

Nugee Memorial Pensions Conference & Dinner

Thursday 5th June 2025



Nugee Memorial Pensions Conference 2025

Talk papers

Thursday 5th June 2025

The views expressed in this material are those of the individual authors and do not necessarily reflect the views of Wilberforce Chambers or its members. This material is provided by Wilberforce Chambers for general information only and is not intended to provide legal advice. No responsibility for any consequences of relying on this as legal or financial advice is assumed by the authors or the publisher; if you are not a solicitor, you are strongly advised to obtain specific advice from a lawyer. The contents of this material must not be reproduced without the consent of the authors.

Contents

Page

4	Speakers
7	The truth about Verity Trustees: lessons for future litigation Paul Newman KC
14	Reflections on Attribution and Intention for Rectification Andrew Mold KC, Jennifer Seaman and Jonathan Chew
32	Nexus v RMT - the implications for pension schemes Michael Tennet KC and Ram Lakshman
36	Wills, wives, and wrecks: pensions as private client assets Joseph Steadman and Benedict Evans
55	Wilberforce contacts

Speakers

Miriam Kimber (Guest Speaker)

Miriam has been at the PPF as a lawyer since 2009, and during that time has been involved in almost everything the PPF does, focusing mainly on the pension protection levy and information law. Miriam is also very passionate about working to encourage diversity, inclusion and belonging. Miriam was winner of Lawyer of the Year at the Women in Pensions Awards 2023.

Tom Robinson KC (Chair)

Tom acts across a wide range of pensions matters, on behalf of scheme trustees, scheme members, employers and bodies such as the PPF and Pensions Regulator. He has advised on matters from the operation of section 67 of the Pensions Act 1995 and section 37 of the Pension Schemes Act 1993 to trustees' duties and the PPF Levy. He has a particular interest in the interplay between pensions and insolvency law, and has written on this topic for pensions and insolvency publications. He frequently advises insolvency practitioners in relation to pensions issues. He is also instructed on rectification matters, both as sole counsel and as part of a team. He is described by Legal 500 2025 as "*fiercely intellectual, incredibly hardworking and solutions-focused*".

Jennifer Seaman (Chair)

Jennifer is an established junior in the field of pensions and is recommended in both Chambers & Partners and The Legal 500 for her pensions experience. Her recent cases in this area have included *Virgin Media Ltd v NTL Pension Trustees II Ltd [2023] EWHC 1441 (Ch)* (acting for the Trustees); *Danapak Flexible Retirement Benefits Scheme* before the Determinations Panel in November 2023 (acting for a target facing a Contribution Notice); *Dean, Wellman & Borsley v The Commissioner of Police of the Metropolis* (acting for the Met Police in a test claim following McCloud). Jennifer's practice covers wide-ranging issues such as the professional negligence of actuaries and solicitors; the construction and rectification of pension deeds and rules; the validity of deeds and estoppel and the proper exercise of pension trustee powers. Jennifer is on the AG's A Panel and advises government departments on pension matters. The 2025 edition of Chambers & Partners praises Jennifer as "*an excellent junior who provides clear advice that is pragmatic and offers the clients commercial solutions*".

Michael Tennet KC

Michael's practice encompasses litigation and advice in the fields of pensions (including professional negligence), financial services and private trusts. Has appeared in many of high profile and complex pensions cases of recent years. He has a particular knowledge of the work of actuaries, both in relation to pension funds and life assurance funds and is co-author of the chapter on actuaries in *Professional Negligence Law and Practice (LLP)*. Michael is ranked as Band 1 Chambers & Partners 2025 where he is commended as "*exceptionally bright and is able to convey complex issues in an easily understandable manner*".

Paul Newman KC

Paul regularly acts for some of the largest UK pension schemes, FTSE 100 companies and regulatory bodies on various pensions and financial services issues, often of a highly technical nature. A seasoned advocate, he is consistently ranked in the legal directories as a leading practitioner: Chambers & Partners 2025 says Paul is “amazing”, and “commercially astute and tactical in his approach to cases”, while The Legal 500 2025 notes that “he fights like his life depends on it to put the best points across”. Paul is the founder and general editor of the Pensions Barrister website. His book, *A Practitioner’s Guide to Correcting Mistakes in Pension Schemes*, is published by Bloomsbury Professional.

Jonathan Hilliard KC

Jonathan advises and litigates regularly on benefit issues, surplus questions, pensions restructuring, other corporate pensions issues, moral hazard concerns, RPI and CPI issues and other similar points. Chambers and Partners 2025 describes Jonathan as “phenomenally clever” and “open and easy to deal with”. The guide says “Jonathan Hilliard KC is widely regarded as the go-to barrister for technical pensions issues, and he represents parties in a broad array of cases. He has significant experience in liberation, moral hazard and professional negligence matters”.

Andrew Mold KC

Andrew has extensive experience in pensions law covering all sizes of matters including proceedings before the Pensions Ombudsman, The Pensions Regulator, the High Court, Court of Appeal and Supreme Court. He acted in, amongst others, the leading cases of *Lloyds GMP*, *Nortel & Lehman*, *Honda*, *Pilots*, *Sea Containers*, *Cemex* and *De La Rue*. He regularly acts for trustees, members, sponsoring companies, professional advisors and the regulatory bodies. In Chambers and Partners 2025 he is described as “quietly brilliant. His razor-sharp intellect enables him to see to the heart of a problem very quickly and to marshal his arguments clearly”.

Edward Sawyer

Edward has extensive experience of pensions litigation and advisory work, having appeared in a number of high-profile cases such as *Verity Trustees v Wood*, *BBC*, *Railways Pensions Trustee v Atos*, *Mitchells & Butlers*, *Lloyds Bank Pension Scheme* (GMP equalisation), *Pensions Protection Fund v Dalriada*, *IBM*, *Nortel*, *Merchant Navy Ratings* and many others. He has often acted against silks on the other side. Edward deals with a broad spectrum of pensions issues, whether on the instructions of employers, trustees or representative beneficiaries. Chambers & Partners 2025 says Edward is “*thorough, calm and collected*”. In the 2025 edition of Legal 500 Edward is praised as being “*both thoughtful and practical and sees the full picture. He combines technical knowledge with commercial awareness and is one of the most highly rated senior juniors*”.

James McCreath

James is recognised as one of the leading pensions juniors at the Bar. The current edition of The Legal 500 describes him as “*A real team player, extremely bright with excellent drafting skills*” and “*more than a match for many KCs*”. He has extensive experience in pensions litigation, regulatory work (where he has acted in most of the high-profile regulatory actions in recent years) and advisory work. As well as work in his own right, he has been a junior for most of the leading pensions silks, inside and outside of Chambers. He also acts in a variety of often very high-value professional negligence actions, both for and against professionals, trustees, and scheme consultants and administrators. In that context, he has acted (including acting unled) for some of the leading pensions solicitors’ firms defending actions brought against them.

Jonathan Chew

Jonathan acts for and advises a range of institutional and pensions professional clients and has been described in the directories as “a first-class advocate in terms of strategy and technical points”. He has appeared in the hard-fought *Mitchells & Butlers* litigation on rectification and other matters and in the Court of Appeal in *Britvic v Britvic*, the leading case on “corrective construction”. His current and recent work reflects relevant pensions issues: for occupational schemes: e.g. RPI/CPI switches and other issues relating to pension increases, rectification, scope of amendment power issues, and regulatory action; and for personal schemes/SIPPs: questions of interpretation, mis-selling, pensions liberation, and investment duties. He is celebrated for his practice in the directories, Legal 500 2025 describe him as “*bright and strategic, a tremendous team player who demonstrates great judgement*”. Chambers & Partners 2025 describes him as “*excellent*” and “*commercially astute and very user-friendly*”.

Joseph Steadman

Joseph has been recognised as a Leading Junior in the Pensions field by the Legal 500 and by Chambers and Partners. He has experience of acting in contentious and non-contentious pensions matters for trustees, employers, members and the Regulator. Joseph has gained a particular understanding of the regimes applicable to public sector and industry-wide schemes, as well as an interest in the cross-overs between pensions and public law. Early in his career, he combined his practice in Chambers with a consultancy role in the pensions, incentives and employment team at a Magic Circle law firm. Through that role, he gained extensive expertise and experience across the spectrum of pensions work, which he brings to bear in his own advice and advocacy.

Ram Lakshman

Ram has a broad commercial chancery practice, spanning commercial disputes, civil fraud, insolvency, trusts and pensions. He regularly appears as sole counsel in both the High Court and the County Court and is equally comfortable being instructed in his own right or as part of a larger counsel team. A substantial proportion of Ram’s practice relates to actual or contemplated pensions disputes. He has experience acting in cases involving errors in pension schemes (including absence of s.37 certificates, non-compliance with formalities, and rectification issues) as well as challenges by the Pensions Regulator. Ram is currently involved in a complex and high value compromise arising out of the potential invalidity of scheme documents across many decades. Feedback for Ram's pensions work includes: “*Ram provides an excellent service in a client-friendly way*”.

