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Dear Mr Cleary

Pensions Committee Meeting on 23 February 2022

UK Lawyers for Israel (UKLFI) is an association of lawyers who seek to ensure the correct understanding and observance of laws in matters relating to Israel.

Our attention has recently been drawn to the matters relating to Israel referenced at items 33 and 38 of the Minutes of the Pension Committee of 29 November 2021 and item 5 of the Minutes of 22 June 2021. We note from item 38 of the Minutes of 29 November 2021 that a report will be brought before the next meeting of the Committee, which has been scheduled for 23 February 2022.

We have a number of observations on these matters which we hope will assist the Committee and Officers to make decisions that comply with applicable laws.

General

Before addressing the specific points raised, we think it is helpful to recall the basic legal obligations of those responsible for investing pension funds.

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The primary obligation is to generate financial returns in accordance with the applicable legislation. Non-financial factors may only be taken into account where (a) this would not involve a risk of significant financial detriment to the scheme and (b) there is good reason to think that beneficiaries as a whole would support the decision.”¹ With regard to the second point, we note that strong feelings are held on both sides of the Israeli-Palestinian conflict. We do not believe that it can be said that there is a consensus in favour of divestment targeting Israel or areas under Israeli administration.

In addition, as a public authority, Wirral Council is bound by the Public Sector Equality Duty (“PSED”) in section 149 of the Equality Act 2010, which requires it in the exercise of its functions to have due regard to the need to eliminate discrimination and to foster good relations between people of different nationalities, ethnicities and religions.

In this connection, it should be noted that extensive research at US universities has shown a substantial linkage between the promotion of boycott, divestment and sanctions (“BDS”) targeting Israel and antisemitic attacks.² For example, it was found that “*The best statistical predictor of anti-Jewish hostility, as measured by actions that directly target Jewish students for harm, is the amount of BDS activity.*”³ Record levels of antisemitic incidents were reported in the UK in 2021.⁴ Adoption of a discriminatory policy in relation to Israel by comparison with other countries would be liable to exacerbate the already high level of tension between Jewish and other communities.

We further note that the Members’ Code of Conduct requires Members to

- “act ... impartially, fairly and on merit, using the best evidence and without discrimination or bias” and
- “consider all matters with an open mind and make decisions based upon weighing the best evidence”.⁵

In our view this requires Councillors to avoid discrimination against Israel and to make decisions on investment with an open mind, weighing all the evidence.

¹ Law Commission, *Fiduciary Duties of Investment Intermediaries* (2014) (Law Com No 350) https://www.lawcom.gov.uk/app/uploads/2015/03/lc350_fiduciary_duties.pdf at para 6.34.

² Amcha Initiative reports <https://amchainitiative.org/reports/>

³ Amcha Initiative, *Report on Antisemitic Activity in 2015 at US Colleges and Universities with the Largest Jewish Undergraduate Populations* <https://amchainitiative.org/wp-content/uploads/2016/03/Antisemitic-Activity-at-U.S.-Colleges-and-Universities-with-Jewish-Populations-2015-Full-Report.pdf> p19

⁴ Community Security Trust, *Antisemitic Incidents Report 2021* <https://cst.org.uk/data/file/f/f/Incidents%20Report%202021.1644318940.pdf>

⁵ <https://democracy.wirral.gov.uk/documents/s50070223/Part%205%201%20Members%20Code%20of%20Conduct.pdf>

Misinformation regarding Israel

There is widespread misinformation about Israel and its administration of the West Bank. It is convenient to make some general remarks about this before addressing various specific points raised in the Minutes.

It should first be noted that it is not inherently unlawful for a business to operate in an occupied territory, as the UK Supreme Court observed in *Richardson v DPP*.⁶ Indeed, many major companies operate in occupied territories around the world⁷ and States have accepted and endorsed this practice.⁸ A policy that targets companies operating in territories administered by Israel without targeting companies operating in territories occupied by other countries or in countries where more serious violations of human rights are taking place would be discriminatory. Such discrimination is not justified by the fact that politicised UN bodies themselves grossly discriminate against Israel. The 57 members of the Organisation of Islamic Cooperation and their developing country allies command a large majority of the votes in these bodies and pass an absurd disproportion of measures targeting Israel while not addressing massive violations of human rights in many other countries.

