Neutral Citation Number: [2023] EWCA Civ 873

Case No: CA-2022-001798

**IN THE COURT OF APPEAL (CIVIL DIVISION)**
**ON APPEAL FROM THE HIGH COURT OF JUSTICE**
**BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES**
**COMPANIES COURT (ChD)**
**Mr Justice Leech**
**[2022] EWHC 1233 (Ch)**

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 21/07/2023

**Before :**

**THE RT HON. SIR JULIAN FLAUX, CHANCELLOR OF THE HIGH COURT**
**LADY JUSTICE ASPLIN**
**LORD JUSTICE SNOWDEN**

- - - - - - - - - - - - - - - - - - - - -

**Between :**

| | |
|---|---|
| **(1) LAWRENCE EWAN MCGAUGHEY**<br>**(2) NEIL MARTIN DAVIES** | **Claimants/ Appellants** |
| **- and -** | |
| **(1) UNIVERSITIES SUPERANNUATION SCHEME LIMITED**<br>**(2) THE INDIVIDUALS LISTED IN APPENDIX 1 TO THE CLAIM FORM**<br>**(3) THE INDIVIDUALS LISTED IN APPENDIX 2 TO THE CLAIM FORM** | **Defendants/ Respondents** |

- - - - - - - - - - - - - - - - - - - - -
- - - - - - - - - - - - - - - - - - - - -

**David E. Grant KC** and **Philip Stear** (instructed by **Leigh Day**) for the **Appellants**
**Andrew Short KC** and **Helen Pugh** (instructed by **CMS Cameron McKenna Nabarro Oslwang LLP**) for the **First Respondent**

Hearing dates: 13-15 June 2023

- - - - - - - - - - - - - - - - - - - - -

# Approved Judgment

This judgment was handed down remotely at 3.00 p.m. on 21 July 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

.....

## Lady Justice Asplin:

1. This appeal is concerned with an application by members of a pension scheme to continue proceedings on behalf of the pension trustee company against the company's current and former directors for breach of their directors' duties, as a common law derivative claim. It raises questions about the nature and requirements of such a claim and whether it is the appropriate procedure in circumstances in which the trustee company is limited by guarantee, the directors are its members and its sole purpose is to act as trustee of a single pension scheme which it is required to administer.

### *Background to the Parties and the Scheme*

2. The Universities Superannuation Scheme was established under a trust deed dated 2 December 1974 for the purpose of providing superannuation benefits for academic and comparable staff in universities and other higher education institutions in the United Kingdom. It is one of the largest private occupational pension schemes in the United Kingdom if measured in terms of assets under management. It is described in the Particulars of Claim as a "hybrid multi-employer scheme". It has 343 participating employers. As at March 2020, there were 200,355 active members, 188,466 deferred members, 90,879 pensioners and 1,159 child pensioners of the Scheme. The Scheme is both a defined benefit and a defined contribution scheme.

3. The Appellants, Dr McGaughey and Prof. Davies, are active members of the Scheme.

4. The First Respondent, Universities Superannuation Scheme Limited, ("USSL") is the trustee and administrator of the Scheme and is limited by guarantee. In summary, the objects of USSL are to undertake and discharge the office of trustee of any pension scheme established solely for the benefit of university teachers and other staff of comparable status and, in particular, to act as trustee of the Scheme; and to carry out all duties and exercise all powers arising out of the trusteeship (Article 71 of USSL's Memorandum and Articles of Association (the "Articles")). Further, amongst other things, Article 74 provides that the income and property of USSL shall be applied solely towards the promotion of its objects and any surplus on a winding up shall be held for such charitable purposes as the management committee shall think fit. USSL generates no profit and recovers its expenses and costs from the Scheme in accordance with Rule 62.6 of the Scheme Rules.

5. Pursuant to Article 26, USSL must have between ten and twelve directors of whom four are appointed by Universities UK (a company limited by guarantee representing over 100 university employers) and three from the University and College Union (the "UCU") (a trade union representing over 130,000 academics and support staff). No more than two of the three directors from UCU may be persons who are not pensioner members and USSL must have no less than three but not more than five independent directors.

6. There are thirteen current directors and one alleged shadow director of USSL. They are listed in the first appendix to the Claim Form and are referred to together as the Second Respondents. Eighteen former directors, who were in office during the events which allegedly give rise to the claim, are listed in the second appendix to the Claim Form and are referred to together as the Third Respondents. As a company limited by guarantee,

USSL has no shareholders. Pursuant to Article 2, however, a person appointed as a director automatically becomes a member of the company.

7. USSL's wholly owned subsidiary, USS Investment Management Limited, ("USSIM") provides investment management and advisory services to USSL. The alleged shadow director, Mr Galvin, is the Chief Executive Officer of USSL and a director of USSIM.

8. Rule 64 of the Scheme Rules provides for the establishment of the Joint Negotiating Committee (the "JNC") which consists of eleven persons of whom five are UUK appointees, five are UCU appointees and one is an independent member who acts as chair of the committee. In addition to the other functions prescribed in the Scheme Rules, Rule 64.1 provides that the functions of the JNC are: to approve any amendment to the Rules proposed by USSL; to initiate and approve amendments to the Rules; to consider any amendment to the Rules proposed by the advisory committee arising out of the operation of the Rules and to decide on contributions increases or decreases and/or benefit changes under sub-rule 64.10. Further, under Rule 62.6, it is the JNC which must agree the remuneration to which the directors of USSL are collectively entitled.

***Procedural History***

9. In October 2021, Dr McGaughey and Prof. Davies issued the Claim Form in this action endorsed with Particulars of Claim and an Application Notice seeking permission to continue the action on behalf of USSL and that they be indemnified against liability for the costs incurred in the application and the claim.

10. The Application Notice was dismissed on paper by Leech J by an order dated 13 December 2021 (the "2021 Order"). In his reasons for doing so, Leech J stated that:

    i) he was not satisfied that the claim could be described as a double or multiple derivative claim or that the procedure for claims of that kind should be applied by analogy; Dr McGaughey and Prof. Davies were not members of USSL or its parent company but are beneficiaries of the trust of which USSL is the corporate trustee; and that although there are authorities such as *Popely v Popely* [2018] EWHC 276 (Ch) which use the description of "multiple" or "double" derivative claim to refer to a claim by beneficiaries against the directors of a corporate trustee, such a claim is better described as a "dog leg" claim [the 2021 Order at [2]];

    ii) he was willing to accept (without deciding) that the procedure in CPR 19.9 applies to "dog-leg" claims by beneficiaries against the directors of a corporate trustee but it remained necessary for Dr McGaughey and Prof. Davies to establish both the grounds of a derivative action under company law and the grounds under trust law (referring to *Lewin on Trusts* 20th ed (2020) Vol 2 at 47 -017 and 47-006 – 011) [the 2021 Order at [3]]; and that

    iii) he was not satisfied that there were exceptional circumstances which would justify the grant of permission to bring a derivative claim. He went on at [4] of the 2021 Order to state that, in particular, he was not satisfied that the claim could not be brought in any other way and that it was unclear to him why a claim by individual scheme members would not be financially viable. He concluded

that the kind of relief sought would be more suited to an action for breach of trust directly against USSL rather than a dog-leg claim against its directors.

11. The application was renewed orally. At a without notice hearing at which the Respondent was not represented Leech J set aside his original order and directed that the Respondent be joined as a party to the application. The matter proceeded to a hearing on notice. At the hearing on notice, Dr McGaughey and Prof. Davies and the First Respondent only appeared, the Second and Third Respondents not having been served pending the outcome of the permission hearing. USSL had filed evidence in response to that which had been relied upon by Dr McGaughey and Prof. Davies when the matter was considered on paper.

12. Mr Grant KC, who appeared on behalf of Dr McGaughey and Prof. Davies (and also appeared with Mr Stear on their behalf before us) made clear in his written submissions for the without notice hearing that by the Claim Form the claimants had commenced a derivative claim under common law principles analogous to those set out in Chapter 1 of Part 11 of the Companies Act 2006 ("CA06") and that the action was intended to be a common law derivative claim in the company law sense.

13. In his written submissions, to which we were referred, Mr Grant disavowed any intention to bring a "dog-leg" claim against the directors which he defined at [20] of his written submissions as "a claim by a beneficiary on their behalf against the director of a trustee company when the ordinary defendant (sic) is the trustee company itself" where the claim against the directors vested in the trustee company is conceptualised as an asset of the trust. He pointed out at [21] of his written submissions that the Particulars of Claim contained no allegation that the directors owed duties to the members of USSL or that USSL holds its rights against the directors on trust for Scheme members. He concluded that that was sufficient to dispose of the conclusion that the claim was better viewed as a "dog-leg" claim. He also noted at [23] of his written submissions that claims brought by beneficiaries of a trust against a third party have been described as derivative claims: *Roberts v Gill* [2010] UKSC 22, [2011] 1 AC 240.

14. Mr Short KC and Ms Pugh, who appeared on behalf of the First Respondent before Leech J and before us, confirmed that the oral application before the judge had been conducted on the basis that the claim should be characterised as a common law derivative claim and that that choice had been made deliberately. There is no dispute, therefore, that the renewed application proceeded on the basis that permission was sought to continue a derivative claim at common law in the company law sense.

15. Leech J dismissed that renewed application and this is an appeal from his order dated 10 August 2022 (the "Order"). The citation for his detailed judgment is [2022] EWHC 1233 (Ch). Reference should be made to that judgment for the full background to this matter.

### *The Claims*

16. There are four claims for which permission to continue the proceedings was sought. They are described, in summary, at [2] of the Amended Particulars of Claim (the "APOCs") and dealt with in detail in the judgment.

- *The Valuation Claim*

17. The first has been described as the "Valuation Claim". The background to it is set out at [60] – [71] of the judgment. As the judge explains, the statutory actuarial valuations of the Scheme were obtained as at 31 March 2017 (the "2017 Valuation") and as at 31 March 2018 (the "2018 Valuation"). Details of those valuations and their consequences are set out at [62] – [64] of the judgment. USSL was not required to obtain a further actuarial valuation under section 224 Pensions Act 2004 until 31 March 2021 [65]. It chose, nevertheless, to obtain a further valuation as at 31 March 2020. That valuation was dated 30 September 2021 (the "2020 Valuation") and forms the basis of the Valuation Claim.

18. On 30 September 2021, Mr Galvin signed the schedule of contributions for the 2020 Valuation. It stated that if a deed of amendment were entered into reflecting certain resolutions in relation to benefit reduction and contribution increases, the members' contribution would be 9.8% of salary and the employers' would be 21.4% from 1 April 2022 to 31 March 2038 [95].

19. On 22 February 2022, the JNC resolved to confirm the benefit reductions and to consent to a deed of amendment (save for one point which is not relevant here). Thereafter, USSL executed a deed of amendment dated 28 February 2022 (the "Deed of Amendment") which put into effect changes to salary threshold, accrual rate and inflationary increases and increased member contributions to the 9.8% rate [96] and [97]. By October 2021, USSL had proposed an increase in employer contributions to 21.4% and employee contributions to 9.8%.

20. Amongst other things, it is said that the directors decided to maintain the 2020 Valuation despite there being no legal need for a valuation as at that date, the effect of the pandemic on the stock market and the rise in asset values after 30 March 2020, assumed a reduced real future asset return and as a consequence inflated the funding deficit, assumed that the growth in assets would be 0% - 0.2% above CPI for 30 years despite growth of 32% in 16 months and recommended contribution rises unless cuts were made to the defined benefit pension and accrual rates. Full details of the allegations are set out at [70] of the judgment which reproduces [81] of the APOCs.

21. It was also pleaded that the alleged breaches in relation to the Valuation Claim and those in relation to the Discrimination Claim to which I shall refer, amounted to "equitable fraud and/or an impermissible furthering of the Directors' interests" because:

    i) The alleged breaches were done "with the aim of reducing future defined benefit accrual in the Scheme" [APOCs at [107]];

    ii) "The improper use of the power of the Company [USSL] as trustee to conduct and control valuations of the Scheme assets to achieve the above aim constituted equitable fraud. Pursuing a policy of reducing future defined benefit accrual under the Scheme to achieve a result that is discordant with the object of the Company [USSL] is a misuse of the Directors' powers. It is to be inferred that the Directors pursued their own interest/benefits when undertaking the breaches . . . because no other explanation for their actions makes rational sense." [APOCs at [108]];

iii) The Directors' actions were "perverse". "The only rational reason why the Directors would want to project a large deficit in the Scheme ignoring substantial subsequent increases in the Scheme's assets was to force the JNC to cut the terms on which benefits would be accrued in future." [APOCs at [109]]; and

iv) The reduction in future accrual in the Scheme was "in the Directors' interests" because: those Directors who are trustees of the universities participating in the Scheme have an interest in reducing future potential liabilities of their university to the Scheme; a reduction in the rate of future accrual reduces the risk of TPR (Pensions Regulator) intervention in the Scheme and the consequences of that intervention on the Scheme and the Directors; and the reduction in future accrual rates is consistent with and in furtherance of Mr Galvin's belief that defined benefit pensions are undesirable. [APOCs [110]].

22. Dr McGaughey and Prof. Davies seek declarations that the directors' conduct was in breach of their statutory and/or fiduciary duty and that the breaches have caused and will cause loss to USSL in the form of loss of assets and increased deficit, the need to recover the deficit, the loss of revenue as employers and members leave the Scheme and new members do not join, the loss of future investment return and other associated consequences [APOCs at [83]]. They also seek an injunction to prevent the directors from implementing the benefit changes and contribution increases.

