 1.5C, but more action to cut greenhouse gas emissions needs to happen immediately. The Met Office works widely internationally and across the UK to help people prepare for the impacts of climate change. An example of this is the work of the Met Office's Urban Climate Services Team, who work with local authorities across the UK to provide detailed information on how climate change will affect cities through extreme heat or flooding events.

£525 Billion

The value of UK property that could be written off due to climate change by 2100

Source: XDI analysis report 2021

The Lending Industry's Perspective

Matthew Jupp – Principal –
Mortgage Policy, UK Finance

Lenders recognise the reality of climate change and have been thinking about how this feeds into their conduct with their customers and other stakeholders in the property transaction. They are also focused on fulfilling their regulatory responsibilities with prudential risk across their lending book.

Lenders need to embed climate risk into their strategy alongside requirements from their regulators. But they will all have different approaches to how they accommodate the data and screening needed to account for this in their back books and forward business.

Of particular concern are transitional risks. The Government has consulted on how the private rental sector can meet EPC band C and above by 2025 for new tenancies and 2028 for all others. This is driving real pressures on how retrofitting to meet this challenge can be accounted for with buy to let finance, as well as the wider educative piece on owner occupiers to improve their properties ahead of re-sale, as part of the drive to be net zero by 2050.

But a just transition is needed: this has real world implications. We cannot create a generation of property prisoners unable to move if they cannot afford to retrofit to make them more mortgageable and attractive to buyers. I don't think we have confronted the scale of the task ahead yet with regard to property heating strategies and risk-based pricing when Flood Re runs out in a decade.

There is a strong role for product innovation through green financing – rewarding those who improve homes to make them greener and encouraging more innovation across the housing market. However, we need to see a clear Government roadmap for how they want to reach net zero with the housing market as a key lever. There needs to be better consumer education through all stakeholders in the process. EPCs need to be updated so they are more current and more relevant to future needs and there needs to be an active and cost-efficient retrofitting industry, backed by government incentives for homeowners to access them.

What is clear is that lenders will be changing and adapting their guidance to conveyancers on what they want to see reported about climate risk. We are keen to work with The Law Society and other professional bodies to ensure that guidance is joined up and that customers are provided with the right information as part of legal due diligence and understand how climate factors will play a greater role in lending decisions.

How a lender is approaching climate risk

Rob Stevens – Head of Property Risk, Nationwide

Consumers are typically just focused on when they can move in – they are not particularly interested with what happens in the process of getting there. Part of the challenge of unblocking any inefficiencies of what goes on behind the scenes lies in trying to break down the silos that exist between conveyancer, valuer and lender - and often the Bermuda triangle of data that call fall between the gaps or be inconsistent.

Lenders are especially concerned about the transition costs from energy efficiency improvements. The average EPC rating on a lender's books is a D. 70% of our book is below a C; 40% of properties have no EPC rating at all and we shouldn't be lending to any property with an F and G, unless there are specific exemptions.

What's worrying is that more people probably know the EPC rating of their fridge than their home and many need to understand the cost of retrofitting their properties to meet better ratings to access better mortgage products and rates in the future. This is certainly gaining traction in the buy to let market now. From our surveys, half of landlords are now aware of the changing legislation as part of the drive to net zero: new tenancies cannot go ahead from 2025 for properties with a D rating or lower.

The challenge is that many landlords are constrained by the cost of retrofitting and lower rated properties are increasingly filtering back into the private sale market, as there is little perceived payback on what can be more than a £10,000 average retrofit cost per property. Landlords could be trapped with their current lender if they don't improve the property and lower value properties could become further disadvantaged as the payback becomes lower.

We will be providing more information on what conveyancers need to think about with both physical and transition risks from climate change as part of our panel arrangements. We must collectively warn consumers against the temptation to go for the property just because of the location or price and think about the wider implications to mortgage choice and their future well-being. We must all support wider customer education to explain hidden risks or that may not be apparent now but could easily fall within the lifetime of the mortgage.

Valuations and Sustainability – where do they fit in?

