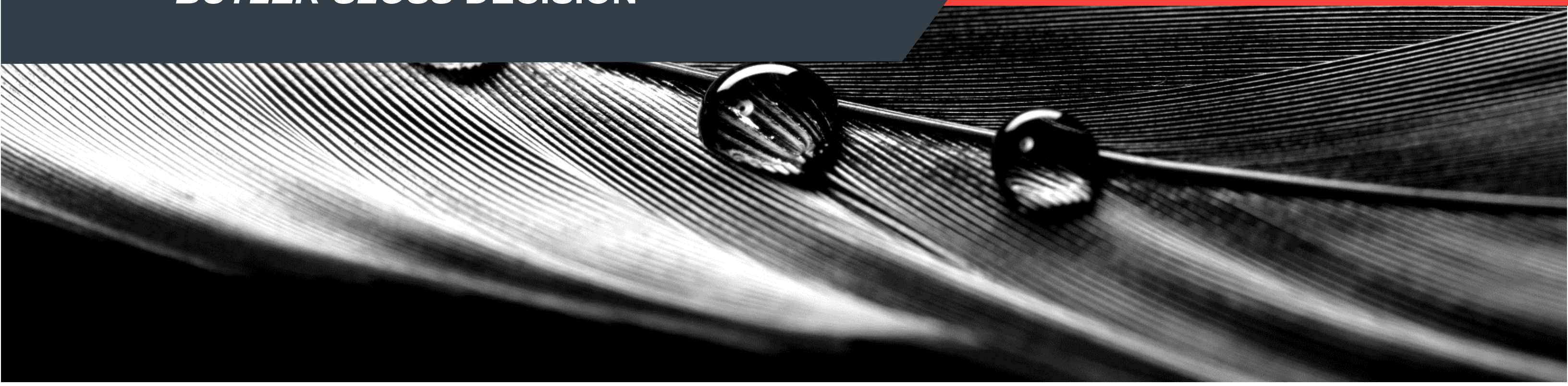
CLIMATE CONSCIOUS INVESTING AND THE *BUTLER-SLOSS* DECISION



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Investors have, so far, brought climate-related claims falling into either of the following two categories. First, claims alleging breach of duties against investment managers (including pension trustees), or against other persons such as company directors. Second, greenwashing claims, based on alleged misleading statements which have caused investors loss.

Butler-Sloss v Charity Commission for England and Wales [2022] EWHC 974 (Ch); [2022] Ch 371 ("Butler-Sloss") has potential implications for both categories. The implications are likely to be of relevance to an increasingly large number of companies and investors as much as to those involved in strategic litigation. The number of funds guided – or even limited – by ESG principles continues to grow; claims alleging either losses resulting from misleading statements or breaches of directors' duties have increased in number; and the regulatory obligations requiring companies to make climate-related disclosures continue to develop.

This summer saw the first deadline for the publishing of reports under the FCA's climate-related financial disclosure regime set out in the ESG Sourcebook, a new component of the FCA Handbook. That regime will apply to an increasing number of companies and funds with consequences for investor actions. In that context, *Butler-Sloss* provides an important insight into how certain aspects of such claims could progress.

Butler-Sloss v Charity Commission

Butler-Sloss was a claim brought by the trustees of two charities. The trust deeds for both charities defined their charitable objects as whichever charitable purposes the trustees determined. In both cases, the respective trustees had used their discretion to decide that a principal purpose of each charity should be "*environmental protection*". The trustees wished to pursue an investment policy that, in effect, would have allowed them to divest from any companies which are not aligned with the Paris Agreement. The Court was asked under the Part 8 procedure to decide whether the investment policy was: (i) permissible; and/or (ii) mandatory having regard to the alleged direct conflict between investing in certain companies and the charities' purposes.

The Court (Michael Green J) held that the investment policy was permissible, but not mandatory (even if investments not aligned with the Paris Agreement directly conflicted with the charities' purposes). In so doing, the Court clarified a debate that had been open since *Harries v Church Commissioners For England* [1992] 1 WLR 1245 (known as **"**the *Bishop of Oxford* case") as to whether it would be obligatory, in circumstances where an investment directly conflicts with a charities' objects, to divest. The Court in *Butler-Sloss* concluded that there were no such circumstances. Instead, "*trustees have a discretion as to whether to exclude such investments and they should exercise that discretion by reasonably balancing all relevant factors including, in particular, the likelihood and seriousness of the potential conflict and the likelihood and seriousness of any potential financial effect from the exclusion of such investments*". This approach is likely to be applicable also to pension scheme trustees and other investment managers. On the facts of the case, the Court held that the trustees had properly exercised their discretion and were entitled to pursue the investment policy. This analysis and conclusion have consequences beyond the scope of charity deeds.

