

## Climate Duty of Care and Groundsure's climate risk data, ClimateIndex™

In July 2022 Groundsure instructed leading environmental law practitioner, Stephen Tromans KC, to advise as to whether conveyancers owe a duty of care to advise their clients about climate risk and, if so, how to discharge their duty, including the use of climate risk analysis information. The Advice is available to download [here](#).

Stephen Tromans KC is not endorsing Groundsure's ClimateIndex™ product. Conveyancers and others can check its suitability for their purposes. Additionally, Stephen Tromans KC assumes no legal duty to any person to whom his Advice is communicated.

Another leading legal authority, Professor Sarah de Gay, formerly Slaughter & May's general counsel, has also written in 2022 on the subject as to whether solicitors qualified in England & Wales have a legal duty to advise their clients on climate-related risks. The article is available [here](#) and referenced below. Professor de Gay concludes that no solicitor (not just environmental specialists) should fail to advise their clients on climate-related risks on a retainer-specific basis.

### Your Duty of Care

#### **Q. What are the main sources of law relating to the legal duties of conveyancers (solicitors and licensed conveyancers) to advise clients about climate risks?**

A. The relevant case law relating to the duty of care owed by conveyancers is reviewed by Stephen Tromans KC in his Advice.

Professor de Gay comments on two aspects of the duty to advise:

- First, the **duty to disclose** to the client information of which the conveyancers are actually aware and which is material to that matter of which they have knowledge. This duty is codified in Rule 6.4 of the SRA Code of Conduct for Solicitors makes it clear that ordinarily solicitors
- Secondly, the **duty to warn** the client, in the context of their work on a matter, about obvious legal and commercial risks which they actually spot or ought to spot and do not think or know their client is already on top of. This duty is derived from case law alone. It is more extensive than the duty to disclose because it is not limited to what the conveyancer actually knows but extends to what they ought to have known. See, for example, *Credit Lyonnais SA v Russell Jones & Walker* [2002] EWHC 1310 and *Robert Boyce v Rendells* [1983] 2 EGLR 146.

#### **Q. Do conveyancers owe their clients a legal duty to warn about the adverse impacts of climate change on land and buildings?**

A. As noted in the above answer, conveyancers owe a duty to clients to provide warning and advice as to risks which they are or should be aware of and which may adversely affect the property being purchased. This now includes predicted climate change impacts.



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It is part of the general duty to exercise reasonable care and skill in carrying out their retainer.

**Q. Does the same duty of care apply to licensed conveyancers?**

A. The law does not distinguish in this respect between the duties of solicitors and licensed conveyancers. The same duty of care applies to both.

**Q. Does the same duty apply to residential property clients and commercial property clients?**

A. The conveyancer's duty depends to an extent on the nature and sophistication of the client. Climate risks are much more likely to be apparent to a conveyancer than to the vast majority of their clients.

The standard of care which conveyancers owe is higher for homeowners and less experienced commercial clients who cannot be expected to know the impacts of climate change on their property.

The standard of care is lower for more experienced commercial clients who can be expected to be better informed about these impacts. Nonetheless, for all commercial clients the key principles of the duty of care apply and should be followed by prudent conveyancers.

**Q. Are law firms with in-house environmental expertise under a higher duty than say a high street law firm?**

A. The short answer is yes.

[Professor de Gay](#) has commented that the more the lawyer knows about climate-change risks, the more likely they are to identify them in the course of their work and hence to have to warn their clients about them.

She has observed that City law firms' websites and pitch documentation referencing their environmental expertise contribute to the growing likelihood that climate change-related risks will be caught by the tortious duty to warn.

This is accentuated for those law firms who have joined legal networks such as the Net Zero Lawyers Alliance or similar initiatives which commit them to reducing their carbon emissions.

Professor de Gay concludes that the duty to warn will be at its strongest where a solicitor from a Magic Circle law firm is advising an unsophisticated client.

**Q. Where does the conveyancers' retainer come in this - can conveyancers exclude the provision of climate advice from their retainer?**

A. A conveyancer should be aware of climate risks and should, as part of their retainer, take steps to

warn their clients and advise them on the steps they may wish to take to respond to the risk.



