BoE Report – Liability Risks

- Duty to Mitigate
- Duty to Adapt
- Duty to Report
  - not to mislead consumers / investors
  - to comply with reporting laws

BoE Report – Liability Risks

- Law
- Cases
- Prospects of success

Climate Change is a Financial Risk

- Physical risks (to infrastructure, commodities, buildings etc)
- Transition risks (increased regulation, competition from low carbon technologies)
- Liability risks

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Duty to Not Mislead

Misleading statements made in relation to:

- A company's policies on climate change
- Its achievements on carbon emissions reduction
- Its green credentials

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Duty Not to Mislead

- Company and financial law
- Consumer protection and advertising law
- Contract law
- Tort

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Company & Financial Law

- Volkswagen (German, U.S., Netherlands)
- In the UK - liable to pay damages (section 90A Financial Services and Markets Act)
- Company directors can be liable (section 463 Companies Act)
- Risk management

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Prospects

- High (short to medium term)
- Investors and consumers increasingly make decisions based on green statements
- Technology advancements
- Litigation funders are moving in

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Duty to Comply

- Task Force on Climate Related Disclosures
- U.S. Attorney General investigations
- FRC letter

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U.K. mandatory reporting requirements

- Principal risks and uncertainties
- Long term factors and trends
- Complementary to financial reports
- Key to understanding long term risks

Cases

- Are carbon intensive companies reporting that climate risks are “principal risks and uncertainties”?
- Paris Agreement
- ClientEarth preparing complaints to the regulator
- If upheld, reports must be corrected, directors can be liable

Prospects

- High (short to medium term)
- Peabody, Exxon (Shell, BP?)
- Paris Agreement changes landscape
- Financial evidence increasing by the week

Duty to Adapt

Investors and directors are ”fiducaries”

- Trustees owe to pension members
- Directors owe to the company

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Duty to Adapt

1. Duty of loyalty – must act in good faith in the **best interests** of beneficiary
2. Duty of prudence – fiduciaries must act with **due care, skill and diligence**

This is a risk management problem

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Cases

- Peabody and Arch Coal
- Case brought by pension fund members
- Litigation funders

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Cases - ClientEarth

- Working with pension fund members
- Asking funds what risk management processes they have in place
- Do they accept climate change is a material financial risk
- Regulator / Ombusman / Court

Prospects

- Trustee liability
- Need to prove loss and damage
- In the short term – moderate (only CE claims on foot – eventually litigation funders will move in)
- In the medium term – high (decisions made today)

Prospects

- Company director liability has some procedural hurdles
- Derivative claims / leave of court
- Role of litigation funders
- In the short term – moderate
- In the medium term – high (decisions made today)

Conclusions

- Liability risks in the BoE are credible, material, and may arise sooner than thought
- Actuaries can play a key role in reduing that liability through educating financial actors on climate related risks
- The ”high priests and priestess of risk”!

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Questions?

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