

McGaughey and Other v USSL and Others Summary of Court of Appeal Judgment – 21 July 2023

JUDGMENT SUMMARY

- 1.1 The Court of Appeal has unanimously dismissed an appeal by two members of USS who had tried to bring claims against current and former directors of the trustee company (Universities Superannuation Scheme Ltd, USSL). The Claimants were appealing a judgment of the High Court in May 2022 where they had been refused permission to take forward any of four claims.
- 1.2 In dismissing all grounds of appeal, the Court not only identified basic flaws in the Claimants' approach to litigating such a dispute, but also decided that the evidence did not show even a prima facie case that would justify allowing any of the claims to continue. Indeed, writing the substantive judgment, Lady Justice Asplin commented that for central elements of the case against the directors: "*it was entirely inappropriate that the allegations should have been made*".

2. NATURE OF THE ORIGINAL APPLICATION

- 2.1 The claim was an application to bring a 'multiple derivative action', i.e. a claim where a person steps into the shoes of a company to take forward litigation that the company will itself not otherwise pursue. Such actions involve the company meeting the legal costs so, to protect companies from speculative claims, permission of the Court is required.
- 2.2 The Court of Appeal decision is important in reinforcing the conditions for such claims not just because of the effect such a claim proceeding would have had on USSL, but also because it is a route being explored by a number of activist organisations to put pressure on large corporations (note the ongoing application by Client Earth in relation to Shell plc). The Court of Appeal was very clear that such an 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.

3. HOW THE GROUNDS OF APPEAL FAILED

- 3.1 The **First Ground** argued was that the High Court was wrong in finding it was essential to show both that USSL had suffered a loss due to the directors' actions and that the Claimants suffered a loss reflective of that. The Court of Appeal found the Claimants' submissions on this point were hopeless, based on the authorities. A multiple derivative action is intended to be used only in exceptional circumstances. The loss requirements are not mere technicalities. Requiring loss to the company "*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*"; reflective loss on the part of the claimant is necessary to enable a court to be satisfied that a claimant has a legitimate interest in the company's actions and is not seeking to use a multiple derivative action for ulterior purposes.
- 3.2 USS has different classes of beneficiary and, unlike shareholders in a company (in respect of those shareholder rights), their interests may conflict. For example, changes to future USS benefits in 2022 (the subject matter of two of the claims) did not detrimentally affect the position

of members no longer in service, including pensioners; indeed their positions would be further secured by the changes. The Court of Appeal decided the Claimants were, in effect, seeking to commence an action that would be against the interests of some classes of member, wishing to do so to avoid the process of joining representatives of other members with different interests.

- 3.3 The Court of Appeal found the **Second Ground** (the High Court had incorrectly applied a test requiring improper financial benefit, leading to other conclusions being wrong) was not made out because, on a proper reading of the judgment, the High Court had considered the possibility of non-financial benefit and still rejected the claims.
- 3.4 The **Third Ground** was that the approach of the High Court was wrong in considering all of the evidence before it and that only the Claimants' evidence should be taken into account when permission is considered.
- 3.5 Lady Justice Asplin noted that the primary facts for the four claims were not in dispute and were well documented. There was no suggestion there had been a false paper trail, so the documents could be accepted at face value. Once evidence on behalf of both parties is before the Court, a judge should take the totality of the evidence into account when exercising discretion, so the High Court's approach was correct.
- 3.6 The **Fourth Ground** related to the exercise of the court's discretion. The High Court had stated that even if it had considered there was a prima facie case, it would not have exercised discretion to permit some of the claims, but instead would have expected those claims to be brought against USSL rather than the directors (individual member claims for discrimination; a trust law claim in relation to Fossil fuels). The Claimants had been frank that they had rejected claims against USSL to avoid the cost and complexity of appointing other members to represent the position of those who were not in the same position. The Court of Appeal saw this as a reason not to provide discretion; multiple derivative claims provide an exceptional remedy when a wrong would otherwise go unremedied, not a way of avoiding procedural hurdles in other available remedies.

4. IMPACT OF FINDINGS ON INDIVIDUAL CLAIMS

The Valuation claim¹

- 4.1 It was alleged that breaches of directors' duties had led to a loss to USSL in the loss of assets and an increased deficit in the funds of the Scheme. Lady Justice Asplin noted that "*such an allegation proceeds on a premise which is fundamentally incorrect.*" A valuation would not itself produce a loss for either the Scheme or USSL (the need to respect the difference between those two entities runs through the judgment), so the High Court was right to conclude that the Valuation claim was not a multiple derivative action - there was no harm to USSL for which a remedy was being sought.
- 4.2 The Court of Appeal had considered the extensive contemporaneous documents produced by USSL in relation to the valuation. Quite contrary to the Claimants' allegations that these showed a misunderstanding by USSL of its duties and deliberate choice of very conservative assumptions for improper purposes and contrary to the best interests of USSL, the Court of Appeal found "*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*

¹ A claim of breach of director duties in relation to the 2020 Actuarial Valuation in not acting in good faith or exercising independent judgment, ignoring relevant considerations, choice of date and failing to justify changes to actuarial methods and assumptions.

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.”

4.3 Apart from one alleged comment that was expressly not relied upon in the hearing, the Court of Appeal was shown no evidence to support any of the allegations made in relation to the directors’ motivation or the allegations that had been made of equitable fraud concerning the valuation. Nor had any such evidence been referred to in the High Court judgment. In the circumstances, Lady Justice Asplin’s disapproval for allegations of this nature was clear.

Discrimination claim²

4.4 The discrimination claims were based on the same decisions as the Valuation claim and so failed for the same reasons (including there being no basis for any pleading of equitable fraud). In addition, there was no suggestion that either of the Claimants were in a position actually to bring such a claim given their personal circumstances, nor that the loss and reflective loss requirements were met.

4.5 The Court of Appeal also noted that any member who wished to advance their own claim that the benefit changes constituted illegal indirect discrimination against them could do so directly against USSL as trustee of the Scheme. So, even if all the other requirements had actually been satisfied, there would be no need for a multiple derivative action.

Fossil fuels claim³

4.6 Lady Justice Asplin agreed that there was no prima facie case of loss to USSL and therefore this claim fell at the first hurdle. Just as fundamentally, there was no suggestion that the directors were acting in bad faith or in what they thought was in the best interests of USSL and the Scheme, having taken proper advice.

4.7 There was “*no evidence at all*” to support the allegation that directors furthered their own interests or put their own beliefs about fossil fuels above the interests of USSL and the beneficiaries.

4.8 This claim was categorised as bound to fail, and 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.*”

Costs and expenses claim⁴

4.9 The High Court had held that the Costs and expenses claim could have been capable of going forward as a multiple derivative action, but refused permission because of the clear support from the evidence that there were no super-inflationary increases and nothing to support the allegations about the conduct of the directors. Lady Justice Asplin agreed on the weakness of the merits, but went further and queried whether the tests for a multiple derivative action could be made out.

CMS Cameron McKenna Nabarro Olswang LLP
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² A claim that reduction to future service benefits from April 2022 were indirectly discriminatory exposing USSL to litigation.

³ A claim that not having a plan to divest all fossil fuel investments was a breach that furthered the personal interests of directors.

⁴ A claim that USSL had incurred super-inflationary cost increases and that directors had furthered their own interests in connection.