Conveyancers can exclude climate advice from the retainer, but this would be a very unattractive course to take.

The client's fully informed consent would be required for the exclusion to be legally effective. This would necessitate a full and clear explanation of climate risk, including physical damage, possible future risks on insurance, acceptability of the property as lending security, and effects on market value.

Professor de Gay has argued that attempts by solicitors to exclude their liability for failing to warn clients about obvious legal and commercial risks may not only be ineffective but could also of themselves amount to a breach of the SRA's rules (see: the 2020 case of *SRA v David Hayhurst*).

Law firms which refuse to advise on climate risk may wish to think twice about the message this sends to their clients, particularly commercial and lender clients who are under increasing pressure from ESG and other forms of market regulation to mitigate their climate impacts.

Lastly, restricting the retainer is unnecessary. The means for discharging the conveyancers' duty of care are readily and freely available - climate risk analysis such as ClimateIndex™ from Groundsure.

**Q. What risks do conveyancers take if they ignore their climate duty of care?**

A. Failure by conveyancers to follow reasonable steps to discharge their duty may result in damages claims for professional negligence, increased professional indemnity insurance premiums, and possible reputational damage.

**Discharging Your Duty of Care**

**Q. How should conveyancers discharge their duty of care?**

A. Conveyancers should make use of the commercial search tools which are available. This now includes climate data analysis which is now included in core environmental searches produced by Groundsure and is easy to use.

The conveyancer's duty is to undertake such searches for the client and communicate the results and their implications to clients in the Report on Title.

**Q. What is a conveyancer supposed to do with climate data - other than simply to pass it to the client?**

A. The benefit of Groundsure's ClimateIndex™ is that we have taken raw climate change data and analysed it to provide a property specific rating. This is then presented to the client in a simple and

easy to understand way.



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Stephen Tromans KC concludes that conveyancers owe their clients a duty to provide warning and advice about risks which they are or should be aware of and which may adversely affect the property being purchased, including climate change impacts.

Conveyancers should become familiar with what site specific climate risk analysis is available and then advise the client on the need for such information.

When the climate information has been obtained by the conveyancer, it is not enough to simply pass over the results to the client. That would be insufficient to discharge their duty of care. The climate risk analysis needs to be explained and the risk put in context. The Report on Title is the most appropriate place for the conveyancer to summarise the findings of the climate data analysis.

If a client does not wish to be advised about these matters, that is their decision. The conveyancer should nevertheless clearly state the risks (both physical and transitional) in not doing so – and should record that advice in writing. The Report on Title is again the most obvious place to do this.

**Q. Is the first key step for conveyancers involved in property purchases or leases to advise the buyer, tenant or lender on how to assess the climate risks associated with the asset?**

A. Stephen Tromans KC advises 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.

Stephen Tromans KC advice is that conveyancers should first of all become familiar with what site specific climate risk analysis is available and then advise the client on the need for such information.

ClimateIndex™ gives conveyancers a simple to follow analysis of complex climate risk data and the consequences for the subject property on timelines aligned to the Bank of England / Prudential Regulation Authority methodology.

**Q. Does the conveyancer have to try to interpret the (technical) information in a climate module of a report for clients who might not technically be experts themselves?**

A. There is no need for the conveyancer to 'interpret' technical climate information because Groundsure has already carried out this analysis.



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ClimateIndex™ is more than climate change data. Groundsure has taken the complex raw data, analysed and interpreted it to provide a property specific score that is easy to understand for all involved parties.

A clear and easy to understand analysis of complex climate change risk data is provided for a number of physical risks. It explains how climate change may impact the property in the future (1,5 and 30 years' time) compared to today.

The information contained within Groundsure's report may be copied by the conveyancer into the Report on Title.

If questions do arise, Groundsure's technical teams are on hand to answer any questions the client may have.

**Q. Should conveyancers simply relay climate risk analysis to the client, or is it also necessary to explain it to the client and spell out any associated legal risks?**

A. Stephen Tromans KC makes it clear that it is not enough for the conveyancer to simply pass over the results of climate risk analysis to the client without comment or explanation. The results need to be explained by the conveyancer and the risk put in context.

