

In the matter of
Conveyancers' Duty of Care to Advise Clients about Climate Risk
and
How to Discharge Such Duty

ADVICE

1. I have been asked to provide this Advice to Groundsure Limited (Groundsure) on the subject of what duties solicitors and other professional conveyancers owe to clients to advise on risks arising from climate change, and how any such duty may be discharged.
2. This Advice is structured as follows:
 - A. Climate change related risks and the commercial context
 - B. Duties of conveyancers generally
 - C. The Law Society and other professional bodies
 - D. Lenders
 - E. Duty of care: discussion
 - F. Practical steps to discharge duty
 - G. Risks of not discharging duty
 - H. When did any duty first arise?
 - I. Other questions raised in my Instructions
 - J. Scope of advice and other related matters
 - K. Summary of Advice

A. Climate change related risks and the commercial context of Groundsure's business

3. Climate change and its impacts in terms of extreme weather conditions, such as heatwaves, extreme storms and flooding have in recent years become all too obvious, as can readily be seen from UK news media reports. These risks have been broadly understood since the 1970s and 1980s within scientific communities, but are becoming increasingly clear and urgent to the general public, politicians and the commercial community, including banks and other lenders.
4. A notable development occurred in April 2019, when the Prudential Regulation Authority issued the world's first supervisory expectations for the management of climate-related financial risks, and in July 2020 set a deadline for them to be embedded as far as possible by the end of 2021. This initiative has been widened to include the Bank of England, the Financial Conduct Authority, the Financial Reporting Council and the Pensions Regulator, who are concerned as to how their regulated companies understand, assess and mitigate climate change related risks.¹
5. Such risks have been categorised by the Bank of England² as falling into two broad categories: physical risks such as loss and damage to property by flooding, coastal change, storms and other climate-related events; and transition risks, which relate to changes in behaviour by governments, commerce, industry and society in relation to climate change (an example might be the reduction in ability to obtain mortgage finance or insurance). As will be seen, this twofold categorization is very relevant to this Advice. This concern has led already to some banks designating climate risk as a "Principal Risk" and identifying real estate and retail mortgage

¹ See the October 2021 Joint Statement by the Heads of these Regulatory Bodies:
<https://www.fca.org.uk/news/statements/joint-statement-fca-pra-tpr-frc-climate-change-adaptation-reports>

² <https://www.bankofengland.co.uk/climate-change>

lending as elevated risk sectors.³ It seems highly likely that others will have to follow suit in the short to medium term. It is worth at this point expanding slightly on what transition risk means, as it is central to this Advice. In broad terms it is financial risk to businesses or individuals arising from a transition to a lower carbon economy. For some businesses it may relate to products or investments, as in diesel vehicles or in fossil fuel extraction. More relevant to this Advice it can relate to changes in professional, commercial and market practices as the risks of climate change come to be recognised. These include, for example professional conveyancing and surveying practices driven by regulatory and professional guidance (such as the Law Society's emerging guidance discussed below); the attitude of lenders and insurers to the risks presented to property by climate change, resulting in higher insurance premiums for buildings at risk, or the inability to obtain mortgage finance; and ultimately the attitudes of more informed and risk averse purchasers resulting in reduced market values.

6. Partly in response to these developments, during 2022 Groundsure, and as I understand some other environmental data providers, have launched climate change data information services which can predict the physical effects of climate change on specific, individual properties. The work undertaken by Groundsure to date has predicted very significant numbers of domestic properties in the UK at risk from surface water flooding, climate change related subsidence, and coastal change in the short term, by 2050 and by 2070, for example with 2,000,000 at risk from surface water flooding in the short term, rising to 2,500,000 by 2050 and 3,000,000 by 2070.
7. To provide information on these risks, Groundsure has developed a "ClimateIndex Module", provided free of charge within its core residential and commercial property environmental report product. This was launched in June

³ See for example, <https://www2.deloitte.com/uk/en/insights/industry/financial-services/climate-change-credit-risk-management.html> and <https://www.mckinsey.com/business-functions/risk-and-resilience/our-insights/banking-imperatives-for-managing-climate-risk>

2022. It adopts scenarios and periods of 1, 5 and 30 years which are aligned to those used in the Prudential Regulation Authority and in the Bank of England's balance sheet stress tests.⁴ This is, I am told, a deliberate choice by Groundsure, to ensure that reports can fit with possible lenders' requirements. A major part of the market for Groundsure's reports are domestic conveyancers, comprising licensed conveyancers, legal executives and solicitors.

