CLIENTEARTH

OPINION ON POTENTIAL LIABILITY FOR CLIMATE-RELATED TRANSITION PLAN DISCLOSURES

A. INTRODUCTION

1. We are asked to advise ClientEarth as to the potential liabilities of companies and directors that might arise under the law of England & Wales if a requirement that companies disclose a climate-related transition plan ("**CRTP**") is introduced following a government consultation on that subject.[1]

2. The International Financial Reporting Standards ("**IFRS**") S2 standard on climate-related disclosures, promulgated by the International Sustainability Standards Board ("**ISSB**"), defines a CRTP as *"an aspect of an entity's overall strategy that lays out the entity's targets, actions or resources for its transition towards a lower carbon economy, including actions such as reducing its greenhouse gas emissions".*[2]

3. IFRS S2 requires the disclosure of any CRTP that a company may have, along with information about that plan. This requirement forms part of the more general disclosure requirements, set out in paragraph 14 of IFRS S2, relating to information enabling users of a company's financial reports to understand the effects of climate-related risks and opportunities on its strategy and decision making. Even in the absence of a formal CRTP, IFRS S2 requires disclosure about many key elements that one would expect to be included as part of any transition plan.[3]

4. The Transition Plan Taskforce ("**TPT**") in its October 2023 "Disclosure Framework" set out in detail what it regards as good practice for robust and credible transition plan disclosures, including numerous specific recommendations under 5 general headings – foundations (including strategic ambition), implementation strategy, engagement strategy, metrics and targets and governance ("**the TPT Disclosure Framework**").[4] In 2024, the IFRS Foundation took ownership of the TPT's disclosure-specific materials

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[1] As of the date of this opinion, the Government's anticipated consultation has yet to be released.
[2] IFRS S2 *Climate-related Disclosures* (June 2023) page 19.
[3] See, for example, paragraph 14(a)(ii) requiring the disclosure of information about how the entity has responded to, and plans to respond to, climate-related risks (etc), including "*current and anticipated direct mitigation and adaptation efforts*".
[4] TPT Disclosure Framework, page 15, page 21.

and indicated that the TPT Disclosure Framework is likely to be incorporated into ISSB-derived climate disclosure regulation and feature heavily in future guidance published by both the ISSB and IFRS Foundation.

5. In considering potential liabilities arising out of the proposed introduction of a requirement to disclose a CRTP, we are asked to use IFRS S2 and the TPT Disclosure Framework as reference points, on the basis that these sources are considered likely to inform the UK regime. We therefore assume that any such requirement (whether by way of amendment to the Companies Act 2006 ("**CA 2006**"), the FCA Handbook, or otherwise) will be based on the content of those two documents. This opinion is intended to be read in the context of those two documents and we summarise their effect briefly below.[5] We also summarise the existing corporate disclosure requirements that cover similar ground.[6] It is, in our view, significant that any requirement for CRTP disclosure would likely build on existing climate-related disclosure obligations.

6. We understand that a number of legal concerns have been raised by some market participants in response to the prospect of additional disclosure requirements, which include:

    6.1. concerns that climate targets deemed acceptable today, may, over time, be judged as insufficient or obsolete – particularly in light of rapid technological advances and shifting expectations;

    6.2. the risk that future access to improved data and methodologies may retrospectively expose inaccuracies in previously reported information or statements within a CRTP, raising questions about whether companies can acknowledge such discrepancies transparently without incurring liability;

    6.3. the prospect of liability in circumstances where a company's CRTP is predicated on external or contingent factors – such as government policy or infrastructure development – that ultimately fail to materialise, thereby undermining the feasibility of the plan.

7. We aim to address those specific concerns at appropriate points below[7].

[5] Section D below.
[6] Section C below.
[7] For example, see paragraphs 163 to 170 below.

8. Our Opinion is structured as follows:

   8.1. Section B sets out an executive summary of our views.

   8.2. Section C provides a summary of the existing framework for climate-related disclosure obligations.

   8.3. Section D provides a summary of the effect of IFRS S2 and the TPT Disclosure Framework.

   8.4. Section E identifies the key elements of potential CRTP disclosures which inform our analysis of the potential liabilities.

   8.5. Section F sets out the relevant law under which companies and directors may potentially incur liability in relation to CRTP disclosures.

   8.6. Section G considers whether CRTP disclosures are likely to result in heightened liability risks for companies and directors.

   8.7. Section H considers, from a liability perspective, whether an additional system of so-called "safe harbours" would be appropriate in relation to the disclosures in CRTPs.[8]

   8.8. Section I considers the potential advantages to companies and directors which we consider are likely to flow from the proposed disclosure of CRTPs.

   8.9. Section J identifies recommended practices for companies and directors to minimise or mitigate liability concerns.

   8.10. Section K concludes, and also deals with certain practical concerns in relation to the proposed reforms.

9. In this Opinion, we are focused primarily on the personal position of directors, their roles, and potential liabilities, as well as the potential liabilities of companies. We focus only on civil liability.[9] We do not address other wider policy considerations which are beyond the remit of this Opinion.

[8] The "safe harbours" concept is defined at paragraph 132 below.

[9] In considering company liabilities, we do not in this Opinion seek to address issues arising in competition law or public law. The Transition Plan Taskforce consider the impacts of competition law in

10. Our advice is directed at the likely general impacts of the proposal to introduce a requirement that companies must disclose a CRTP. It is necessarily high-level, focusing on the main areas of potential liability, particularly where our advice is based on broad assumptions as to the nature of any requirement which might be introduced. It therefore does not cover every hypothetical scenario in which liability might arise, nor does it consider all nuances that might arise in particular causes of action or potential liabilities, which will necessarily be fact dependent.

11. This Opinion is not a substitute for individual legal advice and we do not assume any duty or liability to, or any client relationship with, any reader of this Opinion. Individuals or companies faced with particular issues arising should seek their own legal advice in relation to those matters.

B. EXECUTIVE SUMMARY

12. For the reasons set out in greater detail below, and subject to the more detailed discussion there, in our view:

    12.1. A requirement that companies disclose a CRTP is not likely to result in a materially heightened liability risk for companies and directors.

    12.2. Given the "safe harbours" that already exist under the current law - that we assume are likely to apply to CRTP disclosures - as well as the existing legal requirements which would need to be met in order for liability on the part of companies and directors to arise, there is no compelling reason from a liability perspective to introduce any further or additional specific "safe harbour" regime in relation to CRTP disclosures.[10]

    12.3. In certain material respects, there are likely to be advantages for directors and companies flowing from compliance with a requirement to publish a CRTP, as the discipline of preparing and disclosing the CRTP in line with the TPT Disclosure Framework is likely to promote compliance with existing obligations and potentially reduce the risk of claims in relation to those obligations including potentially greenwashing claims.

'Legal considerations for transition plan preparers using the TPT Disclosure Framework' (October 2023).

[10] The "safe harbours" concept is defined at paragraph 132 below.

12.4. There are certain steps which directors and companies could take to reduce or minimise the risk of liability in respect of CRTP disclosures.

13. We conclude our opinion by considering certain practical concerns which we understand have been expressed in relation to the proposed reforms.

C. SUMMARY OF EXISTING CLIMATE-RELATED DISCLOSURE OBLIGATIONS

14. It is significant context for our Opinion that companies (particularly listed companies) are already subject to a number of disclosure requirements which may require them to make climate-related disclosures. This is important because an assessment of whether any new disclosure requirement presents heightened liability risks must be informed by the disclosure regime already in place.

C1. DISCLOSURES UNDER THE COMPANIES ACT 2006 AND LISTING RULES

15. Part 15 of the Companies Act 2006 ("**CA 2006**") sets out requirements concerning a company's annual account and reports. Chapter 4A of Part 15 CA 2006 sets out the requirements relating to strategic reports.[11]

16. Section 414CA CA 2006 requires certain companies, including all listed companies both on the Main Market and on AIM,[12] to include in their annual strategic reports a "*non-financial and sustainability information statement*".[13] Section 414CB CA 2006 provides that this statement must contain certain stipulated *"climate-related financial disclosures",*[14] including the following:[15]

    16.1. *"a description of the company's governance arrangements in relation to assessing and managing climate-related risks and opportunities";*

    16.2. a description of how the company identifies, assesses and manages those risks and opportunities and how those processes are integrated into the company's overall risk management process;

[11] See, in particular, section 414A CA 2006. The requirement to prepare a strategic report does not apply if the company is entitled to the small companies exemption: s. 414A(2) CA 2006.
[12] See section 414CA(1) CA 2006, albeit subject to the other provisions of section 414CA.
[13] Section 414CA(A1) CA 2006.
[14] Section 414CB(A1) CA 2006.
[15] Section 414CB(2A) CA 2006.

16.3. a description of the principal climate-related risks and opportunities affecting the company and the time periods by reference to which they are assessed;

16.4. a description of the actual and potential impacts of those risks and opportunities on the company's business model and strategy;

16.5. an analysis of the resilience of the company's business model and strategy under different climate-related scenarios; and

16.6. importantly for present purposes, *"a description of the targets used by the company to manage climate-related risks and to realise climate-related opportunities and of performance against those targets"* and a description of the key performance indicators used to assess progress against those targets and the calculations on which they are based.

17. Under section 414CB(4A), directors are permitted to omit (in whole or in part) certain aspects of the climate-related financial disclosure which would otherwise be required where they reasonably believe that such disclosure is not necessary for an understanding of the company's business, having regard to the nature of that business and the manner in which it is carried on. However, directors who take that approach are required by section 414CB(4B) to provide a *"clear and reasoned explanation"* of that reasonable belief.

18. Additionally, under section 414C(2)(a) and (b), the strategic report is required to include a fair review of the company's business and a description of the principal risks and uncertainties facing the company. Where climate related matters are relevant to these areas, they should be addressed accordingly. However, the need for any reference to or disclosure of climate-related matters within these sections of the strategic report will depend upon the specific nature of the company's business and the materiality of climate-related risks.

19. Further, the FCA's Listing Rules require certain types of listed company[16] to state in their annual financial reports whether they have made climate-related financial disclosures consistent with the recommendations of the Task Force on Climate-Related Financial

[16] Companies incorporated in the UK that have their equity shares listed in the equity share (commercial companies) category (6.6.6R(8)); companies with listings of non-equity shares and non-voting equity shares, excluding investment entities and shell companies (16.3.23R); listed companies satisfying the requirements at 22.1.1R (22.2.24R).

Disclosures ("**TCFD**")[17], the identity of any recommended disclosures they have not included and the reason for not including them.