Benedict Evans

Benedict joined Chambers in October 2024 following the successful completion of his pupillage. During pupillage, he gained experience across the range of Chambers’ work and he is now building a broad practice, including pensions. He has assisted in relation to pensions regulatory matters concerning the exercise of moral hazard powers under the Pensions Act 2004 and concerning the significant event regime under s.16 of the Pensions Schemes Act 2017 (led by James Walmsley).

The truth about Verity Trustees: lessons for future litigation:

Managing long Part 8 trials

Paul Newman KC

Introduction

This paper considers some of the case management issues that arose before and during the *Verity Trustees* trial. Although this case was in many ways unusual, even unique, it gave rise to a number of management points which may be of relevance to other Part 8 pensions claims of a less complex nature and a shorter duration. This paper does not cover the substantive issues debated at the trial, for the simple reason that any description or discussion of the substantive issues will be superseded by the judgment when it is handed down.

The claim was brought by the Trustee of The Pensions Trust (**the Scheme**), which is an industry-wide scheme established in 1947 providing pension benefits for employees primarily in the charities, voluntary and social housing sectors. The claim was prompted by uncertainties affecting the Scheme, primarily with regard to the validity and scope of amendments made to the Scheme since 1967.

The Scheme is an unusual scheme. It has nearly 2,500 active employers and over 445,000 members and beneficiaries, and is made up of 57 separate pension arrangements, with a complex governance and administration structure that has evolved over time since its establishment. This structure meant that the uncertainties were unusually extensive, due to the fact that each of the arrangements has its own governing documentation, and that those provisions have been amended many times historically. As a result, the issues raised in the proceedings affected a huge number of amendments: the list of potentially affected amendments ran to some 237 pages. And the position was further complicated by the fact that the relevant powers, the relevant wording of those powers, and their statutory context had all been amended over time.

Even following extensive co-operation between the parties, the issues that required determination at trial consisted of 29 questions, of which many involved sub-questions. Also identified and separately argued were 10 so-called 'generic issues', which applied to multiple questions, and which were intended to allow for shorter submissions on the other questions.

All of this resulted in what was, by some distance, the longest ever trial of a Part 8 pensions claim which featured no witness evidence, lasting for 32 days.

Role of the Trustee

The first point to identify is the role played by the Trustee in the proceedings. Although the Trustee brought the claim as claimant, instead of taking a neutral role and leaving it to the employer and member defendants to argue each side of the issues, the Trustee decided to take an active part in the proceedings, and therefore didn't join any employers,

only a representative member. So, both the Trustee and the member had representative roles – the Trustee argued for the status quo, which broadly aligned with the interests of the employers, whereas the member argued for the opposite.

The scope for trustees to take an active role in pensions proceedings has expanded over time. Originally, trustees were cautious about taking a non-neutral stance because that exposed them to losing their right to an indemnity for their costs, and would only do so where the Court had endorsed that practice beforehand.¹ However, it is now common practice for trustees to put arguments on behalf of one side or the other without the need for prior approval, and in *Ove Arup and Partners International Ltd v Arup UK Pension Scheme Trustees*,² the Judge described orders to that effect as being “now routinely made.”

There were two reasons why the Trustee acted in that way in this case. The first was to save costs, as the size and complexity of the claim meant that the cost of a further party and legal team would be considerable. The other was the practical difficulty in selecting an appropriate employer to take on the representative role, given that no single employer would be affected by all of the issues in the claim form.

As it turned out, one employer, Save the Children, applied to join the proceedings, on the grounds that it had a substantial financial interest in the outcome and wished to protect its own position. The Trustee ultimately agreed to that application, on the basis that Save the Children paid its own costs. The Trustee did this because of the prevailing caselaw, particularly the case of a participating employer in the Pilots National Pension Fund successfully applying in 2009 to join proceedings relating to that fund, even though its interests were the same as another employer which had already been joined in a representative capacity.³ There was also evidence in the *Verity Trustees* case that some other employers were comforted by the presence of an employer in Court to represent their interests on at least some of the issues.

Ultimately, despite the representative member expressing concerns about the possibility of duplication of arguments, there was minimal overlap in both written and oral submissions, thanks to the extensive co-operation between the Trustee’s and Save the Children’s legal teams.

¹ See, for example, *BEC Pension Trustee Ltd v Sheppeck* [2002] EWHC 101 (Ch), [2002] ICR 1343.

² [2020] EWHC 1064 (Ch), [2020] Pens LR 425 at [3] per HHJ David Cooke.

³ *Re PD Teesport Ltd* [2009] EWHC 1693 (Ch); [2009] Pens LR 263.

Retained Judge

The next point of interest concerned the selection of the Judge for the case.

In this case, the Trustee's legal team was of the view that it would be appropriate to ascertain in advance which Judge was to be assigned to try the claim.

Part of the team's concerns were due to an earlier complex Part 8 claim involving the Newell Rubbermaid UK Pension Scheme. In that case, the Judge at the Pre-Trial Review (**PTR**) decided certain trial management issues in light of his preferred way of trying the case on the assumption that he would be the trial judge, when - as it turned out - the case was tried by another Judge, who may well not have made the same decisions had he been dealing with the PTR.

In particular, the Trustee was concerned about the order of oral submissions at trial, given the large number of issues to be determined, and it was felt that the personal preference of the Judge trying the claim would be an important factor in deciding that issue.

Another reason why the Trustee wished to have a Judge allocated at a relatively early stage was to ensure that the claim was tried by someone with existing pensions experience. In fact, the listing office had already provisionally allocated Trower J for the trial for this very reason, but without a formal order there was no guarantee that he would be the trial judge.

Usually, the parties have little or no control over which Judge tries a claim, given both the logistical difficulties of tying down one particular Judge for any period of time, and the general concerns about 'cherry picking' and favouritism. However, there is jurisdiction in the Business and Property Courts for the appointment of a so-called "docketed Judge", being either the same Judge for the entire course of the proceedings, which is known as "full docketing" or a particular Judge and a particular Master for prior to the trial and that same Judge for the trial, which is known as "partnership management."⁴

Normally, docketing applications are dealt with by a Master at the Case Management Conference (**CMC**), although a Master may, without any application, consider whether docketing would be appropriate. If the Master considers that the case should be subject to docketing, the Master will ask the Chancellor to nominate a Judge to take charge of the case.

However, in the *Verity Trustees* case, there was no CMC, so the Trustee decided that the best course of action was to write to the Senior Chancery Division Listing Officer, with the approval of the other parties, requesting that the Chancellor approve the allocation of Trower J as the retained Judge for the case. In doing so, the Trustee relied on three of the factors set out in the *Chancery Guide* as indicating the need for docketing which were of particular relevance to this case, being:

⁴ See generally, paras 6.19-6.29 of The Business and Property Courts of England & Wales Chancery Guide 2022.

- (i) the length of the case and the potential for reducing the length of the trial process by active case management by the trial judge;
- (ii) the particular advantage in pre-trial applications being heard by the trial judge; and
- (iii) the subject matter and complexity of the claim which required the specialist knowledge of a specialist Judge.

Following this application, the Chancellor duly allocated Trower J as the retained Judge. As it turned out, the only case management issues the Judge needed to deal with were all raised at the PTR, but it at least ensured that his decisions and comments about the trial were made in the knowledge that he would be trying the claim.

Trial structure

Of the challenges raised by the *Verity Trustees* case regarding the structure of the trial caused by the number and complexity of the issues arising for determination, the most important was how to order oral submissions.

The usual course is for the claimant to make its submissions on all the issues, and for the defendant then to do the same, followed by a reply from the claimant. But it was considered to be impractical, in the course of a six-week trial, for the Trustee to deal with all the issues in one go, and then for the member to begin submissions on issues which the Trustee had dealt with some three weeks earlier. It was also considered to be inefficient for each issue to be dealt with individually, as there were just too many issues.

Accordingly, the parties proposed, and the Judge endorsed, the division of the issues into five groups, and for all submissions on each group to be heard, before moving on to the next group: effectively five separate trials. This had the advantage of ensuring that the arguments on each issue were not too far apart, and allowing the Judge to re-read the written submissions before arguments on each group began. Ultimately this was thought to have worked relatively well.

Another important structural issue for the management of the trial was the allocation of time for oral submissions between the parties, which was ultimately dealt with by negotiation and agreement between them, and which was then endorsed by the Judge. The lion's share of the time was divided between the Trustee and the member, with the Trustee getting longer, reflecting the fact that it had to introduce the background to the Judge, and had to reply to the member's submissions; by contrast, Save the Children got a relatively small amount of time, which it used to make submissions on points which were of particular importance to it, and which did not overlap with the submissions made by the Trustee.

