

Climate Change Risks – Charity Trustee Investment Duties

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The legal picture



Case law - seriously outdated and insufficient

- Most cases concern private trusts or pension funds
- Bishop of Oxford case the leading case
 - A 1991 case
 - An exempt charity
 - Not unlike a pension fund
 - A declaration sought on the facts and not granted
 - Some obiter comments all the guidance we have
 - No consideration of climate change

Legislative and market developments

- Trustee Act 2000
- Companies Act 2006
- Charities Acts 2006-2011
- Charities (Protection and Social investment Act) Act 2016
- Rise of impact investment

The phenomenon of climate change

- Not an “environmental issue”
- A matter of public trust and confidence
- Pressure growing year on year
- Major difficulties and debate
- Unprecedented?

The coalition



Who are the coalition members?

- Mostly foundations, faith groups and charities
- Over 50 members, including NCVO, RSPB, Nesta, Client Earth
- Former Archbishop Rowan Williams and Lord Stern are supportive
- Own approximately £2.5billion of assets
- Still open to others to join

Why form the coalition now?

- IPCC Report
- Extinction Rebellion
- UN Biodiversity Report
- A climate emergency?
- A nature emergency?
- The Climate Strikes

The aims of the coalition



Requested a reference to the Tribunal

- Written open letters to Commission and Attorney General
- “A new landmark judgment on responsible investment”
- Clarify the law and legal principles applying to charity investment
 - Does anyone know what the law requires?
 - Or are we in a situation where all we have are views and perspectives?
- Asking the Commission or the Attorney General to refer questions about the nature and application of trustee duties to the Tribunal
- Instructed counsel and now preparing applications for consent to seek declarations from the court – expect consent to be given...

Charity Commission Response



CC14 – Potentially Misleading

- CC14 – Charities and investment matters
 - “Decide whether to adopt an ethical, socially responsible or mission related approach to investment and ensure it can be justified”
 - Suggests a purely permissive approach to “ethical investment”
 - No suggestion that trustees may be *obliged* to invest “ethically” or divest
- Bishop of Oxford case
 - Trustees satisfied an investment would conflict with objects?
 - Should not invest, regardless of the financial consequences

Charity Commission Response

- On the positive side...
 - Public attitudes have moved on
 - Sympathetic to the call for greater clarity for trustees
 - Expectation that charities will invest in line with objects
- At the same time...
 - A reference has potential to be costly and time consuming
 - The outcome of a reference is “by definition, uncertain”
 - Other options to consider

What issues will a court consider?



Issues we hope a court will consider

- When does an investment conflict with charitable purposes?
- Do trustees need to analyse and track positive and negative impacts?
- How should “negative impact risks” be weighed against other factors?
- In a climate emergency, are “carbon intensive assets” permissible?
- What does all this mean for investment management mandates?

What will happen next?



Next Steps

- In dialogue with the Commission
- Commission has not indicated any intention to make a reference
- Members of the coalition will be applying for consent to seek a declaration and expect consent to be forthcoming
- A landmark court judgment?...

Questions and discussion



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