8. The ClimateIndex module provides forward climate scenario modelling, on the time horizons indicated above, for flood, subsidence and coastal erosion risks (being the current principal physical risks from climate change in the UK) and has a number of additional features: property specific weighted sum models for reporting periods; clear index ratings and guidance; and time periods aligned (as explained above) with current central bank guidance. In due course it is intended to provide information about some transition risks.
9. Climate change risks are therefore a new area for information provision, and not one which domestic conveyancers will necessarily be very familiar with at present. Groundsure therefore sees informing and educating the market as to the legal implications of such risks and their relevance for conveyancing and other property transactions as being of importance. It is on this basis that it has requested this Advice to inform itself and also professional conveyancers who may use its service, as to duties of conveyancers.

B. Duties of conveyancers generally

10. In this section, I consider the general legal principles as to the duties owed by solicitors and other legal property professionals to their clients, in so far as these may be relevant to a potential duty to advise on climate change risks. In section C I look at any guidance produced by the Law Society and other professional bodies,

⁴ Results of the 2021 Climate Biennial Exploratory scenario. <https://www.bankofengland.co.uk/stress-testing/2022/results-of-the-2021-climate-biennial-exploratory-scenario>

and in Section D I look in more detail at the position of mortgage lenders and other lenders. In section E I then seek to apply the principles to address the key question of whether conveyancers owe a duty of care to advise their residential and commercial property clients and lender about the risks and liabilities relating to climate change.

11. The most comprehensive summary of solicitor's duties of which I am aware can be found in *Jackson & Powell on Professional Negligence*, 9th edition (Jackson & Powell). The summary of key principles is largely drawn from that source (Chapter 11 dealing with solicitors).
12. The starting point is that the function of a solicitor is to give advice on legal matters and to act on behalf of clients in transactions of a legal nature – for example buying property. However, solicitors frequently also advise clients and act for them in matters which are not strictly “legal”: *Balabel v. Air-India* [1988] Ch. 317, 331-332.
13. The origin of the solicitor's duty is the retainer, or contract of engagement with the client. This can be written, oral, or in some cases inferred or implied. Most modern firms of solicitors will have written terms of engagement with clients. Banks and building societies and other lenders who instruct solicitors will have their own written terms or letters of instruction. Plainly anything specified within such instructions will then fall within the solicitor's responsibility if they accept the retainer – which is why the emergent attitude of lenders to climate change risks is so important.
14. It is possible to limit the duty, so as to exclude certain matters from the scope of the retainer but it will be for the solicitor to make clear if any matters (such as for example tax advice) are excluded: *Hurlingham Estates Limited v. Wilde Partners* [1997] 1 Lloyds Rep 525. There needs to be fully informed consent of the client to exclude such matters. In the context of climate change risk this would involve a full and clear explanation of the various aspects of risk, including not only physical

damage but also possible future risks on insurance, the acceptability of the property as lending security, and effects on market value.

15. All professionals are required to exercise reasonable skill and care in the services they supply: see the Supply of Goods and Services Act 1982, section 13, which restates the common law position.
16. Failure to carry out some necessary step within the scope of the retainer is treated as a breach of the general duty to exercise reasonable skill and care.
17. In *Minkin v Landsberg* [2015] EWCA Civ 1152; [2016] 1 W.L.R. 1489 at [38] Jackson LJ summarised the principles as follows:

“i) A solicitor’s contractual duty is to carry out the tasks which the client has instructed and the solicitor has agreed to undertake.

ii) It is implicit in the solicitor’s retainer that he/she will proffer advice which is reasonably incidental to the work that he/she is carrying out.

iii) In determining what advice is reasonably incidental, it is necessary to have regard to all the circumstances of the case, including the character and experience of the client.

iv) In relation to iii), it is not possible to give definitive guidance, but one can give fairly bland illustrations. An experienced businessman will not wish to pay for being told that which he/she already knows. An impoverished client will not wish to pay for advice which he/she cannot afford. An inexperienced client will expect to be warned of risks which are (or should be) apparent to the solicitor but not to the client.

v) The solicitor and client may, by agreement, limit the duties which would otherwise form part of the solicitor’s retainer. As a matter of good practice the solicitor should confirm such agreement in writing. If the solicitor does not do so, the court may not accept that any such restriction was agreed.”

18. The usual formulation of the content of the duty is the care and skill of a reasonably competent practitioner, having regard to the standards usually applied in the profession: see *Midland Bank Ltd v. Hett Stubbs & Kemp* [1979] Ch 384, 402-403, approved by the Court of Appeal in *Martin Boston & Co. v. Roberts* [1996] 1 PNLR 45 at 50. The solicitor should be judged by the standard of the reasonably competent practitioner specialising in whatever areas of law the solicitor holds himself out as a specialist. A similar test was adopted in *Hurlingham Estates Ltd v*

Wilde Partners [1997] 1 Lloyd's Rep. 525 by Lightman J of a "reasonably competent conveyancer and commercial lawyer" in a case concerning a commercial conveyancing.

