Neutral Citation Number: [2020] EWHC 2421 (Ch)

Case No: PE-2018-000025

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS
OF ENGLAND AND WALES
BUSINESS LIST (ChD)
PENSIONS

Rolls Building, Fetter Lane,
London EC4A 1NL

Date: 11/09/2020

Before:

CHIEF MASTER MARSH

- -

Between:

SPS TECHNOLOGIES LIMITED	**Claimant**
- and -	
(1) PHILLEX LOVESTER MOITT	
(2) MICHAEL SEITZ	
(3) STEPHEN TACHOUET	
(4) SALIM SIDAT	**Defendants**

- -
- -

Nicolas Stallworthy QC and Gus Baker (instructed by **Shakespeare Martineau LLP**) for the **Claimant**
David E. Grant (instructed by **Allen & Overy LLP**) for the **1st to 3rd Defendants**
Keith Bryant QC (instructed by **Stephenson Harwood LLP)** for the **4th Defendant**

Hearing dates: 25 February 2020

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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CHIEF MASTER MARSH

Chief Master Marsh:

1. On 25 February 2020 I heard the claimant's application for summary judgment under CPR 24.2. At the conclusion of the hearing I made an order rectifying three documents that govern the SPS Technologies UK Pension Plan ("the Plan") on the basis that the defendants had no real prospect of defending the claim and there was no other compelling reason why the claim should be disposed of at a trial. The three documents in question are:

    (1) The Definitive Deed and Rules dated 30 March 1998 ("the 1998 Rules").

    (2) The Definitive Deed and Rules dated 17 December 1999 ("the 1999 Rules").

    (3) The Deed of Amendment dated 5 June 2003 ("the 2003 Deed").

2. This judgment provides my reasons for making that order. The effect of the order is to correct what has been established as being an error that first arose in the 1998 Rules. The same error was subsequently included unnoticed in the 1999 Rules and the 2003 Deed. The claim therefore involves the serial rectification of successive deeds.

The parties

3. The claimant is the principal employer under the Plan. The first, second and third defendants are the current trustees of the Plan and the fourth defendant ("Mr Sidat") was appointed by the order made on 25 February 2020 to represent all beneficiaries of the Plan in whose interests it would be to oppose the relief sought by the claimant. The claimant was appointed to represent all other beneficiaries of the Plan.

4. The claimant, the trustees and Mr Sidat were represented respectively by Mr Stallworthy QC and Mr Baker, Mr Grant and Mr Bryant QC. I am grateful to them and their instructing solicitors for the meticulous way in which the claim was prepared and the clear way in which it was presented. The particulars of claim run to 149 paragraphs over 53 pages. In a different context, a pleading of such length might attract a negative comment about prolixity and a failure to observe the requirement for concision in CPR rule 16.4(1). However, such an observation is not apt here because the relevant events cover a lengthy period and it has proved helpful for the core facts to be set out in detail in the particulars of claim with cross-references to the bundles. It has meant that this judgment is considerably shorter than might otherwise have been the case.

5. The trustees adopted a neutral position in relation to the claim. They were, however, involved in the preparation of the claim and exercised a supervisory role, not least to ensure that a suitable representative beneficiary was appointed and arrangements were in place for his fees to be met.

6. Mr Sidat, after having received advice from Mr Bryant, has not opposed the making of orders rectifying the 1998 and 1999 Rules and the 2003 Deed. Although the hearing of the application proceeded unopposed, the court had the benefit of reviewing on a confidential basis an opinion written by Mr Bryant for Mr Sidat and of discussing issues that arose from the opinion with Mr Bryant in the absence of the

other parties. As I have remarked on other occasions, this procedure, which has been adopted over many years by a number of High Court judges, proved to be useful.

7. It need hardly be said that orders for rectification are not made lightly. As it is put in *Snell's Equity* 34th Ed. at 16-001:

> "Rectification is a potent remedy because it allows the courts to rewrite the contract."
>
> And at 16-002
>
> "Rectification is a discretionary remedy, "which must be cautiously watched and jealously guarded".[1]

8. The documents that comprise the Plan, like most pension schemes, are lengthy and complex. That errors sometimes occur when such documents are drafted is unsurprising. In the case of what is said to be an error going beyond an obvious typographical error, or the omission of a word, the process for establishing that something has gone wrong, and asking the court to re-write the words that the parties have used, necessarily involves careful consideration by the court. All the more so where the words used do not, taken in isolation, reveal an error. If, despite these hurdles, a view has been reached by the representative defendant that the claim cannot be opposed, the candour that may be offered in a private review of the strengths and weaknesses of the claimant's evidence, together with the reasons why the representative defendant has chosen not to defend the claim, is welcome.