So, for example, for a coastal property at risk of coastal flooding, it may be necessary for the conveyancer to explain the risk to the client that, whilst coastal defences may now be in place and maintained by a public authority such as the Environment Agency or Natural Resources Wales, this will not necessarily continue to be the case in the medium or long term, based on an understanding of the relevant law.

**Q. If conveyancers fail to advise on climate risks, is there a possibility of being sued for negligence by a client who has suffered loss because climate change was not properly explained to them before signing the purchase contract?**

A. 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" Julie Vaughan, Herbert Smith Freehills LLP, July 2022.

The risks of not discharging the duty are an award of damages and future likely increased insurance premiums, as well as possible reputational damage.

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 they would have occupied if the conveyancer had

discharged their duty. *Jackson & Powell on Professional Negligence*, 9th edition, states at para. 11-291:



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*“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.”*

So, 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.

**Q. Is there a danger that conveyancers will not be able to match each of the risks identified in ClimateIndex™ with recommendations as to how the client can mitigate each risk (other than not proceeding with the transaction)?**

A. In the vast majority of cases (>90%), properties in England and Wales will not have a predicted exposure to climate risk.

If the property is already at some level of risk from flooding, ground instability or coastal erosion, as well as being identified by ClimateIndex™ as having an increased exposure to these risks, Groundsure’s recommendations would remain the same. Clients will be directed to the relevant sections of Groundsure’s report for managing these risks.

In some cases, properties which are not currently at some level of risk from flooding, ground instability or coastal erosion will be exposed to these risks as a result of climate change.

To discharge the duty of care, 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 from surveyors, valuers, insurers and technical specialists. Groundsure can also assist conveyancers and their clients with their queries.

In some cases, clients may have to take a commercial view as to whether they wish to proceed with the transaction or not.

### **Climate Data Analysis and ClimateIndex™**

**Q. What climate analysis is available to conveyancers to use and explain to clients?**

A. Stephen Tromans KC has described the emergence of search tools such as Groundsure’s ClimateIndex™ as a very important development for conveyancers.

The availability of such climate data analysis provides a clear and first practical step for conveyancers to take to advise clients about climate risks to UK land and buildings.

**Q. What climate data information is available from Groundsure?**

A. Groundsure introduced a new climate module, known as ClimateIndex™, in June 2022. ClimateIndex™ provides analysis on the physical climate risks from flooding, coastal erosion and natural ground instability. These are the principal physical risks identified by the Bank of



England/Prudential Regulation Authority in their stress testing scenarios. It is important to note the difference between the number of properties in England and Wales at risk today vs 30 years from now (2050):

	<b>Current</b>
<b>Coastal erosion</b>	10,800
<b>Ground instability</b>	449,000
<b>River flooding</b>	88,000
<b>Surface water flooding</b>	2,000,000
<b>Coastal flooding</b>	151,000

**Number of properties affected**

**By 2050**

- 42,000
- 2,000,000
- 202,000
- 2,500,000
- 333,000

So, over the next 28 years an estimated 2.4m properties in England and Wales are predicted to be at risk from increased ground instability, flooding and coastal erosion due to climate change. This equates to 1 in 12 properties.

**Q. What does Groundsure's ClimateIndex™ tell conveyancers?**

A. ClimateIndex™ is Groundsure's analysis of climate change risk data. ClimateIndex™ provides a property specific rating from A to E. It is a weighted analysis tool which looks at the core physical risks of flood, coastal erosion and natural ground instability over 3 time periods; 1, 5 and 30 years. In addition, it shows the variance between the different time periods. The physical risks and time periods are based on the criteria used by the Bank of England/Prudential Regulation Authority in their stress testing scenarios, and how those risks give rise to transition effects such as having a material impact on the ability to insure or mortgage the property, which in turn could affect the future resale value.

ClimateIndex™ has been designed to ensure solicitors are climate compliance ready. It means that there is now a clear, practical and reasonable step which the solicitor can take to discharge their duty of care in respect of such risks.

Solicitors can now advise their clients on future risks which may not only cause physical damage to a property, but also give rise to transition effects, such as having a material impact on the ability to insure or mortgage the property in the medium to long term. In turn, this could affect its future resale value.