20. The Financial Reporting Council reviewed compliance with rules requiring climate-related financial disclosures under sections 414C, 414CA and 414CB CA 2006 in its *'Thematic Review: Climate-related Financial Disclosures by AIM and Large Private Companies'* dated January 2025.[18] The report demonstrates that there is significant room for improvement with regard to compliance with existing obligations. The key finding of the report was that, whilst many companies had endeavoured to comply with the Act, the quality of reporting varied significantly. For example, some companies failed to produce all required information, produced it in an unstructured manner, failed to provide supporting analysis concerning their climate-related resilience and failed to identify specific climate risks outside of general risk management.

C2. DISCLOSURES ARISING FROM THE APPLICATION OF EXISTING ACCOUNTING STANDARDS

21. Furthermore, there is growing recognition among leading accounting institutions that climate-related risks must be considered in a company's financial statements within the framework of existing accounting and auditing standards where material.

    21.1. The IFRS Foundation has stated that in applying existing IFRS standards, "*companies must consider climate-related matters in applying IFRS Standards when the effect of those matters is material in the context of the financial statements taken as a whole*."[19]

    21.2. Furthermore, the International Accounting Standards Board (**IASB**) of the IFRS Foundation are conducting an ongoing programme of work concerned with providing further clarity on how climate-related and other uncertainties should be reflected in financial statements. It has since published the Exposure Draft Climate-related and Other Uncertainties in the Financial Statements, a draft document which includes 8 illustrative examples highlighting the relevance of

[17] Set out in its final June 2017 report *"Recommendations of the Task Force on Climate-Related Financial Disclosures"*.
[18] Financial Reporting Council, *'Thematic Review: Climate-related Financial Disclosures (CFD) by Aim and large private companies'* (21 January 2025). This report followed earlier thematic reviews, including Financial Reporting Council, *'CRR Thematic review of TCFD disclosures and climate in the financial statements'* (July 2022).
[19] IFRS Foundation, *'Effects of climate-related matters on financial statements'* (November 2020), page 1.

climate-related uncertainties to financial statements prepared under IFRS accounting.

22. The International Auditing and Assurance Standards Board (**IAASB**) has also made statements to a similar effect, that climate-related risks must be considered in the application of the International Standards on Auditing (**ISAs**) during auditing processes. In its October 2020 audit practice alert, the IAASB observed that although the term 'climate change' is not expressly referenced in the ISAs, climate-related events or conditions may heighten the vulnerability of financial statement items and disclosures to misstatement. Consequently, such factors fall within the auditor's purview, requiring an assessment of the risk of material misstatement and the gathering of sufficient, appropriate audit evidence to support their professional opinion.[20]

23. Therefore, in considering the potential impact of a requirement to disclose a CRTP, it is important that matters relevant to CRTPs may already need to be considered by companies in the preparation of their financial statements, where such considerations are relevant and required under applicable accounting standards.

D. SUMMARY OF THE RELEVANT EFFECT OF IFRS S2 AND THE TPT DISCLOSURE FRAMEWORK

24. While the scope and content of any transition planning requirement introduced by Government remain to be seen, we assume that an obligation on companies to disclose a CRTP is likely to feature centrally in the new rules. For that reason, this Opinion focuses only on such a requirement and proceeds on the basis that any obligation to disclose a CRTP will be based to some extent on IFRS S2 and the TPT Disclosure Framework. We therefore briefly set out their key elements.

25. IFRS S2 sets out a large number of disclosures required in relation to climate-related risks and opportunities in relation to governance, strategy, risk management and metrics and targets. The requirements as to strategy are set out in paragraphs 8 to 23, covering the identification of climate-related risks and opportunities that can reasonably be expected to affect the company's prospects,[21] the current and anticipated effects of such risks and opportunities on its business model and value chain,[22] their effects on its strategy and decision making[23] and on its financial position, performance and cash

[20] IAASB, *'The consideration of climate-related risks in an audit of financial statement'* (October 2020).
[21] IFRS S2, paragraphs 10 – 12.
[22] IFRS S2, paragraph 13.
[23] IFRS S2, paragraphs 14.

flows[24] and the resilience of its strategy and business model to climate-related changes.[25]

26. The requirements most directly relevant to CRTPs are those concerning the effects of climate-related risks and opportunities on strategy and decision making. Paragraph 14(a) of IFRS S2 sets out a series of specific requirements as to information about how the company has responded to, and plans to respond to, climate-related risks and opportunities, including how it plans to achieve any climate-related targets it has set or which it is required to achieve by law or regulation. One specific requirement under sub paragraph 14(a)(iv) is the disclosure of information about "*any climate-related transition plan the entity has, including information about key assumptions used in developing its transition plan, and dependencies on which the entity's transition plan relies*".

27. The TPT Disclosure Framework sets out in essentially two parts: (**i)** general principles concerning the manner in which companies should conduct their transition planning processes; and **(ii)** detailed disclosure recommendations specifically as to the contents of a CRTP, designed to be consistent with and build on IFRS S2. As for the general principles, the TPT recommends that entities consider three interrelated channels of action in the design of any CRTP: **(i)** decarbonising the entity, **(ii)** responding to the entity's climate-related risks and opportunities, **(iii)** and contributing to an economy wide transition.[26]

28. As for the disclosure recommendations, they both presuppose disclosure of the plan and relate to its substantive content. They are presented under 5 broad topics, which are, in summary: **(i)** the foundation or strategic ambition of the plan; **(ii)** the implementation strategy of the plan; **(iii)** the engagement strategy, i.e., the manner in which the company is engaging with other parties in order to achieve the strategic ambition of its plan; **(iv)** the metrics and targets that the company is using to monitor its progress towards the strategic ambition of the plan; and **(v)** how the company is embedding its plan within its governance structures.

29. Within those broad topics, the recommendations encompass, amongst other things: **(i)** the identification of targets and milestones, including relevant timeframes; **(ii)** current and anticipated actions to achieve those targets; **(iii)** expectations as to the contributions

[24] IFRS S2, paragraphs 15 – 21.
[25] IFRS S2, paragraphs 22 – 23.
[26] TPT Disclosure Framework, pages 16-17.

that those steps will make towards achieving those targets and the overall ambition of the plan; **(iv)** expectations as to the effect of the implementation of the plan on the financial position of the company; and **(v)** the specific metrics used to set targets and monitor progress.

E. THE KEY ELEMENTS OF POTENTIAL CRTP DISCLOSURES

30. It is possible to extract from IFRS S2 and the TPT Disclosure Framework certain key elements that are relevant for the purposes of analysing potential legal liability for companies and directors.

31. In assessing those requirements, in order to frame our discussion of potential liabilities below, it is important to draw a distinction between present statements of fact and forward-looking statements. As to that distinction:

    31.1. Some of the contents of CRTPs will be statements about things that the company has already done or which have already happened – i.e. present statements of fact.

    31.2. Other statements will be forward-looking statements – i.e. broadly speaking, a statement that is about what may happen in the future.

32. We address both of these below, although our focus in this opinion will be upon potential liability for forward-looking statements contained in CRTPs.

33. Broadly, on the basis of the framework set out in IFRS S2 and the TPT Disclosure Framework, there are essentially three broad categories of forward-looking statement that might be required under a CRTP.

34. <u>First</u>, there will be **targets**, by which we mean statements of defined objectives which are more specific than the strategic overall objectives driving the CRTP.[27]

35. <u>Second</u>, there will be **plans**, by which we mean statements of intention as to steps to be taken by the company to achieve the targets or the wider objectives.[28]

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[27] See, for example, TPT Disclosure Framework paragraph 4.3(b) – *"an entity… shall disclose information about any targets for reducing absolute gross GHG emissions for Scope 3 that it has set"*

[28] See, for example, TPT Disclosure Framework paragraph 2.1 "*an entity shall disclose information about the short-medium, and long-term actions it is taking or plans to take in its business operations in*

36. Third, there will be **expectations** of the impact that particular steps or policies will have. For example:

36.1. TPT Disclosure Framework ¶2.1(c) requires an entity to disclose "*the expected principal contributions of its actions towards achieving its Strategic Ambition".*

36.2. TPT Disclosure Framework ¶2.4(b) requires an entity to *"disclose qualitative and quantitative information about how it expects implementation of its transition plan to affect its financial position over the short-, medium-, and long-term"*.

37. Identifying the different kinds of statement under these broad categories more readily enables identification of the potential liabilities of companies and directors. We set out the law governing potential liabilities in Section F immediately below, before considering whether, in our view, the requirement to make such disclosures is likely to result in heightened liability risks for companies and directors.

F. THE RELEVANT LAW GOVERNING POTENTIAL LIABILITIES

38. In this section, we explain the relevant law concerning what we view as the key sources of potential liability in relation to disclosures made in a CRTP, which primarily relate to the different ways in which liability can arise in respect of representations or statements made by a company or its directors. This section is not intended to be an exhaustive analysis of each cause of action and focuses only on the matters relevant to our analysis.

39. This section distinguishes between the potential liability of companies (Section F1 below) and the potential liability of directors (Section F2 below). In practice, it is possible for there to be a degree of overlap between the two and these categories should not be viewed as hermetically sealed.[29]

40. Another important distinction to draw at the outset is between liabilities based on a "**dishonesty standard**" (i.e. knowledge that the representation is false or recklessness as to whether the statement is true or false) and liabilities based on a "**negligence standard**" (i.e. a liability standard based on a failure to exercise reasonable care, skill and diligence). Some liabilities discussed below (for example, claims in deceit) require the Court to be satisfied of dishonesty. In practice, dishonesty-based liability presents a

order to achieve the Strategic Ambition of its transition plan." and 2.3(a) – *"an entity shall disclose… a brief description of any policy or condition that it uses or plans to use in order to achieve the Strategic Ambition of its transition plan."*

[29] See, for example, the discussion in paragraph 63 in relation to so-called 'dog leg' claims.

higher hurdle for potential claimants than negligence-based liability.[30] We discuss the significance of dishonesty standards in greater detail below.

F1. POTENTIAL COMPANY LIABILITIES[31]

41. In practical terms, the potential liabilities facing companies that arise from disclosures in a CRTP can broadly be divided into potential liability owed to investors and potential liability owed to others – a distinction which is identified under each cause of action referred to below. However, it should be noted that this distinction does not always apply neatly, and some sources of liability may give rise to claims from both groups.

Section 90A FSMA

42. In broad terms, section 90A of the Financial Services and Markets Act 2000 ("**FSMA**") imposes certain liabilities on listed companies and also excludes certain liabilities on the part of listed companies and directors.

43. Broadly, it provides that companies admitted to trading on a securities market[32] will, in certain circumstances, be liable to pay compensation to a person who acquires, continues to hold, or disposes of, securities in reliance on published information relating to the company, and suffers loss as a result of any untrue or misleading statement, or an omission of anything required to be included in the publication.[33] Accordingly, liability is limited to claims brought by investors, but can arise from any published information relating to the company.