19. The various components of the duty were listed in the Canadian case of *Tiffin Holdings Ltd v Millican* 49 D.L.R. (2d) 216, approved by the Supreme Court of Canada [1967] S.C.R. 183; (1967) 60 D.L.R. (2d) 469.

"The obligations of a lawyer are, I think, the following:

- (1) To be skilful and careful;
- (2) To advise his client on all matters relevant to his retainer, so far as may be reasonably necessary;
- (3) To protect the interest of his client;
- (4) To carry out his instructions by all proper means;
- (5) To consult with his client on all questions of doubt which do not fall within the express or implied discretion left to him;
- (6) To keep his client informed to such an extent as may be reasonably necessary, according to the same criteria."

20. In considering what is relevant or reasonably necessary to the scope of the retainer, the Court of Appeal of New Zealand has held that while the duties are governed by the scope of the retainer, it would be unreasonable and artificial to define that scope by reference only to the express instructions of the client and that matters which fairly and reasonably arise in the course of carrying out those instructions must be regarded as coming within the scope of the retainer: *Gilbert v Shanahan* [1988] 3 N.Z.L.R. 528.

21. In respect of matters which come to the solicitor's notice in the ordinary course of business, it is the solicitor's duty to identify any matters which are or may be important to the client and to bring them to his notice, for example a right of way over property or the absence of planning permission, or indeed anything which might be materially adverse to the client's interests.

22. A large part of a solicitor's activities is directed towards protecting the client against possible future risks arising from the transaction. This is particularly

true in the realm of conveyancing. If a solicitor fails to protect the client by making appropriate enquiries and searches then he will be negligent. The solicitor may rely on having passed the results of enquiries and searches to the client, but only provided that they take care to explain the gist of any relevant information they have acquired from those enquiries and searches to the client.

23. Another aspect of the solicitor's duty is to warn the client about particular risks by pointing out hazards of a kind which should be obvious to the solicitor but which the client, as a layman, may not appreciate. In *County Personnel (Employment Agency) v Alan R Pulver & Co* [1987] 1 W.L.R. 916 at 922D Bingham LJ stated that:

"If in the exercise of a reasonable professional judgment a solicitor is or should be alerted to risks which might elude even an intelligent layman, then plainly it is his duty to advise the client of these risks or explore the matter further."

24. This may extend to information obtained while fulfilling the solicitor's retainer, whether or not the matter in question is itself within the scope of the retainer. As Laddie J stated in a well-known passage in *Credit Lyonnais SA v Russell Jones & Walker (A Firm)*, 2002] EWHC 1310 (Ch); [2003] P.N.L.R. 2 at [28]:⁵

"... if, in the course of doing that for which he is retained, he becomes aware of a risk or a potential risk to the client, it is his duty to inform the client. In doing that he is neither going beyond the scope of his instructions nor is he doing 'extra' work for which he is not to be paid. He is simply reporting back to the client on issues of concern which he learns of as a result of, and in the course of, carrying out his express instructions ... If a dentist is asked to treat a patient's tooth and, on looking into the latter's mouth, he notices that an adjacent tooth is in need of treatment, it is his duty to warn the patient accordingly. So too, if in the course of carrying out instructions within his area of competence a lawyer notices or ought to notice a problem or risk for the client of which it is reasonable to assume the client may not be aware, the lawyer must warn him..."

⁵ Quoted wholly or in part and approved in *Stone Heritage Developments Ltd v Davis Blank Furniss (A Firm)* [2007] EWCA Civ 765; [2007] Lloyd's Rep. P.N. 33 at [34]; *Swain Mason v Mills & Reeve (A Firm)* [2007] EWCA Civ 765; [2007] Lloyd's Rep. P.N. 33 at [40]; *Minkin v Landsberg* [2015] EWCA Civ 1152; [2016] 1 W.L.R. 1489 at [37]; *Lyons v Fox Williams* [2018] EWCA Civ 2347; [2019] P.N.L.R. 9 at [30].