Submissions

Written submissions

The first point to note about the written submissions is that, notwithstanding its active role in the proceedings, the Trustee, in addition to serving positive submissions on the issues, prepared a neutral skeleton which explained the nature of the proceedings, introduced the background facts and set out each of the issues and the parties' positions on them in non-partisan terms. The Trustee prepared this skeleton relatively early in the piece and shared it in draft with the other parties who provided comments on those drafts. As a result, the Judge had the benefit of the type of skeleton that the Trustee would have produced had it been a neutral party to the proceedings.

As for the written submissions themselves, it would be wrong to call them 'skeletons' as they comprised over 1200 pages in total. A fifty-page limit is imposed on trial skeletons in even the heaviest cases, and permission for longer skeletons must be sought at the PTR.⁵ But the Trustee was keen from the outset not to have any page limits put on the written submissions, reflecting not only the length and complexity of the case, but also the fact that it wished its submissions to serve a very different function to ordinary skeleton arguments. They were not intended simply to open the case ahead of evidence, and in advance of detailed closing submissions. Rather, they were to constitute the substantive written submissions on the matters in issue. Eventually, the defendants and the Judge were persuaded that it was of more assistance to the Court in understanding the issues and in preparing its judgment, and to the parties in ensuring that their oral submissions focused on the key points, for the parties to be free to develop their arguments fully in writing, rather than restricting their ability to do so by a necessarily arbitrary page limit.

In the end, the way in which the written and oral submissions interacted differed somewhat between the advocates, no doubt reflecting their personal preferences and their views on what they thought would best serve their case: so, on some occasions, the written submissions were used as a starting point for oral submissions, whereas on other occasions, the advocate did little more than read out the written submissions.

As far as the Judge was concerned, he very much saw the written submissions as the key document for setting out the respective arguments, so much so that he requested that each advocate make regular cross-references to the paragraph numbers of the written submissions that related to the arguments being made orally.

⁵ Ibid, para 12.51.

Oral submissions

The most notable feature about the oral arguments was the extensive use made by both the Trustee and the representative member of junior counsel as advocates. This was partly for practical reasons, as it would have been impossible for one counsel to have prepared for and argued each and every issue, but it also reflected the experience and skill of the juniors involved and other practical reasons which are referred to below.

Tips for long trials

In conclusion, here are three practical tips for the conduct of long trials which have come out of my experience of the *Verity Trustees* trial.

(1) Allow for advance preparation

Allow the advocate as much time as possible to prepare oral submissions in advance of the beginning of the trial. In practical terms, this means delivering the trial brief sufficiently early and getting assurance from the advocate and their clerk that they will leave enough time for preparation.

Whilst it might be possible in a trial of a few days or even a couple of weeks to leave preparation of the next day's submissions to the night before, that is not feasible in a six-week trial. It is vital, when having to adapt to what the other side have argued or to what the judge has raised, to begin from a solid foundation of knowing what your base oral argument is, rather than having to prepare from scratch. Besides, long trials require careful pacing, not just physically but intellectually and emotionally, which requires scheduling sufficient recovery time during the weekends and any other breaks during the trial. This is impossible if you are having to spend every moment out of Court preparing for tomorrow.

(2) Keep your cool

The second tip is to keep your cool, or at least to recover it as soon as possible. Even in a trial for directions involving purely legal points, there will be scope for dispute over matters such as time allocations and attempts to raise new points or new arguments. And in the heat of battle, it is easy for tempers to fray even amongst the best and most professional of legal teams. But experience shows that more is achieved during the course of litigation through cooperation than antagonism, so if this should happen, if at all possible do not let a heated argument which has taken place overnight or during the day to continue after the close of play for the day. Once the judge has left the courtroom, there will be an opportunity for a quick word to calm things down while everyone is packing up for the day, and I would very much recommend that opportunity is taken.

(3) Use your juniors as advocates

The final tip is to use your juniors as advocates. The judiciary has over the past couple of years encouraged the greater participation of junior counsel in oral arguments, and in 2023 the senior judiciary issued guidance expressing the desirability of giving junior counsel better opportunities to act as advocates during Court proceedings, and judges in suitable cases are now expected to ask whether a speaking part for junior counsel has

been considered. In long cases especially, there is more opportunity for juniors to have speaking roles, and the skillful and polished advocacy of the juniors during the *Verity Trustees* trial demonstrated that there need be no drop-off in quality as a result.

In my experience, the major stumbling block in this respect is the client, who may query why they should have to rely on the junior as an advocate when they have retained leading counsel, no doubt at great expense. Perhaps future responses to that attitude might like to consider using the following closing remarks of Trower J in the *Verity Trustees* trial:

*... can I quite specifically say how much I have enjoyed being able to listen to submissions from juniors? Because I do think it makes a great deal of difference, both to the listener in the form of the judge and to the ability of the case to be presented effectively and interestingly on behalf of your respective clients if you have more than one voice addressing the court, and particularly voices which come from practitioners with such obvious expertise and ability to convey points clearly as the two juniors in this case who have actually addressed me.*⁶

⁶ Transcript, Day 32, page 132, lines 6-16.

Reflections on Attribution and Intention for Rectification

Andrew Mold KC, Jennifer Seaman and Jonathan Chew

1. Rectification claims feature heavily in pensions litigation. This paper will explore the following topics that arise when considering the issues of attribution and intention for rectification claims:
 - a) Attribution of intention when a trustee company is involved
 - b) The *dominant* or *governing* intention
 - c) Positive vs negative intention.⁷

(A) Attribution of intention when a Trustee Company is involved

Introduction

2. The involvement of professional trustee companies in the pension scheme arena has been growing. In April of this year, at a speech given at the Trade Union Congress's Pension Conference, the CEO of TPR spoke about "*The changing face of trusteeship*"⁸ and how more than half of UK schemes are using a professional or sole trustee, and how, between them, just 10 firms govern more than a trillion pounds of savers' DB retirement income.⁹ From this summer, TPR is extending its supervision to build formal supervisory relationships with the largest professional trustee companies. TPR said "*most importantly of all, we want to know who the scheme decision-maker is – not the firm but the person – that these people have the right level of skills and experience and that they are guided entirely by their duties to act in the members' best interests.*"
3. Decision-making and intention are important concepts in the law on rectification. An interesting aspect is the concept of attribution of intention when a company is involved in the execution of the document which contains the alleged mistake to be rectified. Some of these issues will be explored in this paper.

Trustee Company vs individual trustees

4. The reference to "Trustee Company" in this paper means a professional trustee firm, often the sole independent trustee of the Scheme, governed by a formal

⁷ Section A has been written by Jennifer Seaman, B by Andrew Mold KC, and C by Jonathan Chew

⁸ <https://www.thepensionsregulator.gov.uk/en/media-hub/speeches-and-speakers/the-changing-face-of-trusteeship>

⁹ See LCP Sole Mates survey dated September 2024.

memorandum and articles of association. This is in contrast to a group of individually appointed member and employer-nominated trustees.¹⁰

5. The Association of Professional Pension Trustees (APPT) code of conduct for “Professional Corporate Sole Trustees” (i.e. a single independent trust company as trustee of a scheme) requires at least two accredited trustees in the governance model for each Sole Trustee appointment – “*All material decisions affecting the use of any discretion or power conferred on the trustee should involve at least two Accredited Professional Trustees.*”¹¹
6. LCP have grouped professional trustee firms into three different operating models, showing the balance of power for each of the committees and indicating how decisions are taken:¹²
 - a) Model 1 has a ‘Lead Trustee’ as the main point of contact, and all ‘material’ decisions require the agreement of a ‘Co-Trustee’.
 - b) Model 2 has a ‘Lead Trustee’ as the main point of contact and supported by two ‘Co-Trustees’ acting as a simplified Trustee board. All ‘material’ decisions will be discussed by the mini board of three trustees.
 - c) Model 3 has two ‘Lead Trustees’ as the main point of contact with equal responsibility. ‘Lead Trustees’ operate as the simplified Trustee board. Decisions are generally taken between the two ‘Lead Trustees’ on an ongoing basis.
7. The way in which Trustee Companies make decisions might be different from individually appointed trustees. For example, there might be fewer, set trustee meetings per year. Trustee meetings might be replaced by multiple meetings/touchpoints on operational matters with advisers and an annual meeting with a sponsor. There might also be an increase in the use of technology, e.g. to track decisions, monitor risk and business plans.¹³

¹⁰ A scheme will be exempt from s.241-243 PA 04, if a sole trustee is independent within the meaning of s.23(3) PA 1995 – see paragraph 2(k) and 3(m) of the Occupational Pension Schemes (Member-nominated Trustees and Directors) Regulations 2006.

¹¹ <https://appt.org.uk/appt-cop-for-sole-trusteeships-final/>. In 2020, APPT launched its new APPT Accreditation Scheme for professional trustees.

¹² https://insights.lcp.com/rs/032-PAO-331/images/LCP-Sole-Mates-September-2024.pdf?utm_campaign=Solemates&utm_medium=bitly&utm_source=website, page 10.