44. A company is only liable under this section if a "*person discharging managerial responsibilities*" within the company knew the statement was untrue or misleading or was reckless in that regard or knew the omission was a dishonest concealment of a material fact.[34] That is in effect a requirement of dishonesty (i.e. a dishonesty standard).[35]

[30] For example, although the burden of proof remains the balance of probabilities, the Courts have recognised that serious allegations involving fraud and dishonesty require cogent evidence to succeed because *"the more serious the allegation the more cogent the evidence required to overcome the unlikelihood of what is alleged and thus to prove it"*: *ACL Netherlands BV v Lynch* [2022] EWHC 1178 (Ch) at [473]. Counsel pleading a case must not make any allegation of fraud without clear instructions and reasonably credible material which establishes an arguable case of fraud: BSB Handbook rC9.2.c.
[31] It should be noted that many of these sources of liability are capable of applying to both companies and directors.
[32] Schedule 10A, Part 1, Paragraph 1(1). "Securities market" has the meaning given in paragraph 8(1)(b) of Schedule 10A.
[33] Schedule 10A para 3.
[34] Schedule 10A para 3(3).
[35] See further the discussion in *ACL Netherlands BV v Lynch* [2022] EWHC 1178 (Ch) at [468] to [470].

45. The section also imposes liability in respect of loss suffered by a person who acquired, continues to hold or disposes of securities and suffers loss as a result of delay by the company in publishing information, where a person discharging managerial responsibilities within the company acted dishonestly in delaying the publication of the information.[36]

46. Where section 90A applies, paragraph 7 of Schedule 10A excludes (with certain exceptions) other forms of liability on the part of the company.[37] In practice, this essentially means that, where section 90A applies to a set of factual circumstances, the company's liability can only arise under section 90A or under certain other specifically identified forms of civil or criminal liability identified in paragraph 7(3), but not in any other way. Further, paragraph 7(2) provides that *"a person other than the issuer is not subject to any liability, other than to the issuer"* in respect of loss covered by section 90A.[38] In broad terms, the effect of paragraph 7(2) is that investors may only bring a claim under section 90A against the relevant company and not, for example, against the individual director(s).

Section 90 FSMA

47. Section 90 FSMA concerns, more specifically, the contents of listing particulars and prospectuses. Any person responsible for the listing particulars or prospectus (likely to include the directors) must pay compensation to a person who has acquired securities and suffered loss as a result of (i) any untrue or misleading statement in the particulars, or (ii) an omission of any matter required to be included by sections 80 or 81 FSMA.[39] Therefore, liability is limited to claims brought by investors in relation to listing particulars and prospectuses specifically, which may be made against both companies and directors.

48. The liability under section 90 FSMA is expressly subject to exemptions contained in Schedule 10 FSMA.[40] Under paragraph 1 of Schedule 10 FSMA, a person responsible is not liable if they can satisfy the court that:

[36] FSMA Schedule 10A para 5 and 6.
[37] FSMA Schedule 10A, para 7.
[38] FSMA Schedule 10A, para 7(2).
[39] Section 90(1) FSMA.
[40] Section 90(2) FSMA.

48.1. they reasonably believed (having made such enquiries, if any, as were reasonable) that the statement was true and not misleading, <u>or</u> the matter whose omission caused the loss was properly omitted; <u>and</u>

48.2. that one or more of the conditions in Schedule 10 para 1(3) are satisfied.[41]

49. Therefore, this exemption, in effect, applies a negligence standard to liability under section 90 FSMA.

The tort of deceit

50. A claim in the tort of deceit, also known as a claim for fraudulent misrepresentation, requires that:[42]

50.1. the defendant makes a false representation to the claimant;

50.2. the defendant knows that the representation is false, or alternatively is reckless as to whether it is true or false (i.e. a dishonesty standard);

50.3. the defendant intends that the claimant should act in reliance on it;

50.4. the claimant does act in reliance on the representation; and

50.5. in consequence, the claimant suffers loss.

51. This liability may arise in respect of all types of company and in many different kinds of situations. However, in relation to investors, it is likely excluded where section 90A FSMA applies (although the two types of liability are very similar, so that is of little practical significance at a general level).[43]

52. While a full exposition of the law relating to what constitutes a *"representation"* for these purposes is beyond the scope of this opinion, there are three important points to note.

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[41] Schedule 10 para 1(2) FSMA. These conditions are: **(i)** the person continued in his belief until the time when the securities in question were acquired; **(ii)** the securities were acquired before it was reasonably practicable to bring a correction to the attention of persons likely to acquire them; **(iii)** before the securities were acquired, the person had taken all such steps as it was reasonable for them to have taken to secure that a correction was brought to the attention of those persons; **(iv)** the person continued in their belief until after the commencement of dealings in the securities following their admission to the official list and they were acquired after such a lapse of time that they ought in the circumstances to be reasonably excused.

[42] See, for example, *ACL Netherlands BV v Lynch* [2022] EWHC 1178 (Ch) at [546], citing *Eco 3 Capital Limited v Ludsin Overseas Limited* [2013] EWCA Civ 413 at [77].

[43] Schedule 10A paragraph 7 FSMA.

53. First, actionable misrepresentations are not limited to express representations. Instead, further implied representations may be made in addition to express representations. In determining whether, and if so on what terms, an implied representation has been made, the Court has to consider what a reasonable person would have inferred was being implicitly represented by the representor's words and conduct in the context.[44] There must also be clear words or clear conduct of the representor from which the relevant representation can be implied. All manner of implied representations might be made depending on the context, including (for example) an implied representation that the representor genuinely holds an opinion expressed or that they believe that facts exist to justify it.

54. Second, to be actionable, a representation must generally be a representation of existing fact or law.[45] A mere statement of opinion will not, in principle, be actionable (although in practice such a statement may well carry with it an implied representation as to existing fact).[46]

55. Third, forward-looking statements (discussed in more detail below) that are simply statements as to future events will not generally, in and of themselves, found liability in deceit. However, such statements in practice will often carry with them implied statements as to present intention or fact. The Court in *GI Globinvestment Ltd v XY ERS UK Ltd* [2025] EWHC 740 (Comm) emphasised the following at [974]:

> "*Since a representation must be a representation of past or existing fact, a representation as to the future will not as such found liability in deceit. Nor will a broken promise as such. However, it is clearly established that a representation of present intention is a sufficient representation of an existing fact to form the foundation of an action for deceit. A statement as to the future will often imply a statement as to present intention. However, this principle cannot be taken too far. The mere fact that an expressed intention is not eventually carried into effect is little evidence of the original non-existence of the intention, since the representor may have subsequently changed his mind. (See Clerk & Lindsell at paras [17-12] and [17-13]).*"

Statutory liability for damages for misrepresentation

56. The possibility of a statutory claim for negligent misrepresentation may arise in this context under the Misrepresentation Act 1967. Under section 2(1), where a person has

[44] *Property Alliance Group Ltd v RBS* [2018] 1 WLR 3529 at [132] approving the dicta of Colman J in *Geest Plc v Fyffes Plc* [1999] 1 All ER (Comm) 672.
[45] See for discussion *Clerk & Lindsell on Torts* (24th Ed) at [17-05].
[46] See *Clerk & Lindsell on Torts* (24th Ed) at [17-14].

entered into a contract after a misrepresentation has been made to them by another party to the contract and as a result they have suffered loss, then, if the person making the representation would be liable for damages in respect of the representation had the representation been made fraudulently, that person will be liable notwithstanding that the misrepresentation was not made fraudulently. A person will avoid liability if they can prove that they had reasonable grounds to believe, and did believe, up to the time that the contract was made, that the facts represented were true – in effect a negligence standard. The claimant must have been induced by the representation to enter into the contract and suffered loss as a result.

57. Further, where the misrepresentation was innocent, the court may decide in its discretion under section 2(2) to award damages in lieu of rescission.

The tort of negligence / negligent misstatement

58. Under the principles which have developed after *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] A.C. 465, a party making a negligent misstatement may be liable to others in the law of tort. Under a common law action for negligent misstatement, a claimant must prove not only that there has been a misrepresentation made carelessly causing the claimant loss, but also a duty of care owed by the defendant to the claimant in relation to harm of that sort, which is generally pure economic loss. That generally requires the existence of a special relationship of some sort between the claimant and defendant (see *Caparo Industries v Dickman* [1990] 2 AC 605).

59. The Supreme Court in two recent authorities clarified that for a duty of care to arise, the defendant must possess knowledge of both: (a) the person or class of persons likely to rely on the statement; and (b) the specific transaction or business to which the statement pertains. Absent such knowledge, the defendant cannot be said to have assumed responsibility toward the claimant in respect of that transaction, and no duty of care will be imposed.[47] As a result, a claimant is more likely to establish that a duty of care has arisen in relation to direct investors, than in relation to more remote groups such as non-investors or secondary market purchasers.

[47] *NRAM Ltd (formerly NRAM plc) v Steel* [2018] 1 WLR 1190 at [18] to [24] and *Banca Nazionale del Lavoro SPA v Playboy Club London Limited* [2018] UKSC 43 at [7].

F2. POTENTIAL DIRECTORS' LIABILITIES

60. There are different ways in which directors can become personally exposed to liabilities. For present purposes, we can distinguish between liabilities of directors to the company, and liability of directors to others, which we discuss in turn, before addressing the practical significance of section 463 CA 2006.

Liability of directors to the company

61. Company directors owe the general duties set out in Chapter 2 of Part 10 to the Companies Act 2006. These duties include (in summary form) the duty to do what directors genuinely think most likely to promote the success of the company (section 172 CA 2006) and the duty to exercise reasonable care, skill and diligence (section 174 CA 2006).

62. Directors may face claims from the company alleging breach of duty in respect of losses suffered by the company arising from the exercise of the directors' powers. The situations in which directors may face a breach of duty claim are almost infinitely varied and such claims are highly fact specific.

63. In the context of representations, directors may also face so-called 'dog leg claims' brought by the company.[48] A 'dog leg claim' arises where the directors, in breach of their duties owed to the company, have caused the company to make misrepresentations which result in the company becoming liable to investors or others. In such cases, the company may seek to recover from the director(s) the losses it suffered as a result of that liability to third parties. For example, if a company has suffered liability under section 90A FSMA claim (which cannot be pursued directly by an investor against an individual director as a result of paragraph 7(2) of Schedule 10A) it may seek to recover its losses from the director(s) responsible for the default. In such an analysis, the company's liability to the third party is a 'stepping stone' to (i.e., will be made out before and as a preliminary step to establishing) the liability of the directors.

