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Climate Suit Against Directors of UK's Largest Pension Plan Heads to Appeals Court

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A British appeals court will review the 2022 dismissal of a novel lawsuit accusing current and former directors of the United Kingdom's largest private pension plan of mismanagement for, among other reasons, failing to divest from fossil fuels. In 2021, two members of the **Universities Superannuation Scheme (USS)**, the principal pension plan provided by UK higher education institutions, sued USS and its directors on the grounds, among others, that they failed to act in the best interests of beneficiaries by not divesting the plan of fossil fuel investments, despite fossil fuels allegedly performing worst as a category among all plan assets, and the fact that results of a USS survey indicated that the majority of members favored divestment. They also **assert** that USS directors have no credible plan to address risks posed by climate change.

In May 2022, the lower court **dismissed** plaintiffs' claims in their entirety. The court found that plaintiffs failed to allege that the directors committed a deliberate or dishonest breach of duty or improperly benefited themselves at the expense of USS by continuing to invest in fossil fuels. The plaintiffs had alleged that the directors' decisions harmed USS's interests and, consequently, the company has suffered and will continue to suffer resulting damages. However, the court found that plaintiffs failed to identify any "further particulars of this loss" or otherwise "specify which investments the Company should have sold or when or what the consequences would have been." Nor did the plaintiffs explain why USS would have avoided those consequences if it had adopted an immediate divestment plan or specify the plan that the company should have adopted.

The court is scheduled to hear plaintiffs' appeal on June 13, 2023.

In response to the ruling, USS said in a **statement** that it was pleased the High Court dismissed the claims but noted that "we are concerned that anyone should feel it necessary to take such action. We are committed to moving forward and to building stronger relationships with all stakeholders." To that end, ahead of the appeal, USS **announced** on March 12 the implementation of a new Stewardship and Voting Policy that will allow USS to "vote more personally against responsible directors where possible." It will "do this where, among other things, a company hasn't disclosed its climate transition plan, doesn't meet our diversity expectations, or where executive pay doesn't align with company performance." In its announcement, USS also indicated that it would not support "various systemic risks that have a financial impact," such as a bank's failure to make public climate transition plans or an oil and gas company's failure to detail spending on projects that will expand its carbon footprint. The company also shared a **link** to information about its voting history.

Taking the Temperature: While the USS action is one of the first climate-related suits against retirement plan trustees, it is unlikely to be the last, despite the initial dismissal by the court. Sustainability-focused litigation against directors are part of the larger trend of climate-focused civil litigation and enforcement NGO actions that we have discussed previously, often brought by interest groups such as ClientEarth and others, against companies and financial institutions under a variety of legal theories, laws and regulations.

For example, ClientEarth recently sued Shell plc's board of directors, alleging that the board had breached its obligations under the UK Companies Act by failing to adopt and implement an energy transition strategy that was in line with the 2016 Paris Agreement and a 2021 judgment by a Dutch court ruling that Shell must reduce its carbon dioxide emissions by 45% (compared to its 2019 levels) by 2030. In that previous case, seven environmental groups and more than 17,000 Dutch citizens sued the British-Dutch multinational energy company seeking to force it to implement CO2 emissions reductions that aligned with the 2016 Paris Agreement.

As we have previously observed, it is unclear whether these types of climate-related claims against directors will or should prove successful. In our view, it is not possible or productive to take a one-size-fits-all approach to addressing the various complex, nuanced issues arising from climate change, particularly for directors facing competing demands from various stakeholders as well as the imperative to consider and act in good faith on material climate-related risks and opportunities. For directors of Delaware and most other U.S. state-domiciled corporations, courts (in our view, correctly) are unlikely to second-guess board decisions in this area so long as those decisions are made on an informed basis, in good faith and in the best interest of the company and its stockholders.

Likewise, in the USS and similar situations in the UK, plaintiffs appear likely to face an uphill battle in successfully pleading claims for supposed climate-related failures. Despite plaintiffs' citations to a Financial Times article and an empirical study from Imperial College London to support their claims that fossil fuel companies have performed worse than renewable energy portfolios since at least 2017, the court found that plaintiffs failed to show damages. Plaintiffs did not allege that the directors should have sold the plan's fossil fuel investments in the short term, nor did plaintiffs plead that

they have suffered financial loss caused by the plan's investment in fossil fuels or the directors' failure to adopt an adequate plan for the long-term divestment of fossil fuel investments. The court also reiterated that there is no generalized duty of divestment based on ethical grounds.