

The Nugee Pensions Lectures

#2: Does *Four Seasons* really treat the rectification of pension schemes differently?

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How have we got here?

Chartbrook v Persimmon

- Judge accepted landowners' evidence as to subjective intention
- House of Lords held that what mattered was objective intention



Four Seasons

- Security documentation created a primary obligation
- At first instance held that:
 - Not intended objectively
 - Not intended subjectively
 - Rectification granted
- Court of Appeal upheld decision on objective intention



Four Seasons

- BUT held that subjective intention what mattered
- Intention a matter of psychological fact
- Requirement in contractual cases for an outward expression of accord
- Pension cases different – coincidence not accord enough

“Outward Expression of Accord”

A substantive requirement for contracts: [176]

Reason (1): Correct recording error, not make bargain

Reason (2): mutual agreement and objective intention

Reason (3): Caprice to rectify on unknown intention

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“Outward Expression of Accord”

But pension schemes are different (apparently...)

Gallaher: specifically held evidential requirement only

However:

Reason (4): “Consent” wording different to agreement

Reason (5): Trust/pension consent qualitatively
different to contractual agreement

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“Outward Expression of Accord”

Do the reasons work?

(1): recording errors: **true for pensions as anything**

(2): “objective intention”: **no suggestion schemes
different**

(2): “mutual assent”: **POA is “mutual”**

(3): caprice: **Ts/PEs/members all need to know where
they stand**

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“Outward Expression of Accord”

Do the reasons work?

(4): “Consent” ≠ “agreement”: **is it really?**

**turn on choice of
word?**

(5): Pension agreement ≠ contractual agreement

On what basis?

**Different legal form ≠ different substantive
“agreement”**

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“Outward expression of accord”

Nevertheless, has been applied:

Blatchford [2020] Pens LR 5;

Colart [2020] Pens LR 3

More broadly, what evidential/litigation impact will this new test have...

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Does rectification really require ‘cogent’ evidence?

- ‘Cogency’ evidential not legal – *AMP v Barker*
- Reflects a presumption that the written instrument is the best reflection of the parties’ intended:

“It is not, I think, the standard of proof which is high, so differing from the normal civil standard, but the evidential requirement needed to counteract the inherent probability that the written instrument truly represents the parties’ intention because it is a document signed by the parties”

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Does rectification really require ‘cogent’ evidence?

- Logic in contractual cases
- Can be expected to understand one-off contract
- Merit in warding off speculative claims – see e.g. *The Olympic Pride*

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Who needs to give evidence?

- Does subjective intention require evidence from all involved?
- Documents the basis of an inference as to subjective intention
- Witness evidence direct evidence

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Who needs to give evidence?

- Increasing judicial acceptance of the fallibility of human memory: *Gestmin v Credit Suisse*
 - Not just a matter of the passage of time: memory inherently unreliable
- Little chance in practice of objective and subjective intentions diverging
- Pension cases often about lack of intention

Corporate Decision-Makers

Rules of attribution/*Meridian Global* [1995] 2 AC 500:

- Necessary part of corporate personality:
- Primary (constitution; default rules of company law)
- General (common law of agency)
- “Special”: law needs to find an answer

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Corporate Decision-Makers

Application to pension schemes:

IBM [2012] Pens LR 469:

- “Management Committee” decision maker in fact
- Held: within delegated authority from board
- Notwithstanding lack of doc evidence: [94(vii)]
- Appears primary rule of corporate decision-making delegation (query general agency)

Corporate Decision-Makers

Practical Lessons on Attribution:

- Exercise is *factual* and *legal*
 - Factual: who made the decision
 - Negotiators vs Decision-Makers: *Hawksford Trustees*
 - Legal: why does that bind the company
-
- Need to satisfy primary or general rule: identify chain of authority

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Corporate Decision Makers

What is a board's "subjective" intention for rectification purposes?

- 1) Internal discussion/decisions recorded in board documents not shared with outside world
- 2) Unexpressed coincident views of members.

If (1), how is this different to objective intention?

If (2), how do you prove it?

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Corporate Decision-Makers

Given specific context of boards and scheme “consent” reasoning, does *FSHC* make a difference?

1. You still need to show what the board decided;
2. For pensions, still no need to show outward expression of accord

A doctrinal change neutered by evidence?

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Thank you
(and (more) questions?)