Liability of directors to others

64. Directors may personally face claims made against them by third parties arising from false statements made by them, either personally or on behalf of the company. Generally, such claims may arise under section 90 FSMA; in the tort of deceit; under the Misrepresentation Act 1967; or under the tort of negligence. In exceptionally rare

[48] See the discussion in *ACL Netherlands BV v Lynch* [2022] EWHC 1178 (Ch) at [434].

circumstances, directors may also face claims for breach of fiduciary duties owed directly to shareholders.[49]

Significance of section 463 CA 2006

65. Under section 463 CA 2006, a director of a company is liable to compensate the company for **(i)** any loss suffered as a result of any untrue or misleading statement in a report or statement to which section 463 applies, or **(ii)** the omission from a report or statement to which section 463 applies of anything required to be included in that report or statement.[50]

66. The reports and statements to which section 463 applies[51] are the strategic report,[52] the directors' report,[53] the directors' remuneration report,[54] and any separate corporate governance statement.[55]

67. Under section 463(3) CA 2006, a director is only liable to compensate the company if **(i)** the director knew, or was reckless as to the fact that, the statement was untrue or misleading or **(ii)** the director knew the omission was a dishonest concealment of a material fact. The effect of this provision is to impose a dishonesty-based liability and, in effect, to exclude negligence-based liability.

68. Under section 463(4) CA 2006, no person shall be subject to any liability to a person other than the company resulting from reliance, by that person or another, on information in a report or statement to which section 463 applies.[56]

69. Section 463 is a highly significant provision in this context.[57] Broadly speaking, its effect where it applies is that:

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[49] Whereas a director owes statutory duties to the company, the default position is that a director does not owe fiduciary duties to a company's shareholders, although such a duty may arise in exceptional circumstances by virtue of a special relationship: e.g. *Sharp v Blank* [2015] EWHC 3220 (Ch) at [9] – [13].
[50] Section 463(2) CA 2006.
[51] Section 463(1) CA 2006.
[52] Chapter 4A of Part 15 CA 2006.
[53] Chapter 5 of Part 15 CA 2006.
[54] Chapter 6 of Part 15 CA 2006.
[55] Section 472A CA 2006.
[56] Section 463(4) CA 2006.
[57] See, for example, Buckley on the Companies Acts (15th Ed) at [4208] – [4250] on section 463, where the authors note *"Indeed, perhaps surprisingly, s 463 gives very wide protection to directors, absolute protection to all other parties that might be involved in the preparation of the information, and excludes liability to anyone other than the company. Moreover, the standard of proof is one of fraud not negligence."*

69.1. <u>only</u> the company can be liable to third parties for reliance on the reports set out in paragraph 66 above; and

69.2. directors will be liable to compensate the company for loss it suffers <u>only</u> if they are dishonest in the manner required by section 463(3).

70. It is important to note that section 463 has not yet been the subject of material judicial scrutiny. Consequently, the precise scope and application of the protection it affords remains somewhat uncertain. In particular, questions persist as to whether its provisions extend to information voluntarily included in a report to which the section applies.

G. WOULD CRTP DISCLOSURES BE LIKELY TO RESULT IN MATERIALLY HEIGHTENED LIABILITY RISKS FOR COMPANIES AND DIRECTORS?

71. We are asked by ClientEarth whether the requirement to make disclosure in a CRTP in the manner described above would be likely to result in materially heightened liability risks for companies and directors.

72. In our view, such a requirement would not result in materially heightened liability risks for companies and directors. We set out the reasoning underpinning this view in this section, which is structured as follows:

72.1. Section G1 provides an introduction and overview of our analysis.

72.2. Section G2 considers, in general terms, the burdens the requirement to disclose a CRTP would impose upon a company and the impact of such an additional burden on potential liability.

72.3. Section G3 considers whether the requirement to make disclosure of certain additional forward-looking statements is likely to result in materially heightened liability risks in relation to such statements.

72.4. Section G4 considers whether the requirement to make disclosure in relation to Scope 3 emissions is likely to result in materially heightened liability risks in relation to such disclosures.

72.5. Section G5 summarises our conclusions on the various issues and draws together our analysis.

G1. Introduction

73. As described above, in the absence of specific proposed legislative reforms, we assume for present purposes that any requirement to disclose a CRTP would be based on IFRS S2 and the TPT Disclosure Framework.

74. Although it is not yet clear which companies would be subject to such a requirement, we assume that it will apply (broadly speaking) to listed companies and large private companies[58] and that the requirement will form part of the requirements for the content of the strategic report or will otherwise be one of the reports falling within the scope of section 463 CA 2006. Beyond that basic point, the potential routes to liability, and the existence of particular "safe harbours", will depend on the particular nature of the company under consideration.

75. In our view, in assessing whether a new mandatory disclosure requirement would give rise to a materially heightened risk of liability, it is necessary to compare **(i)** the likely potential liabilities arising from CRTP disclosure, with **(ii)** existing potential liabilities. That is a point which we consider, where appropriate, below.

G2. Burden and potential impact of burden on liability

76. The first point of comparison is a general one. A requirement to disclose a CRTP compliant with IFRS S2 and the TPT Disclosure Framework will impose an extra burden on companies in that it will require the gathering and disclosure of information that the company may not otherwise have disclosed. Although, as set out in Section C above, companies are already subject to certain disclosure requirements in relation to the identification, management and disclosure of climate-related risks and opportunities, we assume for present purposes that the burden on companies to make obligatory disclosure under a CRTP will be greater than exists under the law as it currently stands.[59]

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[58] That is, more specifically, those companies to which section 414A CA 2006 would apply and which are therefore required to produce a strategic report (and which are not entitled to the small companies exemption).

[59] The issue of the scale and proportionality of that additional burden is a matter of policy, beyond the scope of this opinion.

Impact of burden on companies

77. As a trite point, the requirement to make additional disclosure to the market could potentially increase the liability of companies simply because it expands the body of material which a company must produce and for which it is responsible. However, the same could be said of any requirement for a company to make disclosure to the market, whether climate-related or otherwise. As such, in assessing liability risk, we consider that it is important to consider the nature of the particular disclosures potentially required (Sections G3 and Section G4 below) and therefore the nature of the potential liabilities arising, rather than simply focusing on the volume of disclosure.

Impact of burden on directors

78. The additional burden of producing a CRTP for disclosure could in theory also be relevant to the potential liability of directors, who will ultimately be responsible for discharging the company's obligations on its behalf. Directors might be concerned that this additional burden could expose them to a greater degree of risk because of the greater volume of disclosures for which they will be responsible. Further, directors might be concerned because, although they bear ultimate responsibility personally, they will be required to rely on inputs and information from other individuals within the company or from its subsidiaries. This concern may be particularly acute in respect of matters where the inputs required are specialist or technical in nature, outside the subject matter expertise of the particular director, or require the inputs of either specialist employees or expert advisers.

79. There are two reasons why, in our view, this risk is limited.

80. First, if one assumes (as we do) that CRTP disclosures will fall within the protection of section 463 CA 2006[60], then **(i)** directors will not be liable to third parties (including investors) who have relied upon information in the CRTP[61] and **(ii)** they will only be liable to the company in relation to any loss suffered by it as a result of a misleading statement or omission if they meet the dishonesty standard described at paragraph 67 above.[62]

81. As such, even if a director has to rely upon information or advice provided by others in coming to the belief that statements made in the CRTP are true and that there has been

[60] For example, by the inclusion of the relevant disclosures in the reports listed at section 463(1) CA 2006.
[61] Section 463(4) CA 2006. This includes both investors and others.
[62] Section 463(2) CA 2006.

no dishonest concealment of anything required to be in the CRTP, that director will not be liable so long as that belief on their part is genuine. We discuss the significance of this point in greater detail below.

82. Second, even if one did not assume that the protection of section 463 CA 2006 would apply, we do not consider that the imposition of the extra burden of disclosure on companies would materially increase the exposure of directors to liability. The role and potential liabilities of directors in relation to their responsibility for the companies' compliance with this extra requirement would, in our opinion, not be materially different to the position of directors in relation to compliance with other requirements imposed on companies, including the preparation and publication of annual reports and accounts.

83. In this regard, we note that, although directors are ultimately responsible for the company's annual reports and accounts, and would ultimately be liable for CRTP disclosures, in larger companies with relatively complex businesses the directors' burden is quite properly shared to a very significant degree with the company's management below board level and by external advisers.

84. Directors are required to exercise reasonable care, skill and diligence in the exercise of their functions.[63] However, directors may discharge their responsibilities and comply with their obligations by delegating large elements of the task to management and relying on expert advisers. While they cannot abdicate their responsibility or unquestioningly accept material presented to them, directors are permitted to delegate tasks, provided that they exercise due care, skill and diligence in the process of delegation (for example, delegating to appropriate individuals) and in subsequently supervising the work being carried out.[64]

85. Directors are also permitted to rely upon expert assistance. Indeed, there are occasions where compliance with their duty of care, skill and diligence may require them to seek expert assistance.[65] While simply taking expert advice is not a substitute for exercising due care, skill and diligence, the decided cases have recognised that a director who takes and acts upon expert advice *"has gone a long way to performing his duties with*

[63] Section 174 CA 2006.
[64] For a helpful synthesis of the law on delegation by directors, see (in the context of charitable non-executive directors) the analysis of Falk J in *Re Keeping Kids Company* [2021] EWHC 175 (Ch) at [857] – [860].
[65] *Equitable Life Assurance Society v Bowley* [2004] 1 BCLC 180 at [70] – [73]; Mortimore *"Company Directors: Duties, Liabilities and Remedies"* (4th Ed; 2024) at [14.48].

reasonable skill and care".[66] Absent some cause for concerns, directors are entitled to trust their expert advisers. While a director should ask appropriate questions and not blindly depend on advice, they are not generally required to embark upon a deep-drilling exercise into the factual or conceptual basis of advice.[67]

86. As such, the position for directors of large companies in respect of producing and approving CRTPs is unlikely to be materially different to other inputs the board receives from time-to-time. In each case, they will generally be entitled to rely upon information provided by management and employees and upon expert advice received. To that extent, these additional burdens are not likely to introduce a materially heightened risk of liability.

G3. FORWARD-LOOKING STATEMENTS

87. In our opinion, the most important issue arising is whether the forward-looking statements required to be disclosed in a CRTP would be likely to result in materially heightened liability risks for directors and companies. We understand that some have expressed particular concern about such potential liabilities. In our opinion, they would not result in such risks.

88. To explain that conclusion, we first analyse the different kinds of forward-looking statements required for a CRTP (adopting the distinctions drawn at Section E above) to inform our analysis of the potential representations which might arise. Having done so, we then consider the potential liabilities for companies and directors for those representations in light of the legal framework set out above in Section F.

89. There are three overarching points which must be kept in mind throughout this analysis.

    89.1. First, as explained further below, the state of mind or standard of conduct which will generally need to be proved to establish liabilities for misrepresentations in CRTPs will be a dishonesty standard (although not in all cases).