- *The Discrimination Claim*

23. It is also alleged that the benefit changes implemented by the Deed of Amendment indirectly discriminate against women, younger and black and ethnic minority members contrary to section 19 Equality Act 2010. This is referred to as the "Discrimination Claim". Further details of the alleged effect of the reduction in salary threshold to £40,000 and the accrual rate to 1/85 are set out at [101]. It is alleged, therefore, that "[A]s the Company [USSL] can only act through its agents" the changes are contrary to USSL's duty to act lawfully for proper purposes in accordance with the Scheme Rules and the Articles and Memorandum of Association, and have exposed USSL to claims for discrimination and that the introduction of each of the changes constitutes a breach of the Directors' statutory and/or fiduciary duties to USSL [[92] and[93] of APOCs].

24. Declarations are sought that the introduction of the changes will amount to discrimination by USSL contrary to section 19 and/or 61 Equality Act 2010; that in doing so the Directors have been in breach of statutory and/or fiduciary duty; and that such breaches "have caused or will cause USSL loss" as a result of its exposure to claims by Scheme members for indirect discrimination on the grounds of sex, age and/or race [APOCs at [94]].

25. As I have already mentioned, the pleaded allegations in relation to equitable fraud and/or impermissible furtherance of the Directors' interests are the same as those in relation to the Valuation Claim although there is no proper link in the pleading to the Discrimination Claim itself.

- *The Costs Claim*

26. The third claim is in relation to alleged impermissible increases in operating costs and salaries. It has been referred to as the "Costs Claim". Details are at [95] – [100] of the APOCs. Reliance is placed on: the increase in total operating costs from £9,752,000 in 1995 to £160,000,000 in 2020 being a relative increase from 0.099% to 0.236% of the fund's net assets; and the fact that individual salaries have increased, and in particular, the increase in the CEO's salary from £291,000 in 2013 to £756,700 in 2020 [[97] and [98] of the APOCs].

27. Further, under the heading of "[E]quitable fraud, conflict and furthering one's own interest" it is pleaded at [111] that the directors and Mr Galvin, in particular, "enjoyed the benefit of super-inflationary increases (in relation to greater spending or, in Mr Galvin's case, in relation to his remuneration) ..." and that it was in the interests of the other directors not to raise concerns for fear of losing their office.

28. It is said that the increases constitute a breach of the directors' statutory and fiduciary duties and/or are negligent to the personal advantage of the directors [APOCs at [99]]. Dr McGaughey and Prof. Davies seek declarations to that effect and/or that the increases were negligent to the personal advantage of one or more of the directors and have caused or will cause loss to USSL.

*- The Fossil Fuels Claim*

29. The fourth claim has been referred to as the "Fossil Fuels Claim". It is outlined at [101] – [106] of the judgment. It is alleged that the Scheme continues to invest directly and indirectly in fossil fuels and although it was announced in May 2021 that the ambition was to be carbon neutral by 2050 the directors have failed to form an adequate plan to deal with the financial risks involved in such investments. It is said, therefore, that the "continued investment in fossil fuels without any or any adequate plan for divestment" is a breach of the director's duty in section 171 and 172 of the CA06 to act for proper purposes including making investments that avoid significant risk of financial detriment to the Scheme, the beneficiaries and the Company [USSL] and to promote the success of the Company [USSL] having regard to the Company's [USSL's] long term interests" [APOCs at [103]].

30. Further, or in the alternative, it is said that in failing to have a plan or in having a mere ambition to be carbon neutral by 2050, the directors have failed to take into account a number of relevant considerations, including the results of a members' ethical survey undertaken in November 2020 [APOCs [104]]. It is said that the long term interests of USSL and the Scheme can only be met by "an immediate plan for disinvestment" and that the only "rational action" that the directors can take pursuant to sections 171 and 172 CA06, is to "devise and implement such a plan as soon as possible." [APOCs at [105]].

31. In addition, it is pleaded that the failure to take such steps has prejudiced and will continue to prejudice the interests and success of USSL which has suffered and will continue to suffer loss in consequence. [APOCs [106] (being the first paragraph numbered [106])]. At [112] of the APOCs it is pleaded that the directors' breaches "furthered their own interests" and that the directors "put their own beliefs with regard to fossil fuels above the interests of the beneficiaries and the Company [USSL]".

32. Declarations are sought that the absence of a divestment plan constitutes a breach of statutory and fiduciary duties and that such breaches have caused and will cause loss to USSL.

***Interested Representatives***

33. At [25] of the APOCs it is pleaded that Dr McGaughey and Prof. Davies are suitably interested representatives to bring the proceedings, inter alia for five reasons. They are:

> "A. . . . the Company's [USSL's] purpose and object is to exist and act for the benefit of the Scheme Members who have given consideration for their pension rights. Failing to act in the interests of the Company [USSL] involves, by definition, failing to act in the interests of the Scheme members.
>
> B. There is no prospect that the directors of the Company [USSL] (whether with or without the shadow director ) will bring the claim not least because of the allegations against them.
>
> C. For the same reason, and because the directors are the only members of the Company [USSL], there are no members of the Company [USSL] who would bring the claim or would resolve to remove directors under s168 CA 06.
>
> D. The Scheme members are beneficially entitled to the assets of the Scheme held on trust by the Company [USSL].
>
> E. In the circumstances, absent the Claimants [Dr McGaughey and Prof. Davies] (or other individuals acting in their stead), there would be no prospect of the claim being brought and the wrongs alleged . . . being righted."

***The Pensions Act and the Scheme Rules***

34. It is helpful at this stage to set out a summary of the relevant Scheme Rules and statutory provisions contained in the Pensions Act 2004 ("PA 2004"). A more comprehensive description can be found at [48] – [53] of the judgment.

35. The office of the Pensions Regulator is established by section 1 of the PA 2004. The Pensions Regulator's main objectives include protecting the benefits of members under occupational pension schemes and reducing the risk of situations arising which may lead to compensation being payable under the Pension Protection Fund: section 5 PA 2004.

36. Section 222 PA 2004 defines the "statutory funding objective" of each occupational pension scheme and its "technical provisions" as follows:

> "(1) Every scheme is subject to a requirement ("the statutory funding objective") that it must have sufficient and appropriate assets to cover its technical provisions.

> (2) A scheme's "technical provisions" means the amount required, on an actuarial calculation, to make provision for the scheme's liabilities.
>
> (3) For the purposes of this Part– (a) the assets to be taken into account and their value shall be determined, calculated and verified in a prescribed manner, and (b) the liabilities to be taken into account shall be determined in a prescribed manner and the scheme's technical provisions shall be calculated in accordance with any prescribed methods and assumptions."

37. Section 223 provides that the trustees of a pension scheme must prepare, review and (if necessary) revise a "statement of funding principles" from time to time and provides that the primary purpose of such a statement is to record the trustees' policy for securing that the statutory funding objective is met. Section 224 provides that the trustees or managers of an occupational pension fund must obtain actuarial valuations at one year intervals unless they obtain actuarial reports in intervening years, in which case, they must obtain actuarial valuations at intervals of not more than three years and other occasions as may be prescribed. In summary, section 224(2) provides that an actuarial valuation is a written report which is prepared and signed by the scheme actuary, valuing the scheme assets and calculating its technical provisions.

38. The Pensions Regulator has various powers which it may exercise if sections 224 – 230 are not complied with (section 231). They include power to modify the scheme in relation to the future accrual of benefits and to give directions about the manner in which the scheme's technical provision are to be calculated, including the assumptions to be used. It is expressly stated at section 231(3) that no modification of future accrual of benefits may be made which "would or might adversely affect any subsisting right of– (a) any member of the scheme, or (b) any survivor of a member of the scheme."

39. Further, regulation 4 of the Occupational Pension Schemes (Investment) Regulations 2005 (SI 2005/3378) (the "2005 Regulations") provides (where relevant) as follows:

> "(1) The trustees of a trust scheme must exercise their powers of investment, and any fund manager to whom any discretion has been delegated under section 34 of the 1995 Act (power of investment and delegation) must exercise the discretion, in accordance with the following provisions of this regulation.
>
> (2) The assets must be invested— (a) in the best interests of members and beneficiaries; and (b) in the case of a potential conflict of interest, in the sole interest of members and beneficiaries.
>
> (3) The powers of investment, or the discretion, must be exercised in a manner calculated to ensure the security, quality, liquidity and profitability of the portfolio as a whole.
>
> (4) Assets held to cover the scheme's technical provisions must also be invested in a manner appropriate to the nature and

> duration of the expected future retirement benefits payable under the scheme.
>
> (5) The assets of the scheme must consist predominantly of investments admitted to trading on regulated markets.
>
> …
>
> (7) The assets of the scheme must be properly diversified in such a way as to avoid excessive reliance on any particular asset, issuer or group of undertakings and so as to avoid accumulations of risk in the portfolio as a whole. Investments in assets issued by the same issuer or by issuers belonging to the same group must not expose the scheme to excessive risk concentration."

40. As I have already mentioned, the JNC has certain powers under the Scheme Rules. In particular, Rule 64.10 provides:

> "If the trustee company determines, on actuarial advice, following an actuarial investigation under rule 76, that either an increase or a decrease in the aggregate contribution rate payable by employers is required towards the cost of benefits under the general fund, whether in respect of the cost of providing for such benefits for future service and/or in respect of the cost of remedying any deficit in the fund, the JNC shall decide how the cost of that increase, or the saving from that decrease, is to be addressed, either by increases or decreases in the rates of contributions payable under sub-rule 5.1 (Ordinary member contributions) and/or sub-rule 6.1 (Ordinary employer contributions) and/or by changes in benefits under the scheme. If the JNC does not agree, within the period allowed under sub-rule 76.4.2, how that cost, or that saving, is to be so addressed, the cost sharing arrangement under sub-rules 76.4 to 76.8 shall apply."

41. Rule 76 is concerned with actuarial valuations and provides, amongst other things, for valuations at an interval of not more than three years (rule 76.1) and that if an actuarial investigation reveals that an alteration or addition to the Scheme is desirable, USSL in consultation with the JNC and in accordance with the amendment power shall take such steps as USSL considers appropriate to achieve the alteration or addition (rule 76.3). Rule 79 provides that USSL may by deed repeal, alter or add to the Scheme Rules. Subject to certain exceptions which are not relevant here, it has power to change the benefit structure and the rate of contribution subject to the written consent of the JNC. Rule 79.7 also provides that subject to a number of caveats, where the JNC recommends any amendment to USSL, the company shall take steps to implement the recommendation.

***Directors' Duties***

42. The directors' duties which it is alleged have been breached are pleaded at [32] of the APOCs. It is said that pursuant to section 171, 172, 173 and 175 of the CA06 and analogous concepts in equity, the directors owed USSL a duty to:

    i) Act properly in accordance with their powers;

    ii) Promote the success of USSL for the benefit of the members;

    iii) Exercise independent judgment; and

    iv) Not to put themselves in a position of conflict.

43. Section 171 CA06 provides that a director must act in accordance with the company's constitution and only exercise powers for the purposes for which they were conferred. Section 172(1) provides that a director of a company "must act in the way he considers, in good faith, would be most likely to promote the success of the company for the benefit of its members as a whole . . ." Sub-section (2) provides that:

> "Where or to the extent that the purposes of the company consist of or include purposes other than the benefit of its members, subsection (1) has effect as if the reference to promoting the success of the company for the benefit of its members were to achieving those purposes."

44. Section 173(1) provides that a director must exercise independent judgment and section 174(1) provides that a director must exercise reasonable care, skill and diligence. Section 175(1) contains the requirement that a director must avoid a situation in which he has or can have a direct or indirect interest that conflicts or possibly may conflict with the interests of the company

***The Judgment and the Grounds of Appeal on matters of principle***

45. Having set out the background and the nature of the claims, the judge turned to the legal framework in relation to company multiple derivative actions at common law at [17] – [47] of his judgment. I shall not set out the reasoning or the authorities in any detail here because it is necessary to consider them below. In any event, at [18] and [19] the judge defined the terms "double derivative claim" and "multiple derivative claim" and went on to note that it was common ground that they were governed by common law rules rather than the statutory test in the CA06. The judge adopted Sir David Richards' definition of a double derivative claim in *Boston Trust Co Ltd v Szerelmy Ltd* [2021] EWCA 1176 at [13] being a case in which an application is made by a member of a holding company of the subsidiary company on whose behalf the claim is issued. He defined a multiple derivative claim to cover both claims which fall within Sir David Richards' second category, i.e. claims by members of a holding company on behalf of a subsidiary where there are a number of intermediate holding companies, "but also to any other claims which do not fall within either the statutory definition or the first category" [19].

46. He also noted that it was common ground that the category of multiple derivative claims was not closed and that the derivative claim is no more than a procedural device to avoid the injustice which might occur where a wrong is suffered for which no redress

could be claimed by an affected party, the obvious example being where the company is controlled by the wrongdoer against whom the claim could be brought [21].

47. The judge also recorded USSL's submission that the authorities establish that permission will be granted to continue a derivative claim at common law only where four requirements are satisfied and noted that those requirements were not challenged but that the real difference between the parties was how they should be applied and whether they were satisfied [23] and [24]. The requirements were:

    i) They have sufficient interest or standing to pursue the claim on a derivative basis on behalf of the company or other entity;

    ii) They establish a prima facie case that each individual claim falls within one of the stated exceptions to the rule in *Foss v Harbottle*;

    iii) They establish a prima facie case on the merits in respect of each claim; and

    iv) It is appropriate in all the circumstances to permit them to pursue the derivative claim or claims.

48. Having set out the two limbed test in *Prudential Assurance Co Ltd v Newman Industries Ltd (No 2)* [1982] Ch 204 at 221G- 222B, the judge stated that it was implicit in the second limb of that test that the derivative claimant must have a sufficient interest in the proceedings to permit them to bring or continue the claim [25]. Having set out the exceptions to the rule in *Foss v Harbottle* at 408G-H, approved in *Harris v Microfusion* 2003-2 LLP [2017] 1 BCLC 305 and Sir David Richards' description of standing as the threshold question in the *Boston Trust* case, the judge noted that there was no authority in relation to multiple derivative claims brought on behalf of a company limited by guarantee [27].