¹³ https://insights.lcp.com/rs/032-PAO-331/images/LCP-Sole-Mates-September-2024.pdf?utm_campaign=Solemates&utm_medium=bitly&utm_source=website, Page 11.

Attribution of Intention

8. To rectify a pension document containing the rules of the scheme (where for example, the trustee of the scheme has the power to alter the rules, provided they obtain the consent of the employer), you need to show that the intentions of the trustee and the employer coincided, in that they both independently had the same intention regarding the effect of the drafting.¹⁴ The intention must be an actual, subjective intention.¹⁵
9. Trustee Companies, like other companies and non-human entities with a legal persona, do not have a mind to express intentions. Companies can only act through human agency, and the attribution of that human intention to the company.
10. The company's primary rules of attribution will generally be in its constitution, i.e. its articles of association. For example:

*"the decisions of the board in managing the company's business shall be the decisions of the company"*¹⁶, or

*"the Directors may meet together for the despatch of business, adjourn and otherwise regulate their meetings and proceedings as they think fit... the quorum necessary for the transaction of business by the Directors shall be three validly appointed Directors... The Directors may delegate any of their powers to any one or more Directors or a committee of the Directors, in each case with the consent of the board of Directors."*¹⁷

11. There are also primary rules of attribution which are not expressly stated in the company's articles, but implied by law, e.g. *"the unanimous decision of all the shareholders in a solvent company about anything which the company under its memorandum of association has power to do shall be the decision of the company."*¹⁸
12. There are then general rules of attribution, which are equally applicable to natural persons and companies, namely the principles of agency, where the acts of the company's employees and agents could count as the acts of the company.¹⁹

¹⁴ *FSHC Group Holdings Ltd v GLAS Trust Corp Ltd* [2020] Ch 365, at [78].

¹⁵ FSHC at [174], [176].

¹⁶ *Meridian Global Funds Management Asia Ltd v Securities Commission* [1995] 2 AC 200 at p.506-507 (per Lord Hoffmann).

¹⁷ An anonymised example from the Articles of Association of a Trust Company.

¹⁸ See *Multinational Gas and Petrochemical Co v Multinational Gas and Petrochemical Services Ltd* [1983] Ch 258 (as referred to by Lord Hoffmann in *Meridian Global Funds Management Asia Ltd* at 506).

¹⁹ There are also special rules of attribution, which often include statutory liability.

The “decision-makers”

13. In the majority of cases, it is expected that the relevant intentions of a ‘company’ will be that of the person(s) who had authority to enter into the contract on behalf of the company, e.g. under the articles or as a matter of agency. But this is not always the case. The authorities in this area have focused on looking at who is the true “decision-maker”, and their intention (or mistaken implementation of intention) to enter into a contract or deed.
14. In *Hawksford Trustees Jersey Limited v Stella Global UK Limited* [2012] EWCA Civ 55, Patten LJ said at [41]:

“... the decision-maker ought in principle to be the person who has the authority to bind the company to the contract. The expressed intentions of a mere negotiator will therefore be immaterial unless he is also the decision-maker or shares in a relevant way those intentions with the person who is the decision-maker on behalf of the company. But, whilst those principles are easily stated, their application to the facts of any given case may be less straightforward...”

15. See also Mann J’s summary of principles in *Murray Holdings Ltd v Oscatello Investments Ltd* [2018] EWHC 162 (Ch), at [198]:
 - “(a) One is looking for the person who in reality is the decision maker in the transaction in order to find intentions in relation to rectification.*
 - (b) In the case of the company that person will usually be the person with authority to bind the company.*
 - (c) Someone who is not a person with power to bind can nonetheless be treated as the decision maker if that is the reality on the facts.*
 - (d) The intention of a “mere negotiator” may be relevant if it is shared with the actual decision maker; but, as it seems to me, that is because the intention has become that of the actual decision maker.*
 - (e) Where a person who would normally be expected to be the decision maker (such as the board of a company) leaves it to a negotiator to negotiate a deal and produce a contract by instructing solicitors, on the understanding that the decision maker would do a deal on those terms, then the negotiator’s intention is the relevant one, either because that person is the decision maker, or, if that description is not apt, because the technical decision maker has simply adopted the intentions of the negotiator (Hawksford at paragraph 43; and see *Liberty Mercian Ltd v Cuddy Civil Engineering Ltd* [2013] EWHC 2688 (TCC) at para 130.)”*

16. In *Univar UK Ltd v Smith* [2020] EWHC 1596 (Ch), Trower J reasoned at [211] that:

*“This link between the decision makers and the persons whose intention is to be attributed to the company for rectification purposes is treated by Patten LJ [in *Hawksford Trustees*] as an answer based on sound principle. It will not always be easy to apply this test on the facts, but what matters is the intention of the person who made the actual decision in relation to the relevant mistake, having regard to whatever constituted the decision*

making process of the entity concerned and the extent to which individuals involved in the decision making process relied on others.”²⁰

Reviewing the intentions of more than one “decision-maker”

17. As set out above, as a matter of good practice, there is unlikely to be just one “decision-maker” in a Trustee Company. Therefore, questions can arise about the different intentions of different “decision-makers.”
18. In *AMP (UK) Plc v Barker* [2001] Pens. LR 77, Lawrence Collins J at [66] said “... when one is considering the intentions of a collective body such as a group of trustees or a committee of a board it is their collective intention which is relevant...”
19. In *Univar*, which had a group of individual trustees, rather than a trustee company, Trower J said at [212]:

“As to ascertaining the collective intention of a body of Trustees, I received some interesting submissions on the correct approach where the subjective intention of some of the Trustees is mistaken as to the words or legal effect of a document, but the subjective intention of others is not. In light of the conclusions I have reached on the facts, I do not think that it would be helpful for me to say any more than this. It seems to me that the correct approach is first to identify the trustees who participated in the actual decision pursuant to which they committed themselves collectively to the words in that part of the document which (objectively construed) is said not to reflect the actual subjective intent. In a case such as the present, that is all of the Trustees, because they were all parties to the relevant document. However, in carrying out that exercise, it may be the case that the actual intention of some of them was simply to be guided by others on a particular issue without having any independent intent of their own. That is only likely to arise, however, where notwithstanding their status as trustee they are not in fact a decision maker in relation to the relevant issue, for example, because the words or their legal effect were of insufficient significance for them to need to form a view which was independent of the view of those who address and were known to have addressed the issue in question.” (Emphasis added).

20. Further, in Paul Newman KC’s book, “A Practitioner’s Guide to Correcting Mistakes in Pension Schemes” at §6.21 he states:

“If the relevant entity comprises a number of decision-makers, it is possible that they will not have been unanimous as to the relevant decision, or that they will have acted with different intentions so that some were mistaken and some were not. In that situation, it is likely that the intention of the number of decision-makers which is necessary to bind the remainder – such as a majority of board directors, if the company’s articles so provide – will constitute the requisite intention of the entity as a whole...”

21. This will involve a review of the company’s articles of association (e.g. how many decision-makers in the company need to agree to make a valid decision of the company) and is a question of fact in any given case.

²⁰ See also *Mitchells & Butlers Pensions Ltd v Mitchells & Butlers Plc* [2021] EWHC 3017 (Ch), Trower J at [20].

Further considerations for rectification when a Trustee Company is involved

(1) Fewer individuals signing off scheme amendments? Fewer witness statements needed?

22. The usual rule of trust law is that the trustees must generally make decisions unanimously. This does not apply to pension trustees, who can agree to take decisions by majority, unless the scheme provides otherwise²¹. Once the matter has been approved, there is usually a need to involve all the trustees in the execution of the deed of amendment, depending on the terms of the scheme's amendment power.²² Therefore, for a rectification claim, evidence is usually obtained from all of the individual trustees involved in executing the scheme amendment.
23. Where a single, independent Trustee Company is involved, it is the articles of that Trustee Company that provides for how decisions are to be made by the Company, and usually there is no need to involve all the directors of that Company in the signing of the scheme amendments by the Trustee, e.g. see the "Sole Trustee" models referred to above, which usually require the agreement of just two/three director "trustees." It is the evidence of these two/three directors which is key for a rectification claim. The involvement of a Trustee Company could reduce the burden of the evidence gathering process, to the two/three directors who were involved (subject to the point below).

(2) Increased delegation? More witness statements needed?

24. Delegation by individual trustees is not generally permitted, unless authorised by the trust instrument, or is in relation to investment matters²³.
25. The limits on delegation are not expressed to apply to any 'delegation' by corporate trustees to some of the directors or other agents, e.g. to an investment committee.²⁴ However, arguably, where a Trustee Company is involved it is not really an act of delegation, but an internal corporate matter, governed by the articles of association, formalizing how the Trustee Company itself will take the relevant decision.²⁵
26. This may mean that, where a Trustee Company is involved in a decision, there could be more delegation to or involvement by other directors or agents. These people may be deemed to be the "decision-maker" behind the scheme amendment (or that other 'decision makers' were guided them, and adopted their

²¹ S.32 of the Pensions Act 1995 – "(1) Decisions of the trustees of a trust scheme may, unless the scheme provides otherwise, be taken by agreement of the majority of the trustees."