25. Before concluding this section there are a few final points to make.
26. The first is that the sophistication and experience of the client will be relevant to the duty to warn in particular. A solicitor may well owe a higher duty to a lay client unused to buying property than to a sophisticated developer client or a commercial lender. An inexperienced client will need and will be entitled to expect the solicitor to take a much broader view of the scope of his retainer and of his duties than will be the case with an experienced client. It is relevant to note that the risks in question here are still quite new, and may well not be obvious even to a client who has purchased property many times previously.
27. Secondly, the judgment of risk is ultimately for the client. If the solicitor takes steps to draw risks to the client's attention and to explain them adequately, but the client still chooses to proceed and take the risk, the solicitor has fulfilled his duty. The duty is to inform and advise, and to ensure that the information and advice is understood by the client. It is not part of their duty of care to force their advice on the client. Obviously in such circumstances the solicitor would be well advised to ensure that the advice is fully recorded in writing.
28. Thirdly, the law summarised above relates to solicitors. There seems to be surprisingly little law on duties owed by other professionals undertaking conveyancing work, i.e. legal executives and licensed conveyancers. However, in my view the same principles will apply. All professionals acting on a property transaction are under the same basic duty to use reasonable care and skill. A firm of solicitors which employs legal executives to undertake conveyancing work should not in my opinion expect them to be subject to a lesser duty than a solicitor undertaking the same work.
29. Licensed conveyancers are registered to undertake specifically that type of work and hold themselves out as specialising in it, and hence may be expected to be expert in it, for example on what types of searches are available and what are appropriate to protect the client's interests. The Society of Licensed Conveyancers

notes on its website that it produces a series of plain English guides for its members to use in explaining particular issues to clients and notes that:⁶

“... studies have shown that failure to communicate or explain issues properly is the second biggest source of negligence claims. These days it is not enough to just tell clients something, conveyancers need to be assured they have understood the point. ”

This tends to suggest very much the same duty as would apply to a solicitor.

30. This brings me to the last point: any guidance issued by the relevant professional body (the Law Society for solicitors and the equivalent bodies for other conveyancers) will be relevant to the existence of a duty and to its requirements, and is likely to be accorded considerable weight by the courts, both as evidence of the general practice of the profession and also in certain situations, as an indication of what specific steps a reasonably careful and competent solicitor would take. As Jackson & Powell points out (para. 11-089):

“Although these various sources are generally intended to reflect the existing practices of the profession, they have also led to a greater uniformity of practice. Thus it has become increasingly difficult for a solicitor to justify conduct which falls short of that described in the guides.”

31. Advice from the professional bodies is addressed in the next section.

C. The Law Society and other professional bodies

32. My Instructions provide a helpful summary of the current state of play in terms of the consideration of Climate Change Risks by the Law Society. As Jackson & Powell points out (para. 11-089) although the Solicitors' Regulation Authority's approach as the regulator of the profession is less prescriptive than it used to be, its *Standards and Regulations 2019* (and in particular the *Code of Conduct for Firms 2019*, and the *Code of Conduct for Solicitors, RELs and RFLs 2019*)

⁶ <https://www.conveyancers.org.uk/membership/client-guides/>

set out the professional requirements on many points of a solicitor's conduct. The SRA also periodically issues warnings about risks inherent in certain areas of practice, e.g. mortgage fraud.

33. The Law Society has issued a number of publications to assist solicitors in practice, the most important of which is probably the *Law Society's Conveyancing Handbook*, which is reissued annually, and has also issued specific warnings or guidance on important matters, the most notable perhaps for this purpose being its "Warning Card" on contaminated land risks (2001) leading to its Practice Note on the topic in 2014. Failures to heed and follow the recommendations given in Law Society Practice Notes, such as the Contaminated Land Practice Note and other authoritative guidance, are likely to be found to be negligent.⁷

34. Work is currently ongoing within the Planning and Environmental Law Committee of the Law Society to develop a Practice Note on Climate Risk, building on the Law Society's Climate Change Resolution which was published in October 2021. Publication of a Practice Note would obviously be an important development in clarifying the duties owed by solicitors. However, internal review and consultation procedures, and the need for ultimate approval by the Council of the Law Society mean that it will be potentially some considerable time before a final, approved Practice Note is issued. It appears that the Law Society is more advanced than other professional organisations. There is no pending guidance from the SRA, Council for Licensed Conveyancers, or Chartered Institute of Legal Executives.

35. The Law Society has however issued an ambitious Climate Change Resolution (28 October 2021).⁸ The Resolution is partly about solicitors' firms themselves recognising their own climate impacts and the profession providing a lead in

⁷ Jackson & Powell, para. 11-127.