49. At [28] the judge observed that one could think of "fairly extreme examples where the directors of the corporate trustee conspire to misappropriate the scheme's assets on an industrial scale" and that in such circumstances, where the company was limited by guarantee and the directors were its only members, he doubted that the court would refuse permission to the members of the scheme to continue the proceedings on the basis that they did not have standing.

50. He accepted USSL's submissions, however, that in order to establish standing or a sufficient interest to continue the claim, it was essential for the derivative claimants to demonstrate "both that the subject company has suffered a loss and that this loss is reflective of their own loss" [30]. He did so having quoted a passage in the judgment of Lord Millett in *Waddington Ltd v Chan Chun Hoo Thomas* [2009] 2 BCLC 82 (a decision of the Court of Final Appeal in Hong Kong) at [74] and [75] to which I shall refer below.

51. The first ground of appeal addressing matters of principle (Ground A) is that the judge erred at [30] in introducing into the test of whether a claimant has standing to bring a derivative claim the requirement that the company has suffered a loss which is reflective of their own loss. It is then said that as a result of this error, the judge erred in relation to his conclusions with regard to the Valuation Claim, the Discrimination Claim and the Fossil Fuels Claim at [130] and [132], [159] and [160], and [191] respectively.

52. Returning to the judge's consideration of the relevant legal framework, he also noted at [30] that: " . . . Lord Millett's observations stress that the principal reason why shareholders have standing to bring a derivative claim is that they will be unable to bring a direct claim against the wrongdoers themselves (because of the principle of reflective loss)." In this regard, the judge concluded at [33] that he "was not satisfied that an independent claim for breach of trust would prevent a derivative claimant from bringing a derivative claim where he or she had suffered a loss as a shareholder which was reflective of the subject company's loss." He decided, therefore, to deal with Dr McGaughey and Prof. Davies' alternative claim under the fourth requirement of whether it is appropriate in all the circumstances to permit the derivative claim to be pursued.

53. As Dr McGaughey and Prof. Davies rely upon the fourth exception to the rule in *Foss v Harbottle*, the judge went on at [34] – [43] to consider the nature of "fraud" which brings the exception into play and allows a minority shareholder to continue an action on behalf of the company to remedy the fraud which would otherwise be without remedy because the company is controlled by the wrongdoers. Having referred to *Daniels v Daniels* [1978] Ch 406 per Templeman J at 413H – 414D, *Estmanco (Kilner House) Ltd v Greater London Council* [1982] 1 WLR 2 per Sir Robert Megarry V-C at 12F – 13A and 15G-16B, in particular, and a passage from the judgment of McCombe LJ in *Harris v Microfusion* at [31] – [33], the judge reached his conclusion at [43]. He held that: "*Harris v Microfusion* [was] clear authority for the proposition that a derivative claimant must establish a prima facie case that the defendants have committed a deliberate or dishonest breach of duty or that they have improperly benefitted themselves at the expense of the company (although the nature of that benefit need not be exclusively financial)."

54. The second ground of appeal on matters of principle (Ground B) is that the judge erred at [43] in introducing a test of improper financial benefit. It is then said that as a result of this error, the judge erred in relation to his conclusions with regard to: the Valuation Claim at [145]; the Discrimination Claim at [163]; and in relation to the Costs Claim and the Fossil Fuels Claim at [178] – [179] and [193] respectively.

55. The judge addressed the third requirement that there be a prima facie case on the merits in respect of each claim at [44] and [45]. He referred to the judgment of David Richards J in *Abouraya v Sigmund* [2014] EWHC 277 (Ch) at [53] and to *Bhullar v Bhullar* [2015] EWHC 1943 (Ch) per Morgan J at [25] and concluded at [45] that "the appropriate course is to find that a prima facie case has been made out only where I am satisfied that there are issues of fact on which it would be wrong to accept the Company's [USSL's] evidence without cross-examination."

56. The third ground of appeal on matters of principle (Ground C) is that the judge erred at [45] in holding that a claimant only makes out a prima facie case in the circumstances he described. It is then said that as a result of this error, the judge erred in deciding at [148] and [150], [170] - [172], [182] - [184] and [194] - [196] that Dr McGaughey and Prof. Davies had failed to establish a prima facie case in respect of the Valuation Claim, the Discrimination Claim, the Costs Claim and the Fossil Fuels Claim respectively.

57. Lastly, it is said that the judge erred in holding at [174] that there was a strong reason why, as a matter of discretion it would not have been appropriate to give permission to continue the proceedings in relation to the Discrimination Claim and at [197] in holding

that it would not have been appropriate to exercise his discretion to enable the Fossil Fuels Claim to be continued on behalf of USSL (Grounds 2D and 4D).

***Judge's conclusions in relation to each of the Claims in outline***

58. The judge rejected the Claims on the following bases:

i) The Valuation Claim –

(a) USSL had suffered no loss which was reflective of Dr McGaughey and Prof. Davies' alleged loss but in substance, a remedy was being sought against USSL [130] and [131];

(b) it is difficult to see that USSL suffered any loss as a result of the 2020 Valuation or by entering into the Deed of Amendment and even if it did, the loss is not reflective of the loss allegedly suffered by Dr McGaughey and Prof. Davies. The valuation had not increased or reduced USSL's assets or liabilities. Further, in entering into the Deed of Amendment, USSL had reduced its potential liabilities by around £750 million per annum and if the JNC had not consented, USSL would have increased contribution rates to cover future liabilities [131];

(c) further, although the contribution changes would lead to an increase in the amounts which Dr McGaughey and Prof. Davies and their employers would have to pay into the Scheme, it would also lead to an increase in the assets held by USSL not a decrease [132];

(d) it followed that Dr McGaughey and Prof. Davies do not have a sufficient interest or standing to bring a multiple derivative claim on behalf of USSL against the directors [132];

(e) in reality, the Valuation Claim was an attempt to prevent the introduction of the benefit changes in the Deed of Amendment which was not a remedy sought on behalf of USSL but against it and accordingly, was not a derivative claim;

(f) in any event, there was no prima facie case that the directors had obtained any personal benefit arising from the breach of duty alleged [138] – [145] nor that breaches had occurred [146] – 152]; and

(g) nonetheless, the judge would have granted permission to continue the Valuation Claim had Dr McGaughey and Prof. Davies been able to bring themselves within the fourth exception to the rule in *Foss v Harbottle* [153] – [157].

ii) the Discrimination Claim -

(a) in the same way as with the Valuation Claim, the Discrimination Claim was brought against USSL rather than being a remedy sought on its behalf and is not a derivative claim [159]. Further, any loss as a result of a successful claim for discrimination brought against USSL is not reflective of any loss which the individual member has suffered nor is

the liability of USSL to the individual member reflective of a loss suffered by Dr McGaughey and Dr Davies themselves or any of the other members of the Scheme. "It is nonsensical to suggest that the liability of the Company to the member gives rise to a reflective loss." [160] and [161];

(b) "Equally, the liability of the Company [USSL] to the individual member is not reflective of a loss suffered by the Claimants [Dr McGaughey and Prof. Davies] themselves or any of the other members of the Scheme." The fact that USSL is liable to pay compensation to a member would not give Dr McGaughey and Prof. Davies sufficient interest to bring the claim. No causal connection between the liability to pay compensation and the benefits to which the members are entitled is alleged [161];

(c) there was no prima facie case that the directors had obtained a personal benefit from the alleged breaches of duty, nor that any breaches had occurred [162] – [172]; and

(d) further, the judge would have refused permission because individual members had direct claims against USSL in respect of any discrimination [173] – [174].

iii) the Costs Claim -

(a) the Costs Claim is a derivative claim and wrongful depletion of Scheme assets would result directly in a loss to active members. Accordingly, had a prima facie case that the fourth exception to *Foss v Harbottle* applied and were there a prima facie case on the merits, the causal connection between the breaches of duty and the changes in the benefit structure would have given Dr McGaughey and Prof. Davies sufficient interest to bring the multiple derivative claim [175] – [176];

(b) however, there was no prima facie case that the directors had secured any personal benefit from the alleged breaches of duty [178] – [181] nor that any breaches of duty had occurred [182] – [184]; but

(c) if there had been a prima facie case, the judge would have granted permission to continue this claim [185].

iv) the Fossil Fuels Claim -

(a) the Fossil Fuels Claim is not a derivative claim as there was no prima facie case of loss to USSL, nor any allegation that such loss was reflective of any loss suffered by Dr McGaughey and Prof. Davies, nor that there was a causal connection between the investment in fossil fuels and the benefit changes [186] – [191];

(b) further, there was no prima facie case that the directors had secured a personal benefit from the alleged breaches of duty nor that any breach of duty had been committed [193]. In fact, the Fossil Fuels Claim would have been susceptible to strike out [194] – [196]; and

(c) the judge would have refused permission to continue the Fossil Fuels Claim on the basis of the ability to bring direct claims for such an alleged breach of trust and as a result of the vague nature of the remedy sought [197].

***The Substantive Grounds of Appeal and the Respondent's Notice***

59. Dr McGaughey and Prof. Davies contend that the judge erred in holding that:

(a) The Valuation Claim, the Discrimination Claim and the Fossil Fuels Claim were not a multiple derivative claim and/or that Dr McGaughey and Prof. Davies do not have standing because of an absence of reflective loss: [130] and [132]; [159] and [160]; and [191] - (Ground 1A, 2A and 4A);

(b) there was insufficient evidence to draw the inference that the directors were pursuing their own ends or were motivated by their own personal interests in relation to the Valuation Claim: [145] - (Ground 1B); in relation to the Discrimination Claim there was no prima facie case that the directors committed a fraud on their powers and knew or believed that the benefit changes involved indirect discrimination and were prepared to tolerate it for their own ends: [163] - (Ground 2B); in relation to the Costs Claim that there was no prima facie case of an exception to the rule in *Foss v Harbottle*: [178] and [179] - (Ground 3B); and in relation to the Fossil Fuels Claim that Dr McGaughey and Prof. Davies failed to establish a prima facie case that the directors committed a fraud on their powers: [193] - (Ground 4B);

(c) Dr McGaughey and Prof. Davies failed to establish a prima facie case in relation to the Valuation Claim: [148] and [150] - (Ground 1C); in relation to the Discrimination Claim: [170] – [172] – (Ground 2C); the Costs Claim: [182] – [184] - (Claim 3C); and in relation to the Fossil Fuels Claim [194] – [196] – (Claim 4C);

and

(d) in relation to the Discrimination Claim there was a strong reason why as a matter of discretion it would not be appropriate to give permission to continue the action: [174] – (Ground 2D); and in relation to the Fossil Fuels Claim that it would not be appropriate to exercise the discretion to allow the claim to proceed: [197] – (Claim 4D).

60. By a Respondent's Notice dated 3 November 2022 and sealed on 30 November 2022, USSL contends that the Order should be upheld on additional grounds. They are that: because Dr McGaughey and Prof. Davies and other members of the Scheme had direct claims against USSL in relation to the Claims, another remedy was available and the test of necessity was not met; and alternatively that as a matter of discretion, in relation to the Valuation Claim and the Costs Claim: direct claims were available; CPR 19.3 made such claims practicable; and the ability to fund such claims was of no or limited weight.

### *Relevant Types of Claim*

*- Company Derivative Claims*

61. The central issue in this appeal is whether the Claims can be categorised as derivative claims in the company law sense and therefore, whether they are suited to the procedure which has been adopted. That question forms a backdrop to the Grounds of Appeal in principle. It is helpful, therefore, to set out the core characteristics of company derivative actions which are not, in themselves, in dispute.

62. As Sir James Wigram VC pointed out in *Foss v Harbottle* (1843) 2 Hare 461 at [491] – [492]: "In law the corporation and the aggregate members of the corporation are not the same thing for purposes like this; and the only question can be whether the facts alleged in this case justify a departure from the rule which, prima face, would require that the corporation should sue in its own name and in its corporate character, or in the name of someone whom the law has appointed to be its representative."

63. The Court of Appeal in *Prudential Assurance Co Ltd v Newman Industries Ltd (No 2)* [1982] Ch 204 set out the rule in *Foss v Harbottle* in the following terms at 210F – 211 B, as follows:

> "The classic definition of the rule in *Foss v. Harbottle* is stated in the judgment of Jenkins L.J. in *Edwards v. Halliwell* [1950] 2 All E.R. 1064 as follows. (1) The proper plaintiff in an action in respect of a wrong alleged to be done to a corporation is, prima facie, the corporation. (2) Where the alleged wrong is a transaction which might be made binding on the corporation and on all its members by a simple majority of the members, no individual member of the corporation is allowed to maintain an action in respect of that matter because, if the majority confirms the transaction, cadit quaestio; or, if the majority challenges the transaction, there is no valid reason why the company should not sue. (3) There is no room for the operation of the rule if the alleged wrong is ultra vires the corporation, because the majority of members cannot confirm the transaction. (4) There is also no room for the operation of the rule if the transaction complained of could be validly done or sanctioned only by a special resolution or the like, because a simple majority cannot confirm a transaction which requires the concurrence of a greater majority. (5) There is an exception to the rule where what has been done amounts to fraud and the wrongdoers are themselves in control of the company. In this case the rule is relaxed in favour of the aggrieved minority, who are allowed to bring a minority shareholders' action on behalf of themselves and all others. The reason for this is that, if they were denied that right, their grievance could never reach the court because the wrongdoers themselves, being in control, would not allow the company to sue."