²² E.g. see the arguments in *HR Trustees Limited v Wembley Plc (In Liquidation)* [2011] EWHC 2974, where the amendment was signed by 4 rather than all 5 of the individual trustees then in office.

²³ Subject to s.34 Pensions Act 1995

²⁴ Pollard, *The Law of Pension Trusts*, at §4.124 referring to the points made by the Legislative and Parliamentary Committee of the APL to the then Department of Social Security.

²⁵ See Pollard, *The Law of Pension Trusts*, at §4.124 – 4.125.

intention). This could in turn lead to *more* evidence gathering in a rectification claim if it is the other directors or agent's intention that is relevant as a "decision-maker" (or guiding individual), in addition to the evidence of the intentions of the director trustees who had the power to bind the Trustee Company to the amendment (e.g. that their intent was to be guided by others on a particular issue without having any independent intent of their own). Paul S. Davies in his LQR article "Agency and Rectification", has suggested that a Trustee Company will need to prove to the court that such other directors' or agent's intentions were positively adopted by the 'decision-makers', and the directors with authority to bind the Company were committed to following the recommendations of the other directors or agent – "A *technical decision maker*" is still a *decision-maker*."²⁶

(3) The governing documents of the Trustee Company are key

27. As highlighted above, the articles of association of the Trustee Company are key to providing who has the power to bind the Trustee Company, and what is the decision-making process of the Company.
28. This may create further sub-issues in rectification claims, arising out of the interpretation of the Trustee Company's governing documentation (articles of association and memorandum), in addition to issues about the meaning of the relevant scheme documents.

(B) The 'dominant' or 'governing' intention

29. Even once the relevant 'decision-maker' is identified, it is important to identify how the mistake is said to have affected the intention of that party. In doing so, it must be kept in mind that, '*[w]hat is rectified is not a mistake in the transaction itself, but a mistake in the way in which that transaction has been expressed in writing*'.²⁷
30. This issue is of particular relevance where the wording used in the document was specifically reviewed by the parties but there is a mistake (usually on account of incorrect advice) as to the underlying legal position.
31. It is now well-established that rectification will not be refused simply because the document sought to be rectified contains the very wording that the parties intended, if the legal effect or meaning of the wording is different from the parties' intention. In *Re Butlin's Settlement Trusts*²⁸, Brightman J stated:

'...rectification is available not only in a case where particular words have been added, omitted or wrongly written as the result of careless copying or the like. It is also available where the words of the document were purposely used but it was mistakenly considered that they bore a different meaning from their correct meaning as a matter of true

²⁶ 2020 LQR, 136 (Jan), 77, at p.95-96.

²⁷ *Snell's Equity* (35th Ed) at 16-001

²⁸ [1976] Ch 251 at 260; for an example in a pensions context, see: *AMP UK plc v Barker* [2001] Pens LR 77 per Lawrence Collins J at [69] to [71].

construction. In such a case...the court will rectify the wording of the document so that it expresses the true intention...’.

32. As explained in by David Hodge KC, in *Rectification: The Modern Law and Practice Governing Claims for Rectification for Mistake* (2nd Ed) at 4-62:

‘It is not infrequently the case, however, that where the parties’ mistake is one of law, their error may affect not only their document, but also their underlying concurrent intention; and in these circumstances rectification will be inappropriate. An error which underlies, without forming part of, the common intention does not amount to a mistake in expression; and, in such a case, the grounds for rectification will not exist.’

33. The operation of an error which underlies the common intention is reminiscent of the distinction often drawn in the cases between mistakes as to the legal effect of a document and mistakes as to consequences.

34. As Lord Walker stated in *Pitt v Holt*²⁹:

‘Rectification is a closely guarded remedy, strictly limited to some clearly-established disparity between the words of a legal document, and the intentions of the parties to it. It is not concerned with consequences’.

35. Although judges have frequently commented that the effect/consequence distinction is not always easy to grasp, it continues to be referred to in rectification cases³⁰ (even if it has become of less relevance in the related jurisdiction of rescission on the grounds of equitable mistake). *Lewin on Trusts* (20th Ed) states (at 5-083) that:

‘It should be remembered that in the case of rectification, the party seeking the remedy must prove the existence of a specific intention which, as a result of a mistake, is not recorded or is mis-recorded. A general intention to achieve a certain fiscal objective is not enough.’

36. Lawrence Collins J candidly described the effect/consequence distinction as:

*‘simply a formula designed to ensure that the policy involved in equitable relief is effectuated to keep it within reasonable bounds and to ensure that it is not used simply when parties are mistaken about the commercial effects of their transaction or have second thoughts about them’.*³¹

37. Hodge³² also refers to another potentially relevant distinction drawn in *Spry, The Principles of Equitable Remedies* (9th Ed):

²⁹ [2013] 2 AC 108 at [131]

³⁰ See e.g. *FSHC Group Holdings Ltd v GLAS Trust Corpn* [2019] EWCA Civ 1361 at [48] and [179] to [181]; *Univar UK Ltd v Smith* [2020] EWHC 1596 (Ch) at [197] et seq.

³¹ *AMP UK plc v Barker* [2001] Pens LR 77 at [36]

³² At 4-76

'Dealing with the case where the parties are aware of the precise terms of the relevant part of the document, but misapplied their effect, Dr Spry QC has distinguished between two positions:

"The first position occurs where the concurrent intention, that is, the intention that the document desired to effectuate, remains the dominant and governing intention. In this event it should not matter that the precise terms of the document have been seen by the parties, and rectification, where otherwise appropriate, should be ordered..."

The second position arises where the parties, whatever their previous intention may have been, have ceased to retain that intention as their governing intention and have formed instead an intention to be bound by the precise terms of the document in question, regardless of possible discrepancies between its provisions and prior or other intentions on their part. In this event rectification is not appropriate."

In the latter situation, unlike the former, the final document is not intended to record the antecedent oral agreement or understanding between the parties; rather they have elected to adopt the actual document as their fresh bargain, independently of what has gone before, so that a mistaken interpretation by one of the parties cannot be relied upon as grounds for rectifying it...'

38. Reference to the 'dominant and governing' intention has parallels with the approach of Warren J in *IBM UK Pensions Trust Ltd v IBM UK Holdings Ltd*³³, when addressing serial rectification:

'How, then, can it be said that the 1990 Trust Deed and Rules 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 1990 Trust Deed and Rules should reflect the entitlement which members of the C Plan had as a matter of law, it would follow that the 1990 Trust Deed and Rules ought also to reflect those rights; if the 1983 Trust Deed and Rules were subject to a valid claim for rectification, then the 1990 Trust Deed and Rules 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 1990 Trust Deed and Rules should do no more than reflect, in new language, the provisions of the 1983 Trust Deed and Rules continuing the substance of those provisions as they stood at the time of the 1990 Trust Deed and Rules, a claim to rectify the 1990 Trust Deed and Rules would fail. Remedies may be available to ameliorate the effect of the mistake in the 1983 Trust Deed and Rules, but rectification would not be one of them.'

39. On the facts of *IBM*, in concluding that the case fell into the former category, Warren J relied on the fact that those executing the 1990 Trust Deed had paid little if any attention to the provisions in respect of which rectification was sought thus it was easier to depart from the language which had been used.

³³ [2012] Pens LR 469 at [448]

40. The most recent detailed application of these principles in the pensions context is contained in two decisions of Trower J in *Univar UK Ltd v Smith* [2020] EWHC 1596 (Ch) and *Mitchells & Butler Pensions Ltd v Mitchells & Butlers Plc* [2021] EWHC 3017 (Ch).

41. In *Univar*:

- a) The Claimant company sought rectification of a rule in a 2008 consolidated deed and rules which required increases to pensions in payment and revaluation of pensions in deferment to be calculated by reference to RPI. The previous rules had provided for pension increases and revaluation to be calculated on the statutory basis. This distinction subsequently became important when (from 2010) statutory increases and revaluation were calculated by reference to CPI.
- b) *Univar* contended that the 2008 rules failed to reflect the common intention of the company and the trustees that the rules would reflect the pre-existing basis for pension increases and revaluation (namely to increase benefits by whatever the statute required from time to time), because it mistakenly hard-wired the then statutory regime (calculated by reference to RPI) into the rules of the scheme. This had the consequence that members continued to be entitled to RPI-based increases even after the statutory regime had switched to providing CPI-based increases.
- c) The company and the trustees were well aware of the actual words used in the 2008 rules (which had been discussed in the drafting process) and those words also reflected the practice of the scheme at the time.
- d) Trower J found that neither the company nor the trustees intended the 2008 increase and revaluation rules to have the legal effect that they did. In the Court's view, the evidence showed that the parties did not intend to make any changes to the pre-existing position, unless specifically identified on a schedule of changes which did not include the disputed changes. This was essentially the 'dominant' or 'governing' intention.
- e) Trower J recorded the Claimant's submissions that:

'218. ...the Company accepted that this is not a case in which the parties to the instrument were unaware of the existence of the relevant clause which effected the relevant changes. It appeared in the various drafts of the 2008 DDR and was the subject of amendments highlighted in the various drafts of the schedule of changes. The Company's case is that, although the parties may have been aware of the existence of the rules which gave effect to the relevant changes, they were ignorant of the fact that the rules as drafted had the legal effect that they did.'