⁸ [file:///C:/Users/st/Downloads/The%20Law%20Society%20%20Climate%20Change%20Resolution%20\(2\).pdf](file:///C:/Users/st/Downloads/The%20Law%20Society%20%20Climate%20Change%20Resolution%20(2).pdf)

making changes to combat greenhouse gas emissions. However, section 3 is particularly relevant to advice provided to clients:

“Urges solicitors, always in a way which is compatible with their professional duties and the administration of justice, to engage in climate conscious legal practice by:

- (a) continuing legal education on matters pertaining to climate change, in recognition of the pervasive impact of climate change on society and legal practice;
- (b) approaching any matter arising in the course of legal practice with regard to the likely impact of that matter upon the climate crisis;
- (c) providing (whether themselves or through others) competent advice to their clients on
 - (i) how they can achieve their objectives in ways which mitigate the effects of the climate crisis and promote adaptation to climate change; and
 - (ii) the potential legal risks and liabilities that may arise from action or inaction that negatively contributes to the climate crisis; and
- (d) 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.”

36. The Law Society itself resolves to “... develop, disseminate and publicise educational tools and resources to support solicitors to incorporate into their daily practice advice on the impacts of climate change” (para.2(c)).

37. Whilst the Resolution stops short of expressly urging or recommending conveyancing solicitors specifically to report on climate change risks, it certainly unequivocally calls for “climate conscious” legal practice which includes providing competent advice to clients on risks, whether through themselves or others (such as a search provider). The fact that the Law Society is taking the issue so seriously indicates that more formal guidance is likely to emerge before too long, and thus is highly relevant to transition risk.

38. The Law Society Resolution also urges solicitors to develop well supported career paths for lawyers wishing to transition into distinct disciplines relating to climate change and to engage in pro-bono activities which support this objective. One such pro-bono activity is the Chancery Lane Project, which is a co-operative exercise to develop and share knowledge and precedents, such as its Climate Clauses, all freely available.⁹

39. I note in that regard the recent publication by Professor Sarah de Gay, Visiting Professor at UCL Laws, *Obligation, Self-Regulation, Lawyers and Climate Change – Exploring the Scope of Duties to Advise*,¹⁰ where she comments that “... the more solicitors who rise to the challenge, the more likely it arguably is that a duty to advise could be created.” I agree with Professor de Gay that the ratcheting up of expected standards of care and skill by improvements in knowledge and best practice is a very important factor and – importantly – is also one which is well in progress, and I note that her view is that solicitors in England and Wales do most likely have a duty to advise their clients on climate-related risks..

D. Lenders

40. Advice on climate change risks is also relevant for solicitors and conveyancers who are retained to act for and advise mortgage lenders. Again my Instructions have provided some helpful background on this aspect.

41. The Bank of England has introduced climate stress tests on the UK’s leading banks and insurers. Such tests use a 30 year scenario. The first Biennial Exploratory Scenario test was completed in May 2022. This indicates that if such institutions

⁹ <https://chancerylaneproject.org/climate-clauses/>.

¹⁰ <https://www.ucl.ac.uk/law-environment/blog-climate-change-and-rule-law/obligation-self-regulation-lawyers-and-climate-change-exploring>

fail to manage climate risks the financial impacts by 2050 could be very considerable, up to £225 billion in credit losses. Obviously some banks are acting more swiftly than others. For example the Head of Property Risk at Nationwide Building Society has stated that climate risk is the biggest risk facing lenders over the next 10-15 years. Given the length of typical mortgage terms¹¹ the risks over a 30 year period are obviously very considerable. While some banks and buildings societies will inevitably be in the vanguard of change, there seems little doubt that both peer pressure and regulatory pressure will cause others to follow suit, and that lenders will inevitably exert influence on conveyancing professionals to ensure that these risks are adequately considered in the conveyancing process. Again, as explained below this is a clear example of transition risk faced by domestic and commercial property purchasers in 2022.

E. Duty of care: discussion

42. In the light of the information and legal analysis above, I am asked to consider whether conveyancers owe a duty of care to advise residential and commercial property clients and lenders about the risks and liabilities relating to climate change.
43. As an initial point, while the cases referred to above largely if not exclusively concern solicitors, in my view the duties of other property professionals such as licensed conveyancers, are the same. All owe the same duty to exercise reasonable care and skill in performing the services for which they are retained. Licensed conveyancers hold themselves out as specialising in property transactions and in my view owe no less a duty than a solicitor undertaking the same work.

¹¹ Online sources suggest that The standard mortgage term in the UK is 25 years, but longer-term mortgages of 30 or more years are increasingly common, with some lenders stretching to 40 years.