The error

9. The Plan was established by an Interim Deed dated 12 August 1988 that amalgamated three predecessor schemes. Prior to the 1998 Rules, the Plan was governed by a definitive deed and rules dated 6 August 1992 ("the 1992 Rules"). The term "Transferred Member" was defined in the 1992 Rules as meaning any member who at any time had been granted pensionable service under the Plan in respect of his membership of a Previous Plan.

10. The error for which rectification is sought relates to the early retirement provisions for Transferred Members. Under the 1992 Rules, other than in the case of incapacity, a Transferred Member was only entitled to take early retirement if in pensionable service and with the consent of the employer. There was no entitlement to take early retirement from deferment. Transferred Members in pensionable service could take an early retirement pension from the age of 60, five years before Normal Pension Date, subject to an actuarial reduction other than in relation to pension derived from specified periods of pensionable service prior to equalisation on 1 May 1991.

11. The position changed in the 1998 Rules. It was intended that Transferred Members should have an entitlement to take early retirement from the age of 60 whether in pensionable service or in deferment and that the actuarial reduction would apply regardless of whether they took early retirement from pensionable service or, after leaving pensionable service other than on retirement, from deferment.

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[1] *Whiteside v Whiteside* [1950] Ch 65 at 71 per Evershed LJ

12. What in fact happened was that the drafting created a striking difference between early retirement for Transferred Members from pensionable service and early retirement from deferment. Rule 10.3 of the 1998 Rules dealt with early retirement from deferment and provided:

> "10.3 If a Deferred Pensioner retires after attaining age 50 but before Normal Pension Date he may (with the consent of both the Principal Employer and the Trustees) elect to receive an immediate Pension except the consent of the Principal Employer and the Trustees will not be required to a Transferred Member receiving an immediate pension after age 60. This will be calculated on the same basis as the deferred Pension but subject to such reduction as the Trustees (acting on the advice of the Actuary) decide having regard to his age. With regard to Transferred Members this reduction will have regard to the period which his actual retirement precedes age 60 only."

13. The effect of the last sentence in this clause was to disapply entirely the actuarial reduction if a Transferred Member took an early retirement pension from deferment at age 60 onwards. By contrast, Rule 9.2 which deals with early retirement of Transferred Members from pensionable service included provision for the actuarial reduction to apply save for the exception noted in paragraph 10 above.

14. It can readily be seen that the result of the drafting of Rule 10.3 is surprising. Transferred Members who have left pensionable service benefit to a greater extent that those who retire early from active service with the employer. Those Transferred Members who remained loyal to the claimant and remained in employment suffered the actuarial reduction, whereas those Transferred Members who had left pensionable service, possibly to work for a competitor, were rewarded with waiver of the reduction if early retirement from the age of 60 was taken. Moreover, the structure was inherently illogical because Transferred Members in pensionable service could become deferred members by terminating their pensionable service and thereby could choose to obtain the status of a deferred member in order to evade the actuarial reduction otherwise applicable under Rule 9.2. With the benefit of hindsight, that there was an error in the 1998 Rules which became embedded in subsequent versions might seem obvious. However, as is often the case with rectification, the obvious meaning of certain words in a complex document becomes overlaid with assumptions about what they mean with the result that the words themselves are not analysed for their true meaning for a lengthy period.

15. I was referred to two examples from reported cases in which deferred members have been favoured over those who remain in pensionable employment:

16. In *Wright v MGN Pension Trustees* [2007] EWCA Civ 1247 at [9]-[14] Lloyd LJ initially said that such preferential treatment for deferred members would be "a somewhat surprising conclusion at first sight" [10], before stating that "it would seem to me to be unusual to find a provision in a pension scheme which gave more favourable treatment to deferred members than to active members. Furthermore, an employer is likely to be at least as much concerned in the case of a deferred member as in that of an active member about the additional cost which is incurred by early retirement with an unreduced pension" [11] and ultimately concluding that "it does not seem to me that to construe the rules as giving the employer control over the

question of actuarial reduction for active members, but not for deferred members, is a sensible reading of the rules" [14].

17. In *Smithson v Hamilton* [2007] EWHC 2900 (Ch) at [25]-[31], [45] & [54]-[55], in particular at [27] Sir Andrew Park said "the feature that a deferred member, like an active member, can commence to draw his pension at 60 without needing the employer's consent, but, unlike an active member, does not have the pension actuarially reduced is anomalous and out of line". He went on to hold at [54]-[55] that the lack of an actuarial reduction was plainly a mistake.

18. Applying common sense and logic the difference between Rules 9.2 and 10.3 calls for an explanation. However, this is insufficient to enable the court to grant an order rectifying the Rules. It has been necessary, therefore, for the claimant to undertake a lengthy investigation into how the difference between the rules came about in order to provide the court with 'convincing proof' that an error occurred in 1998 and the error remained embedded through two further changes to the Plan. Although the error was discovered in 2009, the claim was not issued until 17 December 2018. The need to locate and consider the extensive records of the Plan has resulted in a great deal of painstaking work that is reflected in the careful evidence that has been provided to the court in 10 witness statements. The identity of the witnesses is summarised in an appendix. Although the period between discovery of the error and the commencement of proceedings is very lengthy, no point is taken by Mr Bryant on behalf of Mr Sidat on the basis that the delay in bringing this case does not provide a defence to the claim for rectification.