    89.2. Second, still speaking generally, the foundation of liability will often (but not always) be a false statement.[68] As set out above, generally such a statement

[66] *Sharp v Blank* [2019] EWHC 3096 (Ch) at [629].
[67] *Sharp v Blank* [2019] EWHC 3096 (Ch) at [630] at [742].
[68] Both section 463 CA 2006 and section 90A FSMA also impose liability for omissions, but not all omissions - only omissions of matters that are positively required by the relevant rules to be included. So here too, at the level of generality relevant for present purposes, it is likely that potential liability for forward-looking statements will largely be based on implied statements of present fact.

must be a false statement of fact or law.[69] In the context of CRTPs, these forward-looking statements will typically be framed as statements of opinion or intention. Since a statement giving rise to liability must generally be a representation of past or existing fact, a representation as to the future will not generally in itself found dishonest liability, nor will broken promises.[70]

89.3. Third, however, the most likely apparent source of potential liability in relation to forward-looking statements lies in potential <u>implied</u> representations of present fact or intention that may arise out of such forward-looking statements. These may include, for instance, an implicit assertion that the stated intention or opinion is genuinely held and considered to be supported by a reasonable basis.

90. We discuss the significance of these points in greater detail below. In our view, when considered collectively, they suggest that establishing liability in relation to forward-looking statements in CRTPs will, in most cases, prove challenging.

Analysis of potential representations which might arise in relation to forward-looking statements

91. As set out in Section E above, forward-looking statements in CRTPs will broadly relate to targets, plans and expectations. Each type of statement is likely to have different legal effects, although there is much commonality between them. We analyse each in turn to evaluate the potential implied representations that might be made by the Board or companies when they make forward-looking statements in a CRTP. We also consider the potential liabilities which might arise in respect of omissions.

92. As to <u>targets</u>:

92.1. The identification of a target in a CRTP is likely to involve implied statements of present fact relating to their feasibility. Whether that is the case, and what precisely such statements might be, will depend on the words used and the context.

92.2. Two potential formulations of such an implied statement would be: **(i)** that the board considers the target to be a feasible target, and **(ii)** the board considers that it has a reasonable basis for thinking that the target is a feasible target.

[69] Paragraph 54 above.
[70] *GI Globinvestment Ltd v XY ERS UK Ltd* [2025] EWHC 740 (Comm) at [974].

92.3. Generally, such a representation would present a fairly low hurdle for defendant directors and companies. Such implied representations could be misrepresentations but only if, for example, the company included a target for emissions reduction that was sufficiently plainly unfeasible that the board must have realised that, or at least realised that they had no reasonable basis for thinking it feasible.

92.4. In some cases, it may be possible to argue for a more exacting implied representation, not just that the board <u>considers</u> it has reasonable grounds for its belief in the feasibility of the target, but rather that it impliedly represents that there <u>are</u> objectively reasonable grounds for that belief.

92.5. It might be thought that this poses a greater liability risk for companies and directors and that there would indeed be a greater risk of such a representation being shown to be false (because directors might think they had reasonable grounds when objectively they did not). However, at least where a dishonesty standard applies to any liability, we do not think this distinction is likely to be significant in practice.

93. As to <u>plans</u>:

93.1. A plan is likely to involve express or implied statements of intention as to steps to be taken to achieve the targets or wider objectives. In turn, this is likely to involve implied representations of fact that the board considers that those are feasible steps (i.e. they can be implemented) and that the board considers there to be a reasonable basis for its view that those steps can feasibly be implemented. It is also likely to involve an implied representation that the opinion expressed is genuinely held.

93.2. Again, this is likely a relatively low hurdle for potential defendants. However, it might involve a misrepresentation if, for example, there was some insuperable obstacle to a key step in the plan that the board was aware of, so that it knew the plan was not really feasible. It might also involve a misrepresentation if the board had not considered whether the plan was feasible and so in fact had no basis for thinking that it was feasible.

93.3. Again, in some cases the accompanying implied statement as to reasonable grounds might include a statement that there <u>are</u> objectively reasonable grounds for that belief and not simply that the board considers it has reasonable grounds for its belief in the feasibility of the steps. Although, again, at least where a dishonesty standard applies, it is unlikely, in our view, that that distinction will result in significantly different outcomes.

94. It is notable that one of the effects of the level of detail required in a CRTP complying with the TPT Disclosure Framework is that unrealistic expectations, plans and targets may well be exposed, either on the face of the plan (if they get that far) or in the process of preparing the plan. Under those guidelines (applied properly), high level, broad statements as to targets and plans to achieve them cannot sit alone and have to be backed up by the sort of detail that is likely to undermine them if they are unrealistic. This is particularly so where, for example, the TPT Disclosure Framework requires fairly detailed disclosure, such as under sub-element 4 ("Metrics & Targets"). That means that the exercise required to comply with a more detailed set of requirements is likely in practice to prevent a director being reckless in relation to forward-looking statements.

95. As to expectations:

95.1. Statements of expectation are akin to forecasts, in that they are statements as to what the board expects will happen in relation to matters which are not entirely within its control. The exact meaning of a statement of expectation will depend upon its precise words and the context in which it is made. Usually, a forecast or statement of expectation will be a statement as to what the forecaster thinks is most likely to happen as a matter of probability.

95.2. It is likely that any statement of expectation will be accompanied by the making of an implied representation of present fact. This is likely to be an implied statement that the board considers that the expectation has a reasonable basis. Inherent within this is also likely to be an implied representation that the view is genuinely held. Again, this sets a relatively low hurdle for defendants. The board need only genuinely consider whether there is a reasonable basis for the expectation and conclude that there is.

96. We therefore consider it likely that, depending on the context, forward-looking statements in a CRTP will give rise to implied representations as to present fact. Those in turn could, in theory, give rise to actionable claims; although, as we explain below, the risk of such claims is in our view limited.

97. A further basis upon which a company or directors might be subject to liability arises from dishonest omissions (not giving rise to any misrepresentation). Under Schedule 10A FSMA, an issuer of securities can be liable for dishonest omissions (¶¶42-46 above), while directors similarly can be liable under section 463 CA 2006 (¶67 above).

98. As to potential liabilities for such omissions, such liability only attaches to information required to be included in the particular statement. As such, the precise nature and extent of such potential liability will depend on what, precisely, is required to form part of a CRTP. However, where clear guidelines are promulgated, companies and directors will (we anticipate) have a clear framework for assessing whether the required information has been included.

99. The requirement for dishonesty in relation to potential liability for omissions is also significant. Directors will only be liable if they know the omission to *"be dishonest concealment of a material fact"*.[71] Under section 90A FSMA, the company will be liable only if the person discharging managerial responsibility *"knew the omission to be a dishonest concealment of a material fact".*[72] Boards are unlikely to omit things altogether; but, in any event, if they do, their honesty will be a complete defence to liability.

100. Having set out our analysis, we now turn to consider the potential liabilities of companies and directors in light of the legal mechanisms set out in Section F above. We first make some overarching observations as to why liability for forward-looking statements is likely to be difficult to establish on the basis of a dishonesty standard (¶¶101-108) before considering why liability is also likely to be difficult to establish in the case of companies (¶¶109-118) and directors (¶¶119-122).

Analysis of potential liabilities for forward-looking statements: dishonesty standard

101. Above, we have considered how misrepresentations might arise from targets, plans and expectations stated in CRTPs. However, liability will also require a claimant to show the necessary state of mind on the part of the representor. Of the potential sources of liability set out in Section F above, most of the relevant bases of potential liability for companies, and (because of section 463 and Schedule 10 FSMA) all of the potential bases of liability

[71] Section 463(3)(b) CA 2006.
[72] Schedule 10A FSMA, paragraph 3(3). See too the definition of *"dishonesty"* for these purposes in paragraph 6 of Schedule 10A, which provides that the person's conduct is regarded as dishonest only if (a) it is regarded as dishonest by persons who regularly trade on the securities market in question, and (b) the person was aware (or must be taken to have been aware) that it was so regarded.

for directors, will engage a dishonesty standard – i.e. knowledge that the statement is false or at least recklessness as to whether it was untrue or misleading.

102. This is inherently a high hurdle for claimants, particularly in relation to the types of implied representation likely to be made. There are four reasons for this.

103. First, as explained above at ¶40, in practice a claimant generally requires more cogent evidence to prove dishonesty than negligence.

104. Second, under a dishonesty standard, the representor must either know the statement is not true or be reckless as to its truth (that is, they neither know nor care whether it is true or false).[73] An honest belief in the truth of the statement will defeat a claim based on a dishonesty standard, even if it is unreasonable.[74]

105. Third, in relation to statements rather than omissions, if a dishonesty standard applies then the defendants will only be liable if they realise at the time they make the statement that they are making an implied representation to that effect. This follows from the basic conceptual point that an individual cannot know they are making a dishonest statement if they do not know that they are making such a statement at all.[75]

106. Such a requirement exists in deceit[76] and under section 90A FSMA[77] and is, in our opinion, also required under section 463 CA 2006 in relation to any untrue or misleading statement. Depending on their level of sophistication and the advice they have received, in practice a director may or may not actually understand that they have made the implied representation allegedly relied upon in any particular case.

107. Potential liability in relation to targets in a CRTP offers an illustrative example. In our opinion, a director who honestly believes that the target is feasible and that there are reasonable grounds for that conclusion will not be liable on any basis that requires the

[73] *Ibid.*
[74] *Ibid.*
[75] *Cassa di Risparmio della Repubblica di San Marino SpA v Barclays Bank Ltd* [2011] EWHC 484 (Comm) at [221], per Hamben J ("*A person cannot make a fraudulent statement unless he is aware that he is making that statement*") citing *Goose v Wilson Sandford & Co* [2001] Lloyd's Rep. PN 189, at [41].
[76] *Derry v Peek* (1889) 14 App Cas 337 at page 374. See for example, *Cassa di Risparmio della Repubblica di San Marino SpA v Barclays Bank Ltd* [2011] EWHC 484 (Comm) at [221] (ibid). See also Grant and Mumford *"Civil Fraud"* (1st Ed; 2018) at 1-085 – 1-087. The obiter comments of the Court of Appeal in *Property Alliance Group Limited v RBS plc* [2018] EWCA Civ 355 at [158] does not appear to have changed the law in this respect – see *GI Globinvestment Ltd v XY ERS UK Ltd* [2025] EWHC 740 (Comm) at [979]; *Robert Gordon Kidd v Lime Rock Management LLP* [2025] CSIH 11 at [80]; *Farol Holdings Ltd v Clydesdale Bank Plc* [2024] EWHC 593 (appeal outstanding) at [214], *Marme Inversiones 2007 SL v Natwest Markets Plc* [2019] EWHC 366 (Comm) at [261] and [263].
[77] *ACL Netherlands BV v Lynch* [2022] EWHC 1178 (Ch) at [468] to [470].

dishonesty standard. On the other hand, directors who do not actually think the target is feasible, or who know they do not have any reasonable basis for thinking the target feasible (perhaps because they know they have just 'plucked the target out of the air') may potentially be liable, provided they appreciate that they are making the relevant implied representations as to the feasibility of the target. They may also be liable, on the basis of dishonesty through recklessness, if they have not given any thought to the feasibility of the target (perhaps because they have unthinkingly approved what was put in front of them), although again they would have to appreciate that they were making the relevant implied representation.