It should next be noted that around 30,000 Palestinians are employed by businesses in or in the vicinity of Israeli communities in the West Bank and East Jerusalem, at average salaries that are more than three times average salaries at Palestinian businesses, and with benefits such as health insurance and pension contributions that are not usually provided by Palestinian employers.⁹ Taking into account the families of these workers as well as other Palestinians who provide goods and services to them, this employment provides the livelihoods of hundreds of thousands of Palestinians. Palestinians also benefit from goods and services provided by these businesses.¹⁰ In addition, productive employment of Palestinians working together with Israelis contributes to reducing conflict and promoting peace and reconciliation.¹¹

⁶ [2014] UKSC 8 <https://www.supremecourt.uk/cases/docs/uksc-2012-0198-judgment.pdf>, para 17. Similarly the [decision](#) of the Cour d'Appel de Versailles in *AFPS and PLO v Alstom and Veolia* RG No 11/05331, 22/3/2013.

⁷ Kohelet Policy Forum, *Who Else Profits* (2017) https://euiha41fnsb2lyeld3vkc37i-wpengine.netdna-ssl.com/wp-content/uploads/2017/06/WhoElseProfits_most-final-19.6.pdf and *Who Else Profits, Second Report* (2018) <https://euiha41fnsb2lyeld3vkc37i-wpengine.netdna-ssl.com/wp-content/uploads/2018/11/WhoElseProfits-e-version.pdf>

⁸ Kontorovich, *Economic Dealings with Occupied Territories*, 53 *Columbia Journal of Transnational Law* 584 (2015) https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2494964; *Unsettled: A Global Study of Settlements in Occupied Territories*, *The Journal of Legal Analysis* 2017

<https://academic.oup.com/jla/article/9/2/285/4716923>; *State practice regarding trade with occupied territories* in Duval and Kassoti (eds), *The Legality of Economic Activities in Occupied Territories* (Taylor & Francis, 2020) https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3545928

⁹ Diker (ed), *Defeating Denormalization: Shared Palestinian and Israeli Perspectives on a New Path to Peace*, Jerusalem Center for Public Affairs (2018) https://jcpa.org/pdf/Defeating_Denormalization_Final_22_january.pdf pp35-36 (note that Area C does not include East Jerusalem) and pp96-98

¹⁰ *Ib*, particularly cap 8

¹¹ *Ib*, particularly caps 6-9; *Islands of Peace* <https://www.youtube.com/watch?v=PwJ9JX95u5Q&t=8s>

More generally, Israeli administration in the West Bank has achieved an enormous improvement in the standard of living, health, education and welfare of Palestinians in this area. Conditions in the West Bank were dire prior to 1967. The improvement was particularly marked in the period prior to the Oslo Accords in the mid-1990s,¹² when Israel administered the whole of the West Bank. However, it continued subsequently¹³ until the recent disruption caused by Covid, despite the incompetence and corruption of the Palestinian Authority which governs the vast majority of Palestinians in the West Bank.

A business may violate human rights in the West Bank or anywhere else in the world. However, there is no evidence that the risk of violation is greater in the West Bank than in many other territories, and indeed it is probably lower than in many other territories. As explained further below, the list of companies operating in the West Bank published by the UN Human Rights Council (UNHRC) is not based on any legal characterisation of the listed activities and has been discredited. It does not provide a reliable basis for a divestment decision.

Similarly, commercial and financial risks exist for companies operating anywhere in the world. Again there is no evidence that they are particularly serious for companies operating in territory administered by Israel and they are probably less serious than in many other territories around the world.

We will now address specific points raised in the Minutes of the Pension Committee meetings on 22 June and 29 November 2021.

Minutes of 22 June 2021, Item 5

The question presented to the Committee contains a series of misconceptions which we would wish to correct:

- (1) The question stated: *“The people of Palestine have been living under occupation and denied their human rights for more than 50 years.”* Israeli administration of the West Bank and Gaza Strip ensued from Israel’s response to threats by Egypt to destroy it and armed attacks by Jordan in 1967. As mentioned above, Israeli rule in fact brought major improvements for Palestinians in these areas. The majority of Palestinians in the West Bank are now under the administration of the Palestinian Authority, which is obligated by the Oslo II Accord to *“exercise their powers and responsibilities pursuant to this agreement with due regard to internationally-*

¹² Karsh, *What Occupation?*, Commentary Magazine, July/August 2002
https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3187122

¹³ See eg <https://data.worldbank.org/indicator/NY.GDP.PCAP.PP.CD?locations=PS> (GDP per capita);
<https://data.worldbank.org/indicator/SP.DYN.LE00.IN?locations=PS> (life expectancy);
<https://data.worldbank.org/indicator/SE.ADT.LITR.ZS?locations=PS> (adult literacy)

accepted norms and principles of human rights and the rule of law."¹⁴ Palestinians in the Gaza Strip are currently ruled by the terrorist organisation, Hamas. Businesses operating in the parts of the West Bank that remain under Israeli administration are unlikely to be responsible for human rights by the Palestinian Authority or Hamas.