19. Unusually, the power to amend the Plan is a unilateral one and only the claimant needed to approve amendments. Clause 10 under the 1992 Rules, which was materially replicated in the 1998 and 1999 Rules, provides that:

> "The [Company] may at any time by deed alter, amend, extend, modify or add to all or any of the provisions of the Definitive Deed or the Rules. Any alteration, amendment, extension, modification or addition may have retrospective effect."

20. Regardless of the source of power to make amendments, in practice it is natural that the approval of the trustees was also obtained. Each of the three documents was executed both on behalf of the claimant and by the trustees.

21. Mr Stallworthy and Mr Baker have provided a helpful table that shows the roles played by the witnesses:

Name	**Capacity**	**1998 D & R**		**1999 D & R**		**2003 Deed**	
		Company	**Trustee**	**Company**	**Trustee**	**Company**	**Trustee**
Julian Bird	Company signatory & Trustee	x	x	x	x	x	x
Michael Kirk	Company signatory & Trustee	x	x	x	x		
Peter Lisburn	Company signatory & Trustee		x				
Philip Baker	Trustee		x		x		x
Phillex Moitt	Trustee		x		x		x
Colin Emeny	Trustee					x	x
Steven Billington	Trustee				x		x
Caroline Harris	Draughtswoman at Edge Ellison	Drafted		Drafted		No longer involved	
Anna Smith	Adviser at Coopers & Lybrand	Involved		No longer involved		No longer involved	
Mark Packham	Actuary at Coopers & Lybrand	Involved		Involved		Involved	

22. The table illustrates a number of points:

    (1) It is apparent that the evidence of Mr Bird is central to the claimant's case since he was involved on behalf of the principal employer and as a trustee in respect of the 1998 and 1999 Rules and the 2003 Deed.

    (2) Mr Kirk is also an important witness due to his involvement in dual capacities with the 1998 and 1999 Rules.

    (3) The court has been provided with evidence from the draftsperson, Caroline Harris, in respect of the 1998 and 1999 Rules.

    (4) There is also evidence from the actuary at Coopers & Lybrand, Mr Packham, in respect of all three documents and Ms Smith who was involved in the 1998 Rules.

23. Mr Sidat is a suitable representative defendant because he started pensionable service in the TJ Brooks Pension Plan in 1981 and that scheme was merged into the scheme that was established in 1988. He left his employment with the claimant in February 2018 at the age of 60 and so became a deferred member of the Plan. He started to receive his pension under the Plan in October 2018 which was some time before his 65th birthday. His pension has been paid to him on the mistaken assumption that the actuarial reduction applied to him. He would have stood to benefit had the relief sought by the claimant been refused. He is therefore directly affected as a Transferred Member by the alterations to the Plan that result from the order I have made. Mr Sidat has made a statement summarising his employment history, his connection with the Plan and the process by which he was provided with advice by his solicitors, Stephenson Harwood LLP and Mr Bryant.

24. Mr Sidat's position is not unique. The Plan has been administered at all times on the basis that the actuarial reduction applied to Transferred Members who have taken early retirement from deferment regardless of the terms of the applicable deed and rules. If all Transferred Members were to have taken advantage of the rules in their unrectified form the additional liability, on a technical provisions basis, would have been £4.9 million.

The law

25. I received full submissions from counsel in their skeleton arguments and from Mr Bryant in his opinion. It is fair to say that in the case of bilateral pension documents, those that require the approval of both the employer and the trustees, the law on rectification can now be regarded as being settled as a result of the extensive review by the Court of Appeal in the judgment of Leggatt LJ in *FSHC Group Holdings Ltd v GLAS Trust Corp Ltd* [2019] EWCA Civ 1361. The application of the principles discussed in that case as they affect pension cases was subsequently considered in *Blatchford Ltd v Blatchford and others* [2019] EWHC 2473 (Ch).

26. In this case the 1998 and 1999 Rules and the 2003 Deed would all have been effective had they been executed by the claimant alone. Accordingly, it is only the intention of the claimant that is relevant and it is not necessary to consider the intentions of the trustees: see *Butlin's Settlement Trusts* [1976] Ch 251 at 259B, 261 D-G and 262G.