108. <u>Fourth</u>, in relation to omissions, as noted above, it is necessary under section 463 CA 2006[78] and section 90A FSMA[79] that the omission be accompanied by dishonesty, such that the analysis above applies with equal force to omissions. Moreover, advice from professional advisers is also likely to be relevant to such allegations. Where a director understands on advice from professional advisers that disclosure of a particular fact is not required, it is unlikely that any omission on the basis of that advice would amount to dishonest concealment.[80] In our opinion, the same is likely to be true where a director honestly relies upon management (on the basis of the authorities set out at ¶¶85-86 above).

Analysis of potential liabilities for forward-looking statements: companies

109. Drawing together the threads above, in our opinion, it is also unlikely that the forward-looking disclosures required to be made under a CRTP would materially heighten the liability risks facing companies.

110. As set out in Section F1 above, the most obvious sources of potential liability arising from forward-looking statements are those founded on a dishonesty standard, and such claims face the difficulties described above. In particular, where section 90A FSMA applies, a company will only face potential liabilities arising from its disclosures in this context (subject only to certain alternative preserved gateways to liability)[81] where a person discharging managerial responsibilities has been dishonest.

111. Where section 90A FSMA does not apply (or where one of the other grounds for liability preserved under paragraph 7 of Schedule 10A to FSMA is relied upon), we consider

[78] Section 463(3)(b) CA 2006.
[79] Schedule 10A FSMA, paragraphs 3(3) and 6.
[80] *ACL Netherlands BV v Lynch* [2022] EWHC 1178 (Ch) [474] – [475].
[81] Paragraph 7 of Schedule 10A FSMA.

that there is limited scope for increased liability risk for companies arising out of forward-looking statements made as a result of the disclosure of CRTPs, particularly where a company's directors have been honest. There are six points to be made.

112. First, where a claim is brought on the basis of another cause of action reliant upon a dishonesty standard (such as deceit) the potential analysis will broadly be as described above.

113. Second, where a claim is brought on the basis of a cause of action reliant upon a negligence standard (such as a claim for negligent misstatement), even if it can be shown that a duty of care has been assumed, liability will not arise so long as the company (through its agents) exercised reasonable care in the preparation of the CRTP.

114. Third, while that might create room for an increased risk of liability in theory, in this respect, it is important in practice that CRTPs may include disclaimers or exclusionary statements (and, in this respect, we note that sub-element 1.3 of the TPT Disclosure Framework requires disclosure of the key assumptions made and external factors on which it depends in order to achieve the strategic ambition of its CRTP). These disclaimers or exclusionary statements might include statements excluding implied representations or warnings qualifying express statements, for example, as to the limited confidence with which expectations are held or targets put forward. Such disclaimers, in principle, can have the effect of excluding or minimising the company's liability, or otherwise modifying the scope of any duty of care which might be found to exist.

115. Indeed, it is important to note in passing that, even in cases which do not concern the negligence standard, disclaimers are also likely to be relevant to allegations relying upon a dishonesty standard, since they will qualify the scope of the express or implied representation made. While such inclusions might, at first glance, appear to undermine the perceived robustness of any CRTP, they might - if well directed and set out in good faith – actually enhance the CRTP's clarity by reflecting very real uncertainties in the disclosures made and in specific cases in themselves might greatly reduce the risk of liability.

116. Fourth, where a claim is based on section 90 FSMA in respect of listing particulars, directors and companies are likely to be able to invoke the exemptions to liability if they have exercised reasonable care, skill and diligence in the production of those particulars.

117. <u>Fifth</u>, as with directors, it is possible that a company may incur other liabilities as a result of forward-looking statements in CRTPs arising from the CRTP being deployed in other ways on behalf of the company (for example, as a pre-contractual representation to a potential contractual counterparty). Again, the existence and scope of any such liabilities will greatly depend on the way in which the CRTP is in fact deployed.

118. <u>Sixth</u>, in sum, unsurprisingly, companies whose directors act honestly and reasonably are unlikely to be liable and, in any event, well directed disclaimers may limit the risk of any liability even when directors do not live up to that standard.

Analysis of potential liabilities for forward-looking statements: directors

119. Again drawing together the threads above, in our opinion, it is unlikely that the forward-looking disclosures required to be made under a CRTP will materially heighten the liability risks facing directors.

120. As a result of the protection provided by section 463 CA 2006, and on the assumption that this protection would extend to CRTPs,[82] directors' potential liabilities in relation to CRTP disclosures are narrowly confined. As set out above, the directors can be liable only to the company.[83] Specifically, liability to the company would arise only where the CRTP contains false or misleading statements, or omits required information – but only if the directors acted dishonestly, meaning they either knew the statement was false or misleading, were reckless as to its truth, or knowingly concealed a material fact. The risks facing directors in this respect are qualitatively no different than the risks they face in respect of any other report to which section 463 CA 2006 applies.

121. We recognise it is relevant to consider not only the risks of actual liability but also the risks of facing claims which, while they will ultimately fail, might nonetheless potentially place a burden on directors. On that point, in relation to potential liabilities based on the dishonesty standard, in our opinion, it will generally be very unlikely that claims will be capable of being rationally asserted against directors who have not only acted honestly in relation to forward-looking statements made in a CRTP but have done so with a reasonable level of care and diligence (even if not necessarily fully up to the standard required by section 174 CA 2006). Evidence of the exercise of reasonable care and diligence may in many cases serve in practice to rebut any suspicion of fraud that might

[82] On the basis that they will form part of the set of documents to which section 463 applies, as set out at paragraph 66 above.
[83] Section 463(4) CA 2006.

otherwise fuel a claim or at least make potential claimants less likely to pursue proceedings premised on allegations of recklessness.

122. It is possible, of course, that directors might incur other liabilities as a result of forward-looking statements in CRTPs arising not from the act of disclosure of the CRTP itself, but from the CRTP being deployed in some other way on behalf of the company. For example, material in the CRTP may form the subject of a representation made on behalf of the company as part of a transaction entered into by the company (such as a sale of its business). Such liabilities are beyond the scope of this opinion, because they would arise not from the anticipated disclosure requirement but from that further deployment of the CRTP, and the existence and scope of any such liabilities would depend very much on the way in which the CRTP was in fact deployed.

Conclusions on forward-looking statements

123. Having addressed the different potential routes to liability above, we do not consider that it is likely that a requirement for disclosure of CRTPs will materially heighten the liability risks of directors and companies.

G4. STATEMENTS OF EXISTING FACT ABOUT SCOPE 3 EMISSIONS

124. Making climate-related disclosures in accordance with the TPT Disclosure Framework and IFRS S2 may require disclosure of information about "**Scope 3 emissions**".[84] That will involve statements as to present or historical facts, rather than forward-looking statements. However, since Scope 3 emissions are indirect and more difficult to estimate, there may be concern on the part of directors and companies about making disclosure in relation to current Scope 3 emissions. We consider the specific position of Scope 3 emissions because they may give rise to particular concern on the part of companies and directors, and because they illustrate the position in respect of disclosures in CRTPs which are not pure forward-looking statements.

125. We do not consider that the requirement to make statements as to a company's current Scope 3 emissions in a CRTP would materially heighten the potential liability risks of companies and directors. We address first the potential liabilities of companies before addressing the potential liabilities of directors.

[84] For the purposes of this Opinion, we adopt the definition of *"Scope 3 greenhouse gas emissions"* used in IFRS S2, which is *"Indirect greenhouse gas emissions (not included in Scope 2 greenhouse gas emissions) that occur in the value chain of an entity, including both upstream and downstream emissions."*

126. However, by way of overarching comment, we note two points:

126.1. First, companies are already required to routinely disclose information relating to matters which are inherently uncertain and difficult to estimate. For example, the reporting in a company's accounts may be dependent on financial reporting and accounting decisions taken at operating subsidiary level on the basis of complex facts which, in turn, involve the exercise of professional and accounting judgment by a range of individuals.

126.2. Second, a company may rely upon an existing and established methodology for the calculation of its Scope 3 emissions.[85] Indeed, the TPT Disclosure Framework recommends that companies be transparent about the underlying methodologies used,[86] and makes specific reference to the Greenhouse Gas Protocol.[87] Where a company employs such established methodologies to calculate their Scope 3 emissions, we consider that, in most cases, it would be more difficult to allege that the company or its directors have failed to exercise reasonable care, skill and diligence or that they were reckless in the preparation of this material in the CRTP.

Potential liabilities of companies

127. The potential liabilities companies may face when making present statements of fact regarding Scope 3 emissions are broadly similar to the matters discussed above – there will be both express statements, and potential implied statements, as to the basis upon which the express statements were made. In those circumstances, the same basic analysis as is set out above will apply. For claims under section 90A FSMA or (where it does not apply) in deceit, the application of a dishonesty standard will impose a high hurdle for claimants. For other claims based on a negligence standard, potential liability can be mitigated by exercising care and skill and through the use of appropriate qualifications and disclaimers. Consequently, the fundamental bases upon which liability can arise in this context are expected to remain unchanged and continue to be relatively limited in scope.

[85] For example, the TPT Disclosure Framework and the IFRS S2 recommend that companies use the the Greenhouse Gas Protocol – e.g. the publication *"Corporate Value Chain (Scope 3) Accounting and Reporting Standard"*.
[86] TPT Disclosure Framework section 4.3I.
[87] For example,TPT Disclosure Framework, section 4.3I(ii).

Potential liabilities of directors

128. Where section 463 CA 2006 applies, as we assume it would, the potential liabilities for directors would generally be limited to claims based on dishonesty (as discussed in greater detail above).[88] For broadly the same reasons as are set out in relation to implied representations in respect of forward-looking statements, we consider that the risk of liability for directors is likely to be limited. Moreover, to the extent those directors also take reasonable steps in producing the material, that will also reduce the practical risk of potential threatened claims, in particular, the risk of claims asserted on the basis of recklessness (and at Section J below we offer some practical guidance on what such steps might entail). Therefore, as with our conclusion regarding companies, the potential avenues for establishing liability against directors remain similarly tightly circumscribed.