Breach of Fiduciary (and other) Duties

The gist of investor claims in the first of the two categories above is that investment managers have breached their duties to investors, particularly fiduciary duties. Investment managers must act in the best interests of their investors. This duty will be supplemented by contractual duties in the investment management agreement or pension trust deed, tortious duties (i.e. a duty to exercise due skill, care and diligence), and regulatory duties, such as the duties under FSMA.

Butler-Sloss makes it less likely that investment managers will have been found to have breached their duties if they pursue investments informed by ESG factors. That is evident from the Court's conclusion – the charity trustees were entitled to pursue an investment policy that, in essence, divested from companies which were not aligned with the Paris Agreement, but which nonetheless may generate capital growth and/or income.

This reflects a shift from the earlier decisions in *Cowan v Scargill* [1985] Ch 270 and the *Bishop of Oxford* case. In *Cowan v Scargill,* the Court held that the trustees of a mineworkers' pension scheme were in breach of fiduciary duty as a result of their refusing to approve an investment plan for the scheme unless it was amended to, in essence, prohibit an increase in overseas investments in sectors in competition with coal – essentially prioritising a non-financial consideration in the investment decision. In the *Bishop of Oxford* case, the Court refused to grant declarations to the effect that the Church Commissioners of England were obliged to use ethical (i.e. Christian) considerations in their investment decisions. The court in each case reaffirmed the fundamental principle that investment managers are obliged to give "*paramount*" consideration to the financial interests of their investors. For example, in the *Bishop of Oxford* case, the Court stated (at p.1258H) that "*the circumstances in which charity trustees are bound or entitled to make a financially disadvantageous investment decision for ethical reasons are extremely limited. … [I]t is not easy to think of a practical example of such a circumstance.*" The Court also stated (at p.1247-8) that trustees should not make investment decisions on the basis of moral views, even where one view is more widely supported, where that course would involve "*a risk of significant financial detriment*".

Butler-Sloss cuts across these statements of principle. The Court in *Butler-Sloss* concluded (at [87]) that the charity trustees "*have decided, reasonably in my view, that there needs to be a dramatic shift in investment policies in order to have any appreciable effect on greenhouse gas emissions and for there to be any chance of ensuring that there is no more than a 1.5ºC rise in pre-industrial temperature. The only question is whether they have sufficiently balanced that objective with any financial detriment that may be suffered as a result. In my view they have…*". This is a significant change in emphasis. It is no longer the case that ethical considerations should be taken into account only in "*extremely limited*" circumstances (where they are financially disadvantageous). The new approach is that non-financial considerations can reasonably be balanced against the risk of financial detriment.

Of course, a key plank of the reasoning in *Butler-Sloss* was the fact that one of the principal purposes of the charities was environmental protection. For those investment managers who hold themselves out as managing "green" investments, the position will be similar, where the trust deed or investment management agreement will likely stipulate parameters around the status and extent of ESG compliance of underlying investments. Given the exponential growth in the green investment market and assets under management in so-called "green", "ethical", and "ESG" funds[1], the decision in *Butler-Sloss* has application beyond the charity sector and reflects a wider shift in favour of taking ESG factors into consideration when making investment decisions.

The case does not address the more complex issue of whether trustees can breach their duty by *not taking enough* consideration of ESG factors: that remains for another day.

The decision also recognises that non-financial considerations (such as environmental factors) will not necessarily lead to reduced returns for investors. Much will depend on the evidence in the case. The trustees' position, which the Court did not criticise, was that there may be a risk of short-term financial detriment as a result of the proposed investment policy, but that this risk would decrease over the longer-term. The Court appears to have accepted that as a reasonable position.

[1] For example, a report from October 2022 noted that ESG-related assets under management already totalled USD 18.4 trillion in 2021 but were expected to continue growing and reach USD 33.9 trillion by 2026. See PwC, *Asset and wealth management revolution 2022: Exponential expectations for ESG* (2022).

