

On behalf of: the Claimants
Lawrence Ewan McGaughey
First
Exhibit LEM1

Claim No. _____

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
INSOLVENCY AND COMPANIES LIST (ChD)

IN THE MATTER OF UNIVERSITIES SUPERANNUATION SCHEME LIMITED
MULTIPLE DERIVATIVE CLAIM

BETWEEN:

- 1. LAWRENCE EWAN McGAUGHEY**
- 2. NEIL MARTIN DAVIES**

Claimants

and

- (1) UNIVERSITIES SUPERANNUATION SCHEME LIMITED**
- (2) THE INDIVIDUALS LISTED AT APPENDIX 1 TO THE CLAIM FORM**
- (3) THE INDIVIDUALS LISTED AT APPENDIX 2 TO THE CLAIM FORM**

Defendants

WITNESS STATEMENT OF THE FIRST CLAIMANT
MR LAWRENCE EWAN McGAUGHEY

1. This witness statement is made in support of the Claimants' application pursuant to CPR 19.9(4) for permission to continue a derivative action against the Company.
2. In particular, this statement explains:
 - (A) Why I am a 'suitably interested representative' for the purpose of bringing this claim.

(B) On what basis the claim is brought.

(C) The sources upon which the Claimants rely.

3. I am employed by King's College London at the School of Law, as a Reader in Law, specialising in company law, institutional investment, labour law and network regulation. I am also a research associate at the Centre for Business Research at the University of Cambridge, and a volunteer for the Free Representation Unit.
4. I am a member of the Universities Superannuation Scheme (the "**Scheme**") of which the First Defendant (the "**Company**") is the corporate trustee. I commenced membership on 1 October 2008.
5. I have read the witness statement of Dr Davies with which I agree and I do not repeat.
6. In this statement, I first set out on what basis the Claimants contend we are suitable individuals to bring a claim on behalf of (the Company. While I appreciate that I am addressing matters of law, it is the Claimants' hope that the application will be granted in paper without a hearing. I now explain.
7. The particulars of claim identify four claims which exist in the hands of the Company by reason of the conduct of the directors identified at Appendix 1 and Appendix 2 to the Claim Form. The Claimants recognise that, as one of the fundamental principles of company law, the cause of action of such claims is vested in the Company itself. A second fundamental principle is that company directors are accountable to those who hold the economic interest in it. However, as the Company is controlled by the directors against whom the claim is brought, there is no prospect that the Company will bring the claim.
8. Chapter 1 of Part 11 of the Companies Act 2006 identifies the principles by which members of a company may bring such a claim vested in and on behalf of the company. Here the members of the company are the directors themselves and there is no prospect of a direct derivative claim, to uphold any directors' duties. However, it is possible for people other than members of a company to bring what is generally known as a multiple derivative claim, pursuant to principles analogous to those set out in sections 260 to 264 of the Companies Act 2006.

9. I am aware that the legitimacy of such claims by ‘someone with a sufficient interest to sue as the company's representative claimant, for the benefit of all its stakeholders’ has been approved by the courts, most noticeably by Mr Justice Briggs (as he then was) in Universal Project Management Services Ltd v Fort Gilkicker Ltd [2013] EWHC 348 (Ch), [24]. In that case the claimant was a member of a limited liability partnership which owned a joint venture company. This was the first defendant and the entity which was said to have the cause of action that the claimant continued. There was no possibility of a straightforward derivative action. However Mr Justice Briggs granted the claimant permission to bring a multiple derivative action. Gilkicker establishes that multiple derivative actions existed at common law prior to the coming into force of the 2006 Act and survived the coming into force of the Act.
10. In this case, we contend that we are in an analogous position to the claimant in Gilicker. The purpose of the Company is to promote and protect the interests of the beneficiaries of the Scheme of which the Company is the corporate trustee. Without enabling such sufficiently interested representatives to bring the claim, there is no realistic prospect that the duties of the Company directors could be upheld.
11. Much of the material upon which we rely has been taken directly from – and remains accessible via - the Company’s website – www.uss.co.uk. In due course, the Claimants will seek full disclosure from the Company and directors.

(1) Valuation methodology and scheme governance

12. Since 2013, university pension benefits have continually been reduced, while contributions have risen. This has been done following scheme valuations in three main steps.
 - (A) The first step, after the 2014 valuation was the replacement in 2016 of the ‘final salary’ scheme with a ‘career revalued benefits’ scheme. The guaranteed income (defined benefit) pension was then capped at £55,000 in earnings, which would rise in line with inflation. Above this ‘salary threshold’ members were entitled to defined contribution benefits.