G5. SUMMARY OF CONCLUSIONS

129. To conclude, we do not consider that the requirement to make disclosures in a CRTP is likely materially to heighten the liability risks faced by directors or companies, despite the fact that this will result in an increased volume of information disclosed for which the company is responsible.

130. First, for the reasons explained above, we do not consider that requiring CRTP disclosures will significantly increase the overall scale of risk for directors and companies (i.e., the frequency and likelihood of claims). That is because the bases upon which liability can arise in this context remain relatively limited, owing to the high hurdles that claimants must overcome to establish a successful claim.

131. Second, we do not consider that it would be likely to change the qualitative nature of those risks – that is, the type or character of the claims directors and companies might face. That is because the underlying legal bases of liability are likely to be of the same nature as the potential liabilities which could arise in respect in other forms of corporate disclosure.

H. WOULD ADDITIONAL "SAFE HARBOURS" BE APPROPRIATE FOR DISCLOSURE OF CRTPS?

132. In broad terms, a "**safe harbour**" is a provision which limits or reduces the liabilities to which a party might otherwise be subject. Examples of existing "safe harbours" under

[88] Paragraphs 63 to 70 above.

English law relevant to our advice (i.e. conditions that limit liabilities which might otherwise arise) are section 463 CA 2006 and paragraph 7 of Schedule 10 FSMA. The particular way in which safe harbours can operate will vary with context. They might, for example, limit liability to a dishonesty standard either completely (section 463) or limit liability to a dishonesty standard subject only to certain carve-outs (Schedule 10A FSMA).

133. As set out above, we assume that these existing limits on liability would apply to any disclosures made in relation to a CRTP. As such, in this section of our Opinion, we consider whether there should be some additional safe harbour over and above these existing protections for directors and companies specifically in relation to CRTP disclosures.

134. Whether it is appropriate to have any additional safe harbour is ultimately a policy decision for the legislature potentially involving consideration of a wide range of competing factors. Those who would be responsible for CRTP-related disclosures have a natural incentive to lobby for a wider safe harbour to mitigate any perceived risk of their own liability, and it might be argued that the creation of excessive liability risks arising from disclosure requirements might represent an impediment to business. However, on the other hand, an overly broad safe harbour risks watering down the legislative aim of the enactment by removing the sanctions attached, and leaving those who suffer loss from reliance on badly prepared material without remedy. Sanctions are ultimately imposed in order to encourage and enforce compliance. The issue is therefore inherently one of drawing the line in the right place so as to balance those different policy considerations. Full analysis of all potential policy considerations bearing upon the issue of additional safe harbours in the context of CRTPs is beyond the scope of this opinion.

135. However, a key consideration as to whether a new safe harbour should be introduced specifically in relation to CRTPs must, in our view, be the potential liabilities of directors and companies which would exist absent any such new safe harbour (taking account of the existing protections for directors and companies which currently exist).

136. On the assumption that section 463 CA 2006 would cover disclosure of CRTPs, we do not see any reason, from our perspective as company law litigators, that any additional or further safe harbour is required to limit or exclude any potential liabilities that might otherwise arise from an obligation to disclose a CTPR. This is because:

136.1. Section 463 CA 2006 already provides extensive protection to honest directors; and

136.2. In respect of companies, there does not appear to us to be any special feature of potential CRTP-related liabilities which means that the liability position should differ from the rules governing any other corporate disclosure. Where section 90A applies to a disclosed CRTP, companies will already benefit from a limited safe harbour under Schedule 10A FSMA. In view of our analysis above, it is difficult to see why the particular form of disclosure under a CRTP should be treated differently from other forms of disclosure caught by section 90A FSMA.

137. In short, we do not see any reason why the balance between competing policy considerations already struck in relation to existing disclosure requirements should not apply to the proposed CRTP-related disclosures.

I. ARE ANY ADVANTAGES FOR DIRECTORS AND COMPANIES LIKELY TO FLOW FROM THE PROPOSED DISCLOSURE OF CRTPS?

138. We are asked to advise as to the impact a requirement to produce and disclose a CRTP consistent with the TPT Disclosure Framework might have on legal risks more generally in relation to the management and disclosure of climate-related risks, opportunities and impacts to which companies and directors are already exposed and, in particular, whether compliance with such requirements might mitigate those more general legal risks. In our opinion, there would in many cases be advantages to directors and companies flowing from the proposed disclosure of CRTPs.

139. At the outset, we note that there is a distinction to be drawn between a requirement to have a CRTP and a requirement to disclose it. It might be said that many of the advantages we identify below could be achieved simply by requiring companies to produce a CRTP without requiring companies to disclose that CRTP. However, we think it is reasonable to expect that the introduction of a disclosure requirement would, in practice, result in more and more robust transition plans than would otherwise be produced, particularly by forcing generally a more rigorous and comprehensive approach backed up by greater expert input than might otherwise be the case. Market scrutiny backed up by potential liability or other sanction (even if limited) is likely to focus the minds of those involved in producing CRTPs and produce better outcomes.

I1. Existing Disclosure Obligations

140. Where a company is already subject to less specific legal or regulatory disclosure obligations in relation to climate-related risks and opportunities and its response to them, for example under section 414CB CA 2006 (described above), it is in our opinion likely that in many cases the discipline of having to prepare and disclose a CRTP compliant with the TPT Disclosure Framework would tend in practice to promote better compliance with those existing less specific disclosure obligations. That is particularly so where, as we have identified above at paragraph 20, there is currently significant room for improvement in complying with those existing obligations. The same exercise is likely to reduce the prospect of liability arising on a dishonesty standard under section 90A FSMA or otherwise, since the exercise of formulating a CRTP compliant with the TPT Disclosure Framework will in practice significantly reduce the prospect of dishonesty allegations framed on the basis of reckless indifference as to whether the statements made were true or false.

141. In turn, this process would indirectly reduce the risk of directors incurring liabilities to the company on the basis of their responsibility for the failures of the company to properly identify and disclose climate risks and opportunities (although, since section 463 CA 2006 applies to limit the directors' liabilities to claims by the company based on dishonesty, the risk directors face is already quite limited for the reasons we have explained above).

I2. Greenwashing Claims

142. A detailed discussion of the potential liabilities in relation to greenwashing as such are beyond the scope of this Opinion, and so we address them only briefly. In very general terms, outside of investor claims in respect of misleading corporate statements under the rules considered in this Opinion, they might arise in three primary ways.

143. First, they might arise through non-compliance with FCA rules and guidance in relation to ESG matters, primarily the FCA's Environmental, Social and Governance Sourcebook which applies to '*firms*',[89] in particular the FCA's anti greenwashing rule at paragraph 4.3.1R of that ESG Sourcebook and the guidance on that rule published by the FCA on 23 April 2024 FG 24/3.

[89] Paragraph 4.3.1(1) of the FCA ESG Sourcebook. '*Firm*' is defined at F14 of the FCA Handbook, Glossary, release 47, May 2025, but see Pleming et al, "The Law of Net Zero and Nature Positive" (Jan 2025) p752

144. Second, they might arise under consumer protection legislation, particularly the Consumer Protection from Unfair Trading Regulations 2008, which, although not specifically directed at greenwashing, set out general principles that will catch various forms of greenwashing.[90]

145. Third, greenwashing may also infringe the codes of conduct on advertising enforced by the Advertising Standards Authority.[91]

146. In our view, disclosure of a CRTP compliant with the TPT Disclosure Framework would likely to go some way towards protecting companies from allegations of greenwashing in relation to their responses to climate change, namely by substantiating any claims they might make in that respect.

I3. Directors' Duties to the Company

147. More generally and probably most importantly, in our opinion, the discipline of having to prepare and disclose a CRTP compliant with the TPT Disclosure Framework would also tend in practice to reduce the risk for directors of claims and liabilities for breach of duty to the company arising from their handling of climate-related risks and opportunities generally.

Climate-related risks and the directors' duties

148. The first of the relevant directors' duties is the primary duty of loyalty under section 172 CA 2006, which in effect defines the objective directors must pursue. Directors must act in the way that they genuinely consider in good faith would be most likely to promote the success of the company for the benefit of its members as a whole having regard to, amongst other things, the likely consequences of any decision in the long term. As part of that duty, under section 172(1)(d), directors are also required to have regard to the impact of the company's operations on the environment. However, in our opinion, the requirement, discussed below at paragraph 151, to consider relevant climate-related

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[90] See Pleming et al "The Law of Net Zero and Nature Positive" (Jan 2025) at 32.53. The CMA's Green Claims Code also gives guidance to assist businesses understand and comply with existing obligations under consumer protection law when making environmental claims.

[91] See Pleming et al "The Law of Net Zero and Nature Positive" (Jan 2025) at 32.56. For examples of ASA Council decisions upholding claims for breach of advertising codes in relation to environmental claims see Lloyd's Bank (18 December 2024), Mazda Motors UK Ltd (25 September 2024) and Virgin Atlantic Airways Ltd (7 August 2024) to name just a few.

risks and opportunities and how to respond to them, does not depend on section 172(1)(d).[92]

149. The second relevant duty is the duty to exercise reasonable care, skill and diligence under section 174 CA 2006. Directors may genuinely think that there are no climate-related risks or opportunities relevant to the company's business and so no steps that need to be taken in response, but if they have not taken reasonable care to consider and, if necessary, investigate the existence of such risks and opportunities then they might very well be in breach of section 174. A genuine belief on the part of directors that they are doing their best for the company is not enough to avoid liability under section 174.

150. In applying those duties to climate-related issues, in our opinion, consideration of the climate-related risks and opportunities relevant to a company's business and consideration of how the company should respond to those risks is clearly a task falling within the role and responsibility of the board in accordance with the directors' duties to the company. Exactly what is required in order to sufficiently consider those risks and opportunities and that response will depend very much on the nature and scale of the business. Generalisations are therefore impossible. However, clearly, for some businesses, there are obvious and highly significant climate-related risks and opportunities that are relevant to it in the short, medium or long terms.

151. In our opinion, in order to comply with their duties, directors of all businesses should at least <u>consider</u> whether there are climate-related risks and opportunities which to some level face the business (even if only in order to reliably reach the conclusion that such risks and opportunities are not significant for that business). Climate-related risks and opportunities are in this respect no different in principle to other significant risks and opportunities which a business may face (whether related to regulation, competition, macroeconomic circumstances, geopolitical developments or whatever).

[92] Under section 172(1)(d), directors are required to have regard to *"the impact of the company's operations on the community and the environment"*. However, apart from that subsection and by way of illustration, a director who is complying with their core section 172 duty may be required to have regard to environmental considerations where they could otherwise impact the company's business (for example, due to potential adverse publicity from environmentally deleterious actions which could impact the company's profitability). See paragraphs 151 and 152 below.