64. The Court of Appeal went on to set out the conditions for the bringing of a simple derivative action at 211A—B, 221G—222B in the judgment of the court. The would-

be claimant must show a prima facie case (i) that the company is entitled to the relief claimed and (ii) that the claim falls within the proper boundaries of the relevant exception to the rule in *Foss v Harbottle*. That exception arises where what has been done amounts to fraud and the wrongdoers are themselves in control of the company. The rationale for the derivative action is to enable justice to be done where the wrongdoer is in control of the entity in which the cause of action is vested.

65. Lord Denning MR described a company derivative action in these terms in *Wallersteiner v Moir (No 2)* [1975] 1 QB 373 at 390A-E:

> "2. The Derivative Action "
>
> It is a fundamental principle of our law that a company is a legal person, with its own corporate identity, separate and distinct from the directors or shareholders, and with its own property rights and interests to which alone it is entitled. If it is defrauded by a wrongdoer, the company itself is the one person to sue for the damage. Such is the rule in *Foss v. Harbottle* (1843) 2 Hare 461. The rule is easy enough to apply when the company is defrauded by outsiders. The company itself is the only person who can sue. Likewise, when it is defrauded by insiders of a minor kind, once again the company is the only person who can sue. But suppose it is defrauded by insiders who control its affairs by directors who hold a majority of the shares—who then can sue for damages? Those directors are themselves the wrongdoers. If a board meeting is held, they will not authorise the proceedings to be taken by the company against themselves. If a general meeting is called, they will vote down any suggestion that the company should sue them themselves. Yet the company is the one person who is damnified. It is the one person who should sue. In one way or another some means must be found for the company to sue. Otherwise the law would fail in its purpose. Injustice would be done without redress. In *Foss v. Harbottle*, 2 Hare 461, 491-492, Sir James Wigram V.-C. saw the problem and suggested a solution. He thought that the company could sue "in the name of someone whom the law has appointed to be its representative." A suit could be brought" by individual corporators in their private characters, and asking in such character the protection of those rights to which in their corporate character they were entitled, . . ."

66. Briggs J, as he then was, explained the rationale for the simple derivative action in *Universal Project Management* Ltd *v Fort Gilkicker Ltd* [2013] Ch 551 at [16] in the following way:

> "The ordinary derivative action (by which a member of a company is exceptionally permitted to litigate a cause of action vested in the company where the company is unable to do so) was by 2006 a long-established creature of the common law, both in England and other common law jurisdictions. It constituted a pragmatic but principled exception to the rule in

> *Foss v Harbottle* (1843) 2 Hare 461, that the only person with locus standi to pursue a claim on behalf of a company is the company itself. It reflects the principle that, although the would-be claimant may have suffered loss as the result of wrong done to the company, its loss would be merely reflective of the company's loss and insufficient to give it a cause of action in its own right."

67. Simple corporate derivative claims in which a shareholder seeks to litigate on behalf of the company in which he holds shares have been codified. They are proceedings by a member of a company, in respect of a cause of action vested in the company in which relief is sought on its behalf: section 260(1) CA06. The cause of action may be in relation to negligence, default, breach of duty or trust by the director: section 260(3). Permission to continue such an action must be refused if the court is satisfied, amongst other things, that a person acting in accordance with section 172 CA06 (the duty to promote the success of the company) would not seek to continue the claim: section 263(2)(a). Furthermore, when considering whether to give permission, the court must take into account, amongst other things: the importance that a person acting in accordance with section 172 (duty to promote the success of the company) would attach to continuing it (section 263(3)(b)); and whether the act or omission in respect of which the claim is brought gives rise to a cause of action that the member could pursue in his own right rather than on behalf of the company (section 263(3)(f)). The court is also required to "have particular regard to any evidence before it as to the views of members of the company who have no personal interest, direct or indirect, in the matter": section 263(4).

68. Lewison J, as he then was, considered the application of section 263 in relation to an alleged breach of section 172 CA06, in *Iesini v Westrip Holdings* [2009] EWHC 2526 at [85] –[86] as follows:

> "There are, of course, a number of factors that a director, acting in accordance with section 172 would consider in reaching his decision. They include: the size of the claim; the strength of the claim; the cost of the proceedings; the company's ability to fund the proceedings; the ability of the potential defendants to satisfy a judgment; the impact on the company if it lost the claim and had to pay not only its own costs but the defendant's as well; any disruption to the company's activities while the claim is pursued; whether the prosecution of the claim would damage the company in other ways (e.g. by losing the services of a valuable employee or alienating a key supplier or customer) and so on. The weighing of all these considerations is essentially a commercial decision, which the court is ill-equipped to take, except in a clear case.
>
> In my judgment therefore [the bar under section 263(2), CA 2006] will apply only where the court is satisfied that no director acting in accordance with s.172 would seek to continue the claim. If some directors would, and others would not, seek to continue the claim, the case is one for the application of [section 263(3)(b), CA 2006]."

69. A similar approach is adopted in more complex situations where there is a holding company with subsidiaries, although they do not fall within the statutory provisions. As Sir David Richards explained at [13] in the *Boston* case, such claims may arise where a member of a holding company brings proceedings to enforce claims, not on behalf of the company of which they are members, but on behalf of subsidiaries of that company. They are claims in which companies have been interposed between the would be claimant and the company on behalf of which it is proposed to bring the action. Nevertheless, it is easy to see that they are a logical extension of what I have called the simple corporate derivative claim. Those claims fall outside section 260 CA06 and remain governed by the common law. These more complex situations have been termed "multiple derivative actions".

70. Although the cases thus far mentioned are all cases involving shareholders and companies in a corporate group, the Judge adopted the term "multiple derivative claims" for other claims which do not fall within the definition in section 260 CA06, and he accepted that the categories of such claims are not closed at common law.

71. It goes without saying that a derivative action of any kind is the company's action brought on its behalf. That is the very essence of the exceptions to the rule in *Foss v Harbottle*, explained in the *Prudential* case and in the passage from the *Gilkicker* case at [16]. In exceptional circumstances a member is permitted to litigate a cause of action which is vested in the company.

72. Further, as Sir David Richards stated at [42] in the *Boston* case, it is only if a claimant has standing to bring an action on behalf of a company that the issues as to whether permission to continue the action on its behalf arise. Unless the claimant can cross the threshold by establishing that they have standing, there is no reason to examine the issues contingent upon it.

73. It is generally accepted that the would-be claimant must be bringing the action bona fide for the benefit of the company and not for an ulterior purpose (*Barrett v Duckett* [1995] 1 BCLC 243 per Peter Gibson LJ at 250C and *Nurcombe v Nurcombe* [1985] 1 WLR 370 per Lawton LJ at 376B) and in the paradigm case, does so on behalf of themselves and all other minority shareholders (*Prudential*).

74. Further, as in this case, where the would-be claimant seeks an order to be indemnified as to costs by the company which may benefit from the derivative action, the court's approach is to consider whether and to what extent an honest, independent and prudent board might decide to authorise prosecution of the action given the available evidence: *Waddington Ltd v Thomas* per Ribeiro J at [20]; *Wallersteiner v Moir (No2)* at 404 and *Smith v Croft (No1)* [1986] BCLC 207 at 217- 218.

75. It is not in dispute that the court exercises a discretion whether to grant permission and will consider all relevant factors. That requirement is illustrated by the requirement that a reasonable board of directors would consider it to be in the best interests of the company to pursue the proceedings: *Abouraya* at [26].

76. Claims pursuant to section 260 CA 2006 are now governed by CPR Rule 19.14 and it is accepted that it applies to common law claims, by analogy. The Rules have been amended and their numbering changed since Sir David Richards considered them in the *Boston* case, although their substance remains much the same.

77. Amongst other things, Rule 19.14 provides that after issue of the claim form, save for exceptions which are not relevant, the claimant must not take any further step in the proceedings without permission of the court (CPR Rule 19.14(4)). Applications for permission are governed by CPR Rule 19.15. Where an application is refused on paper, the applicant may ask for an oral hearing to reconsider the decision: CPR Rule 19.15(10). Where the application is not dismissed at such an oral hearing, the court will order that the company and any other appropriate party is joined as a respondent to the permission application and give appropriate directions: CPR Rule 19.15(12). A further hearing will then take place at which the judge will consider the evidence on behalf of both the applicant and the company.

- *"Beneficiary Derivative Claims"*

78. It is also helpful to bear in mind the circumstances in which a beneficiary of a trust may bring an action on its behalf. Trustees administer a trust as principals and not as agents for the beneficiaries, albeit as fiduciaries on behalf of the beneficiaries. The trustees, therefore, are usually the proper claimants in proceedings against agents or other third parties. See *Lewin on Trusts* 20th ed at 47-001 and Underhill and Hayton *"Law of Trusts and Trustees"* at 71.1. This applies just as much where the third party is a director of a corporate trustee of the trust who wrongfully and in breach of duty causes the corporate trustee to commit a breach of trust, as it applies to a third party: *Lewin on Trusts* 20th ed at 45-084 citing *Bath v Standard Land Co Ltd* [1911] 1 Ch 618.

79. Where the trustees are not mere bare trustees and they fail to pursue a claim which is vested in them as trustees, a beneficiary may commence an administration action against the trustees to compel them to take proceedings to enforce the claim. If there are questions about whether the trustees ought to sue, they will be determined by the court in accordance with the principles in *Re Beddoe, Downes v Cotton* [1893] 1 Ch 547. If the court is satisfied that the claim ought to be brought, it may direct the trustees to do so or give permission to the beneficiary to use the trustee's name. *Lewin* at 47-005.

80. There are other types of claim which are sometimes known as "beneficiary derivative actions". They arise where a beneficiary seeks to bring an action in his own name on behalf of the trust or estate, against a third party. The beneficiary sues in the right of the trust or estate and does not enforce duties owed to him directly. As Lord Collins of Mapesbury explained in *Roberts v Gill* [2011] 1 AC 240 at [21] the claimant in that case wished to take advantage of a passage in the speech of Lord Nicholls of Birkenhead in *Royal Brunei Airlines Sdn Bhd v Tan* [1995] 2 AC 378, 391 as follows:

> "for the most part [professionals] will owe to the trustees a duty to exercise reasonable skill and care. When that is so, the rights flowing from that duty form part of the trust property. As such they can be enforced by the beneficiaries in a suitable case if the trustees are unable or unwilling to do so."

As Lord Collins explained at [22]: "The action is a derivative action in which the beneficiary stands in the place of the administrator and sues in right of the estate and does not enforce duties owed to him rather than to the administrator."

81. That was a case in which the claimant commenced an action in his personal capacity as a beneficiary of his grandmother's estate, claiming damages in negligence against two firms of solicitors which had advised the estate's former personal representatives. After the relevant limitation period had expired, the claimant applied to amend the proceedings in order to continue them both in his personal capacity and on behalf of the estate as a derivative action.

82. In order to be entitled to bring such an action, the beneficiary must establish "special" or "exceptional" circumstances: *Hayim v Citibank NA* [1987] 1 AC 730, 748 and *Roberts v Gill* at [46] – [53]. The beneficiary cannot be in a better position than the trustee and just as the trustee could not sue the other beneficiaries against their interests, nor can a beneficiary do the same in the name of the trustee: *Twigg v Franks* (1916) 50 Ir Lt 173. Furthermore, the cause of action itself must be trust property: *Bradstock Trustee Services Ltd v Nabarro Nathanson* [1995] 1 WLR 1405 at 1411F.

83. The commentary in *Lewin* at 47-015 and 47-016 deals with the question of whether the views of other beneficiaries to the continuance of the action should be sought. It is stated that if there are other beneficiaries with substantial interests who may be prejudiced by the claim, for example, if trust assets would be vulnerable to a costs order against the trustees if the claim fails, there is a good argument to canvas the views of other beneficiaries, similar to the procedure in a *Beddoe* application.

84. The notes to the White Book at 19.14.2 state that a beneficiary derivative action of this kind falls within the definition of a representative action and so is governed by CPR Rule 19.8 and not by CPR Rule 19.14 - 20 (which applies to company derivative claims). Under CPR Rule 19.8 where more than one person has the same interest in a claim, the claim may be begun or the court may order that the claim be continued by or against one or more of the persons who have the same interest as the representatives or any other persons who have that interest. The Rule was comprehensively reviewed recently by the Supreme Court in *Google LLC v Lloyd* [2021] UKSC 50.

85. A case may raise the need for both a company derivative claim and a beneficiary derivative claim where a trustee is shareholder in a company and has grounds to commence a company derivative action in respect of a wrong done to the company, but fails to bring the action. In such circumstances, a beneficiary of the trust may seek, on behalf of the trustee as shareholder, to bring the company derivative claim against the alleged wrongdoer. In such a case, the beneficiary will be allowed to continue the claim where both the grounds for a derivative action under company law and for a derivative action under trust law are established. That was what happened in *Popely v Popely* [2018] EWHC 276 (Ch) at [98]- [116].

- *"Dog-leg claims"*

86. I have already mentioned "dog-leg" claims and how Mr Grant defined them. They are claims where it is alleged that a corporate trustee has a claim against its directors for breach of duty in causing the corporate trustee to commit a breach of trust and the benefit of the claim is held by the corporate trustee on trust for the beneficiaries.

87. In *HR & Ors v JAPT & Ors* [1997] PLR 99, Lindsay J was not prepared to describe a dog-leg claim as unarguable. He concluded that whether a particular chose in action was or was not a trust asset did not involve an examination of high principles but

consideration of the facts of the case. He distinguished the case of *Young & Ors v Murphy & Anr* [1994] 13 ACSR 722, on the basis that in *HR* the former corporate trustee had no separate assets or business and only had one trust of which it was trustee [78].