44. With regard to the duty, I will consider first the case where the client is a normal domestic purchaser, with no commercial interest. Commercial clients and lenders will be considered separately.
45. The starting point will be the terms of the retainer. Unless climate change related risks have been clearly excluded from it on an “informed consent” basis there is no reason why climate change should be treated differently to any other risk. The care and effort likely to be required by the solicitor in explaining the exclusion from the retainer seem to me likely to make that a very unattractive course, since as discussed above, in order to protect themselves this would involve a full and clear explanation of the various aspects of risk, including not only physical damage but also possible future risks on insurance, the acceptability of the property as lending security, and effects on market value
46. One key issue will be the standard of care expected of the professional, judged by the level of the ordinarily competent solicitor or conveyancer. This includes a duty to warn the client about risks associated with the transaction, in particular risks which may be apparent to a professional concerned with property but not necessarily to a lay client. These risks may change over time – a prime example being the risk relating to contaminated land, which are now plainly matters which a solicitor should advise on.
47. In my view, climate change related risks of flooding, coastal erosion, and climate related subsidence are similar risks. A property professional should know that such risks are real, that extreme weather events are highly likely to become more frequent and more serious in their consequences, that these will disproportionately affect properties in particularly vulnerable locations, and that as well as the physical damage caused there are likely to be transition effects, i.e. very high insurance premiums, or non-insurability, the inability to obtain a mortgage, affecting the ability to re-mortgage or sell, and ultimately the value of the property.

48. I note that there is as yet no direct professional guidance from the Law Society on the issue, though the relevant Committee is looking at the issue, which itself is indicative there is a real concern. It is also the case that the Law Society has published a Resolution based on such risks, and that lenders and their regulators are at the first stages of responding to these risks. These factors create a clear transition risk. Even if such searches are not yet widespread, these factors point towards the likelihood of their becoming more common, if not indeed standard practice, in the near future. This presents an obvious risk to a client who purchases property now, with the intention of holding it for any significant period, without having undertaken a search which is available, if future searches should demonstrate the property to be at risk.
49. Most importantly, whereas previously it might have been difficult to warn clients in anything but general and probably not particularly helpful terms, commercially available property searches now allow a much more precise assessment of risk for particular properties, over time horizons consistent with those which lenders are likely to adopt.
50. I would suggest that where there is a known risk, such as climate change, it must be within the scope of the conveyancer's duty to exercise reasonable care and skill to be familiar with what products are available and to advise the client as to their use.
51. In my opinion there is therefore now likely to be a duty to advise on such risks, though of course every case is going ultimately to turn on its own facts.
52. In the case of a commercial client, the duty may be somewhat lower, in that some commercial clients might be expected to be more familiar with such risks. However, many commercial clients are likely to be little or no better informed than lay clients, and as mentioned above, these climate change risks are relatively novel for commercial clients just as for lay clients. Furthermore, the commercial client

will not necessarily be aware of what searches are available, and so I would suggest that there is still a duty on the solicitor.

53. Lenders are or obviously should be aware of such risks and are likely to include taking the necessary steps to address such risks, by way of searches, in their instructions to solicitors. If the lender does specifically require an assessment of climate change risk in the letter of instruction then this will become a contractual responsibility for solicitors, and as such a key driver of change in market practice. The prospect that such instructions will become much more common, if not indeed standard practice, will give rise to transition risk for purchasers now. The solicitor will in any event owe a duty to the lender to pass on information which may affect the lender's security: see *Mortgage Express Ltd v Bowerman and Partners*, 7 [1996] 2 All E.R. 836, 1058 per Sir Thomas Bingham MR:

"A client cannot expect a solicitor to undertake work he has not asked him to do and will not wish to pay him for such work. But if in the course of doing the work he is instructed to do the solicitor comes into possession of information which is not confidential and which is clearly of potential significance to the client, I think that the client would reasonably expect the solicitor to pass it on and feel understandably aggrieved if he did not ... if in the course of investigating title a solicitor discovers facts which a reasonably competent solicitor would realise might have a material bearing on the valuation of the lender's security or some other ingredient of the lending decision, then it is his duty to point this out."

F. Practical steps to discharge duty

54. Given the existence of a duty to advise on climate risks, what practical steps should conveyancers take to discharge that duty?
55. The first step seems to me to become familiar with what search services are available and then to advise the client on the need for such a report. Obviously then if the client does not wish to incur the cost, that is their decision, but the

conveyancer should in my view state clearly the risks (both physical and transactional) in not doing so – and should record that advice in writing.