Ben Elder – International Head of Valuations, RICS

A valuer has an important regulatory function to apply a figure to the market value – this is not necessarily the price that would be paid but set against as set of specific criteria. Customers want advice but the valuation is very much set on what that value is today.

The problem for the valuer with sustainability measurement, is that international financial reporting standards and Environmental Social Governance (ESG) reporting is set at an entity level, not individual, so there is a disconnect. For large corporates, big changes in the ESG investment market are now driving senior directors to act to ensure they have met ESG criteria to ensure their ongoing shareholder investment. This has been reflected in our Red Book standards on sustainability in their commercial asset valuations for the last 20 years, with further updates to specific global advice in Dec 2021.

One of the key phrases a valuer uses is "should" – meaning they should advise the client, but if they do not, give clear reasons as to why advice has not been given. This is true of sustainability and while they report on today, they should consider impacts in the short, medium and longer term.

The residential market is constrained through how the reports are produced, with limited opportunity to add comments. From my personal perspective, one way we could incentivise homebuyers to retrofit properties to make them more energy efficient is through a possible stamp duty holiday to kickstart greener homes.

Unfortunately, sustainability is just one factor and comes a long way down the priorities for the homeowner after location and facilities. RICS Research in Europe for greener homes showed that just 2% put sustainability as the main driver for buying a property, which suggests we still have a long way to go to change consumer perception on the importance of this issue.

4.5 million

The number of UK homes that are likely to overheat due to climate change

Source: CCC Report: UK Housing: Fit for the Future? 2019

Is there a Duty of Care for Clients on Climate Change Risk?

Stephen Tromans QC – Environmental Law Barrister, 39 Essex Street Chambers

Professional negligence is case dependent and until now there have been no cases specifically dealing with a duty of care in relation to environmental and climate guidance. However, there are several factors that are now converging that make the likelihood for such cases all the more likely. To date, the warning card and guidance on contaminated land is understood and in general, acted upon.

Firms can say that their duties are defined by the scope of their retainer, but it can't stop there. If risks come to the attention of the solicitor, they do have to warn the client about them even if it comes outside of the retainer. A dentist may be asked to work on a specific tooth but in the course of treating it may find something wrong with another tooth and has to advise the patient of this.

This analogy has been tested in the High Court and has been successful in influencing judges on these similar duty of care cases. In the case of Russell Jones v Walker at the Court of Appeal, it was clear that warning about something else was not "extra work" and was within the scope of what was expected by the solicitor to their client. Another test is how experienced the client is and what a solicitor can assume about this. There are hidden pitfalls that may not be as obvious to a client as they are to a solicitor.

And the larger and more sophisticated the firm, the more it is expected that there would be ESG expertise within its resources in order to flag environmental and climate risks as part of a duty of care, so an elevated expectation.

The law adapts to new situations. While climate change is more generic a set of risks than a specific contamination risk on a site, there are tools and data increasingly available on a property specific basis so foreseeability becomes an important test in terms of what is "fair" and "reasonable" for a solicitor to comment on. If the tools are there to enable risk to be assessed, they should be used..

This comment could cover physical and transition climate risk, but also costs of future mitigation, potential for physical stress and impacts on employees and businesses.

Increase in number of non-residential properties affected by flooding due to climate warming at 2C

Source: Technical Report for the CCRA https://www.ukclimaterisk.org/independent-assessment-ccra3/technicalreport/

Short term	27%
By 2070	45%

Is there a Duty of Care for Clients on Climate Change Risk? *(continued)*

Searches are a key part of the mitigation here, where climate data exists on a property specific level. Also, the question may arise of what contractual provisions can be put in place to safeguard, such as long-term commercial lease agreements on development land. This is a significant consideration for commercial lawyers.

A solicitor has to help the client make sense of a report that includes climate data, summarise it and discuss its implications. The Law Society Resolution, published in October 2021, did not provide much on specific duties but was clear on the implications. It spelt out the need to reinforce education on climate change and to seek out competent advice, including from third parties such as data providers, to mitigate, in order to reduce risk to the practice.