88. *Young* was a case which was heard in the Supreme Court of Australia. It was held that claims against directors of the former trust company for breach of duty to use reasonable care and skill arose only out of the director's office and was owed only to the trust company and was not trust property. The directors could not be said, on the basis of the pleading, to owe their duties to the company only in relation to a particular trust nor were the duties imposed upon them in relation to a particular item or items of trust property. There was no basis for assuming that the right of action was trust property. See Phillips J, with whom Brooking and Batt JJ agreed.

89. In *Gregson v HAE Trustees Ltd & Ors* [2009] 1 All ER (Comm) 457, however, Robert Miles QC, as he then was, held that a dog-leg claim had no real prospect of success. HAE was the trustee of a number of trusts, had outside creditors and was not set up for the purpose of acting as trustee of the particular trust. The deputy judge did not consider that the fact that HAE, under its constitution, was not allowed to make a profit and that its only function was to act as trustee, albeit of a number of trusts, justified the imposition of a trust in relation to the claim against the directors.

90. Dog-leg claims are dependent, therefore, upon whether the chose in action in relation to the breaches of duty by the directors is held by the trustee company on trust for the beneficiaries. Whether such a claim is arguable will turn upon the facts of the case. But as *Lewin* explains at 43-067, where the trustee company is a one trust, no asset company, created solely for the purpose of administering the trust in question, it is not unarguable that the company's claims against the directors may be held on trust, opening up the possibility of a dog-leg claim.

***Ground A - Is it necessary that the company suffers a loss and that the would-be claimant suffers reflective loss?***

91. Mr Grant, on behalf of Dr McGaughey and Prof. Davies submits that USSL's objects are to act as the trustee of the Scheme, it is a "one trust" trustee company, it has no shareholders, the directors are automatically appointed as members and all its normal organs of control are entirely in the hands of the directors who will not sue themselves. He says that the categories of multiple derivative claims are not closed, that such claims are a mere procedural device, that Dr McGaughey and Prof. Davies are interested parties because they are members of the Scheme of which USSL is the trustee and if they were not allowed to continue the action in relation to the alleged breaches of the Directors' statutory duties, an injustice would have been suffered by USSL which would go without a remedy.

92. Further, both in his pleading that USSL has suffered loss, and in submissions before us, Mr Grant contended that the chose in action arising as a result of the directors' and former directors' breaches of their statutory duties belongs to USSL as a corporate body and is not a trust asset. In these, circumstances, he submits that all the ingredients of a common law multiple derivative claim are present and that the judge was wrong to decide otherwise in relation to the Valuation, Discrimination and Fossil Fuels Claims.

93. He also submits that in deciding that it is essential that the derivative claimants demonstrate both that the company has suffered a loss and that this loss is reflective of their own loss, the judge misread Lord Millett's judgment in *Waddington Ltd v Chan Chun Hoo v Thomas* [2009] 2 BCLC 82 at [74] and [75]. That passage, which the judge set out at [29] of his judgment, is as follows:

> "[74] As I have said, the question is simply a question of the plaintiff's standing to sue. This would have been obvious when the procedure was for the proposed plaintiff to apply to the court for leave to use the company's name. On a question of standing, the court must ask itself whether the plaintiff has a legitimate interest in the relief claimed sufficient to justify him in bringing proceedings to obtain it. The answer in the case of person wishing to bring a multiple derivative action is plainly 'Yes'. Any depletion of a subsidiary's assets causes indirect loss to its parent company and its shareholders. In either case the loss is merely reflective loss mirroring the loss directly sustained by the subsidiary and as such it is not recoverable by the parent company or its shareholders for the reasons stated in *Johnson v Gore Wood & Co* [2002] 2 AC 1. But this is a matter of legal policy. It is not because the law does not recognise the loss as a real loss; it is because if creditors are not to be prejudiced the loss must be recouped by the subsidiary and not recovered by its shareholders. It is impossible to understand how a person who has sustained a real, albeit reflective, loss which is legally recoverable only by a subsidiary can be said to have no legitimate or sufficient interest to bring proceedings on behalf of the subsidiary.
>
> [75] This is not to allow economic interests to prevail over legal rights. The reflective loss which a shareholder suffers if the assets of his company are depleted is recognised by the law even if it is not directly recoverable by him. In the same way the reflective loss which a shareholder suffers if the assets of his company's subsidiary are depleted is recognised loss even if it is not directly recoverable by him. The very same reasons which justify the single derivative action also justify the multiple derivative action. To put the same point another way, if wrongdoers must not be allowed to defraud a parent company with impunity, they must not be allowed to defraud its subsidiary with impunity."

Mr Grant points, in particular, to the passage at [74] at which Lord Millett states that the court must ask itself whether the plaintiff has a legitimate interest in the relief claimed sufficient to justify him in bringing proceedings to obtain it and submits that the judge turned Lord Millett's reasoning on its head by focussing on whether the company had suffered a loss reflective of the derivative claimant's own loss.

94. He says that: the judge also focussed on loss in the sense of depletion of assets rather than increase in liabilities; not all the authorities require reflective loss; loss is not required for some of the situations in which the rule in *Foss v Harbottle* does not apply,

and it is not required in relation to a simple derivative claim under section 260 CA06; such a requirement undermines the enforcement of the section 172 statutory duties, would stymie derivative claims in relation to companies limited by guarantee and would make it virtually impossible for pension scheme members to bring such an action even where the directors of a corporate trustee had engaged in asset stripping on an industrial scale.

95. It seems to me that Mr Grant's submissions based upon the authorities is hopeless. The passage in the *Waddington* case and the question of loss, in general, was considered by David Richards J (as he then was) in the *Abouraya* case at [24] in the following terms:

> "[24] It is therefore the case that all the authorities on direct derivative actions have taken as a requirement that the alleged wrongdoing should result in a loss to the company and, hence, an indirect or reflective loss to the shareholders and also that the alleged wrongdoers should have personally gained from their breaches of duty. The same approach has been taken in double derivative actions. In all the cases of which I am aware, the alleged breach of duty by directors of the subsidiary has resulted in loss not only to the subsidiary but also to the holding company and therefore, indirectly, to the shareholders in the holding company". …. This aspect was specifically addressed by Lord Millett *in Waddington Ltd v Chan Chun Hoo Thomas* at [74]-[75]:
>
> > '[74] As I have said, the question is simply a question of the plaintiff's standing to sue. … On a question of standing, the court must ask itself whether the plaintiff has a legitimate interest in the relief claimed sufficient to justify him in bringing proceedings to obtain it. ….."
>
> [25] It follows, on the authorities as they stand, that financial or other loss to the shareholders, albeit normally of a reflective character, is essential to give a claimant shareholder sufficient interest in the proceedings to make the shareholder an appropriate claimant on behalf of the company. . . "

96. David Richards J had already addressed the circumstances in *Estmanco* which are closer to the circumstances in this case, at [23] as follows:

> "*Estmanco* is not a case of financial gain to the majority and financial loss to the company and the minority members. It is, however, a case, and in his judgment Sir Robert Megarry V-C analysed it as being a case, in which the majority exercised their control of the company to advance their own interests as the local authority and, as a necessary result, to injure the interests of the company and its other members."

It was for that reason, no doubt, that he referred to "financial or other loss" at [25].

97. *Estmanco* was a case in which a company was formed to manage sixty flats which were being sold on long leases by the Greater London Council (the "GLC"). The company's shareholding was divided into 60 shares and under its articles of association one share was attributed to each flat. As each flat was sold, a share was transferred to the purchaser. When all the flats were sold, the shares were to carry the right to vote, but until that time, although the purchasers could attend and address general meeting of the company, the votes were to remain vested in the GLC or its nominees. The GLC entered into an agreement with the company in which, amongst other things, the GLC was required to use its best endeavours to dispose of all the flats on long leases in a specified form. Once all the flats were sold, the GLC was to grant the company a superior lease also in a specified form and it was intended that the company would run the block of flats. The leases contained restrictive covenants which were intended to be mutually enforceable between the purchasers.

98. As a result of a change of control at the GLC, it decided on a change of policy and instead of disposing of the remaining flats on long leases, it was decided to let the remaining 48 flats to high priority applicants on the housing list. The three directors of the company who were GLC employees, took the view that the company should seek to enforce the agreement with the GLC and issued a writ against it. At an extraordinary meeting of the company at which only the GLC was eligible to vote, a resolution was passed requiring the directors to withdraw the action. One of the purchasers of the flats sought an order that she be substituted as plaintiff and that the action continue as a derivative action in her name.

99. Sir Robert Megarry V-C noted that it seemed clear that the GLC was actuated by a desire to put its new housing policy into effect which involved a breach of contract and destroying the scheme under which the purchasers had purchased their flats. He also rejected the contention that the reason why the GLC voted to discontinue the action was because it considered such a step to be in the best interests of the company. To the contrary, he held that: "[T]he council [GLC] did this in order to suppress proceedings which stood in the way of carrying out their new housing policy regardless of breaches of contract and injuries to the existing purchasers of flats." (15B-C).

100. He went on at 15G- 16C as follows:

> "As I have indicated, I do not consider that this is a suitable occasion on which to probe the intricacies of the rule in *Foss v. Harbottle* and its exceptions, or to attempt to discover and expound the principles to be found in the exceptions. All that I need say is that in my judgment the exception usually known as "fraud on a minority" is wide enough to cover the present case, and that if it is not, it should now be made wide enough. There can be no doubt about the 12 voteless purchasers being a minority; there can be doubt about the advantage to the council of having the action discontinued; there can be no doubt about the injury to the applicant and the rest of the minority, both as shareholders and as purchasers, of that discontinuance; and I feel little doubt that the council has used its voting power not in order to promote the best interests of the company but in order to bring advantage to itself and disadvantage to the minority. Furthermore, that disadvantage is no trivial matter, but

> represents a radical alteration in the basis on which the council sold the flats to the minority. It seems to me that the sum total represents a fraud on the minority in the sense in which "fraud" is used in that phrase, or alternatively represents such an abuse of power as to have the same effect.
>
> I appreciate, of course, that there is a difference between the applicant's rights as a shareholder and her rights as a purchaser of a flat; but I think, first, that the injury to the rights as a shareholder suffices in itself, and, second, that her rights as a shareholder form such an integral part of the scheme as a whole as to make it unreal to consider those rights independently of her rights as a purchaser. No right of a shareholder to vote in his own selfish interests or to ignore the interests of the company entitle him with impunity to injure his voteless fellow shareholders by depriving the company of a cause of action and stultifying the purpose for which the company was formed."

101. Furthermore, David Richards J's approach to the exception to the rule in *Foss v Harbottle* in *Abouraya* was expressly endorsed in the Court of Appeal by McCombe LJ with whom Christopher Clarke and Jackson LJJ agreed in *Harris v Microfusion* at [31] in the following terms:

> " I do not think that either of these cased (*Estmanco* or *Gilkicker*) supports Mr Harper's wider proposition that the exception to the rule in *Foss v Harbottle* is 'opened up' in cases, short of deliberate and dishonest breach of duty, in the absence of personal benefit to the party allegedly in breach of duty. For my part, having reviewed the authorities, with the helpful assistance of counsel, I consider that the extent of the relevant exception to the rule is indeed as stated by David Richards J in *Abouraya v Sigmund*."

102. It seems to me, therefore, that the authorities make clear that the first and essential element of any derivative action is that the claim is brought for the company in order to seek a remedy for a loss or harm which it has suffered which would not otherwise be remedied and that the claim is for the benefit of the company. That is clear from a decision of this court. As Lord Denning MR put it in *Wallersteiner v Moir*, it is the company which must be "damnified". Further, as Templeman J put it in *Daniels v Daniels*, the breach of duty by the directors must harm the company. If the company has not suffered harm of some kind, an action would be unnecessary and it would be impossible to establish that the company had a bona fide claim which a reasonable, independent director would pursue in its best interests. The need to establish that the company has suffered a loss or harm which it is sought to remedy by the action, also avoids the situation in which an applicant might seek to use a derivative action to challenge the legitimate decision making of the board, or otherwise subvert the constitutional allocation of decision-making power within a company.

103. The fact that loss or harm to the company may not be necessary under other situations where the rule in *Foss v Harbottle* does not apply is beside the point. Furthermore, it seems to me that there is nothing in Mr Grant's point in relation to section 260 CA06.

It is true that there is no express reference to the need for loss in that section. However, as I have already mentioned, permission to continue an action to which section 260 applies must be refused if the court is satisfied that a person acting in accordance with section 172 CA06 (the duty to promote the success of the company) would not seek to continue the claim: section 263(2)(a). Although the conclusion which such a hypothetical person might reach is multi-faceted, it will inevitably include the question of whether the company has suffered loss or harm.

104. Further, the suggestion that the loss requirement undermines the enforcement of section 172 duties is to mischaracterise the nature of a derivative claim. It is not designed to enable shareholders or others to monitor every step taken by directors on behalf of the company. The procedural device is intended to be used only in the exceptional circumstances explained in the *Prudential* case. If loss or harm were not necessary, it is difficult to see how one would delimit the exception. Furthermore, it is not clear to me that the requirement necessarily stymies derivative claims on behalf of companies limited by guarantee or prevents action being taken where asset stripping has taken place. The company is still capable of suffering harm or loss even if it is limited by guarantee and is non-profit making. I will consider the aspects of Mr Grant's submission which relate to the standing of members of a pension scheme below.

105. What of the standing of the would-be litigant? Once again, it is clear from the passage at [25] in *Abouraya*, which was approved by this court in *Harris v Microfusion*, that "financial or other loss to the shareholders, albeit normally of a reflective character, is essential to give a claimant shareholder sufficient interest in the proceedings to make the shareholder an appropriate claimant on behalf of the company. . . ".