**Q. How much does ClimateIndex™ cost?**

A. ClimateIndex™ is included within Groundsure's core environmental reports at no additional cost to the client.

**Q. Is ClimateIndex™ included in an existing report or is there a separate report?**

A. ClimateIndex™ is included as standard in Groundsure's core environmental searches: Homebuyers and Avista for residential properties and Screening and Review for commercial properties. All at no additional cost. Circa 30% of the residential market and 20% of the commercial market are already benefiting from ClimateIndex™.

**Q. Is it possible for Groundsure to provide a standalone climate report (e.g., if a relatively up to date desktop report already exists)?**

A. As we have chosen to include the ClimateIndex™ in our core environmental reports at no additional cost, this is not something we are currently offering. We have chosen this route as it streamlines the workflow for all involved and saves additional disbursement costs on searches.

**Q. Would a conveyancer breach their duty of care by not commissioning a specialist climate risk report if the seller has provided insufficient information?**

A. Stephen Tromans KC has advised that tools such as ClimateIndex™ are an important



development in the establishment of the duty of care. It means that there is now a clear, practical and, above all, reasonable step which conveyancers can take to advise their clients about climate risks.

Consequently, it is prudent for conveyancers to undertake such searches for the client - unless the client has given them its fully informed consent to exclude these matters. See *Hurlingham Estates Limited v. Wilde Partners* [1997] 1 Lloyd's Rep 525. See the Q&A relating to the Retainer.

Failure to advise on climate risk may result in damages claims for professional negligence, increased insurance premiums and possible reputational damage.

The Chancery Lane Project (a collaborative initiative of legal and industry professionals which provides practical contractual clauses to mitigate climate risk) published guidance in 2020 that where climate change risk searches are unavailable, standard climate change statements should be added to the Report on Title to make buyers aware of the future risks that may affect the property.

## Lenders

### Q. What approach are lenders and insurers taking to climate change?

A. Lenders and insurers are exposed to climate change impacts just like anyone else, but on a bigger scale.



The image shows a promotional banner for Groundsure. On the left is the Groundsure logo with the tagline 'LOCATION INTELLIGENCE'. Next to it is a Twitter icon with the handle '@groundsure'. To the right is a speech bubble icon. Further right, contact information is provided: 'For more information visit [www.groundsure.com](http://www.groundsure.com) or contact your preferred search provider. Email: [info@groundsure.com](mailto:info@groundsure.com) Tel: +44 (0)1273 257 755'. Below this is the address: 'Sovereign House, Church Street, Brighton, BN1 1UJ'. At the bottom left of the banner is a grey rectangular box containing a black warning triangle icon with a white exclamation mark.

In May 2022, the Bank of England (BoE) completed its first 'climate stress test' of the UK's leading banks and insurers.

The BoE predicted that banks are exposed to £225bn of credit losses by 2050. They also predicted that insurers might experience an 8-15 per cent decrease in asset value, with up to 7% of UK homes becoming uninsurable for flood risk.

The record breaking temperatures and resulting drought in England and Wales during the summer of 2022 will result in a 500% increase in claims for damage to buildings from subsidence.

These numbers help to frame the conveyancer's climate duty of care. This is not a minor risk for lenders or borrowers.

In addition, as Professor de Gay has pointed out, professional indemnity insurers are going to ask law firms, at annual policy renewal time, about their efforts to train their lawyers on climate-related topics. To secure PI insurance cover at an affordable rate, law firms will need to respond to this challenge.

### **Q. What duties do conveyancers owe their lender clients?**

A. Conveyancers acting for lenders owe a duty to pass on to them information which may affect their security. This includes climate change data analysis about likely impacts to land and buildings.

Furthermore, over time lenders will inevitably require an assessment of climate change risk in the letter of instruction. This then becomes a contractual responsibility for conveyancers.