- (B) The second step was the proposal, following the 2017 valuation, to cancel all defined benefit elements of the pension, effectively reducing the salary threshold to zero. This plan was dropped after the 2018 industrial action by UCU.
- (C) The third, and current step is the proposal to reduce the defined benefit salary threshold to £40,000, as well as reductions in accrual rates from 1/75th of salary to 1/85th, and caps at 2.5% in the rises of the salary threshold and accrual rates.
13. These reductions in benefits coincide with the tenure of Mr Bill Galvin, previously the Pensions Regulator at USS, as the group Chief Executive Officer.
14. During an ‘away day’ from Friday 1 March 2019, Mr Galvin told those attending, including the Company board, that “DB pensions in the UK have failed. This is not controversial.”
15. This statement was reported by Professor Jane Hutton, a member of the Company board at the time, to the chair of the Joint Negotiation Committee, Sir Andrew Cubie in an email of 2 March 2019 [LEM1 p.1].
16. Subsequently, these statements were recorded in the minutes of a meeting of the Company board on 16 May 2019, with the addition of Mr Galvin’s assertion that Professor Hutton ‘had only used part of a quote which was about private sector DB having failed substantially due to inadequate decision making processes and the need therefore for the Scheme to have good governance.’ The minutes continue that ‘Mr Galvin expressed concerns that he had been misrepresented and that it was a deliberate attempt to undermine his position with the JNC.’ [LEM1 p.2] It was not clarified what the other ‘part’ of the quote was, or what the ‘misrepresentation’ was.
17. Whatever the context surrounding Mr Galvin’s apparent statements that ‘DB pensions in the UK have failed’, this view appears consistent with the conduct of Mr Galvin as CEO, and the directors of the Company as a whole. There have been repeated attempts to reduce or close the Scheme DB pension (see paragraphs 12(A) to (C) above) including the adoption of a methodology to achieve that result, and disregard for any considerations that may detract from this apparent objective.

18. Subsequent to Mr Galvin's statements, Prof Jane Hutton was removed from the Company board, among other things, for breach of confidentiality. This as well as their recording in the board minutes suggests that the reported statements of Mr Galvin were broadly accurate (and therefore deemed by him to be confidential).
19. Professor Hutton is currently bringing proceedings in an Employment Tribunal, among other things, for unfair dismissal following a protected disclosure of unlawful conduct in the public interest.
20. The valuation methodology and justification for its key assumptions have never been disclosed to the Company board, or made public, by USS Investment Management Ltd, the subsidiary that Mr Galvin also directs. In particular, the methodology behind the assumption in the 2020 valuation that there would be 0.0% growth in assets above Consumer Price Index inflation on the 'Tending To Strong' covenant at the time, has never been disclosed.
21. There appears to have never been a prudent or rational basis to say that the Scheme assets would grow at 0.0% for 30 years. This would, however, provide an ex-post rationalisation for those proposing closure of the defined benefit pensions, and who take the view that it is uncontroversial that "DB pensions in the UK have failed".
22. There is no current or (on a prudent and rational basis) future deficit in USS Scheme assets. The July 2021 report shows £87.8 billion in assets, that is £22.3 billion more than the March 2020 assessment of £66.5 billion, where a £17.9 billion (future) deficit was predicted. It is doubtful that there is any rational basis to say that liabilities have also suddenly risen dramatically.
23. The most appealing method by which it can be maintained that there is a future deficit to justify cuts is to further manipulate the actuarial assumptions: for instance, to raise life expectancy predictions (therefore raising liabilities) or maintain a low prediction of future returns (the current prediction is 0.29% growth in assets above inflation, above the covenant based on the proposed benefit reductions).
24. This ignores the relevant considerations that the Scheme assets have more than recovered since the March 2020 stock market crash, that asset growth has amply

recovered, and it violates a core director's duty to act within one's powers and for proper purposes.