56. Assuming a report is obtained, it is not enough simply to pass over the results to the client – these need to be explained and the risk put in context. For example for a coastal property it may be necessary to explain the risk that whilst coastal defences may now be in place and maintained by an authority, that will not necessarily continue to be the case in the medium or long term.
57. If there are issues arising outside the conveyancer's own professional expertise, such as valuation or insurance or flood risk, it may be necessary to recommend the client considers taking such professional advice. This would of course depend to a large extent on the size and nature of the transaction.
58. It is very important in order for the conveyancer to protect their own position to ensure that all this advice is clearly recorded in writing. The Report on Title would seem the most obvious place to do this.

G. Risks of not discharging duty

59. The risks of not discharging the duty are of course a successful claim in professional negligence, leading to damages and future likely increased insurance premiums, as well as possible reputational damage.
60. Whether the claim is brought in contract or tort, the fundamental principle governing the measure of damages is that the claimant should be put, so far as money can do it, and subject to rules as to remoteness and foreseeability, in the position he would have occupied if the solicitor had discharged his duty. *Jackson & Powell* state at para. 11-291:

“ Where the purchaser's solicitor errs in his advice he gives or in the investigations which he makes on the client's behalf, the property purchased may prove to be less valuable than was assumed at the time of

purchase. The normal measure of damages in such circumstances ... is the amount by which the sum paid by the client exceeds the true value of the property at the date of purchase.”

61. Thus there would have to be an assessment of the value of the property if it had been known to be affected by climate change related risk – this being a question for valuers.

H. When did any duty first arise?

62. My instructions ask whether there is any basis to argue that a duty to advise on climate risks first arose when a climate emergency was declared in the UK in 2019. Obviously as well as the UK Parliament, many local authorities have declared similar emergencies at different times. I find it difficult to derive a duty on conveyancers from these, as they are in very general terms.
63. If asked to say when the relevant factors came together to create the conditions for a breach of duty, I would identify a combination of (a) the beginning of regulatory requirements on lenders as to climate risk, (b) interest by the Law Society in the provision of guidance to solicitors on the topic; and (c) the availability of commercial reports identifying specific at risk properties.
64. That means that the duty probably came into being sometime in 2021/2022.

I. Other questions raised in my Instructions

65. There are a few other miscellaneous questions raised in my Instructions which I address in this Section. I am asked whether there are any key features which it would be helpful for data on climate risk to include. On basic principles I would assume it must identify whether the property is at risk, from what hazard (flooding, subsidence, coastal change, etc.) it is at risk, and over what timescale. I am also asked whether I would recommend aligning forward data provided with relevant international agreements, such as the Paris Agreement. Such agreements

are in my view not particularly useful as a yardstick, as they embody greater or lesser degrees of aspiration and commitment by governments, and are not particularly a good guide for how climate change may occur, or how the market (lenders, insurers, etc.) may react. It is in my view much more useful to align with periods adopted in stress tests by central banks, as the attitude of lenders seems to me to be a key driver of transition risk.

J. Scope of advice and other related matters

66. I deal in this Section with a few administrative matters. I have agreed that my advice is exclusive to Groundsure. I also appreciate that given the transition phase we are in as the issue of climate risk in property transactions develops, Groundsure would wish not only to use the Advice itself, but also to communicate it to conveyancers who may be potential users of their service on the basis that I am not providing legal advice to such conveyancers or endorsing any specific product of Groundsure. I am sympathetic to that, as it is important to educate and inform the profession.

67. This Advice relates to the law in England and Wales and I am not advising on the position in other common law jurisdictions. However, the physical and transition risks will be much the same in jurisdictions such as Australia, and I do not understand there to be significant differences in the law relating to duties of conveyancers, though of course there may be professional guidance which differs in different state jurisdictions. I have noted that there is interest in Australia in the growing importance of climate change issues to lawyers, for example as recent seminar in 2021 in New South Wales¹² and that there is a fast growing amount of climate change litigation in Australia, which is again raising awareness among law

¹² <https://www.lawyersweekly.com.au/biglaw/33158-use-legal-skills-to-solve-this-wicked-problem-the-role-of-lawyers-in-climate-change-debates-litigation-and-social-change>.

firms.¹³ Perhaps most notably, the Chief Judge of the Land and Environment Court of New South Wales, Hon Justice Brian D Preston, in a speech at University College London in February 2020 urged lawyers to take a holistic approach to advice, which would include communicating climate change risks to clients, and said this:¹⁴

“Incorporating the climate change consequences of actions in legal advice is a necessary corollary of the lawyer’s duties to their clients. Under professional rules, lawyers are tasked to deliver legal services competently and diligently.¹⁵ In tort, lawyers also owe a duty of care to their clients. They must exercise the standard of care and skill expected of a qualified and ordinarily competent and careful lawyer in the exercise of their profession.¹⁶ Climate change and its consequences are leading to changes in what is to be expected of a competent and careful lawyer. “

K. Summary of Advice

68. In summary, my Advice is as follows:

- (1) Solicitors and other conveyancers owe a duty to clients to provide warning and advice as to risks which the conveyancer is or should be aware of and which may adversely affect the property being purchased.