Wider purposes of CRTPs

152. The discussion above relates to only one element of a CRTP under the TPT Disclosure Framework (namely, responding to an entity's climate-related risks). The other purposes for CRTPs under the TPT Disclosure Framework are the company's own transition to net zero and its contribution to an economy wide transition.[93] Those additional substantive elements of a CRTP relate less obviously to the core objective under section 172, although failure by a company to make any effort to transition to net zero or to contribute to an economy wide transition could theoretically inhibit its own success if, for example, that harms its brand or reduces potential investment in its business (particularly from sources applying "ESG" criteria such as many pension funds).

153. There is a debate as to the extent to which these wider environmental considerations form part of the objective defined by section 172 on its true construction under its 'enlightened shareholder value' approach. We express no view on that debate here. We have for present purposes assumed a conservative construction of that section, under which the environmental impact of a decision is only to be taken into account to the extent of affecting that decision insofar as consistent with, and as part of, pursuit of a core objective of long-term shareholder value. Even on that assumption, we consider that the discipline of preparing and disclosing a CRTP compliant with the TPT Disclosure Framework would tend in practice to reduce the risks of claims and liabilities faced by directors.

Impact of CRTPs on enforcement of breaches of duty

154. Naturally, in practice, many breaches of directors' duties go unremarked and do not give rise to any claims or liabilities, merely potential claims and liabilities. Breaches of duty are normally actually enforced in practice when they cause serious loss to the company, particularly where the company has changed ownership or control or has gone into an insolvency process. A climate-related risk that eventuated and caused or contributed to the failure of a business could result in claims against directors who, in breach of duty, had failed to appreciate or adequately respond to that risk.

155. Breaches of duty may also be enforced through actions by minority shareholders, often in the form of derivative claims, which have in this context sometimes been made by

[93] TPT Disclosure Framework para 2.2 and figure 4.

activist shareholders.[94] It is true that disclosure of CRTPs might provide activist shareholders with information which might allow them to evaluate possible derivative claims more easily, which might lead to such activist *claims* being pursued in some situations where otherwise they would not be. However, generally such claims are unlikely to be pursued at all, still less pursued successfully, if the CRTPs which are disclosed suggest that directors have complied with their duties.

Conclusion on CRTPs and director duties

156. Therefore, in our opinion, the enforced rigour of having to prepare and disclose a CRTP compliant with the TPT Disclosure Framework is likely in practice to increase compliance by directors with their duties in relation to climate-related risks and opportunities and therefore reduce the overall risk of *liabilities* for breach of such duties arising in this context.

J. RECOMMENDED PRACTICES TO MINIMISE LIABILITY CONCERNS

157. In light of our analysis above, in this section of our Opinion we identify recommended practices which directors and companies can adopt to reduce further the risks of liabilities which might otherwise arise from a requirement to produce and disclose a CRTP. Those recommendations arise from the matters discussed above (having regard to the nature of the potential liabilities potentially arising and the evidence required to set out a defence) and are informed by our combined practical experience as corporate litigators.

158. First, it would be extremely important for companies and directors to ensure that proper processes are in place for the production of the CRTP. As to that:

    158.1. It is permissible to delegate the task of producing the CRTP to members of staff or other senior management who have appropriate skills and experience to carry out that role.

[94] It is sometimes thought that the decision in *ClientEarth v Shell* [2023] EWHC 1897 (Ch) has undermined the scope for such derivative claims by activist shareholders. We do not express any view on that point in this Opinion, but note for present purposes that this decision has come in for significant criticism in some quarters, for example from Lord Carnwath (a retired Judge of the Supreme Court) in an article entitled *"ClientEarth v Shell: What future for derivative claims"* (February 2024). We anticipate that *ClientEarth v Shell* is very unlikely to be the last word on this subject and consider that this is a developing area of jurisprudence.

158.2. However, the company's board of directors should supervise that process by receiving regular reporting on the work being conducted, asking questions where necessary, and following up on matters arising.

158.3. Where appropriate, specialist external advice or input should be sought and reliance placed upon established bodies of practice or international standards.

158.4. Board members with specific expertise in the area (or a committee of the board with responsibility for this area) should monitor the production of the CRTP more closely in addition to main-board reporting.

159. <u>Second</u>, directors should check with management and any external advisers that all necessary information is contained within the CRTP in accordance with the applicable rules in force. If any matter is not included, or if there is uncertainty as to whether material should be included, they should seek to understand why.

160. <u>Third</u>, appropriately targeted caveats, cautionary language, or explanations of the methodologies adopted or assumptions relied upon should be included where relevant. That is not just for the purpose of limiting liability but in order to explain more accurately to the reader the basis for the statements made in the CRTP and the differing degrees of confidence with which the various views expressed or implied may be held.

161. <u>Fourth</u>, the directors should maintain proper records of the consideration they have given to these matters as well as the scrutiny and oversight they have afforded (whether at board meetings or otherwise). This might most obviously be in the form of board minutes or minutes of any committee meetings, but need not be so limited.

162. <u>Fifth</u>, directors should genuinely apply their minds to the representations being made in the CRTP and the basis for those representations. They should not make any statement which they do not genuinely believe or which they do not consider they have a reasonable basis for believing. The best defence to a claim – however formulated – is likely to be evidence that the director genuinely believed the statements being made after they had scrutinised the process by which the CRTP was produced and were satisfied of the integrity of those processes and that they had sufficient information to have reached the conclusions expressed in each statement.

K. CONCLUDING COMMENTS

163. It may assist, by way of concluding comment, to draw together our analysis by reference to specific illustrative examples. Our instructions refer to a number of concerns which have anecdotally been raised in relation to the proposal for compulsory disclosure of CRTPs, which we assume are representative. We summarise them in general terms before responding to them.

164. Turning first to the concerns which have been expressed, we set them out below together because the answers overlap significantly.

164.1. First, generally, will there be liability if a company adopts a CRTP in good faith but it subsequently fails, particularly if the failure is caused by an assumption made in the plan proving later to have been inaccurate, for example an assumption as to government action, for instance as to infrastructure provision?

164.2. Second, what are the consequences of adopting a CRTP that is, when adopted, consistent with then current global ambitions for climate change response but in coming years is regarded with hindsight as insufficiently ambitious because of a global recognition of a need for an accelerated response?

164.3. Third, if a company is aware of the limitations of the available data, for example in relation to scope 3 emissions, yet publishes that data or estimates based on it, will it attract liability if subsequently new and better data shows that its earlier estimates of its emissions were significantly inaccurate?

165. In response, the most important general point, which applies to all of those questions to some extent, is that, as we have explained above, liability arising from the disclosure of a CRTP is based firmly on the facts available when the plan is adopted and disclosed. While the CRTP will inevitably include forward-looking statements, liability does not arise just because those forward-looking statements prove in the future to have been inaccurate – that is, if targets and expectations are not met or steps not taken. In a nutshell, liability could arise only if a factual statement made at the outset in relation to those forward-looking statements was wrong at the time the statements were made. Further, as also explained above, even if such a factual statement made at that time was wrong, liability does not follow automatically. On the contrary, in many instances, liability will arise only if that inaccurate factual statement was made dishonestly by virtue of the legal rules which we have described above.

166. It is not possible to say that there could never be liability in these circumstances. If the steps set out in the CRTP are not in fact pursued without any good explanation, it might in some cases be inferred that the company never had any intention of implementing its plan and that could give rise to liability on the basis of a misrepresentation as to the company's intention to implement the plan at the time it was adopted. Put bluntly, if subsequent events in relation to a CRTP suggest for example that the targets included ought at the time to have been recognised as utterly unrealistic or that the company never had any real intention of implementing the plan, then that might help a claimant prove a case based on allegations that false statements of fact were made by the company and its directors at the time of the plan with the necessary culpable state of mind, which as noted will in most cases require dishonesty.

167. That, however, is a rather extreme scenario. As we have stated above, the consequence of our analysis is that liability will not arise simply because the targets and expectations provided for in a CRTP adopted in good faith are not met. Nor will liability arise simply from the fact that the steps identified in the plan are not in fact implemented. A board which acts honestly and which adopts appropriate processes in relation to the production of the CRTP will, in our view, have robust defences available to them in the event that a claim is brought or liability is alleged.

168. As regards the consequences of adopting a plan which with hindsight might look insufficiently ambitious as a result of increasing global ambitions to combat climate change, that in itself, in our opinion, could not provide any basis for liability. The requirement we are considering in this Opinion is a requirement simply to disclose a CRTP[95]. Subsequent changes to global expectations would not alter the liability analysis of the statements made in that context, since those statements are to be assessed as at the time they were made.

169. As regards data relating to present and historical matters, such as a company's Scope 3 emissions, companies and directors of course must be careful in how they present such data (as with any data disclosed or relied on). Disclosing such data will involve making statements as to present and historical fact and so could in principle give rise to liabilities

[95] For the purpose of this Opinion, we proceed on the basis that such a requirement would not extend to prescribing the level of ambition of the CRTP. However, we acknowledge that any future requirement may entail making statements regarding the CRTP's alignment with the Paris Agreement, or other national or international climate goals. While such aspects may require a different analysis, they would not, in our view, materially alter the conclusions made in this paragraph.

if such statements are false when made. The same is true of many different matters which may be the subject of corporate disclosure. However, the fact that the underlying data might be unreliable, perhaps for example because of difficulties in the obtaining or measurement of that data, does not in itself necessarily increase the risk of liability. The key point is that such statements based on inherently unreliable data need to be made in a manner that takes account of that unreliability. Put simply, if the statements made do not misleadingly suggest that the conclusions stated and the data on which they are based are fully reliable, then those statements should not be false and no liability should follow. It might not be sufficient to rely on the fact that many are aware that the estimation of Scope 3 emissions, for example, is inherently very difficult. However, any unreliability should simply be acknowledged and catered for in some way within the statement, for example, by the inclusion of an appropriate caveat or disclaimer. The risk of liability will be reduced yet further by adopting appropriate established methodologies for the calculation of Scope 3 emissions.

170. In those circumstances, despite the length and detail of the legal analysis above, our conclusions (as summarised in Section B above) are relatively simple:

170.1. A requirement that companies disclose a CRTP is not likely to result in a materially heightened liability risk for companies and directors.

170.2. There is no compelling reason from a liability perspective to introduce any further or additional specific "safe harbour" regime in relation to CRTP disclosures.

170.3. In certain material respects, there are likely to be legal advantages for directors and companies as regards compliance with their obligations more generally flowing from compliance with a requirement to publish a CRTP.

170.4. Further, there are steps that directors and companies can take to further reduce or minimise the risk of liability in respect of CRTP disclosures.

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20 June 2025

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