- (2) The question continued: "*1.9 million Palestinians are cut off from the outside world by a blockade of Gaza and 4 million live under an Israeli government occupation that continues to build illegal settlements that segregates them behind a wall.*" Border controls are required between the Gaza Strip and both Israel and Egypt to obstruct terrorist attacks. However, it is a misconception to describe this as a blockade. According to the website of the United Nations Office for the Coordination of Humanitarian Affairs, in 2021 alone there were 358,366 exits from and entries into Gaza. This figure refers only to the movement of people and is additional to transfers of goods and fuel which occur on a large scale.¹⁵

The Palestinian population of the West Bank is about 3 million, not 4 million. The security barrier in the West Bank was also constructed to obstruct terrorist attacks. It consists mainly of a fence; only a small proportion of its length is a wall, where required to prevent sniper fire. Over 100,000 Palestinians cross the border daily from the West Bank to work inside Israel.¹⁶

In the Oslo II Accord, it was agreed that Israeli settlements would be dealt with in permanent status negotiations. It is inappropriate for a councillor to pre-judge the resolution of this issue.¹⁷

- (3) The question alleged "*There are many companies that are profiting from this illegal breach of human rights.*" It is not clear what the questioner was referring to by the phrase "*this illegal breach of human rights*". As stated above, it is not inherently unlawful for a business to operate in or in the vicinity of an Israeli settlement in the West Bank. As also mentioned above, there are many companies operating in other occupied territories around the world. It would be wrong to operate a different policy in relation to Israel than in relation to other countries.

The Committee's response to the question noted that LAPFF has met with the "UN Special Rapporteur". We assume this referred to Michael Lynk, the Special Rapporteur appointed by the UNHRC to report on the human rights situation in the Occupied Palestinian Territory. A Special Rapporteur is not a member of the UN staff and Mr Lynk's politicised appointment to this advisory role resulted from the automatic majority enjoyed by the members of the Organisation of Islamic Cooperation and their

¹⁴ Israeli-Palestinian Interim Agreement on the West Bank and the Gaza Strip, 28 September 1995, Article XIX

¹⁵ Maurice Hirsch, *The lie of the "Gaza blockade"*, 23 January 2022 <https://palwatch.org/page/29966>

¹⁶ <https://www.bbc.co.uk/news/world-middle-east-52470718>

¹⁷ Note 14, Article XXXI.5

developing country allies. He is heavily biased against Israel. The organisation NGO Monitor points out that he “*is unfit to fulfil his mandate due to:*

- *Partnerships with organizations that have alleged ties to terror groups and that promote BDS (boycott, divestment, and sanctions) campaigns against Israel.*
- *Self-admitted lack of expertise in international law.*
- *Moral failures, as shown in labeling a virulent antisemite as a “human rights defender” in his March 2017 report to the UN Human Rights Council.”*¹⁸

Further critical comments about Mr Lynk and the mandate given to him by the UNHRC have been made by the organisation UNWatch.¹⁹ No reliance should be placed by the LAPFF or the Pensions Committee on input provided by Mr Lynk.

Minutes of 29 November 2021, Item 33

We now address a number of statements in the question submitted by Cllr Bird at the November meeting, using the numbering in the Minutes:

1. Cllr Bird referred to: “*Questions, motions and protests by members of Merseyside Pension Fund and the wider public.*” This is vague and non-specific, and its weight must be discounted. It does not satisfy the second limb of the legal test which allows administering authorities to take non-financial considerations into account provided that doing so would not involve a risk of significant financial detriment to the scheme and where they have good reason to think that scheme members would support their decision.²⁰

There is no evidence before the Pensions Committee that there is widespread support amongst beneficiaries of the scheme for “adjustment” or divestment. In fact, the Israeli-Palestinian dispute does not lend itself to a consensus in the way that pollution or pay-day lending might. The divisive nature of the Israeli-Palestinian dispute is an unconvincing candidate for any consensus between beneficiaries. Where the issue is whether to support a highly political and partisan policy, the possibility of a consensus is surely further reduced. When it involves a person’s nest egg, that consensus is even more remote.²¹

Even if a consensus of beneficiaries is detected, the fiduciary must still consider whether the pursuit of BDS is in the best interests of the fund. As the Principles for Responsible Investment has said, “*Trustees and relevant parties should not take beneficiary preferences as instruction, but rather as key input*”²²

¹⁸ <https://www.ngo-monitor.org/reports/special-rapporteur-human-rights-palestinian-territory/>.