(2) Discriminatory impact of changes

25. In addition to my work researching, lecturing and teaching in the School of Law, since December 2020 I have been a union representative for the University and College Union at King's College London. This carries a solemn duty to act in our members' and all workers' best interests, and particularly to ensure that our members' pay and conditions are protected. This includes action against unlawful discrimination, as enshrined in the Equality Act 2010 and international law.
26. Across the university sector, the gender pay gap (average wages of men compared to women) was reported as 15.1% in 2019, while statistics are partial for the sector-wide ethnicity pay gap (average wages of white staff compared to black and ethnic minority staff). In the twenty-four 'Russell Group' universities, the ethnicity pay gap was reported to be as high as 26% in 2018: see R Pells, 'Gender pay gap: UK universities report slow progress' (8 April 2019) [Times Higher Education](#) [LEM1 p.3]; R Croxford, 'Ethnic minority academics earn less than white colleagues' (7 December 2018) [BBC News](#) [LEM1 p.6].
27. Across the UK as a whole, the gender pension gap (average male pension income compared to average female pension income) is approximately 40%, a figure that compounds the gender pay gap, and the fact that women tend to live approximately 4 years longer than men on average. We do not have data disclosed from the Company to determine what the gender or ethnicity pension gaps are in university pensions.
28. It is reasonably clear to me that the proposed salary threshold reductions, reduced accrual rates, and pension increase cap changes will have a particularly disparate impact upon female, younger and/or black and minority ethnic beneficiaries of the USS Scheme, compounding the existing inequality. This is true because:
 - (A) less of the pension will be a defined benefit pension but rather a defined contribution pension, which runs out if people live longer;

(B) women tend to live on average 3.9 years longer than men: J Buxton, ‘Statistical Bulletin. National life tables – life expectancy in the UK: 2018 to 2020’ (23 September 2021) [Office for National Statistics](#) [LEM1 p.10].

(C) in the case of younger beneficiaries, who are more likely to be black and minority members, the total benefits will be lower than for older beneficiaries who are further more likely to be white.

29. To my knowledge, the Company has neither conducted nor published an Equality Impact Assessment of its proposed changes.

30. The Company directors have failed to take into account both the relevant considerations of the particular disadvantages at which its proposals put women, young, and black and ethnic minority members, and the exposure of the Company to claims for discrimination, to the detriment of all members.

(3) USS cost increases

31. For several decades, but particularly from 2013, USS costs have been rising relative to the Scheme assets, while the directors have been predicting ever more extravagant deficits.

32. One of the primary determinants of pension benefits in the UK is the proportion of fees charged by asset managers.

33. In 2009, the UK Government Actuary’s Department found that on average, the fees in an annuity product that is purchased upon retirement to insure against the risk of living longer than expected (a step necessary with individual defined contribution pensions, but not with defined benefit) takes from 20 to 39% of a typical person’s retirement savings. This appeared in analysis of the difference between individual defined contribution accounts and ‘collective defined contribution’ with pooling and risk-sharing among beneficiaries, as opposed to the employer bearing a risk in a defined benefit plan: DWP, *Modelling Collective Defined Contribution Schemes: A summary of The Government Actuary’s Department modelling of collective defined contribution schemes* (December 2009) 3 [LEM1 p.13].

34. While the Company is proposing to increase the proportion of the defined contribution pension, and shrink the guaranteed income (defined benefit) pension, which will require members to purchase more in annuity products, its total operating costs have inflated out of all proportion compared to the Scheme assets.
35. This has funded a substantial rise in asset management personnel, expensive offices on 60 Threadneedle Street, and higher pay packages for the senior managers and Chief Executive Officer, while delivering cuts to the beneficiaries.
36. My understanding is that a corporate trustee is required to manage beneficiaries' money in the interests of beneficiaries, not itself or its directors and managers. A trustee corporation's directors are not entitled to benchmark their costs to commercial asset managers who may or may not owe fiduciary obligations to their clients, and who deal at arm's length from their clients. A trustee's core fiduciary duty is to act in the beneficiaries' best interests, not its own.
37. The escalating costs at USS amount to self-serving negligence to the advantage of the directors of the Company. This is conduct pursuing interests that directly conflict with the interests of beneficiaries.