Sarah de Gay, visiting professor at UCL has stated that the more information that is freely available on climate change, the greater duty of care, to which I agree. There are also Chancery Lane Project clauses, representing good practice which can be used in conjunction with the findings from climate data in searches. The final decision is of course for the client, but it must be a decision properly **advised by the solicitor**, given that this information is now available.

Impact of climate change risks on firms' reputation and insurance

Stephen Sykes – Consultant Lawyer, Capital Law

Forward climate risk dwarfs contaminated land in terms of potential liability and likelihood of occurrence – and therefore how it could affect legal practices.

There are some 28 million homes in the UK and yet just 1000 or so have been served with a Part 2A notice. While the average cost of £50,000 is considerable for those affected, it is nothing compared to the 10,000 homes at risk right now from coastal erosion, which is a total loss of the property value. Equally, flood and subsidence risks are far more widespread and evidently getting worse: millions of UK properties are at risk from these physical impacts.

As climate change accelerates, contaminated land risks won't change much, except perhaps for specific sites that may see contaminants mobilise through groundwater or surface transmission from leaking landfills or toxic sites caused by extreme weather events. But with climate risk driven subsidence, we could see an 8-fold risk in the risk and with flooding a 4-fold rise.

So, while solicitors aren't environmental consultants, our job is to mitigate risk through the tools available – searches, insurance and drafting. Given this, it would be manifestly unwise to turn our backs on climate change, not least from an ethical standpoint.

Climate risk also has to be taken in the context of professional liability risk. PI costs are already very high, with conveyancing at the highest risk end of the spectrum. Some property law firms are already paying double digit percentages of their turnover for PI cover. **Insurers will also want to see climate risk training, good practice guidance and the latest available climate data being used in practice to be comfortable that law firms are on top of this new PI risk.**

Bird & Bird Vs. Orientfield stands as a litmus test for us all not to sit on search data, nor fail to advise our clients about it. Data - including climate risk data - must be explained to our clients and summarised in the Report on Title.

The number of properties in England and Wales affected by subsidence

Short term

449,000

By 2070

3.6 Million

801% increase

Impact of Climate Change risks on firms' reputation and insurance *(continued)*

Law firms could amend their retainer to exclude advice about climate risk, but this is very difficult to defend from an ethical and ESG perspective, and it would have to be explained to the client for their considered approval. That would take time to explain and might well lead to very awkward conversations with clients.

Guidance is coming from the Law Society on how lawyers should advise clients about climate risks, but notwithstanding that, a climate duty of care exists today.

A Climate Emergency was declared by the UK Government in 2019. We need to recognise as lawyers that we have an obligation to warn our clients about climate impacts, especially now that easy-to-understand, property-specific climate risk data is readily available from Groundsure.

London's insurance market is the most innovative in the world and is using data to look ahead on climate impacts. New pools of capital will be needed to manage flood and subsidence risk better so that lending decisions can be made more seamless and transactions maintained. But some properties will become climate-stranded assets given government policies such as managed retreat of communities that will be lost to coastal erosion and coastal inundation. There should be no expectation that government agencies will maintain sea and river defences indefinitely. Property lawyers will need to understand these risks and explain the implications to their clients.

Our duty is to warn our clients about climate risk and our PI insurers will want to see that we have a grip on this, ahead of or in tandem with the Law Society's emerging guidance.

What is the Law Society's position on Climate Change?

Seb Charles – Founder, Aardvark Law; Chair of the Law Society Planning and Environmental Law Committee

Climate Change will have significant additional considerations for UK conveyancers. There is a transition period in terms of guidance, but while it is a complex area, the direction of travel is becoming clearer. The Law Society has already published the Climate Change Resolution, which makes explicit the need for conveyancers to understand and advise clients where climate change may have an impact on assets and could affect decisions, as well as the potential liabilities to the firm for not giving that advice.