¹⁹ <https://unwatch.org/lynk/>

²⁰ Note 1 above

²¹ For authoritative academic legal discussion see Daniel Harris, *English Law and BDS: Taking Stock*, *Justice* No. 67 (Fall 2021) 11 <https://www.ijl.org/justicem/no67/10/> pages 12-13

²² Principles For Responsible Investment, *Understanding and Aligning with Beneficiaries’ Sustainability Preferences*, 21 April 2021 <https://www.unpri.org/download?ac=13321> page 17

2. Cllr Bird next referred to “*Two consecutive and critical engagement reports by Local Authority Pension Fund Forum*”. LAPFF’s quarterly engagement reports for the second and third quarters of 2021 describe continuing engagement with companies operating in the West Bank as listed by the UNHRC, but the epithet “critical” does not appear to be apposite. It appears from the reports that progress is being made and should be continued.

Furthermore, LAPFF should adopt a non-discriminatory approach, even though the UNHRC has not produced similar lists of companies operating in other disputed territories or in countries where serious human rights violations are occurring. This requires LAPFF to carry out additional research into other occupied territories and other countries. The Kohelet Policy Forum reports identified in note 7 above provide a convenient starting point in relation to other occupied territories.

Reliance on LAPFF processes that have not avoided discrimination against Israel would be liable to conflict with the PSED and with the Members Code of Conduct.

3. Cllr Bird mentioned “*Reports and advice from the United Nations Special Rapporteur on the situation in the Occupied Palestinian Territories*. We assume that this referred again to Michael Lynk. It is not clear to us which reports and advice of Mr Lynk she had in mind. However, we repeat the observations above regarding his bias and unfitness, as well as the limitations of his mandate. No reliance should be placed on his input.
4. Cllr Bird suggested that there is “*Government advice on high risk of trade with Occupied Palestinian Territories*.” The UK Government’s advice does not characterise the risk of trading with the Palestinian territories as “high”.²³ As noted above, there are commercial risks of operating in many countries around the world, and there is no evidence that the risks are particularly high in the West Bank. Moreover, by investing in shares of multinational companies that carry on some trade with the West Bank, the pension fund is not itself doing business with or in the “Occupied Palestinian Territories.”
5. Cllr Bird then referred to “*Extensive engagement by the United Nations resulting in a list of 112 companies linked to illegal settlements*.” This is no doubt a reference to the list published by the UNHRC on 28 February 2020.²⁴ This list has been discredited.

²³ <https://www.gov.uk/government/publications/overseas-business-risk-palestinian-territories/overseas-business-risk-the-occupied-palestinian-territories>

²⁴ A/HRC/43/71 <https://www.un.org/unispal/document/un-high-commissioner-for-human-rights-report-on-business-activities-related-to-settlements-in-the-opt-advance-unedited-version-a-hrc-43-71/>

In the first place, it sidesteps the legal and factual analysis required by making a seamless leap from the acts of a State to the acts of non-State enterprises. The decisions of the UK Supreme Court in *DPP v. Richardson* and the Cour d'Appel de Versailles in *AFPS v Alstom*²⁵ illustrate the fact that a company cannot be assumed to be responsible for alleged violations of international law by a State in the territory where it operates.

With regard to legal analysis, the UNHRC report admits that it “*is not, and does not purport to constitute, a judicial or quasi-judicial process of any kind or legal characterization of the listed activities or business enterprises’ involvement therein.*”²⁶

As regards factual examination, where the companies contacted did not provide additional information, “*OHCHR relied on desk research to assess the information received from Member States and stakeholders*”²⁷ (emphasis added). Examination of the list suggests heavy reliance on pro-BDS publications from partisan NGOs such as Who Profits and Human Rights Watch.²⁸ Moreover, the database uses the nebulous criterion “human rights concerns” rather than “human rights breaches.” Inclusion on the list does not therefore imply any finding of violation.