(4) Fossil fuels, risk of financial detriment and ethical investment survey

38. The Scheme remains invested to a significant degree in fossil fuels, which risk significant financial detriment in the future, and have caused significant financial detriment to the interests of beneficiaries in recent years.
39. Since 2017, fossil fuel companies as a whole have been repeatedly found to be the worst performing investments in the stock market: see for example, A Mooney, 'The best and worst performing equity funds of 2020' (16 January 2021) Financial Times [LEM1 p.14], and B Naumann, 'Sharp rise in number of investors dumping fossil fuel stocks' (9 September 2019) Financial Times [LEM1 p.17].
40. Since 2010, renewable energy portfolios have consistently 'generated higher returns relative to fossil fuels': *Clean Energy Investing: Global Comparison of Investment Returns* (March 2021) Imperial College Business School and International Energy Agency, 3 [LEM1 p.20].

41. This suggests that the risk of significant financial detriment to the Scheme will escalate as companies carrying on fossil fuel extraction, or burning in energy production, are eliminated from the global economy, in order to prevent climate damage, and to comply with obligations under the Paris Agreement 2015.
42. USS has failed to divest from fossil fuels, despite the detrimental financial impact to scheme members, and it has failed to adopt any credible plan for use of shareholder voting rights to decarbonise other companies in its portfolio. It appears to be adopting an 'ethical policy' based upon the personal preferences of the directors, several of whom have backgrounds in the coal industry, and the banking industry that is primarily responsible for financing fossil fuels.
43. From October 2020, the Company conducted an 'Ethical Investment Survey', with results completed by November 2020. The results have never been published or publicly released although I provide at [LEM1 p.22] a screenshot of the powerpoint slides showing results.
44. I am aware that Dr Davies responded on behalf of several thousand members of the scheme, and there was widespread participation, although figures on total responses to the ethical investment survey do not appear to be public.
45. It is a breach of the duty of directors to act for proper purposes for that director to ignore the risk of significant financial detriment to the Company from investments in fossil fuels, and to prefer the ethical views of its directors over the large majority of Scheme members.

Statement of truth

I believe that the facts stated in this witness statement are true. I understand that proceedings for contempt of court may be brought against anyone who makes, or causes to be made, a false statement in a document verified by a statement of truth without an honest belief in its truth.

Signed:

A handwritten signature in black ink, appearing to read 'GEGE' with a stylized flourish at the end.

Print Name: Lawrence Ewan McGaughey

Dated: 27 October 2021

On behalf of: the Claimants
Lawrence Ewan McGaughey
First
Exhibit LEM1

Claim No. _____

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
INSOLVENCY AND COMPANIES LIST (ChD)

IN THE MATTER OF UNIVERSITIES SUPERANNUATION SCHEME LIMITED
MULTIPLE DERIVATIVE CLAIM

BETWEEN:

- 1. LAWRENCE EWAN McGAUGHEY**
- 2. NEIL MARTIN DAVIES**

Claimants

and

- (1) UNIVERSITIES SUPERANNUATION SCHEME LIMITED**
- (2) THE INDIVIDUALS LISTED AT APPENDIX 1 TO THE CLAIM FORM**
- (3) THE INDIVIDUALS LISTED AT APPENDIX 2 TO THE CLAIM FORM**

Defendants

**EXHIBIT LEM1 TO THE WITNESS STATEMENT OF THE FIRST
CLAIMANT
MR LAWRENCE EWAN McGAUGHEY**

- 1.* Email from Professor Jane Hutton to the chair of the Joint Negotiation Committee, Sir Andrew Cubie 2 March 2019 [LEM1 p.1].
- 2.* Minutes of a meeting of the Company board on 16 May 2019 [LEM1 p.2],
- 3.* Gender pay gap UK universities report slow progress Times Higher Education (THE) [LEM1 pp.3-4],

4. Ethnic minority academics earn less than white colleagues - BBC News [**LEM1 pp.5-8**],
5. ONS, National life tables, 2018-2020 [**LEM1 pp.9-10**]
6. DWP, *Modelling Collective Defined Contribution Schemes* (December 2009) 3 – [**LEM1 pp.11-13**]
7. A Mooney, ‘The best and worst performing equity funds of 2020’ (16 January 2021) Financial Times [**LEM1 pp.14-15**],
8. B Naumann, ‘Sharp rise in number of investors dumping fossil fuel stocks’ (9 September 2019) Financial Times [**LEM1 pp.16-17**].
9. *Clean Energy Investing: Global Comparison of Investment Returns* (March 2021) Imperial College Business School and International Energy Agency, 3 [**LEM1 pp.18-21**].
10. Screenshot of the powerpoint slides from the Ethical Investment Study [**LEM1 pp.22-23**].