27. This point was considered by Mr John Martin QC sitting as a Deputy High Court judge in the context of pensions in *MNOPF v Watkins* [2013] EWHC 4741 (Ch). At [12] he applied the same approach as in *Re Butlin's Settlement* on the basis that only the consent of the scheme's trustees was required to an amendment. He concluded that the position was analogous to that of a trustee power of amendment in a private trust context where no consent was required. There is no reason to adopt a different approach to that which has been applied in the case of settlements and pension deeds where only consent of the trustees is required. Of course, where there is evidence of the other party, in this case the trustees, sharing the same intention as the party with the power to amend, the evidence will necessarily be added to the scales. Moreover, the distinction between the intention of the principal employer and the trustees becomes somewhat artificial where the same person is both an officer or senior employee of the principal employer and a trustee. An example of that is Mr Julian Bird who is one of the principal witnesses who is relied upon here.

28. The difference of approach between unilateral and bilateral powers of amendment is only likely to have significance in practice where the evidence shows a difference of intention between the principal employer and the trustees or the weight of the evidence lies in one direction or the other.

29. The claimant seeks serial rectification of successive deeds on the basis that the error in the 1998 Deed became embedded and was not noticed on the two subsequent occasions, in 1999 and 2003. As it seems to me, this is primarily an evidential issue because it is commonly the case that the parties have not addressed their minds to the particular change that is said to be an error. Vos J (as he then was) considered this point in *Industrial Acoustics Co Ltd v Crowhurst* [2012] EWHC 1614 (Ch) at [45] (which was a bilateral transaction case):

> "… it seems to me that there will be cases, particularly in a pensions context, where it will be permissible to allow rectification when one can say by implication perfectly clearly that the parties did not intend by the Deed they entered into, to effect a particular change, even though they had not stated outwardly to each other (or indeed at all) that they did not intend to effect that change, simply because the change was not in any form discussed."

30. The tenor of this observation can apply with equal force in the case of a unilateral power.

31. In *IBM UK Pensions Trust Ltd v IBM UK Holdings Ltd and others* [2012] EWHC 2766 (Ch) the position was extreme because rectification was sought in respect of a 1983 deed and six subsequent deeds from 1990 onwards. By the time the 1990 deed was executed the directors of the trust company had changed providing difficulty in establishing that the signatories to the 1990 and later deeds had the same intentions as those who had executed the 1983 deed. Warren J accepted that an intention merely to carry over the true provisions of the 1983 deed sufficed:

> "How, then can it be said that the [subsequent deed] should be rectified when the Trust Company cannot demonstrate that the relevant individuals had a positive intention that there should be a right to early retirement without consent between ages 60 and 63, the onus being on it to establish the intention necessary for rectification? The answer to that is that a different intention may be sufficient.

> Thus, if it were clear that the intention was that the [subsequent deed] should reflect the entitlement which members of the C Plan had as a matter of law, it would follow that the [subsequent deed] ought also to reflect those rights; if the [earlier deed] were subject to a valid claim for rectification, then the [subsequent deed] ought to reflect that claim and themselves be rectified to give effect to the intention. In contrast, if it were clear that the intention was that the [subsequent deed] should do no more than reflect, in new language, the provisions of the [earlier deed] continuing the substance of those provisions as they stood at the time of the [subsequent deed], a claim to rectify the [subsequent deed] would fail.…".

32. The approach adopted by Warren J in *IBM* has been followed in a number of cases including *Industrial Acoustics Company v Crowhurst*, *CIT Group (UK) v Gazzard* [2014] EWHC 2557 (Ch), *Citifinancial Europe v Davidson* [2014] EWHC 1802 (Ch) and *Blatchford Ltd v Blatchford and others*.

33. The approach to successive deeds can be seen alongside a principle concerning the admissibility of evidence, also expressed by Warren J, namely that conduct after the date of the document can constitute evidence of the intention of the person effecting it: *Drake Insurance v MacDonald* [2005] EWHC 3287 (Ch) at [35]. Conduct may include matters such as there being no change to the manner in which the Plan is administered and plan booklets published after a change to the Plan that reflect the same position as before. Where serial rectification of successive deeds is sought, a powerful evidential factor is that the 'error' has not disturbed the status quo from the first occasion when an error is said to have occurred and through the successive deeds. The continuity of established practice over an extended period will support the case for there having been an intention for the successive deeds to reflect the rights the members had as a matter of law, that is with the first deed in the chain duly rectified.

34. There are four other legal principles that can be briefly summarised:

(1) Until the decision of the Court of Appeal in *FSHC* there was some doubt about whether in the case of common intention mistake the intention was to be assessed objectively or subjectively in light of Lord Hoffmann's obiter dicta in *Chartbrook v Persimmon* [2009] UKHL 38. The law is now settled and only the subjective intention of the parties matters. That was the approach adopted by the Deputy High Court judge in *MNOPF* and I respectfully agree. I can see no reason why the nature of the intention that the court must ascertain should vary between unilateral and bilateral transactions.

(2) In the same way as with bilateral transactions, there is a need for the claimant to provide convincing proof, on the balance of probabilities, of the intention of the claimant: *Joscelyne v Nissen* [1970] 2 QB 70.