106. In the paradigm case, the applicant will be able to establish that they have sufficient interest to continue the claim on behalf of the company because as a shareholder of the company itself or of a holding company, the diminution in the value of their shares (for which they cannot claim damages or other relief) mirrors the loss or harm which the company has suffered. The harm to the company causes a loss to the shareholder. That reflective loss is a simple way of establishing that the would-be representative litigant has a legitimate interest in pursuing the claim on behalf of the company and that that interest relates to the company's interest. As Mr Short put it, it is an easy way of ensuring an identity of interest between the company and the would-be litigant on its behalf.

107. Even in the more unusual case of *Estmanco*, the would-be claimant suffered damage both as a shareholder and as a purchaser/leaseholder. Sir Robert Megarry V-C considered that the injury to the claimant's rights as a shareholder sufficed for the purposes of the derivative action whilst recognising that it was unreal to consider them separately from her rights as a leaseholder. The majority had deprived the company of its cause of action in relation to the breach of covenant by the GLC. That conduct harmed the company and its shareholders in the same way. David Richards J analysed the case as one in which the majority had advanced its own interests and as a *necessary* result, (emphasis added) injured the interests of the company and its other members (*Abouraya* at [23]).

108. The need to establish not only that the would-be representative claimant has suffered harm but also that the harm relates to or correlates with the harm to the company is necessary, therefore, in order to enable the court to be satisfied that the applicant has a

legitimate interest in the company's action. If there is a divergence, it is likely that the applicant's interest is different from that of the company and accordingly, it is likely that they are not an appropriate representative or to put the matter another way, that they have no standing or to put the matter yet another way, that they are seeking to use the derivative action for ulterior purposes. A derivative action is not an opportunity for someone to pursue their own grievances or claims or to further their own particular interest in the name of the company.

109. Mr Grant submits, however, that Dr McGaughey and Prof. Davies have sufficient standing and that the necessary link arises from: the fact that USSL exists in order to administer the Scheme and is not a trustee of any other trusts; in the circumstances, failing to act in the interests of USSL involves, by definition, failing to act in the best interests of the Scheme members; Dr McGaughey and Prof. Davies are members of the Scheme; and scheme members are beneficially entitled to the assets of the Scheme held on trust by USSL.

110. In aid of these submissions, Mr Grant went as far as to submit that Dr McGaughey and Prof. Davies had made contributions to USSL. I should say immediately that that is incorrect. It is true to say that they are not volunteers in relation to the Scheme because they have given consideration for the benefits provided under it as a result of their labour. They have not made any contribution to USSL, the trustee company, however. To suggest otherwise is to seek to elide the trustee as a corporate entity with the trust fund.

111. There are numerous strands to Mr Grant's main submission on this topic which need to be considered separately. First, the thrust of the argument seems to me to be an attempt to render the existence of a corporate trustee of a single trust all but nugatory and thereby, to elide the trust (in this case, the Scheme) with the trust company (in this case, USSL). They are not one and the same. USSL, as the trust company, has a separate existence from the Scheme for very good reason. Apart from anything else, as Mr Grant accepted, it has creditors and incurs liabilities.

112. Secondly, Mr Grant's submission that failing to act in the interests of USSL involves, by definition, failing to act in the best interests of the Scheme members, seems to me to be an attempt to collapse the company into the trust and impliedly to suggest that the directors' duties are owed to the members of the Scheme. Mr Grant is careful, when asserting that this is a true company derivative action which could not be brought as a dog-leg claim or a beneficiary derivative claim, to submit that the right to sue the directors for breach of trust is a company asset and not a trust asset. He seems to take a contrary stance in relation to Dr McGaughey and Davies' standing, however. Once again, it is important to bear in mind that USSL as the trust company has a separate identity for good reason.

113. Thirdly, Mr Grant's reliance upon section 172(2) CA06 as the basis for his submission that failing to act in the interests of USSL allegedly involves, by definition, failing to act in the best interests of the Scheme members, oversimplifies the matter.

114. Section 172(2) provides that where or to the extent that the purposes of a company consists of or includes purposes other than the benefit of its members, section 172(1) has effect as if the reference to promoting the success of the company for the benefit of its members in that sub-section were to achieving those additional or other purposes. In

summary, sub-section 172(1) provides that a director must act in the way that he considers, in good faith, would be most likely to promote the success of the company for the benefit of its members (or as a result of section 172(2), would be most likely to promote the other purposes, which in this case is said to be the best interests of Scheme members). In this case, therefore, it is said that achieving the purposes of USSL should be read as acting appropriately as trustee of the Scheme.

115. Mr Grant's formulation takes no account, however, of the fact that the duty in section 172(1) CA06 is couched in subjective terms and is subject to a requirement of good faith. A director must act in the way that **he** considers, **in good faith**, would be most likely to promote the success of the company (emphasis added).

116. Further, it takes no account of the fact that the Scheme itself has a large number of different classes of members and beneficiaries, many of whose interests are in conflict with one another. Decisions in the best interests of the Scheme, therefore, are multi-faceted and it would be wrong to assume that the directors have a duty to act in the interests of one class of members, or any individual members, without considering the position of others and the Scheme as a whole.

117. Fourthly, there is no dispute that Dr McGaughey and Prof. Davies are active members of the Scheme. However, although the assets of the Scheme are held by USSL on trust for the purposes of the Scheme set out in its Deeds and Rules, which include the provision of pension benefits to members, it is too simplistic to suggest that the assets of the Scheme are held for Dr McGaughey and Prof. Davies as members. They have no direct right or interest in any of the assets and are only entitled to have the Scheme administered in accordance with its Deed and Rules from time to time. It is for this reason that a member of a pension scheme might bring a direct action against a trustee in breach of trust or might commence an administration action or a beneficiary derivative action.

118. The fact that Dr McGaughey and Prof. Davies are members of the Scheme does not place them in a position which is analogous to the position of a shareholder in a company derivative action. In a case of a company, loss or harm to the company will affect all the ordinary shareholders proportionately to their shareholdings in the same way, so that there will be a causative connection between the loss to the company and the loss or harm felt by the shareholders. Hence the ability of a shareholder to bring a claim on behalf of the company and on behalf of themselves and all others in a similar position.

119. As I have already mentioned, the interests of members and beneficiaries of a pension scheme in that scheme can differ widely, however. Those interests are dependent upon the relevant rules of the scheme and the effect of any benefit changes are likely to differ between classes of beneficiary. In this case, it cannot be said that the alleged breaches of duty by the directors of USSL in relation to the Valuation Claim affect all beneficiaries or members of the Scheme in the same way. They may not even affect some beneficiaries or members of the Scheme detrimentally at all. It is Dr McGaughey and Prof. Davies as active members who complain that their future benefits have been curtailed. Other members and beneficiaries of the Scheme will have benefited or, at least, had their positions further secured by the changes. Furthermore, there is no direct causative link between the alleged harm to USSL and the diminution in benefits of which Dr McGaughey and Prof. Davies complain. They are not in a position to bring

the action on behalf of all members of the Scheme. In effect, they are seeking to commence an action which would be against the interests of some classes of member.

120. Furthermore, Dr McGaughey and Prof. Davies' position is different from that of the shareholder in the *Estmanco* case. The harm suffered by all shareholders/leaseholders was the same in that case and the harm to the company was directly linked to that loss. There was no question that the would-be claimant was not representative of all the shareholders. Had the company been limited by guarantee, one can see that a leaseholder might well have been in a position to bring an action on behalf of the company because the harm to the company would be reflected in the harm suffered by each of the leaseholders. That is not the case here.

121. It seems that Dr McGaughey and Prof. Davies wish to avoid the process of seeking a representation order for themselves and of joining representatives of other groups of members and beneficiaries whose interests are affected differently by the alleged breaches of the directors' duties.

122. It follows that I consider the judge to have been correct when holding at [30] that in order to bring a company derivative claim, of whatever kind, the company must have suffered a loss or harm which the claim seeks to remedy and the would-be claimant must have suffered harm or loss which is reflective of it.

***Ground B – improper financial benefit***

123. Ground B is that the judge erred at [43] in introducing a test of improper financial benefit. Mr Grant says that the test is that those with control of the company have engaged in equitable fraud which furthers their own interests. In his written submissions he says that it is enough that a power is exercised for an improper purpose and not in good faith or with a possibility of a conflict of interest.

124. I have to say that I am a little puzzled by this ground of appeal. At [43] the judge stated as follows:

> "In my judgment, *Harris v Microfusion* is clear authority for the proposition that a derivative claimant must establish a prima facie case that the defendants have committed a deliberate or dishonest breach of duty or that they have *improperly benefitted themselves at the expense of the company (*although the nature of that benefit *need not be exclusively financial*. . . ." (emphasis added)

It is clear, therefore, that he did not restrict the benefit to a purely financial one.

125. The judge had come to this conclusion having considered a passage in the judgment of McCombe LJ in *Harris v Microfusion* at [31] – [33] which he had set out at [41] of his judgment. As I have already mentioned, in that passage, McCombe LJ endorsed David Richards J's approach in *Abouraya* at [25] where he referred to "financial or other loss" to the shareholders. McCombe LJ had already analysed the *Estmanco* case at [29] as one "where the majority was seeking to use the alleged breach of duty to further its own ends and in that sense to gain a personal benefit, albeit political rather than financial

and therefore, was (allegedly) using its majority voting power to commit a 'fraud on the minority'".

126. The judge concluded that "McCombe LJ was doing no more than restating the rationale for the fourth exception, namely, that parties are free to choose majority rule and that equity will only step in where the majority have abused that power to excuse their own dishonest and deliberate breaches of duty or to *excuse their actions in improperly benefitting themselves at the expense of the subject company*" [42] (emphasis added).

127. It seems to me, therefore, that this ground has no real basis. I should address Mr Grant's further submissions, nevertheless. Mr Grant says that the test is that those in control of a company have engaged in equitable fraud which furthers their own interests and that it is enough that a power is exercised for an improper purpose, not in good faith, or with a possibility of a conflict of interest. He says that for these purposes, the concept of fraud should not be drawn too narrowly and that it includes " a variety of forms of equitable wrong, including breach of fiduciary duty, although not mere negligence": *Gilkicker* case at [18]. Furthermore, he says that in circumstances such as these, in which USSL is limited by guarantee and its object and purpose is to act as a trustee and administrator of the Scheme, if the directors act otherwise than in accordance with that object and purpose (and, he extrapolates, the objects and purposes of the Scheme), they are in breach of section 171 CA06 and as a result in breach section 172. They are pursuing their own ends, therefore, and there is no need to establish a separate "fraud on the minority" in order to fall within the fourth exception to *Foss v Harbottle*.

128. In this regard, Mr Grant referred us to Lord Sumption's consideration of the proper purpose rule as stated in section 171(b) CA06 at [14] and [15] of his judgment in *Eclairs Group Ltd & Anr v JKX Oil and Gas plc* [2016] 3 All ER 641 at which Lord Sumption explained that the rule was concerned with "an abuse of power by doing acts which are within its scope but done for an improper reason." Mr Grant also stated in his written submissions that as appears from *Estmanco*, where the conduct complained of stultifies a substantial part of the purpose for which the company was formed, the remedying of that conduct suffices.

129. He also says that the position in *Estmanco* is consistent with section 170 – 175 CA06 under which USSL has a claim against directors for: (i) acting outwith their powers or other than for proper purposes; (ii) failing to promote the success of the company; (iii) failing to exercise independent judgment; and (iv) failing to avoid a conflict of interest. He says, therefore, that breaches of section 171 and 172 CA06 fall within the fourth exception to the rule in *Foss v Harbottle* where the directors were pursuing their own ends.

130. In addition, Mr Grant referred to a passage in the judgment of Hon Yen JA, sitting in the High Court of Hong Kong Special Administrative Region Court of Appeal in *Wang Pengying v Fai and Ors* [2021] HKCA 100 at [85] and [86]. In that passage the element of personal benefit to wrongdoers in *Microfusion* is criticised and it is said that the real test is "whether there has been (or would likely be) a misuse of the majority's voting power to release the directors from their breach."

131. It seems to me that this another attempt to collapse the duties owed to the trust company (USSL) into the trust (the Scheme) and in eliding the directors' statutory duties owed to the company with the objects of the trust to seek to avoid the requirements of the

fourth exception to the rule in *Foss v Harbottle,* or to expand the fourth exception. The authorities are clear. As McCombe LJ put it in the *Microfusion* case, the fraud on the minority exception prevents directors from improperly benefitting themselves at the expense of the company. It is necessary, therefore, to identify the alleged fraud on the minority and the benefit.

132. As I have already mentioned, my reading of [43] of the judgment, especially when read in the context of the judge's conclusions about *Estmanco,* is that he was focussing on directors who benefit themselves at the expense of the company and was not confining the benefit to a financial one. He considered *Estmanco* itself, the consideration of it in *Abouraya* and the Court of Appeal's conclusions on the subject in *Harris v Microfusion*. I cannot see that he erred unless one gives undue emphasis to his reference to "financial" at the end of [43].

***Ground C – test of prima facie case for relief***

133. Mr Grant's third ground of principle is that the judge was wrong to hold at [45] that the claimant only makes out a prima facie case where the court is satisfied that there are issues of fact on which it would be wrong to accept the Company's evidence without cross-examination.

134. In relation to the test to be applied when determining whether the first limb of the test in the *Prudential* case is met, whether there is a prima facie case that the company is entitled to the relief claimed, Mr Grant referred us to the *Abouraya* case at [53] and *Bhullar v Bhullar* [2015] EWHC 1943 (Ch) at [21] and [25]. In the *Abouraya* case, David Richards J stated as follows:

> "53. The first requirement is that the claimant must demonstrate a prima facie case that the company, . . . . is entitled to the relief claimed. A prima facie case is a higher test than a seriously arguable case and I take it to mean a case that, in the absence of an answer by the defendant, would entitle the claimant to judgment. In considering whether the claimant has shown a prima facie case, the court will have regard to the totality of the evidence placed before it on the application."

