

Universities Superannuation Scheme Limited
Royal Liver Building
Liverpool
L3 1PY

By email to bgalvin@uss.co.uk

25 October 2021

Dear Mr Galvin

Universities Superannuation Scheme (“USS” or the “scheme”) – 2020 valuation

1. As you know, many of our members are also members of the USS and are deeply concerned at recent developments regarding the funding and benefits of the scheme, in particular, following the 2020 valuation.
2. On their behalf, we have consulted leading counsel who has advised that there are serious grounds for questioning the rationality and reasonableness of the decision-making of the trustee regarding the 2020 valuation. The consequential changes in the scheme that are currently proposed are “particularly momentous” and, in counsel’s view, there can be no doubt that they justify an application to the court for directions, falling within the second category described by Robert Walker J in the unreported case of *Re Egerton Trust Retirement Benefit Scheme* cited in *Public Trustee v Cooper* [2001] WTLR 901 – where there is no real doubt as to the nature of the trustees’ powers and they have decided how they want to exercise them, but wish to have the decision blessed by the court because it is particularly momentous.
3. If the trustee itself does not make such an application, then counsel has advised that it would be open to members of the scheme to make the application and that it is likely that the Court would make a pre-emptive order for the payment of the costs of the application out of the assets of the scheme. See the classic statement in *Re Buckton* [1907] 2 Ch 406, to the effect that (a) proceedings brought by trustees to have the guidance of the Court as to a question arising in the course of administration of the trusts will be paid out of the trust fund; and (b) the costs of an application made by someone, but raising the same kind of point that would have justified an application by the trustees will be treated in the same way. An application by members would, in counsel’s view, fall fairly and squarely into the second class.
4. Counsel has, however, advised that because of its access to the relevant material the trustee would be better placed to make the application in the most cost-effective manner; and that our members should, in any event, defer making their own application until the current internal dispute resolution

process has concluded, since that may resolve the matter or at any rate reduce the scope of the issues. Nevertheless, on behalf of members of the Union who are members of the scheme we invite the trustee company to agree to make such an application unless it is possible to resolve the current disagreements consensually.

5. To this end we would like to raise our concerns about the following points which have been identified arising out of Rules 64 and 76 of the scheme.

Rule 64.10 says:

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.

(Emphasis added)

It is therefore of critical importance that there should be a determination by the trustee company, on actuarial advice following a rule 76 valuation, that an increase or a decrease (in each case in the singular) in the aggregate contribution rate payable by employers is required. For it is this which triggers the Rule 76 process and may ultimately bring into operation the cost-sharing provisions of the scheme. Under the Rules there is no scope for addressing a deficit unless and until there is such a determination. Anything purportedly done to address a deficit that is not the subject of a determination by the trustee company would be outside the scope of the Rules and void.

6. There are two points. This first is that it is a precondition to a determination under Rule 64.10 that there should have been an actuarial investigation under Rule 76 but it is unclear whether the report prepared by the scheme actuary in the present case satisfies the requirements of that Rule. Under Rule 76.1 the scheme actuary is required to report to the trustee company on the financial condition of the scheme and make such recommendations as the actuary shall think fit. The scheme actuary's report does not appear to do so but is more of a commentary on the reasonableness (or otherwise) of the trustee's position.
7. Secondly, and in any event, the trustee company has not determined that an increase or decrease in aggregate contribution rate is required. The Rule calls for a determination of the required increase or decrease and, although the Rules contain a conventional provision that the singular includes the plural, there is in this context no room for multiple alternative determination. The trustee company does not appear to have made any such determination, but has instead posited three different

potential increases to the aggregate contribution rate payable – scenarios 1, 2 and 3. Whether or not there has been an actuarial investigation compliant with Rule 76 the trustee company appears, therefore, to be in breach of its obligation under Rule 64.10 with the consequence that the mechanism for addressing the increase or decrease as determined by the trustee company has not come into operation.

8. Leading Counsel has advised that this is more than just a technicality, based on a semantic analysis of the Rule, because of its impact on the JNC decision-making process. It means, for instance, that if the UCU sides works up a proposal on one basis, UUK can effectively veto it by withdrawing covenant support. That would in our view undermine the entire joint decision-making process and would be contrary to the spirit as well as the letter of the Rules.

9. If the trustee company has taken advice on this aspect of the matter, members of the scheme including those whom we represent are entitled to see that advice and we should be grateful if you could let us have a copy of that advice and all documents relevant to it. In addition, we should be grateful for confirmation that no action will be taken pursuant to the purported operation of Rule 64.10 pending clarification of this point.

We look forward to hearing from you as soon as possible.

Yours faithfully

A handwritten signature in blue ink that reads "Jo Grady". The signature is written in a cursive, slightly slanted style.

Dr Jo Grady
General Secretary