(3) In the case of a collective body such as a group of trustees or a committee of a board it is their collective intention which is relevant: see *AMP (UK) Ltd v Barker* [2001] Pens LR 77 at [67].

(4) "The task in hand is to identify in relation to the transaction the person or person who actually approved the nature and terms of the transaction, not the

person or person upon whose authority the transaction was entered." Per Norris J in *Girls Day School Trust v GDST Pension Trustees Ltd* [2016] EWHC 1254 (Ch) at [10].

The 1998 Rules

35. The terms of the 1992 Rules, the predecessor to the 1998 Rules, so far as they are material are summarised in the particulars of claim:

> "16. Under the 1992 Deed & Rules:
>
> (a) provision was made for members to take an early retirement pension only directly from pensionable service under Rule 5.3 (no express provision being made under Rule 9.3 for early retirement from deferment), but only with the consent of the Company (save in cases of incapacity);
>
> (b) under Rule 5.3.2, such an early retirement pension was subject to an actuarial reduction of ¼% per month for each month between the date of his retirement and the member's NPD (or such other percentage calculated on a basis certified as reasonable by an Actuary having regard to the period between the date the first instalment of pension falls due and the NPD);
>
> (c) provided that:
>
> i a Transferred Member who had previously been a member of the T J Brooks Pension Plan or the Alexander Socket Screws Pension Plan would have no actuarial reduction applied to his or her early retirement pension if such early retirement was at the request of his or her employer; and
>
> ii. a female Transferred Member was entitled to draw her early retirement pension from age 60 onwards without any actuarial reduction to the proportion of her pension derived from pensionable service prior to 01.05.91."

36. On 23 May 1996 Edge Ellison was instructed by the claimant to update the 1992 Rules. Their letter dated 15 July 1996 recorded that:

> "1. The purpose of the project is to update the Plan's existing Trust Deed and Rules to take account of legislative, best practice and benefit changes since 1992.
> …
>
> 4. We would suggest that the first draft of this document be reviewed by Messrs Coopers & Lybrand, your actuaries and consultants. This should help iron out any technical issues and allow us to identify any points of principle which have to be considered by the trustees."

37. The instruction was clear. Edge Ellison were to undertake an exercise in updating the 1992 Rules. It might have been expected, therefore, that any radical changes to the benefits members of the Plan were entitled to receive under what became the 1998 Rules, or any significant disparity of benefit in favour of deferred members against members in service, would have been the subject of discussion and documented. There is, however, no documented explanation for what is now said to have been a mistake. The limited scope of Edge Ellison's instructions, the absence of any

discussion allied with the disparity between the entitlement of Transferred Members in pensionable service and in deferment is strongly suggestive of an error having occurred.

38. Caroline Harris, who was a Senior Associate at Edge Ellison, dealt with the instruction on a day to day basis under the supervision of a partner Robert Gravill. Their principal point of contact at the claimant was Julian Bird who was both the claimant's Group Financial Controller and a trustee. At Coopers & Lybrand Mark Packham was the plan's actuary and Anna Smith was a senior pensions manager. All of them, other than Mr Gravill, have produced statements setting out their recollections. Inevitably after such a lengthy period, the contemporaneous documents provide the best sources of evidence and the witness statements are inevitably a reconstruction of events that happened many years ago.

39. The particulars of claim between paragraphs 19 to 63 set out a summary of events up to the execution of the 1998 Deed and Rules by Mr Bird and Mr Kirk on behalf of the claimant and all the trustees (other than Mr Morrash), that is Mr Bird, Mr Kirk, Mr Lisburn, Mr Baker and Mr Moitt. In the interests of brevity it is unnecessary to set out the chronology of events in detail.

40. Paragraphs 75 to 79 of the particulars of claim seek to explain how the error came about, as far as that is possible. It seems the error found its way into the second draft of what became the 1998 Rules when dealing with equal pay between members of different genders. Transferred Members were given the right to take an early retirement pension, rather than having to seek the claimant's consent from the age of 60 onwards, whether in pensionable service or in deferment. In the case of members taking early retirement from pensionable service (para 76(b) POC):

> "... at age 60 onwards, such pensions were subject to an actuarial reduction under Rule 9 save:
> i. for female Transferred Members, in relation to pension in respect of pensionable service before 01.05.91;
> ii. for male Transferred Members, in relation to pension in respect of pensionable service between 01.05.90 and 01.05.91; and
> iii. for Transferred Members who had previously been members of the T J Brooks Pension Plan or the Alexander Socket Screws Pension Plan, if such early retirement was at the request of his or her employer;".

41. By contrast, when taking an early retirement pension from deferment at age 60 onwards, such pensions for Transferred Members had no actuarial reduction applied whatsoever under Rule 10.3.