Further, the Court noted that, when considering the exclusion of certain investments, it may be appropriate to "*take into account the risk of losing support from donors and damage to the reputation of the charity generally and in particular among its beneficiaries*".

Butler-Sloss therefore strengthens the position of investment managers who wish to take into account ESG factors when reaching investment decisions or investors and shareholders who call for directors, trustees, or managers to take more substantive action in response to the climate crisis, another trend faced by funds, charities, and public companies over recent years.

Greenwashing claims

Butler-Sloss is also relevant to greenwashing claims. Such claims have been brought by investors under ss.90 and 90A FSMA (and tortious claims may also be possible). The basis of the FSMA claims is for the loss suffered as a result of: (i) untrue or misleading statements within, or omissions from, prospectuses or listing particulars (s.90); or (ii) untrue or misleading statements within, or omissions from, certain other information published by the company, or as a result of a dishonest delay by the company in publishing information (s.90A).

Such litigation has gathered recent momentum. In 2010, a US Supreme Court decision limited the ability of investors to bring claims against non-US listed issuers in the US (where this litigation was well-established).[2] This development, combined with the growth of the third-party funding and ATE insurance markets and increasingly experienced and specialist litigation firms, has seen a steady rise in claims against issuers for misleading statements in the UK.

Such claims are often brought on behalf of institutional investors or a very large class of individual investors and seek substantial damages. Prominent examples of claims include the RBS rights issue litigation, and a very high value claim against Tesco. Other claims – of significant value – have been brought more recently against Glencore, G4S, and Indivior.

It might be said that these claims all fall under the ESG umbrella where they relate to failures of corporate governance. In parallel, and alongside a wider political, social, and regulatory move towards ESG and climate change literacy, there has been a measurable increase in the volume and specificity of statements made to the market by issuers about ESG and climate issues (whether in listing particulars or more broadly).

The circumstances in which climate change issues may be of interest to investors also appears to be increasing. At the beginning of October 2023, a report commissioned by Schroeders[3] analysing 770 global institutional investors found that 49% of investors in Europe and the Middle East have made a commitment to reach net zero by 2050: the target set in order to achieve the Paris Agreement's goal of keeping global warming at no more than 1.5°C. This would tend to suggest a greater degree of consideration by investors as to what issuers say about the climate

[2] *Morrison v. National Australia Bank*, 561 U.S. 247 (2010)

[3]https://www.schroders.com/en-us/us/individual/media-center/schroders-institutional-investor-study-2023-investors-target-sustainability-and-private-assets-amid-energy-transition-opportunities-as-inflation-concerns-remain/

change policies, leading to a greater risk of potential claims should any related statements transpire to be inaccurate.

These claims, of course, are distinct from the claims brought in *Butler-Sloss*. However, some of the discussion in the judgment is illustrative. The Court, in *Butler-Sloss*, noted that there "*is an obvious difficulty in defining which investments are or are not aligned with the goals of the Paris Agreement*". However, it is implicit in *Butler-Sloss* that the Court considered that a strategy of alignment with the Paris Agreement was not too uncertain or vague. This is relevant in FSMA claims in answer to the (potential) defence of non-reliance, i.e. that the impugned statement is too vague as to be reasonably capable of being relied upon. In *Butler-Sloss*, the Court upheld the decision of the charity trustees to pursue an investment policy which, in essence, divested from companies that were not aligned to the goals of the Paris Agreement, and appears to have considered such an investment policy to be sufficiently certain for the charity trustees to pursue it. By analogy, a claimant in a greenwashing claim can say that a statement about a company's alignment with the Paris Agreement is sufficiently certain and concrete for: (i) the claimant to have been misled; and (ii) the statement to be proven to be false. Such an argument is increasingly pertinent where Paris-alignment is proving to be a widespread benchmark against which issuers are describing their climate change policies to the market (whether in listing prospectuses or in statements to the market more broadly). Further, in *Butler-Sloss*, the Court accepted that it is not necessarily the case that considerations which appear to be non-financial may not have financial consequences in the long-run.

Finally, *Butler-Sloss* indicates the increased willingness of Courts to grasp the nettle in respect of predictive future judgments in a complex field, namely climate change. Its judgment illustrates the extent to which courts will analyse and review decisions made in a complex and uncertain world, of which climate change is a particularly clear example.

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