The Law Society is currently engaging in two strands of work: firstly, looking at the overarching ethical considerations through the Climate Change Working Group, but also through the Environmental and Planning Law Committee on advice to solicitors on specific conveyancing transactions. Residential property will be the priority.

Flood risk is our number 1 concern, but we will move beyond that with regard to heating and cooling of properties as well as its degree of resilience to meet the climate change challenge. Overall, our stated objective is "Climate-Conscious Legal Practice".

There are some wider factors at play which may affect the course of guidance as it evolves. In an ideal world, we need to find a way to account for whether a property has resilience built in already to mitigate climate risks. With energy and heat resilience, a lot of this could go beyond what the EPC tells us. Insurability is the key driver in terms of mortgage-ability, but there is a disconnect between the requirement for having insurance in place for the first year as a condition for the mortgage, but what about the presence of a policy for the remaining 39 years. How many properties in the area still have cover or gave up because it was too costly? Much of this isn't in the public domain.

With leasehold properties, how much control do leaseholders have on mitigation if the freeholder is not focused on climate change? Also, the homebuyer can't assume that a new build is automatically climate resilient, nor that if the client lends today that it won't be a problem down the line. There are many considerations to think about.

It isn't illegal to buy or sell a property at risk from climate change and is isn't illegal not to advise, but it is commercially unwise. **But it is clear the profession needs guidance to navigate this in order to raise standards.** This will evolve over time as new climate data beds into the market in much the same way as it did with contaminated land and flood risk. There is also no current market differentiation in terms of value on properties affected or not by climate change, but this will be sure to change over time, based on ease of completion or not.

The evolution of environmental and climate risk data

Dan Montagnani – CEO, Groundsure

So, where does the responsibility lie for clarity on climate risk reporting? Conveyancer? Lender? Valuer? Data Provider? The truth is all of us in some form, so it is all about collaboration across the stakeholder chain and working with good data so that we, in conjunction with the client, can all make good, empowered decisions.

We have a collective responsibility to identify and respond to the truth on forward climate change impacts. Because lenders are now approaching climate change as a tier 1 banking risk, meaning directors have greater liability, more weight is being placed on improved compliance through the Prudential Regulatory Authority. This will cascade more requirements through the stakeholder chain to conveyancers through changes in lenders' handbooks on items for scrutiny in the Report on Title. So this starts with data – but its not data that is designed to blight; it is ensuring it is a balanced, non-alarmist and proportionate forecast of forward risk.

And the data also has to fit within the workflow of the lender and the valuer, as well as the conveyancer or commercial real estate lawyer, just as it does now for environmental searches. To us they are one and the same. At Groundsure, we already work with 3 of the top 5 lenders to provide their valuation network with forward climate data for their commercial property screening. This is done in a seamless way alongside our core environmental searches.

And with the **launch of our ClimateIndex™ forward climate data module**, this is now applied to conveyancing transactions in our existing key residential and commercial reports at no extra cost. This delivers friction-free, compliance-ready climate due diligence that can work for lenders' future reporting requirements and delivered in a simple, easy to understand format for clients. Physical risks covering the main concerns of flooding, subsidence and coastal erosion at a property-specific level are provided, and more transitional risk analysis will be added in short order.

There is clearly a lot more that needs to be done with collaboration across the stakeholder value chain about where significant climate impacts could affect the property or land asset, in terms of valuation and the impact of insurance and consequent lending availability. Environmental searches have evolved to look ahead not just at past land use and events that have shaped our land and coast. They will continue to evolve, and our communities, investments and livelihoods need to adapt and become more resilient for us all to prosper and make empowered land and property decisions.

The number of properties in England and Wales at risk of fluvial (river) flooding

Short term

88,000

By 2070

316,000

359%
increase

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Groundsure is a leading UK environmental and climate data authority. We give land and property professionals expert information on risks including land contamination, flooding and ground stability, as well as forward guidance on potential climate risks, to advise their clients in the transaction. We provide high value, property-specific opinions and analysis of land use, turning data into practical, actionable insight.

For more information visit www.groundsure.com
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