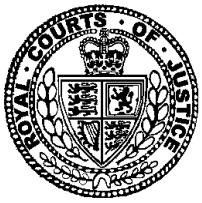

Neutral Citation Number: [2022] EWHC 2565 (Ch)

Claim No: PE-2022-000002

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

7 Rolls Building
Fetter Lane, London
EC4A 1NL

Date: 20th September 2022

Before:

DEPUTY MASTER MARSH

- -

Between:

VIAVI SOLUTIONS UK LTD

Claimant

- and -

(1) VIAVI SOLUTIONS PENSION TRUSTEE UK LTD
(2) JEFFREY COTTRELL
(representative member)

Defendants

- -
- -

PAUL NEWMAN KC (instructed by **Boyes Turner LLP**) for the **Claimant**
MICHAEL UBEROI (instructed by **TLT LLP**) for the **First Defendant**
DAVID GRANT KC (instructed by **Temple Bright LLP**) for the **Second Defendant**

- -

Approved Judgment

- -

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DEPUTY MASTER MARSH:

1. This morning, I heard an application under CPR 24.2 in this claim. At the end of the hearing shortly before lunch, I indicated to the parties that I intended to make the order for rectification sought by the claimant, as well as the other orders contained in the draft order, and said that I would give brief reasons for that decision this afternoon.

2. At the hearing of the application, Paul Newman KC appeared for the claimant, Michael Uberoi appeared for the first defendant, and David Grant KC appeared for the second defendant. I am most grateful to each of them for the clear way in which their written and oral submissions were presented.

3. The claim for rectification was unopposed. However, it has received very close and careful consideration.

4. The parties to the claim are the following. The claimant is the current principal employer under the Wandel & Goltermann Retirement Benefits Scheme. Another company was the principal employer at an earlier stage, but nothing turns on that. The Scheme now has the first defendant (a corporate trustee) as its trustee. At material times individual persons were trustees of the scheme. The second defendant Mr Cottrell is, as a result of the order I have made, a representative party. He represents the interests of all the members and beneficiaries of the scheme in whose interests it is for the relief sought by the claimant not to be granted.

5. The procedure that was adopted for the purposes of the hearing is now a well-established one. Mr Cottrell's counsel, Mr Grant, prepared a private opinion for his benefit which was filed and supplied to the court. Having heard submissions from Mr Newman and Mr Uberoi, the hearing then proceeded in private with only Mr Grant and his instructing solicitors present. This gave an opportunity for Mr Grant to make private submissions to the court and for the court to ask him such questions as may have been appropriate and to obtain his answers. As I have said in a number of previous cases, I consider this procedure to be a helpful one in cases of this type.

6. The issue in this claim concerns rule 61.4 of the 1999 Deed and Rules of the Scheme which were brought into effect by a Definitive Deed and Rules dated 15 September 1999. Notwithstanding the date that the deed bears, it was in fact executed by the Principal Employer and the individual trustees in January and February 2000.

7. As the rule was executed, it provided for increases in pension in the following way:

> "(a) for that part of the pension which is attributable to Pensionable Service before 6th April 1997 3% per annum compound; and
>
> (b) for that part of the pension which is attributable to Pensionable Service after 5th April 1997 3% per annum compound (or, if greater, the annual rate of increase in the Index as determined at 1st September of the previous year up to a maximum of 5%)."

8. As Mr Newman put it in his submissions, both parts of that rule contain "underpins", namely a minimum increase of 3 per cent per annum.

9. The claim for rectification is based upon the premise that those underpins were included in the rule in error and that in (a) the words "3% per annum compound" should be removed and replaced by "a rate decided upon by the trustees at their discretion" and in (b) the words "3% per annum compound (or if greater…)" should be removed. Rectification in that way would take out the underpins in both limbs of the rule.

10. The law concerning rectification as it relates to pension deeds is now in an entirely settled form. It is unnecessary to look further than the judgment of Trower J in *Mitchells & Butlers Pensions Ltd v Mitchells & Butlers* PLC [2021] EWHC 3017 (Ch), and the passages at paragraphs 14 to 22. There is no need for me to set out those passages in this judgment. I would merely highlight three points which are of particular pertinence to this case.

11. First, there is the well-known point that a claim for rectification must be established on the basis of 'convincing proof'.

12. Secondly, it is worth highlighting the point Trower J makes at paragraph 18 that there will be cases in a pension context where the parties have not communicated with each other about the changes in question. The judge makes this helpful observation:

> "There will be cases where an important change is made to an existing arrangement between the parties and the absence of any discussion of that change may itself be evidence that the parties did not intend it."

13. Thirdly, and importantly in this case, there is the principle that the court may have regard to events after the transaction as evidence of the parties' intention at the time of the transaction itself.