'225. The Company said that this situation is quite different from a situation in which an instrument has an unintended consequence, as opposed to a mistake about its legal effect. The mistake in the present case is one as to legal effect because it is all about the amount of pension which a member will enjoy on retirement in accordance with the terms of the Scheme. Any unintended change to the basis of that provision is a change to the effect of

the instrument not a mistake as to the consequence or collateral advantage which may enure (such as minimising tax or the like).'

f) The submissions for the representative beneficiary included that:

'235. The Representative Beneficiary then submitted that the factor which caused the claim to be brought was the unforeseen change to CPI in 2010. It could not be said therefore that the rule as drafted did not accord with the subjective intentions of the parties at the time, either because several of the witnesses had no difficulty with the new rule as RPI had been the rate previously used for indexation or because it reflected the practice under the old rule. It was therefore said that this was a case where the mistake was equivalent to the mistake as to fiscal consequences explained in Allnutt v Wilding and that rectification was not therefore available.'

g) Trower J concluded that:

'239...In my judgment, the process of consolidation with changes, which was one that was approved by all of the Trustees meant that for each of them their positive subjective intent was to make no changes to the member benefits described on the face of the 1996 DDR other than changes required by the law and changes to record the practice that had developed since the time of the 1996 DDR as reflected on the face of the schedule of changes.

240. The evidence is also compelling that all of the Trustees and the Company...appreciated that the schedule of changes was the document which was used by Hammonds to draw the attention of the Trustees, including those who could not remember, and the Company to the changes proposed to be introduced to the substance of the 1996 DDR. I am satisfied that each of the Trustees proceeded on the basis that there were to be no changes of substance unless they were included in the schedule of changes (or were otherwise expressly authorised).

244. Nor do I consider that the fact that a number of the Trustees ...appreciated that the wording of the rule itself cross-referred to a definition of Index (which itself made reference to RPI) and were conscious of the fact that RPI reflected the existing practice for granting pension increases makes any difference. In particular, it is not inconsistent with a subjective intent to maintain the status quo of linking pension increases to the statutory minimum rather than to give members the benefit of RPI come what may. I approach this question on the basis that all the Trustees and the Company knew that RPI was the normal starting point and that RPI was the statutory index on which LPI was based.

245. It is also the case that none of them appreciated that CPI might be introduced as an alternative statutory index, and to that extent did not foresee that there was a possibility that RPI might no longer be the minimum requirement for statutory indexation. Nonetheless there is no evidence that any of them appreciated that the legal effect of the 1996 DDR was that the pension increases were not hardwired to RPI, while the legal effect of the 2008 DDR was that they were. Making provision for such increases as the law required to be made is very different from tying an increase entitlement to such increase as the law required to be made at the time the new DDR was entered into, but they did not appreciate that there was such a distinction.

249...the Representative Beneficiary relied on the principle explained in Allnutt v Wilding in support of a submission that the mistake was as to consequence not legal effect and was

therefore not one which could attract the remedy of rectification. I disagree. The effect of the words used was to alter the benefit from one which made provision for pension increases by reference to the statutory provision (both as to indexation and revaluation), to one which had the legal effect of tying RPI into the entitlement to an increase, irrespective of what happened to the statutory minimum. This was a direct but unintended legal effect of the words used and was quite different to the commercial or fiscal consequences of that legal effect.'

42. Accordingly, whilst the individuals most involved on behalf of the trustees were aware that the 2008 Rules were drafted by reference to RPI, Trower J held this did not serve to displace what might be described as the 'dominant' or 'governing' intention that the 2008 Rules should not depart from the substantive position under the predecessor rules.

43. In *Mitchells & Butlers*:

- a) A 1988 deed and rules provided for the trustee to select an index for determining the annual rate of pension increases. Subsequent deeds and rules instead conferred power on the principal employer to decide the rate of increase.
- b) One issue that arose as part of the proceedings was the correct approach towards determining whether a later 2006 deed which repeated a rectifiable error made in an earlier 2002 deed should itself be rectified.
- c) In approaching this issue, Trower J referred to the passage of Warren J in *IBM* (as set out above) which concentrated on the precise nature of the parties' intention:

'19. Where there is a consolidating pension trust deed which repeats a rectifiable error made in an earlier deed or deeds, rectification may be available for the later deed or deeds if the evidence of intention at the time of its execution was that the consolidating deed should reflect the members' substantive legal entitlements under the earlier deed including the right to rectify. If, however, the only intention at the time of the consolidating deed was to replicate the language of the earlier deed as it then stood, a claim to rectify may not be established: IBM at paras 448–451. Ultimately, however, this is a question of interpreting the evidence and is thus a question of fact (IBM at para 449).

285. *In considering this question, the approach of Warren J in IBM was relied on by M&B...But it is important to appreciate that Warren J was approaching serial rectification on the basis of the facts of his case in which importantly he had previously held that (IBM at para 445), "there is no evidence of the subjective understanding of any of those attending the board meeting about the contents of the 1983 Trust Deed and Rules in relation to early retirement ." It seems to me that, if those whose subjective intention is in issue did have an understanding about the contents of the earlier deed, albeit one that was incorrect, a different intention again will be sufficient, namely an intention to reflect in new language the provisions of the 1996 deed and the 2002 deed continuing the substance of those provisions as their meaning was understood to be at the time of the 2006 deed and rules. Doubtless there would have been no specific understanding one way or the other in relation to many of the provisions, but if there were to be a specific understanding in relation to any particular provision (such as the pension increase provisions) that was not*

reflected in the language of the 2002 deed, that is likely to be an important consideration in assessing the relevant subjective intent.

287. *It follows that the important question is whether, when they gave their evidence that they intended no change, the decision-makers had what they believed to be an actual understanding of the meaning of the relevant parts of the 2002 deed. On the assumption that they did have such an understanding, did they intend no change from the way they understood this benefit as described in the Plan handbook or did they have in mind no change from the way it was in fact described in the 2002 rules? This is why, in order to answer that question, it will be necessary to look at the extent of their ingrained understanding as to how the pension increase provisions worked...*

346. *In my judgment, this material is entirely consistent with what I am satisfied was the generally held understanding that the Plan's pension increase provisions continued to provide for an annual increase at a guaranteed rate of 5% LPI and that M&B and the Trustee continued to have the aspiration of achieving the Aim. This had been the situation since before the 1996 deed and rules had been entered into and continued to be the situation after the 2006 deed and rules were entered into. In my judgment, it supports the existence of a continuing common intention by the decision-makers in 2006 that, although the 2006 deed and rules had not been intended to make substantive changes to the form of the 2002 deed and rules, this was because the decision-makers all had an actual, albeit erroneous, belief that the pension increase provisions had a meaning that was different from the true legal meaning and effect which they are now known to have. In these circumstances, I consider that the rectification sought by the Trustee should be granted.'*

44. Accordingly, Trower J made perhaps unusual factual findings as to the decision-makers' actual positive belief of a "generally held understanding" as to the meaning of the pension increase provisions. For the purposes of the claim to rectify the 2006 deed and rules, that remained the relevant 'dominant' or 'governing' intention.

(C) Positive / Negative Intention

45. Much of what has been set out in Section A on trust company duties and structures applies more widely to non-trust companies involved in occupational pension schemes. As a matter of law, those of a seniority to be involved in making major pensions decisions will owe either directors' duties or even simply e/ee duties to give proper consideration/exercise reasonable care and skill in respect of decisions they make and approving documents put before them. On the facts, likely to be careful and diligent people trying to do the right thing (even if disagreement over what "right thing" is). This creates a paradox.
46. The paradox can be illustrated with the usual structure of a "negotiator" i.e. a non-decision-making body (advisers or internal) who prepares or negotiates a proposed instrument, which is then put for approval to a board or relevant committee with authority. Assume the draft deed is put before the board, but its attention is not drawn to provision X of that deed.
47. The paradox becomes this: the more careful the board is about looking at the proposed instrument, the more difficult it will likely be to get rectification to remove X.