42. Paragraph 79(e) of the particulars of claim summarises the reasons why the terms of the 1998 Deed and Rules concerning early retirement from deferment for Transferred Members did not reflect the intention of the claimant:

> "… the total disapplication of the actuarial reduction to the early retirement pension of Transferred Members on early retirement at age 60 onwards from deferment was inconsistent with:
> i. the instructions given to Edge Ellison by Ms Smith in her letters dated 13.11.96 and 22.11.96 (as set out in paragraphs 33-34 & 36-37 above);

ii. the interest in providing more generous pension on early retirement directly from pensionable service than on early retirement from deferment (see e.g. paragraphs 35, 51 & 53-54 above);
iii the terms of the Edge Ellison Report recording what was intended by the Company and the Trustees in relation to Rules 9 and 10.3 (as set out in paragraphs 42 to 45 above);
iv. the terms of the insert notices dated April 1998 issued to Transferred Members by the Company (see paragraphs 64-69 above); and
v. the summary of the Plan's early retirement benefits at Appendix C to PwC's Pension Counsellor report on 30.09.98 which nowhere indicated that Rule 10.3 entirely disapplied the actuarial reduction to Transferred Members' early retirement pension on early retirement from age 60 onwards from deferment (see paragraphs 70-73 above);".

43. The claimant's case is further supported by the following features that are set out at paragraphs 79(f) to (i):

> "(f) the fact that so structuring the Plan's early retirement pension provisions would be inherently illogical structurally, as Transferred Members in pensionable service could simply terminate their pensionable service and become deferred members in order to evade the actuarial reduction to early retirement pension otherwise applicable under Rule 9.2;
>
> (g) the lack of any commercial reason for the Company to provide more generous benefits to deferred Transferred Members, especially in circumstances in which the Plan's funding position was deteriorating and a resumption of Company contributions was contemplated (see e.g. paragraphs 50 & 71 above);
>
> (h) the absence of any evidence that the Company (or the Trustees) intended that the actuarial reduction to the pension of Transferred Members should be entirely disapplied on early retirement at age 60 onwards from deferment; and
>
> (i) the fact that at all material times between the execution of the 1998 Deed & Rules and the discovery of the error in Rule 10.3 in 2009, the Plan has been administered (amongst others, by the Company) on the basis that under Rule 10.3 an actuarial reduction applied to Transferred Members' early retirement pension at age 60 onwards taken from deferment in the same way as applied to Transferred Members' early retirement pension at age 60 onwards taken directly from pensionable service (under Rule 9)."

44. The claimant's witnesses, in particular Mr Bird and Mr Kirk, provide detailed evidence that the company and the trustees, intended Transferred Members in pensionable service and those in deferment to be treated the same way. Their evidence is supported by Mr Lisburn, Mr Baker and Mr Moitt who were trustees and by Ms Smith and Mr Packham from Coopers & Lybrand. Ms Harris, who was the principal draftsperson at Edge Ellison, accepts an error was made and says that the last sentence of Rule 10.3 was incomplete and should have been in the form in which it has now been rectified, namely:

> "With regards to Transferred Members, this reduction will have regard to the period by which actual retirement precedes age 60:

10.3.1 in the case of a female Transferred Member, for Pension in respect of Pensionable Service before 1st May 1991; and

10.3.2 in the case of a male Transferred Member, for Pension in respect of Pensionable Service between 1st May 1990 and 1st May 1991."

The 1999 Rules

45. The claimant acquired Smith Levick Magnets Limited ("SLM") on 3 July 1996. SLM had its own pension scheme with Clerical Medical. Consideration was given to the possible merger of the SLM scheme with the Plan shortly after the acquisition, but the merger did not take until after the 1998 Rules were executed necessitating a revised set of rules.

46. The decision to merge the two schemes was taken in the course of the 1998 Rules being drafted. The 1999 Rules were only intended to incorporate into the Plan the benefit basis under the SLM Scheme for members who were transferring across. It was not intended that the early retirement benefits for Transferred Members would be amended or that Transferred Members could benefit from an unreduced pension.

47. In essence, the error that became embedded in the 1998 Rules was carried over into the 1999 Rules without it being noticed. At first sight, this might be thought to be surprising given that the Plan was being reviewed afresh for additional Transferred Members. On the other hand, Rule 10.3 even in draft form, had become the orthodoxy and no thought was apparently given to the effect of the words that had been used.

48. The evidence relied upon by the claimant is summarised in paragraphs 80 to 113 of the particulars of claim. The claimant relies, in particular, on three events subsequent to the execution of the 1999 Rules to support its case that the intention of the decision makers was not to permit Transferred Members to take early retirement with an unreduced pension. Each illustrates starkly a mismatch between the words used in the Rules and what it was thought (or assumed) they meant.