Finally, it should also be noted that the list does not take into account benefits to Palestinians from the activities of the listed enterprises, which in many cases are very considerable, as discussed above.

6. Cllr Bird mentions “*Adverse findings against two Britain-based companies by the Department for International Trade and OECD.*” We understand this to refer to decisions of the UK National Contact Point (“NCP”) for the OECD Guidelines for Multinational Enterprises, which is now part of the Department for International Trade. So far as we are aware the only cases where adverse findings have been made against British-based companies relating to the West Bank were G4S²⁹ and JCB.³⁰ Neither of these companies is included in the list of holdings of the Merseyside Pension Fund at item 5 of the Minutes of the meeting on 22 June 2021. G4S is not included in the list published by the UNHRC. JCB is included in that list, but it should be noted that the NCP decision relating to JCB was published on

²⁵ Note 6 above

²⁶ Note 24, para 19

²⁷ *Ib*, para 30.

²⁸ NGO Monitor, *Analysis of the UN’s Discriminatory BDS Blacklist*, 13 February 2020 <https://www.ngo-monitor.org/reports/un-blacklist-analysis/>

²⁹

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/846880/bis-15-306-lawyers-for-palestinian-human-rights-final-statement-after-examination-of-complaint-uk-national-contact-point.pdf

³⁰ <https://www.gov.uk/government/publications/lawyers-for-palestinian-human-rights-complaint-to-uk-ncp-about-jcb/final-statement-lawyers-for-palestinian-human-rights-complaint-to-uk-ncp-about-jcb>

12 November 2021 and there is at present no evidence that JCB will not comply with its recommendations.

7. Finally, Cllr Bird asserts that “*Realising around £2m of investment in 7 companies is of a scale and nature unlikely to cause significant financial detriment to Merseyside Pension Fund members.*” The value of the investments identified at item 5 of the Minutes of the meeting on 22 June 2021 amounted to £2.74 million at that date. However, the financial detriment to the fund from disposing of these investments would not be limited to the loss of return on these shares alone.

In the first place, it appears that at least some of these investments are in externally managed funds. In order to dispose of these holdings, it would probably be necessary to dispose of the entire holdings in the relevant funds, which would no doubt be much greater than £2.74 million.

Secondly, if a policy of not investing in stocks such as these is adopted, this would preclude the Fund investing in a larger range of companies in a similar position, thereby limiting the Fund’s options for investment. The opportunity cost could well be significant, especially if other investment options are narrowed, as can happen at any time. For example, at the time of writing, there is a real possibility that conflict in the Ukraine will result in wide-ranging sanctions being imposed by the UK and other countries on businesses trading in Russia. In this eventuality, other investments that are not sanctioned may also become commercially unattractive. And even if no escalation of armed conflict in the Ukraine materialises, inflationary pressures are producing instability in financial markets, which may make various companies operating in Israel and territory under its administration relatively attractive, and holding cash unattractive.

Thirdly, if the Fund divests from companies operating in the West Bank, it should also divest from companies operating in other occupied territories. As the reports of the Kohelet Policy Forum show,³¹ these include a large number of major international companies. If discrimination is to be avoided, the divestment required is likely to be very substantial. On the other hand, if discrimination is not avoided, the divestment decision could be legally challenged and there is likely to be external pressure to apply a similar policy in relation to other territories.

Fourthly, there are likely to be significant costs of management and administration arising from a policy of divesting from and not investing in companies operating in occupied territories.

³¹ Note 7 above

The Law Commission test is not a simple “tick-box” exercise. It is much more complex than simply calculating realisable value of the holdings to be divested and requires expert analysis.³²

Conclusion

The implications of a decision to divest from holdings in companies because they operate in the West Bank has implications that go far beyond the value of these individual holdings. It would be acutely divisive, promote antisemitism and exacerbate tensions between different communities. Even if limited to companies operating in the West Bank, the detriment to the Fund could well be significant. Moreover, targeting companies that operate in the West Bank without following a similar approach to companies operating in other occupied territories would be discriminatory. On the other hand, applying a similar approach to other occupied territories and countries where serious violations of human rights take place would be likely to result in very substantial detriment to the Fund.

Due to these factors, it is likely that a decision to divest these holdings on this ground would breach fiduciary duties, the PSED and/or the Members Code of Conduct.

We hope that these observations are of assistance. If you have any questions, please do not hesitate to contact me.

Yours sincerely



Jonathan Turner
Chief Executive

³² See Daniel Harris, op cit (note 21) at pages 12-13.