48. This difficulty arises for two reasons (touching on the analyses in the previous section):
- a) The fact the instrument was formally put to the board makes it likely (if not highly likely) that the board was the decision-maker, and it is the board intention that is relevant.
 - b) The more the board looked at the document or e.g. considered a red line which showed provision X being introduced, the more difficult it is to say either that the relevant intention is that of a negotiator which had been adopted by the board, or that some other general intention should be given effect to.
49. The Court's solution to this paradox, to date, has been a willingness to identify, as a finding of fact, different types of intention in order to justify rectification.
50. This has not been done explicitly: the general/specific distinction explained in section B above, and how and when one is given priority over the other, has not been explained. Rather, there has been a subtle shift in the authorities. The identification of the negotiator and his intention (as explained in Section A) is now being used less with a view to arguing that the negotiator's intention is directly decisive, but rather as one tool in the toolbox of different potential intentions within board that can be found to allow rectification.
51. Thus, when assessing the outcomes (at least in pensions cases), the statements of general principle in *Hawksford* and *Murray Holdings* on role of negotiator are rarely determinative. Rather, the courts (and indeed, counsel) have strived to find a board intention that will suffice to avoid a finding that there was no intention on the point such that the claim failed: as happened in *Lansing Linde v Alber* [2000] Pens LR 15. It should be remembered that *Lansing Linde* was a relatively early pensions rectification case and the various tools and techniques relating to the identification of intention had not been refined and deployed by the profession.
52. To understand the different types of intention and how they are used, I want to explore three examples and how they apply in a particular fact pattern of a board membership changing over time.
53. **"Negative" Intention only to make particular changes:**
- a) Posit a board that has the intention only to make changes A, B, C, which is specifically explained to board or that has resolved to make (because put in e.g. heads of terms or board paper). If the drafting then either carries forward or also makes change X, which was not put in the board paper or resolution, then the argument is that change X is a mistake because there is no intention to make that change.
 - b) There is good authority that the absence of discussion of change evidence that parties did not intend it: see *M&B* at [18]: *Crowhurst, Univar, FSHC* (at first instance: [2018] EWHC 1558 (Ch)).
 - c) Fact pattern of *M&B* is a good example: Trower J accepted evidence that any change to the pension increase rules in the 1996 Deed would have been an

“extraordinary event” (at [66]) and there would have been a “very strong reaction” had it been raised [68]. The board was told that there would be no change in the “balance of power”, which the judge found a change in the pension increase rule would have been (at [93]).

- d) This is an example of the use of a general intention (not to make a change) in the absence of any evidence of a specific intention.
- e) While the practical justice of the outcome is readily justifiable, conceptually this approach is not without its challenges. In principle (whether at a general or specific level) success in such a claim ought to require proof of the positive existence of a negative intention (i.e. the intention not to make a change) rather than just the absence of any intention because the rule was not thought about. This is logically problematic: absence of evidence is not evidence of absence. Rhetorically: how can there be an intention not to make a change about something you are unaware of?
- f) This may be an argument that this argument is easier to succeed on for a “deletion” rectification claim, striking out words that were not intended to be there, than a rectification claim that would put new or different words in. In that latter case, it is hard to see how an intention to introduce wording can be found.
- g) Even with a deletion claim, however, this argument succeeds because it is easier to find a generalised intention “not to make a change.”

54. Intending to Replicate Substantive Benefits/Terms of Scheme:

- a) This example is the converse of the previous example. Posit Deed 1 which states Y, Deed 2 introduces X in place of Y, and Deed 3 repeats X.
- b) In this case, the Court finds as a fact that the board intended to replicate or retain what was understood as the substantive scheme, and so intended Y throughout. As a result, Deed 3 as well as Deed 2 is rectified.
- c) As the example suggests, this intention arises most commonly when dealing with serial rectification, but its logic goes wider than that. It could in principle cover the situation where rule X was brought in first time but not brought to the board’s attention: there was an intention to retain what was understood to be the substantive scheme, and given rule X contradicts that, it should be rectified away.
- d) This finding of an intention is predicated on the board intending “something” in relation to the scheme when executed deeds 2 and 3. Summarising the question put by Warren J in *IBM* at [448]-[449] (set out above): if the board intended the true legal entitlement then there would be rectification of the rule, if the intention was to repeat the black and white rule there would be no rectification. When the potential options are phrased like that, it is perhaps not surprising that rectification ordered.
- e) There are two health warnings on the *IBM* intention approach to serial rectification:

- i. In *IBM* the individuals did not read the relevant deed. Warren J said that, if they had, there would be a “compelling” argument for no rectification if they did. This recognises the paradox at the heart of the problem.
 - ii. At the time, the relevant approach to intention was the objective rectification test from *Chartbrook*. This is of course now out of date, see: *FSHC*. The use of objective intention allows an intention more easily to be found. It is easier to say that the board must be taken to have intended something about this change, and so the binary choice between substantive rights and rules arises, than it is to prove a positive subjective intention. Post-*FSHC*, however, it is irrelevant whether objectively the board should be taken to have intended the rules or the substantive schemes. In a subjective intention world, they are not the only two options: most obviously, there could be no subjective intention at all on the relevant point. If so, how can you rectify?
- f) This issue arose in *M&B* at [286]-[287]. The evidence was that the decision makers intended no change in Deed 3: but is that no change in comparison to Deed 2 or to the substantive rights under Deed 2, viz. the right to rectify so as to reflect Deed 1? In the event, Trower J identified a different intention: on the facts, there was a positive but erroneous understanding about the terms of the relevant rule (i.e. that the board thought throughout that the rule was Y so even in deed 3 could rectify out X for Y). In those circumstances, on the facts of the case, the answer was easy: substantive rights. But, having found that specific intention, the conceptual issues around the *IBM* serial intention at a more general level did not arise.
 - g) This leaves the tantalising question of whether this analysis implicitly accepts that a binary *IBM* intention analysis may not be enough in the subjective intention world? The ingrained understanding in *M&B* may be relevantly fact-specific: one can imagine many types of rules that many times of boards would not have an ingrained understanding on that would allow serial rectification to be found on the facts. So it may be we could see more *Lansing Linde*-type refusals to rectify, because there was not the relevant intention.

55. Saw Words but thought they had different legal effect.

- a) The third intention, set out above by reference to *Re Butlins ST*, and which was applied in both *Univar* and *M&B*, is where the decision maker saw the words but was mistaken as to the legal effect of the words used.
- b) This is a specific intention based on a different fact pattern to the above: the decision-maker saw the words that effected change X, did in fact have a positive intention to use the very words adopted, but thought they meant something else.
- c) This is orthodox board decision making, just a variant on how the mistake is made. On the basis the error can properly be treated as one which relates to legal effect rather than commercial or fiscal consequences, the most difficult issue is likely to be obtaining the evidence of what the board in

fact thought. In the absence of an ingrained understanding about a particular rule, such as was the case in *M&B*, or advice that the rule meant Y instead of X, it may be difficult to show that board members independently all made the same error in respect of the meaning of the words.

56. It is useful to test these different techniques against a board that changes over time. If a board has institutional memory, or slow changes over time, one can see how new members can come in and learn the culture of the scheme and its benefits. In this situation they new members would either positively intend the learned status quo or adopt the intention of the longstanding members, justifying rectification.
57. One can see the position could be very different if, say on the employer side, if there was a hostile takeover and a whole new board was put in place thereafter. It does not seem farfetched to suggest that such a board would not, at least on certain fact patterns, have an intention to replicate whatever the substantive scheme was. Indeed, it may be the contrary. If the takeover entity's due diligence reported on the scheme's black and white rules (and assuming that due diligence did not identify any specific potential rectification claim), one can see that it may well be more likely that the new board without institutional memory had a positive intention to replicate the black and white terms of the scheme that they thought was part of the business they had bought.
58. Take the following examples:
 - a) The business was purchased on the bases that the employer was funding early retirement at 63, but there was in principle a rectification claim available to 60; or black and white terms the pension increase rule was 2.5% when it was rectifiable to 5%.
 - b) The Board would likely have positive intention next time it approved a deed that it intended the black and white rules, or, at least, the board would not have a positive intention at whatever level of generality to reinstate benefits that it did not know existed and were adverse to the employer's financial position.
 - c) In that situation, none of the three intentions above would apply:
 - i. the negative intention not to change is hard to make out because the board by definition did not know it was changing anything;
 - ii. similarly, in the absence of subjective knowledge of the existence of prior substantive benefits not on the face of the current deed, it is hard to see how there could be an intention to replicate the substantive benefits; and
 - iii. there was no misreading of the words, because they were taken at face value and there was no ingrained cultural or other reason to misread them.