14. I have been taken through the evidence in a very helpful way and it is quite unnecessary in this case to undertake a thorough review of that evidence. As I indicated earlier, I am in no doubt that this is an appropriate case for rectification, the claimant having amply reached the relevant evidential threshold. It suffices to summarise the evidence in five stages.

15. First, the baseline, as it were, is the position prior to execution of the 1999 Deed. That is not in doubt. The supplementary deed dated 7 November 1995 did not include the underpins. Indeed, there was no entitlement for members to obtain mandatory increases. The trustees, however, were given power to provide discretionary increases. The position is stated in clear terms in the Scheme Booklet in its then form. If that were not sufficient, there is a helpful summary of the position in a report from the Scheme Actuary dated 19 March 1998, the opening sentence of which reads: "The Scheme Rules do not currently provide for increases to pensions in payment." It goes on to say that there is an established practice of increasing on a discretionary basis.

16. The second stage concerns the changes that were made which led to the 1999 Rules coming into being. Mr Clarkson of Bond Pearce was instructed in October 1998. The basis of his instructions, as it can be discerned from the documents, is entirely clear. His instructions were to do two things: first, to update the rules, in particular to have regard to the changes made by the Pension Act 1995 which included the changes made by section 51 of that Act; and secondly, to check the Scheme Booklet so as to ensure that it matched the Scheme Rules. Importantly, there was no record of an instruction

to increase the benefits to members under the Scheme. As I have said, the 1999 Deed was executed in early 2000. It was executed by Mr Richard Taylor as an authorised director (Mr Taylor was also a trustee) and also signed by all of the trustees.

17. The third area to highlight briefly is the written evidence that has been provided to the court for the purposes of this application. At first blush, it might be thought that the evidence was deficient. Only two out of the six trustees have provided evidence and only one director (Mr Taylor) of the principal employer has provided a statement. Out of the six witness statements placed before the court, four are from professional witnesses. However, that is not in any way a criticism of the preparation of this case because it is clear that considerable efforts were made to contact and obtain evidence from all of the relevant parties. In any event, given that the events took place so long ago, it is hardly surprising that those persons who have provided witness statements have very little first-hand memory of the events. Mr Clarkson, who was the draftsman, is unable to provide an explanation as to why clause 61.4 ended up as it did. The best he is able to say is that the wording might have derived from a precedent he used. But other than that, his evidence is of limited effect. Mr Taylor's evidence is slightly more helpful. He is able to say with some conviction that the instructions to Mr Clarkson and his firm were merely to bring the rules up to date and there is no indication that further changes were required. The position as at execution of the deed is that there is no evidence of any type to suggest that there was an intention to extend benefits to members by adding the underpins.

18. The events that postdate execution of the 1999 Rules are in this case of great importance. Indeed, they provide, if anything, rather more cogent and convincing evidence than the evidence of matters leading up to execution of the 1999 Deed and Rules.

19. At a very early stage, indeed in March 2000, -so within a month or so of the 1999 Deed being executed, Mr Higgs sent an email to Mr Taylor pointing out that there was an error in rule 61.4(a); and not long afterwards at a meeting of trustees in April 2000, it was recorded that both limbs of rule 61.4 were incorrectly drafted.

20. Efforts were then made to correct what was seen as an error. Sadly, those efforts were deficient. An amending page purporting to correct and change rule 61.4(a) was signed by the trustees in November 2000. It is, however, not in dispute that such an effort to amend the rules was of no legal effect. More materially, in December 2001, a Deed of Rectification was executed by the company and the trustees. The Deed of Rectification purported to rectify only rule 61.4(b). However, recitals C to E are of much wider significance. Recital C records that an error was made in the drafting of rule 61.4(a) and (b). In 2016, Mr Fancourt QC sitting as a Deputy High Court Judge held that the Deed of Rectification had been validly executed. I do not need to dwell here upon the possible wider effects of that decision. The important point for today's purposes about the Deed of Rectification, and indeed the earlier effort to correct the error, is that they provide the best possible evidence of the intention of both the company and the trustees at the time the 1999 Deed was executed.

21. The last point that I make in this brief summary is that since the 1999 Deed and Rules were implemented, the scheme has been administered and funded on the basis that it is not subject to the underpins.

22. What I have set out is by no mean a full review of the evidence. However, there is ample evidence in this case to satisfy the court that the order for rectification should be made.

23. So far as Mr Cottrell's position is concerned, following the established practice, members of the Scheme have been notified of these proceedings on two occasions. No member of the Scheme has chosen to object to these proceedings or the relief sought. The notifications led to two responses which Mr Uberoi has explained to me. Neither of them are material for the purposes of today.

24. I am therefore satisfied that it is appropriate to make the order, including the orders for representation.

This judgment has been approved by the Deputy Master.