¹³ <https://www.law.com/international-edition/2022/03/30/climate-litigation-makes-its-mark-in-australia-law-firms-are-taking-note/?slreturn=20220619100747>

¹⁴ *Implementing a climate conscious approach in daily legal practice*. The article was based on a paper first given at the Australian & New Zealand Legal Ethics Colloquium Fifth Bi-Annual Meeting: Sustainable Legal Ethics as part of the public symposium ‘Should Lawyers Challenge Emitters?’, 4 December 2015, Monash University Law Chambers, Melbourne and substantially revised for the public seminar on 11 February 2020 at the Faculty of Laws, University of College London, London. See file:///C:/Users/st/Downloads/Preston_CJ_-_Implementing_a_climate_conscious_approach_in_daily_legal_practice_presented_at_UCL_February_2020.pdf.

¹⁵ See, for example, Legal Services Council, Australian Solicitors’ Conduct Rules, r 4.1.3. The Australian Solicitors’ Conduct Rules are made pursuant to Part 9.2 of the Legal Profession Uniform Law (NSW), which is a law of NSW pursuant to s 4 of the Legal Profession Uniform Law Application Act 2014 (NSW).

¹⁶ *Hawkins v Clayton* (1988) 164 CLR 539.

- (2) This is one aspect of the general duty to exercise reasonable care and skill in carrying out their retainer.
- (3) Another aspect of the duty is to make such searches and enquiries as are necessary to protect the interests of the client, unless the client decides, having been properly advised, not to make the search or enquiry.
- (4) It is clear that climate change is now presenting two types of risk to purchasers of property.
- (5) The first is physical risk, i.e. the risk of future damage by surface water flooding from extreme storm events, by the sea as a result of sea level rise and coastal erosion, and by subsidence resulting from more extreme temperature conditions. These are likely to worsen in scale and frequency in coming years, and may result in costs and damage to property, devaluation of property, and a worst complete loss of property and associated risk to life.
- (6) The second type of risk is transition risk. This is the risk flowing from the fact that we are in a period of change of attitudes of financial regulators, banks, building societies and other lenders to climate risks, and that this extends to the Law Society as a professional body
- (7) It is therefore foreseeable that in the relatively short term climate change related risks will assume significantly greater importance in the conveyancing and associated lending processes, and that properties which are at risk from such effects will suffer in terms of value and saleability. Such risks are much more likely to be apparent to an experienced conveyancer than to a lay client
- (8) However, in the absence of search reports capable of objectively identifying and ranking specific individual properties in terms of such risks, conveyancers could do little but warn in general terms which would be of limited assistance to a client. The emergence of search tools such as Groundsure's ClimateIndex

is a very important development, as it means that there is a clear practical step which the conveyancer can advise their client to take in respect of such risks.

(9) Taking these factors together, my view is that an experienced conveyancer should be aware of physical and transition climate risks and should as part of their retainer take steps to warn their client about them and advise on steps to respond to that risk.

(10) My view is that this duty probably arose first as a result of the transition risks becoming clear in 2021 as a result of the attitudes of financial regulators, leading banks and building societies; and secondly with the emergence in 2022 of search tools which could pinpoint risk on specific properties.

(11) An obvious step is to make use of the commercial search tools which are available. The conveyancer's duty extends not only to undertaking such searches for the client but also communicating the results and their implications to the client.

(12) Obviously the client is free to disregard and not follow such advice, but it must be clearly communicated and recorded, most likely in the Report on Title.

(13) The consequences of the failure by the conveyancer to follow these practices are the increased likelihood of damages claims for professional negligence, increased insurance premiums, and possible reputational damage.

(14) The conveyancer's duty will depend to some extent on the nature and sophistication of the client. It may be lower in the case of an experienced commercial client who is very familiar with property transactions, but even in the case of commercial clients generally the principles set out above will in my view hold good and would be followed by a prudent conveyancer.

STEPHEN TROMANS KC

**39 Essex Chambers
81 Chancery Lane
London
WC2A 1DD**

21 July 2022

In the matter of

**Conveyancers' Duty of Care to
Advise Clients about Climate
Risk**

and

How to Discharge Such Duty

ADVICE

STEPHEN TROMANS QC

**39 Essex Chambers
81 Chancery Lane
London
WC2A 1DD**

Sykes Partners

Stephen Sykes Esq.