49. **Mr Kirk's early retirement**

(1) Mr Kirk, who was one of the Company's signatories and decision-makers in relation to the 1999 Rules (and the 1998 Rules), took early retirement on 9 April 2000 aged 62 directly from pensionable service. He was a Transferred Member, having previously been a member of the T J Brooks Pension Plan. Upon his early retirement, his pension was actuarially reduced (save in respect of pensionable service between 1 May 1990 and 1 May 1991).

(2) If Mr Kirk had intended and understood that Rule 10.3 permitted him to evade any actuarial reduction to his pension by the simple expedient of leaving pensionable service to become a deferred member and then drawing his early retirement pension from deferment, he would have done so.

50. **PwC's valuations**

(1) On 18 January 2001 PwC provided its actuarial valuation of the Plan as at 5 April 2000. Page 19 of Appendix II (which summarised the Plan's benefits)

detailed the actuarial reduction to the pension of Transferred Members taking early retirement directly from pensionable service at age 60 onwards, in terms reflecting Rule 9 of the 1999 Deed & Rules. However, on page 22, where the Appendix deals with the description of the deferred pension of Transferred Members who had left pensionable service, it makes no reference to the actuarial reduction to a pension on early retirement at age 60 onwards from deferment being disapplied.

(2) On 23 August 2002 PwC provided its actuarial valuation of the Plan as at 5 April 2002. Appendix A (which summarised the Plan's benefits) described the benefits for Transferred Members in similar terms to Appendix II of the actuarial valuation of the Plan produced in January 2001.

(3) Such a favourable early retirement benefit for Transferred Members would have been identified in these Appendices to PwC's valuations if it had been understood and appreciated, because it would have had a potentially significant impact on the funding position of the Plan.

51. **Mr Emeny's early retirement**

(1) On 20 May 2003 Mr Bird sought advice from Ms Nita Champaneri of Hammonds (as Edge Ellison had become) about the early retirement of Mr Colin Emeny, who was a director of the Company (and a Trustee), at the end of June 2003 at the age of 61.5. Mr Emeny was a Transferred Member who was a former member of the Alexander Socket Screws Pension Plan. It is clear from the record of the conversation that Mr Bird did not appreciate that Mr Emeny was entitled to take early retirement without any actuarial reduction, in accordance with Rule 10.3.

(2) If the Company (and Mr Bird as its representative) had understood and intended that Rule 10.3 of the 1999 Deed & Rules entitled Transferred Members at age 60 onwards to take an early retirement pension from deferment without any actuarial reduction, Mr Bird would have had no need or reason to request advice, because after the termination of his employment Mr Emeny would have been entitled to take an early retirement pension without any actuarial reduction from deferment under Rule 10.3.

52. In addition to these discreet evidential points, all the same points made in relation to the 1998 Rules about the inherent illogicality of applying the actuarial reduction to members in service and not to those in deferment apply and the fact the Scheme was administered on a basis that paid no regard to the terms of Rule 10.3. It is clear from the evidence that the claimant's intention, and that of the trustees, remained unchanged from that which applied when the 1998 Rules were executed.

The 2003 Deed

53. By an email dated 27 March 2003 PwC sent Mr Bird a report that reviewed, amongst other things, the actuarial early retirement discount factors applicable to early retirement pensions under the Plan. At paragraph 1.7, the Report recommended that the Trustees:

> "consider amending the early retirement factors in respect of future service benefits for both active and deferred members to reduce the strain on the funding of the Plan caused by early retirements."

54. Section 5 of the Report set out PwC's recommendation in relation to early retirement from deferment (similar recommendations having been made in section 5 in relation to early retirement from pensionable service). Paragraphs 5.2 and 5.4 stated:

> "5.2 The current early retirement factors are shown in Appendix III. *Note that for certain periods of service and for certain members an early retirement reduction factor is only applied if retirement is before age 60. The table in Appendix III takes this into account. …*
>
> 5.4 *The Trustees may wish to consider amending the early retirement factors in respect of future service benefits for deferred members.* If cost-neutral factors (which result in no funding strain) were adopted, the reduction factors would be approximately 53% at age 55 and 72% at age 60. This would result in early retirement benefits approximately 10% to 20% lower than those currently provided." (emphases added).

55. Appendix III of the Report stated that on early retirement from age 60 onwards an actuarial reduction would be applied to the pension of both deferred and active Transferred Members, other than:

> (i) for female Transferred Members, in respect of pensionable service before 01.05.91; and
>
> (ii) for male Transferred Members, in respect of pensionable service between 01.05.90 and 01.05.91.

56. However, this was based upon a misunderstanding of the 1999 (and 1998) Rules. Appendix III of the Report can be seen to be consistent with Rule 9 but inconsistent with Rule 10.3 of the 1999 Rules. Ultimately, this led to the amendments to the 1999 Rules made by the 2003 Deed maintaining the distinction between Transferred Members taking early retirement from pensionable service and those who took early retirement from deferment. The drafting that is applicable to each class makes a clear distinction between them.