## **Law Society and Climate Risk**

### **Q. What position is the Law Society taking on whether solicitors have a duty of care to advise clients about climate change?**

A. In 2020, the Law Society set up its Climate Change Working Group, chaired by Caroline May of Norton Rose Fulbright, and in October 2021 published its Climate Change Resolution, in which it:

*“Resolved to provide guidance to solicitors on how, when approaching any matter arising in the course of legal practice to take into account the likely impact of that matter upon the climate crisis in a way which is compatible with their professional duties and the administration of justice”.*

The Law Society has just (September 2022) consulted on a wide-ranging Practice Note relating to the development of climate conscious legal practices which solicitors will wish to monitor.

In addition, the Law Society’s Planning and Environmental Law Committee is developing a new, detailed Practice Note on Climate Change.



**Q. Is climate change too difficult a topic to be covered by a Practice Note? It is quite different from contaminated land and flood risk for which Law Society Practice Notes exist. (There is no dedicated legal regime (e.g., Part IIA of the Environmental Protection Act 1990 for contaminated land) that allocates / apports liability between landowners for damage caused by climate change. Climate risk may be uninsurable).**

A. There are currently just two environmental Practice Notes: The Contaminated Land Practice Note, last updated 28th January 2020; and the Flooding Practice Note, last updated 31st January 2020. The Law Society understands that these Practice Notes will need to be updated to take account of climate change impacts.

Practice Notes describe good practice. Whilst solicitors are not obliged to follow Practice Notes, if questioned by the Solicitors Regulation Authority or sued by a client, it will be a lot easier for them to account for the advice they have given if it is consistent with the relevant Practice Note.

The Law Society is currently developing further Practice Notes on climate change and developing

climate conscious legal practices, as well as a sector specific Practice Note on Climate Change and Real Estate.

Notwithstanding the complexity of climate change, the Law Society is mindful of the serious consequences which it presents to clients (including homeowner, lender, commercial property owners) and law firms alike. Quite simply, the risks are too significant to ignore.

## Other questions

**Q. Does ClimateIndex™ identify opportunities for adapting the property or site to mitigate climate change risks (e.g., an investment opportunity to retrofit buildings and increase their capital value)?**

A. Indirectly, yes. If the property is at risk from flooding, it provides an opportunity for property owners to retrofit their property to future proof it against climate change risks. Where risks are identified, it may be prudent for a purchaser to have discussions with a vendor over the purchase price, taking into consideration possible increases in insurance and the availability of mortgages.

However, we have also seen many examples where the ClimateIndex™ score does not become significantly worse over the next 5 or 30 years. In these scenarios it provides a useful tool for helping customers get a better context and perspective. More than 90% of properties will receive a climate risk rating of A or B (meaning little to no increased risks) over the medium term (2050).

**Q. Isn't the climate risk for a specific property mitigated by how that property is constructed and the climate adaptations included in its design? Is this considered by Groundsure's climate data module, ClimateIndex™?**

A. ClimateIndex is a property specific analysis of climate change risks focused on the increasing



frequency and magnitude of these over the next 30 years. The inclusion of design specific information is not possible in a desktop search report. Only a property specific survey undertaken by a chartered surveyor or similar would incorporate such information.

Additionally, construction in flood prone areas is increasing despite warnings from the relevant authorities. As such, a new build should not automatically be seen as being protected from physical climate change risks.

**Q. Does the climate data module overlap with other reports obtained by conveyancers, e.g., flood risk reports, surveyors' reports?**

A. Whilst the ClimateIndex™ module does not overlap with other datasets or reports obtained as

part of the transaction, it is included as standard in Groundsure's core environmental searches (Homebuyers, Avista, Screening and Review).

**Q. How can conveyancers and clients have confidence in ClimateIndex™?**

A. Groundsure is the market leader for environmental searches in the UK having produced products for millions of properties.

Groundsure has over 20 years' experience providing environmental data, analysis and reports to property professionals and lenders.

Three of the UK's top five lenders use Groundsure analytics to support secured lending decisions with forward climate data for their commercial property lending decisions.

Groundsure developed ClimateIndex™ after extensive research and development, working with a range of partners, government agencies and leading climate data specialists.

Groundsure is a founding member of the Conveyancing Information Executive and adheres to the codes of practice published by the CIE.

Groundsure operates stringent internal operating practices to ensure data integrity and quality via its own Data Governance Council.

Groundsure search products are backed by £10m professional indemnity insurance as standard.