135. In the *Bhullar* case, Morgan J considered whether to grant permission to continue a double derivative claim. He noted that the claim fell outside section 260 – 264 CA06 but, nonetheless, CPR Rule 19.9 (now CPR Rule 19.14) provides that permission is needed to take further steps in the proceedings. At [25], he stated as follows:

> "It is one thing to ask whether the claimant has shown a prima facie case in the absence of an answer from the defendant and another thing to ask whether the claimant has still shown a prima facie case when one takes into account the suggested answer. If the facts relied upon by either the claimant or the defendant are not disputed, there may be little difference. But what if the claim and the suggested answer depend, as they often will, on disputed facts? Further, what if the resolution of that dispute will in due course require the trial judge to reach conclusions as to the credibility of witnesses? I consider that the court has to recognise

> that it cannot resolve disputes of fact at a hearing which does not involve any cross-examination of which witnesses and which takes place in advance of any formal disclosure of documents. It will not be unusual to find that the claimant can establish a prima face case, if one ignores the evidence relied upon by the defendant, but yet the claimant would fail at trial if the defendant's evidence were to be accepted. In such a case, I consider that it is still open to the court to hold that the claimant has made out a prima facie case because it would be wrong to assume that the defendant's evidence will be accepted at the trial and it may simply not be possible to predict with any degree of confidence whether the defendant's evidence will be so accepted."

136. Mr Grant submits that the purpose of the test is to ensure that frivolous and unmeritorious claims are weeded out but what the judge did went far beyond this. He assumed that USSL's evidence was to be accepted unless cross-examination was necessary and effectively reversed the burden of proof. In his written submissions, Mr Grant makes reference, by analogy, to the test for the purposes of section 261(2) CA06 which was under consideration in *Client Earth v Shell plc &Ors* [2023] EWHC 1137 (Ch), a case in which the question was whether Client Earth was entitled to proceed with its substantive application for permission to continue a claim.

137. Mr Grant seems to imply, therefore, that it is sufficient to consider the applicant's evidence alone. His point, if, in fact, he is making it, is not well founded. Section 261(2) applies when the application is first made and the only evidence before the court is that of the applicant. If, at that stage, the applicant's evidence does not reveal a prima facie case that the company is entitled to the relief sought, it will be weeded out without more. Section 261(3) makes clear, however, that if the application is not dismissed at the preliminary stage, the court will give directions for evidence to be filed on behalf of the company and a further hearing will take place (section 261(4)). At that stage, the court will be faced with a more complex consideration.

138. The *Client Earth* case was concerned with the preliminary stage. Client Earth is a private company limited by guarantee, a non-profit environmental law organisation and a UK registered charity. It holds or held a small number of shares in Shell Plc (27 shares to be precise) and is/was therefore, a member of Shell. It sought to bring a claim against Shell's directors in respect of a cause of action vested in Shell, seeking relief on its behalf. The alleged breaches of duty and/or trust by the directors were said to arise out of the directors' acts and omissions relating to Shell's climate change risk management strategy and their response to an order of the Hague District Court.

139. The claim fell within section 260(1) CA06. As I have already mentioned, in such circumstances, the court is required by section 261(2)(a) CA06 to dismiss the application if it appears to the court that the application itself and the evidence filed in support of it, do not disclose a prima face case for giving permission. At that preliminary stage, only the evidence of the would-be claimant is before the court and the company is not made a respondent. It may, nevertheless, choose to put in submissions. Shell did so and Trower J took them into consideration when determining whether there was a prima facie case for giving permission to continue the proceedings.

140. Trower J noted that the procedural position was different at common law from where permission is sought to continue a derivative action governed by the statutory rules noting that where the statutory rules apply there is a two stage process. He concluded, however, that the approach to whether there was a prima facie case would be similar [10]. In that case, however, the consideration of whether there was a prima facie case arose before any evidence had been filed on behalf of the company. It seems to me, therefore, that it is of limited assistance here.

141. We were also referred to *Tulip Trading Ltd ( a Seychelles company) v Bitcoin Association for BSC & Ors* [2023] 4 WLR 16. It was concerned with permission to serve out the jurisdiction, in which a different test applies, namely whether there is a serious issue to be tried. As a result, I do not find it helpful.

142. It seems to me that once evidence on behalf of both the applicant and the company is before the court, it is obvious that the judge must take the totality of the evidence into consideration when determining whether, as a minimum if the claim is to continue, there is a prima facie case that the company is entitled to the relief claimed: *Abouraya* at [53]. The way in which the evidence should be approached will depend upon the nature of the evidence itself and the nature of the claims.

143. In this case, the primary facts in the sense of the steps which were taken in relation to the 2020 Valuation and the subsequent change to benefits were not in dispute and were very well documented. The Discrimination Claim relied upon the same facts, although as Mr Short pointed out to us, there is a dispute about the comparisons made for the purposes of establishing a breach of the Equality Act 2010. There was no dispute about the figures in relation to the increases in investment costs and salaries in relation to the Costs Claim. They too were well documented. There was also some documentation in relation to the Scheme policy in relation to investment in fossil fuels. There was no suggestion that there had been a false paper trail and that the documents could not be accepted at face value.

144. The real question was as to the interpretation of those facts and whether there was a prima facie case of equitable fraud in the sense pleaded in relation to each of the Claims. It was necessary for the judge to look at the totality of the evidence in that regard, in order to determine whether there was a prima facie case. In carrying out such a task, it is appropriate to apply the practical approach advocated by Morgan J in the *Bhullar* case.

145. As Morgan J put it where there is evidence on both sides, it is still open to the court to hold that the claimant has made out a prima facie case "because it would be wrong to assume that the defendant's evidence will be accepted at the trial and it may simply not be possible to predict with any degree of confidence whether the defendant's evidence will be so accepted." In other words, where the issue is one which is not merely raised and answered on the documents, such as whether a director was acting in good faith in a way which would be most likely to promote the success of the company for the benefit of its members as a whole, it should not be assumed that the evidence on behalf of the company/directors will be accepted at trial and the claimant's evidence should prevail for the purposes of determining whether there is a prima facie case.

146. Although the judge's turn of phrase could have been more elegant, it seems to me that that was his approach at [45].

### *The effect of these conclusions on the Claims*

- *Valuation Claim*

147. What is the effect of these conclusions upon the Valuation Claim? It is alleged that the breaches of directors duties have led to a loss to USSL in the form of a loss of assets and an increased deficit in the funds of the Scheme. It seems to me that such an allegation proceeds on a premise which is fundamentally incorrect. The assets of the Scheme are held by USSL on trust. It does not hold them on its own behalf and, therefore, even if there were a loss to the Scheme as a result of the 2020 Valuation and the steps which were taken as a result, it would not be a loss to USSL qua company.

148. In any event, as the judge pointed out at [131], it is difficult to see that USSL suffered any loss as a result of the 2020 Valuation. It neither increased or reduced USSL's assets or liabilities. The same is true of the Scheme. Furthermore, by executing the Deed of Amendment, USSL reduced the Scheme's potential liabilities. Neither the Scheme nor USSL suffered a loss as result. It seems to me, therefore, that the judge was correct to find that USSL has suffered no loss and as a result, to conclude that the Valuation Claim was not a derivative action because there was no harm to USSL for which a remedy was being sought.

149. In my judgment, this is so even if one adopts a wider perspective. In oral submissions, Mr Grant encapsulated the alleged wrong in relation to the Valuation Claim as a use of the valuation power for improper purposes which were to action change in relation to benefits and to force the JNC to reduce future benefits by way of amendment. He also made clear that there was no allegation of bad faith on the part of the directors, nor was he saying that no reasonable board of directors could have decided as they did. This is despite the pleading at [109] of the APOCs that the directors' actions were "perverse", that they pursued their own interests [108] and those of others [110]. Mr Grant submitted instead that they had lost sight of the purpose of the Scheme, that there had been a misunderstanding and that the adoption of conservative assumptions for the Scheme and the intention to prioritise accrued benefits showed that the directors were acting other than in the best interests of USSL and not for a proper purpose.

150. In this regard, we were taken to documents which had been before the judge and which show allegedly that the directors thought that they had a duty to secure benefits which had already accrued. These included a document headed "2020 Valuation: Principles for Decision Making". It is a very detailed document which expressly states that the trustee must exercise its powers having taken into account all relevant considerations and ignoring all irrelevant ones. Under the heading "The Trustee will prudently choose assumptions for calculating technical provisions" there are numerous bullet points in relation to setting prudent assumptions "with the objective that the members' benefits can be paid in full." It is pointed out that prudence is a qualitative judgment and cannot be quantified in a statistical sense. In particular, it is stated that:

> "Because this is ultimately a judgment, and not a statistical exercise, the trustee will need to be able to show that the process it followed in arriving at that judgment was reasonable: as part of this, the trustee's minutes/records will need to show that the assumptions were chosen with a view to achieving the objective of protecting the security of existing benefits and based on

> reasonable evidence (and this usually involved considering current conditions and expected future trends) which is specifically relevant to the Scheme.

Amongst many other things, the paper also emphasises that it will be necessary to take both legal and actuarial advice.

151. We were also taken to a methodology paper in which it was stated that the primary objective and statutory duty of the Trustee was to ensure that the benefits of the members which have already built up can be paid when they fall due. A similar phrase is used in a lengthy document entitled "A consultation for the 2020 valuation" which is dated 28 August 2020. It states, amongst many other things, that: "We have been guided through this process by our primary legal duty to ensure that the scheme can meet its obligation to pay the benefits that members have already been promised. We have also sought to ensure that contributions and investment strategies are appropriate for securing new promises."

152. We were also referred to a detailed document entitled "Update on the 2020 valuation" which is dated 3 March 2021. It bore a disclaimer which explained, amongst other things, that: the Trustee was not an actuary and where actuarial information had been included the relevant actuary had confirmed that it complied with Technical Actuarial Standards; the document was for information purposes only and did not constitute advice; and that it was important for the recipients to take their own professional advice.

153. Although the Update is a complex document we were taken to a number of individual statements and pieces of information in isolation. They were: that "the overall level of prudence is lower than implied by the discount rate assumptions" and that USSL and the Scheme Actuary believed that the level of prudence was appropriate given the conditions as at 31 March 2020; a table showing three scenarios based on different levels of covenant support by employers; and the statement that "benefits already earned by members cannot be changed and so deficit contributions will be required in any case, and the scope for benefit changes to reduce contributions is focussed on the future service contribution rate." It is said that this reveals an intention on the part of USSL to manoeuvre the JNC to require benefit changes and that the use of very conservative assumptions which led to the benefit changes were adopted for improper purposes and not in the best interests of USSL.

154. Amongst other things, we were also referred to a paper produced by Aon for Universities UK in which it stated that it considered USSL to be "overly prudent" on its pre-retirement discount rate. However, Aon acknowledged expressly that it was a decision for USSL to make.

155. Lastly, in a document headed "USS briefing: Why we decided to proceed with the 2020 Valuation", USSL explained itself as follows:

> "**USS briefing: Why we decided to proceed with the 2020 valuation**
>
> - In early 2020, when preparations for a valuation were already well under way, the Coronavirus pandemic began to take hold. Funding conditions were very volatile: financial

> markets reacted to the disruption and uncertainty, and entire sectors of the global economy shut down to help contain the spread of the disease.
>
> - At that time, we believed that continuing with the 2020 valuation was the most measured response to addressing the Scheme's deteriorating funding position: it avoided more immediate and impactful measures, such as increasing contributions, and it is likely we would have decided to hold a valuation if preparations for one weren't already under way.
>
> - Nearly 12 months later, we still believe that continuing with the 2020 valuation is the most measured response because we now expect investments to produce less income than we assumed in the past, which means our members' pensions are at risk of being under-funded. That is something we have to investigate and act upon.
>
> - By law, a valuation would have been required by 31 March 2021 in any event."

156. In this regard, I also agree with the judge that Dr McGaughey and Prof. Davies failed to show a prima facie case of equitable fraud in Mr Grant's sense of acting otherwise than in the best interests of USSL and for a proper purpose and as a consequence were unable to show that USSL suffered a loss as a result of the alleged breaches, that breaches were committed or that there had been any personal benefit on the part of the directors.

157. The documents to which both he and we were referred do not reveal such a prima facie case or any loss as a result. USSL was under a duty to ensure that the Scheme could meet its obligation to pay the benefits that members have already been promised in terms of the accrued rights of all of the members of the Scheme (including active members), the adoption of discount rates was a matter for USSL and there is no suggestion that its decision was improper and there is no evidence of an intention to manoeuvre the JNC to require benefit changes. The documents merely reveal consideration of the relevant issues.

158. Save that it is documented that Mr Galvin stated that "DB pensions in the UK have failed. This is not controversial.", something which is not now relied upon, we were not shown any evidence to support any of the allegations made in relation to the Directors' motivation and the allegations of equitable fraud and the judge makes no reference to any evidence which would support those allegations. It seems that Mr Grant no longer relies on the matters at [107] – [110] of the APOCs. In the circumstances, it seems to me that it was entirely inappropriate that the allegations should have been made. One of the consequences of that is that not only are Dr McGaughey and Prof. Davies unable to show that USSL has suffered loss or that any harm which they have suffered is reflective of that loss, they are also unable to show that an equitable fraud has been perpetrated in order to bring the proceedings within the fourth exception to the rule in *Foss v Harbottle*.

159. Even if there were a loss, it seems to me that Dr McGaughey and Prof. Davies's alleged loss would not be reflective of it. It seems to me that what they are really complaining about is the reduction in their future benefits under the Scheme. That will lead to a reduction in Scheme liabilities and does not affect USSL itself at all. Furthermore, as the judge pointed out at [132], the increase in employee contributions to the Scheme will lead, if anything, to an increase in the assets held on trust for the Scheme and not a diminution in those assets.