57. In relation to Transferred Members taking early retirement directly from pensionable service under Rule 9, the amendments made by the 2003 Deed to the 1999 Deed & Rules were:

> (1) Rule 9.2.1 was replaced with a new rule which increased the early retirement discount factor from 0.25% to 0.5% in respect of pensionable service from 1 July 2003;
>
> (2) a provision was added at the end of Rule 9.2.3 so that in the case of a female Transferred Member taking early retirement before age 60, the newly increased early retirement discount factor specified in Rule 9.2.1 would only apply in respect of pensionable service before 1 May 1991 in relation to each month by which her retirement precedes her 60th birthday;

(3) an equivalent provision was added at the end of Rule 9.2.4 so that in the case of a male Transferred Member taking early retirement before age 60, the newly increased early retirement discount factor specified in Rule 9.2.1 would only apply in respect of pensionable service between 1 May 1990 and 1 May 1991 in relation to each month by which his retirement precedes his 60th birthday.

58. In relation to Transferred Members taking early retirement pension from deferment under Rule 10.3, clause 2.1(f) of the 2003 Deed replaced the final paragraph of Rule 10.3 in the 1999 Deed & Rules with the following:

> "This will be calculated on the same basis as the deferred Pension but shall be reduced as follows:
>
> (i) in relation to Pensionable Service up to and including 30 June 2003, as the Trustees (acting on the advice of the Actuary) decide having regard to his age at retirement; and
>
> (ii) in relation to Pensionable Service on or after 1 July 2003 by ½% per month by which his retirement precedes his Normal Pension Date or by such other amount certified as reasonable by the Actuary having regard to his age at retirement.
>
> With regards to Transferred Members or Swift Levick Members who were active members of the Swift Levick Plan on 30 June 1991 such reduction in relation to Pensionable Service up to and including 30 June 2003 will have regard to the period by which his actual retirement precedes age 60. *With regard to Pensionable Service on and after 1 July 2003 such reduction shall be 1/2% per month in respect of each month his retirement precedes his Normal Pension Date or by such other amount certified as reasonable by the Actuary having regard to his age at retirement.*" [emphasis added]

59. The change by the 2003 Deed added the sentence which is emphasised which only affected pensionable service from 1 July 2003. It left in place the previous sentence which formed part of the 1998 and 1999 Rules. The drafting of the 2003 Deed thus replicated, in respect of pensionable service prior to 1 July 2003, the total disapplication of the actuarial reduction to the pension of a Transferred Member taking early retirement from deferment at age 60 onwards, albeit introducing the proposed new early retirement discount factor in respect of pensionable service from 1 July 2003.

60. The sequence of events that led to the execution of the 2003 Deed in July 2003 is set out in detail in paragraphs 130 to 139 of the particulars of claim and does not need to be repeated here. It is plain from this evidence that the claimant only intended to increase the early retirement discount factors that were applicable to future accrual, in accordance with PwC's Report from 1 July 2003. It was not intended to alter the past service benefits of Transferred Members.

Conclusion

61. The claimant made out a compelling case for rectification of the 1998 and 1999 Rules and the 2003 Deed.

Appendix

Julian Bird – was the Group Financial Controller up to January 1999 when he was appointed Group Finance Director. He was a trustee of the Plan from January 1999.

Philip Baker – was a trustee and signatory of the 1998, 1999 and 2003 Deeds and is a Transferred Member.

Steven Billington – was a Business Controller at Smith Levick Magnets Ltd in 1997 and later Finance Director. He was appointed a trustee on 7 April 1999 and was a signatory to the 1999 and 2003 Deeds.

Colin Emeny – is a Transferred Member and was a director of the claimant. He was appointed a trustee of the Plan in 2002 but prior to that date has regularly attended meetings of the trustees. He was a signatory to the 2003 Deed.

Caroline Harris – was the senior legal assistant at Edge Ellison (later Hammonds Suddards Edge) with the main conduct of drafting the 1998 and 1999 Deeds. She was supervised by Robert Gravill who was a partner with the firm.

Michael Kirk – is a Transferred Member of the Plan and was Managing Director of the claimant and chairman of the trustees. He was a signatory to the 1998 and 1999 Deeds.

Peter Lisburn – is a Transferred Member of the Plan and was Company Secretary of the claimant until 1999, a trustee from the inception of the Plan in 1988 and a signatory to the 1998 Deed. He was also a member of the drafting committee for both the 1998 and 199 Deeds.

Phillex Moitt – is a current trustee and the first defendant. He was a signatory to the 1998, 1999 and 2003 Deeds.

Mark Packham – was employed by Coopers & Lybrand (later PwC) and was the Plan actuary from 1998 to 2002.

Anna Smith – was a Senior manager with Coopers & Lybrand (later PwC) between 1994 and 2000 and part of the drafting sub-committee for the 1998 Deed.