160. In any event, as I have already mentioned, Mr Grant submits that the chose in action against the directors and any damages which might be recovered if they were successfully sued, would belong to USSL and would not be a trust asset. He went as far as to accept in argument, that the members of the Scheme, including Dr McGaughey and Prof. Davies, would not benefit if a claim for breach of directors' duties led to USSL recovering damages.

161. This analysis is necessary for the purposes of characterising the proposed action as a multiple derivative claim rather than a beneficiary derivative claim like *Roberts v Gill* or a potential dog-leg claim. However, if that is the case, it is not clear to me that Dr McGaughey and Prof. Davies, as members of the Scheme, have any interest in such a claim and in the proceeds of it at all. Although USSL is a "one trust" trustee company and its objects provide that it should discharge the office of trustee, in particular of the Scheme and its income and property should be applied towards the promotion of its objects, it is not clear that any damages it might receive would ultimately be held for the benefit of the Scheme.

162. Having accepted that the members of the Scheme would not benefit from the proceeds of any successful claim against the directors of USSL, Mr Grant suggested, rather inconsistently, that although the chose in action and its proceeds would not be trust property, those proceeds would, under the Articles of the Company, have to be used for the benefit of the Scheme and that was sufficient to give his clients an interest in the proceedings. If that were the case, however, it is difficult to see a real distinction between such a situation and one in which the chose in action itself is, in fact, trust property.

163. It seems to me that neither situation assists Dr McGaughey and Prof. Davies. Either the proceeds of any action is held qua company, in which case, it is not clear that they have any interest in it whatever and certainly not enough to give them standing to continue the action, or the proceeds would, ultimately, be held on behalf of the Scheme and therefore, a beneficial derivative action or a dog-leg claim would be the correct course to take.

164. I also note that there is no claim for damages in the APOCs. Instead, declarations and an injunction are sought. The declarations are to the effect that there have been breaches of duty by the directors and that they have caused or will cause loss to USSL and the injunction seeks to prevent steps being taken to implement the benefit and contribution changes. I agree with the judge that this is indicative of a claim against USSL as trustee, rather than on its behalf. As trustee of the Scheme, USSL has taken various steps on the basis of the professional advice of the Scheme Actuary and its lawyers. Those steps were considered and approved by the JNC, debated and discussed in consultation and were the subject of reports by other actuaries, none of whom suggested that the

proposed steps were outwith the proper exercise of USSL's powers in the circumstances but were a matter of judgment.

165. Neither USSL, nor the Scheme have suffered loss or harm and therefore, there is nothing to pursue on behalf of USSL itself. In effect, it seems to me that Dr McGaughey and Prof. Davies are seeking to interfere with the decision making of the trustee company and to do so without seeking to bring an action against USSL itself. In my judgment, the judge was right to refuse permission in relation to this Claim on the basis that it was not a common law multiple derivative action. He was also right to decide that Dr McGaughey and Prof. Davies did not suffer loss or harm reflective of that suffered by USSL. They could not have done so and, in any event, did not.

- *Discrimination Claim*

166. I also consider that the judge was right in relation to the Discrimination Claim. These claims are parasitic upon the Valuation Claim and are based upon similar reasoning. They are said to arise from the decisions in relation to future accrual and contributions, taken as a result of the 2020 Valuation. The Discrimination Claim fails for the same reason as the Valuation Claim, therefore. Furthermore, such claims are hypothetical and it is not suggested that Dr McGaughey and Prof. Davies themselves are in a position to bring such a claim.

167. The decisions in relation to benefit and contribution changes were taken with the consent and after consultation with the JNC. Furthermore, each member who alleges that they have been indirectly discriminated against is able to bring a claim directly against USSL as trustee of the Scheme. There is no need for a multiple derivative action. Even if that factor should be left to be considered as a matter of discretion as to whether the multiple derivative claim should be allowed to proceed, it seems to me that Dr McGaughey and Prof. Davies would not suffer a loss or harm which is reflective of any loss suffered by USSL. Dr McGaughey and Prof. Davies do not allege that there would, in reality, be any causal connection between any liability on the part of USSL to pay compensation for indirect discrimination to other members of the Scheme and the benefits to which they are entitled under the Deed of Amendment. The only conceivable mechanism under which any members of the Scheme could conceptually claim to suffer any loss as a result of successful discrimination claims being brought against USSL by another member would be if USSL was indemnified from the assets of the Fund pursuant to Rule 75 of the Scheme Rules. However, if no indemnity was paid, the members of the Scheme would not suffer any loss reflective of USSL's loss: but if USSL was indemnified, then it would not have suffered a loss. Either way, there would be no basis to permit a company derivative action to be brought on behalf of USSL by members of the Scheme.

168. Furthermore, as I have already mentioned, there is no basis for the pleading of equitable fraud in this regard.

- *Fossil Fuel Claim*

169. What of the Fossil Fuel Claim? In this regard, we were taken to a document headed "Climate Change and USS" dated February 2022. Amongst other things it states that: in accordance with its fiduciary duties, USSL should consider climate related risks including the exercise of investment power for proper purposes; that the Scheme could

not divest to zero, the economy and the assets in which the Scheme was invested have to transition over 30 years and that USSL has to play its role in engaging with the assets and markets in which it invests. It also refers to establishing a set of principles to guide the Scheme towards net zero and to consider a range of interim targets. It also states that a review of climate data was being undertaken for which the starting date was likely to be 31 December 2020. In addition, at [59] of Mr Atkinson's witness statement of behalf of USSL, he states that the Board is provided with annual updates on climate change matters and annual training. The most recent training took the view that divestment was not the proper way to achieve net zero. Rather, USSL would have to play its role in engaging with the assets and the markets in which it invests.

170. Mr Grant submitted that USSL was wrong to concentrate on the global perspective rather than taking a company perspective and that it needed to have a plan for divestment. In the pleading at [105] it states that the long term interests could only be met by an immediate plan for disinvestment and the only rational action pursuant to section 171 and 172 CA06 was to devise and implement such a plan as soon as possible. Mr Grant did not press this point so firmly in oral submissions. He said that the directors needed to have a plan and that it was not clear that they had one. He also went so far as to say that the directors had taken an irrational view that it was best to seek to influence the market as a large investor and had preferred their own interests above the attitude of active members revealed in a survey of less than 1% of the active membership.

171. I agree with the judge that there was no prima facie case of loss to USSL in relation to this claim and therefore, it falls at the first hurdle. It cannot be characterised as a derivative claim because there is no prima facie case that USSL has suffered loss as a result of the alleged breaches of directors' duties. Nor is there a causal connection between the investment in fossil fuels and the benefit changes which affect Dr McGaughey and Prof. Davies. In fact, as the judge points out at [190], it is not alleged that they have suffered any loss as a result of the alleged breaches of duty.

172. Furthermore, it is not suggested that the directors were acting in bad faith, or had done other than acted in what they considered to be the best interests of USSL and the Scheme, having taken proper advice. It is alleged that the Directors' breaches "furthered their own interests" and that the "Directors' actions put their own beliefs with regards to fossil fuels above the interests of the beneficiaries and the Company [USSL]" [APOCs at [112]]. There is no evidence to support these allegations at all. I do not consider that the survey which was completed by a tiny proportion of active members in the Scheme can form the basis for such an allegation.

173. I also agree with the judge that it is doubtful that there is a prima facie case in this regard. As he pointed out at [195] of his judgment, regulation 4 of the 2005 Regulations imposes a duty upon USSL to exercise its powers of investment in a manner calculated to ensure the security, quality, liquidity and profitability of the investments as a whole. It also provides that the assets must be properly diversified in such a way as to avoid excessive reliance on any particular asset, issuer or group of undertakings so as to avoid accumulations of risk in the portfolio as a whole. Mr Atkinson's evidence was that USSL had complied with those requirements in exercising its discretion and had taken appropriate professional advice. A breach of regulation 4 was not identified.

174. In effect, the Fossil Fuels Claim is an attempt to challenge the management and investment decisions of USSL as trustee without any ground upon which to do so. There

is nothing in the pleading or the evidence to suggest that USSL has exercised its powers in an improper fashion.

175. In all the circumstances, this was a claim which was bound to fail.

- ***Conclusions***

176. It follows, from what I have already said, that none of the Valuation Claim, the Discrimination Claim and the Fossil Fuel Claims are derivative actions.

177. Even if the Valuation Claim, the Discrimination Claim and the Fossil Fuels Claims had been suitable to be progressed as common law company derivative actions and there was a prima facie case of loss or harm suffered by USSL reflected in a loss to Dr McGaughey and Prof. Davies, it seems to me that these Claims would have failed for the lack of a prima facie case to the effect that the directors improperly benefitted as a result of their conduct. As I have already pointed out, there was no evidence to this effect at all.

178. I should reiterate that in my judgment, at best, the Valuation Claim, the Discrimination Claim and the Fossil Fuels Claims would have been best suited to having been commenced as beneficiary derivative actions or administration actions. In such circumstances, it would have been necessary to meet the requirements of CPR 19.8 in relation to representation. It would have been necessary for Dr McGaughey and Prof. Davies to have sought to represent the members of the Scheme with the same interest as theirs and to join representative defendants in relation to different interests from within the Scheme. It would also be necessary to consider whether it is appropriate to consider the merits of the claims and whether they should proceed on behalf of USSL. It seems that they have sought to avoid these difficulties by attempting to shoe-horn this action into the straitjacket of a common law multiple derivative claim.

***The effect upon the Costs Claim of Grounds A, B and C***

179. The judge held that the Costs Claim was capable of being pursued as a common law company multiple derivative claim. There is no cross appeal against the decision. However, I should say that I find the conclusion surprising. The increase in investment costs and/or in remuneration has caused no loss to USSL itself which has been reimbursed such costs and remuneration from the Scheme. Nor is any specific loss to the fund pleaded. Mr Grant says that the directors' improper behaviour in this way has left USSL open to a breach of trust claim, but none has been asserted, and this reasoning is circular.

180. Furthermore, in relation to Ground B, there is no evidence that the increases were improper in any way. In fact, total remuneration also had to be approved by the JNC. Finally, in this regard, there is nothing to suggest that the judge was wrong to decide that there was no prima facie case in this regard. In particular, there is nothing to suggest that the judge was wrong to conclude at [183] of his judgment that on the totality of the evidence, there was clear support for USSL's case that there were no super-inflationary increases in costs and there was nothing to support the allegation at [111] of the APOCs that the directors and Mr Galvin, in particular, had benefitted from super-inflationary increases and that it was in the interests of the directors not to raise concerns for fear of losing office.

181. It seems to me, therefore, that even if the Costs Claim is capable of being brought as a multiple derivative claim, it would fail for lack of a prima facie case and prima facie evidence of improper benefit.

***Ground D – Discretion***

182. Lastly, I come to Ground D. It arises in relation to the Discrimination Claim and the Fossil Fuels Claim. It is also raised in the Respondent's Notice. In the light of my other conclusions, it is not strictly necessary to consider it at all. I will do so, nevertheless, albeit only in outline.

183. It is said that the judge erred in holding at [174] that there were strong reasons as a matter of discretion that it would not have been appropriate to give permission in relation to the Discrimination Claim because it would be far better for individual claimants to make their claims directly against USSL either individually or in group litigation. He added that if USSL were found to be in breach of section 19 Equality Act 2010, USSL and its members can consider the position (including any potential claims for negligence against the directors or their advisers) in the light of the findings made by the employment tribunal or the court. At [197] in relation to the Fossil Fuels Claim, the judge stated that even if he had considered that there was a prima facie case on the merits, he would not have exercised his discretion to permit the Claim to be continued but would have left them to pursue a direct claim against USSL for breach of trust.

184. In relation to the Discrimination Claim, in his written submissions, Mr Grant stated that the exercise of discretion in this regard was wrong. It failed to recognise USSL's rights against its directors. Claims by Scheme members against USSL are a loss to that company which the directors inflicted upon it. Dr McGaughey and Prof. Davies now seek to remedy that loss on behalf of USSL. In relation to the Fossil Fuels Claim it is said that the exercise of the judge's discretion at [197] was wrong and was inconsistent with his conclusions about the Valuation Claim at [155] that the difficulties in pursuing a breach of trust claim justified an exercise of discretion to permit the Valuation Claim to continue.

185. In my judgment, the judge was right to approach this matter as he did. It is quite clear to me that the issues in relation to discrimination are better suited to an individual claim or claims which, in themselves would be less cumbersome and expensive. If successful, they would have the same effect as a result of the effect of section 61 Equality Act 2010. This is a powerful reason to refuse to allow the multiple derivative action to proceed in relation to this claim.

186. The same would have been true in relation to the Fossil Fuels Claim. The judge was fully entitled to take the view he did at [197] of his judgment. The Fossil Fuels Claim is well suited to be brought as a direct claim in breach of trust and there is no reason, save perhaps a desire to avoid the difficulties in relation to costs and representation, to seek to bring it in as a derivative action. The derivative procedural mechanism is not intended to enable would be claimants to avoid other procedural hurdles. It is an exceptional remedy when a wrong would otherwise go unremedied. In effect, the Fossil Fuels Claim is a challenge to USSL's investment policy and should be brought against it as just that.

***Conclusion***

187. In the light of my conclusions, I consider that the appeal should be dismissed on all grounds. I have been surprised that Dr McGaughey and Prof. Davies chose to bring this action in the form they did and to pursue it despite the fact that the judge flagged up what he saw as the difficulties at the initial stage when he considered it on paper.

**Lord Justice Snowden:**

188. I agree that this appeal should be dismissed for the reasons given by Asplin LJ.

**The Rt Hon. Sir Julian Flaux:**

189. I also agree.