59. Finally, two practical traps for the unwary arising out of these intention issues, given the varying ways in which a successful intention has been put over recent years:
- a) At the pleadings stage, pleading alternative inconsistent intentions means the claim is liable to be struck out: *CH Pearce v Stonechester* (1983). While it would not be a basis to strike out, if the delicately pleaded intention turned out to be different to that put perhaps more generally in a pre-action letter, it could lead to some uncomfortable cross examination and undermining of witnesses. The three intentions set out above are all different, as is the “intended what negotiator thought” intention. So the lawyers cannot be too careful too early.
 - b) At the evidence stage, the temptation is likely to be (especially given the disapplication of PD57AC to pensions rectification cases) to explore a witness’s evidence on intention by reference to different hypotheticals or to put the different potential types of intention to the witness to see what they say. These are complex concepts for lay witnesses (or anyone) to grapple with. While given the relaxation of the practice direction one may be able to get good evidence on paper, there is still considerable risk, as ever, in the box – and the more curated the evidence the greater the risk of it going wrong.

Nexus v RMT - the implications for pension schemes

Michael Tennet KC and Ram Lakshman

1. This paper focusses on the decision of the Supreme Court *Nexus v RMT* [2024] UKSC and its implications on the construction and rectification of pension schemes.

The Facts

2. The case related to a collective agreement between the Tyne and Wear Passenger Transport Executive, known as “**Nexus**”, and the National Union of Rail, Maritime and Transport Workers and Unite the Union (together, the “**Unions**”).
3. A collective agreement is an agreement negotiated between one or more unions (in this case the Unions) and an employer (in this case Nexus) which is incorporated into the contracts of employment of individual employees, and which can be varied through further negotiations between the union and the employer. The collective agreement binds members through the employment contracts into which it is incorporated and is not itself legally binding on the unions or employers who negotiated it.
4. As part of the collective agreement, Nexus and the Unions agreed to consolidate a so-called “productivity bonus” into the basic pay of the employees.
5. A group of employees brought a claim against Nexus in the Employment Tribunal arguing that on the proper construction of the collective agreement (and therefore their contracts of employment), their shift allowances (which were calculated as a basic uplift of their basic salary) should have reflected the productivity bonus as well. They succeeded as a matter of construction.
6. Rectification was not raised as an issue before the Employment Tribunal but having lost on construction, Nexus brought a separate claim against the Unions to rectify the collective agreement. The mistake was said to have been that the consolidation of the productivity bonus into basic pay was not intended to increase the shift allowance.
7. The individual employees whose contractual terms were being varied by the rectification claims were not made parties to the proceedings between Nexus and the Unions for rectification.

The Decision

8. The Supreme Court decided that Nexus must be entitled to rectify the collective agreement, for the following reasons:

- a. It would not be possible to rectify the individual contracts of employment which incorporated the terms of the collective agreement.
 - b. It was not possible to rectify employees' individual contracts of employment because the employees had made no mistake in entering into those contracts and they said exactly what they were intended to say.
 - c. Nor had the individual employees instructed or authorised the Unions to negotiate the collective agreement as their agents or on their behalf.
 - d. The fact that the collective agreement was not legally enforceable between Nexus and the Unions did not mean it was incapable of being rectified, provided that its terms determined the legal rights of third parties.
9. Unfortunately for Nexus, this did not mean that they could proceed as they were proposing:
- a. Although their individual employment contracts were not being rectified, the proper defendants to a claim for rectification would still be the individual employees because it was their legal rights that were being affected.
 - b. In contrast the Supreme Court left it open whether the Unions needed to be parties to the rectification claim.
 - c. The Supreme Court recognised that evidence from the Unions of their intention would be relevant in the proceedings between Nexus and its employees, but that was a different question to who should be the parties.
 - d. The Supreme Court agreed with Nexus that though the correct parties to a claim for rectification were before the Employment Tribunal, the Employment Tribunal itself lacked the jurisdiction to order rectification.
 - e. However, this did not justify Nexus failing to ask the Employment Tribunal to decide the issue of rectification.
 - f. On the contrary, the Supreme Court decided that Nexus should have raised the issue of rectification before the Employment Tribunal and the Employment Tribunal would have been able to deal with that issue by deciding whether the collective agreement was "rectifiable" rather than ordering it to be rectified.
 - g. Having failed to do this, Nexus was not entitled to join the employees to the current proceedings for rectification.

10. Significantly, as part of its reasoning as to why Nexus should have raised the issue of rectification before the Employment Tribunal, the Supreme Court (relying on the maxim “*equity regards as done what ought to be done*”) suggested that a court or tribunal could treat a document that was “rectifiable” (in the sense that a mistake had been made that would justify an order for rectification) as having been rectified, without the need to make an order for rectification. In particular, the Supreme Court held at [79]:

“If it is clear that, because of a relevant mistake, a document does not accurately record the true position between the parties to proceedings, a court is entitled in determining their mutual rights and obligations to treat the document as if it had been rectified without the need to make an order for rectification. We would add that this principle is not, as Snell’s Equity suggests, limited to “a defence of rectification.” As Breslauer illustrates, it applies equally where the claimant asserts that a document ought to be treated as if it had been rectified.”

Implications for pension schemes

11. Employees whose terms and conditions are determined by collective agreements have rights and obligations that are determined by documents which the employees themselves did not negotiate or become parties to. In a similar way, rights and obligations in a pensions context often derive from what might be termed third party documents- deeds and rules, deeds and rules of predecessor schemes, and transfer agreements- to which members, and potentially even the trustees and employers under a scheme may not themselves be parties.
12. Therefore, the suggestion by the Supreme Court that a document that is rectifiable can be relied on in its rectified form without an order for rectification actually being made is very significant in the pensions context. There are a large number of potential implications, five of which are considered below.
13. First, in order to obtain an order for rectification it is necessary for all the parties to the relevant document to be before the court. However, where all the parties to a document are not before the court, it is possible that one of the parties (or even a non-party) may seek a declaration that a particular document is “rectifiable” (and therefore to be treated as rectified) instead of an order for rectification. That would seem to be permissible in light of the Supreme Court’s approach. However, a number of issues arise, including the following:
 - a. The Supreme Court did not provide any guidance as to the standing of non-parties to seek a declaration that a particular document is rectifiable, or the limits (if any) of who can apply.
 - b. Nor did the Supreme Court provide any guidance as to how to protect and deal with the position of the parties to the original document who might

traditionally have been thought of as solely entitled to seek an order for rectification of it.

- c. There is also an open question as to how to protect the rights of others who might be affected by a declaration that a third party document is rectifiable if that document also affects persons other than the original parties to it and the parties to the current proceedings in which meaning is being contested. A prime example is the beneficiaries of a predecessor scheme which is said to be rectifiable by a person interested in a successor scheme.
14. Second, the decision of the Supreme Court potentially throws open a question which many pensions lawyers might have assumed had been put to bed some years ago when deeds of rectification ceased to be fashionable, namely do you actually need to go to court for a rectification order? A party may conclude that if a document is “rectifiable” then they are entitled to treat it as rectified (and that a court will take the same approach) such that there is no need for an order for rectification.
15. Third, the flip side of this opportunity is a concern as to whether parties can safely act on the basis of what a particular pension scheme document actually says. Post Nexus those advising on members’ rights and potential claims may routinely have to look beyond simply the words of a document and consider to what extent there might also be grounds for rectifying it (such that a Court would treat it as having been rectified).
16. Fourth, there is a question as to what happens when an original party to the document with a clear right to rectification decides they do not want to rectify it. Previously, when it was thought that an order was rectification was required, this did not give rise to any issues. But now there is a question as to whether the maxim “*equity sees as done that which ought to be done*” would apply such that it would be necessary to proceed on the basis that the document had been rectified.
17. Fifth, what this also means is that when advising on claims under rules (even rules to which the litigants are not parties) it is necessary to construe the rules but also consider if they might be rectifiable. If a party does not raise rectification at the outset then Nexus makes very clear that you might be precluded from doing so in a separate action at least against those bringing the claim (and anyone they represent). At the very least it would be advisable to get an agreed reservation of rights at an early stage.

Wills, wives, and wrecks: pensions as private client assets

Joseph Steadman and Benedict Evans

According to the Office for National Statistics, private pensions account for 35% of household wealth.³⁴ For many people, that means that their pension savings will be their most significant asset other than their home. And that is all the more so for high-net worth individuals and households: individuals in the highest wealth decile hold median private pension wealth of £627,000, as compared with the overall median of £125,000.

It is therefore unsurprising that pension scheme trustees often find themselves embroiled in private client disputes involving their members. In this paper, we consider three of the main contexts in which such disputes may arise – probate, divorce, and shareholder disputes – and discuss how a pension scheme trustee might respond.

Benefits beyond the grave: pensions and probate

Pension savings generally fall outside of a person's estate, and therefore do not pass by will or under the intestacy rules.³⁵ However, that does not mean that pension scheme trustees can safely ignore the law of succession.³⁶ Rather, it will often be important to identify – at least in overview – the assets that fall within a person's estate, and the beneficiaries who are entitled to them.

That is all the more so when those things may be in dispute, for instance because there is a dispute about the validity of a will, a claim for reasonable provision under the Inheritance (Provision for Family and Dependents) Act 1975, or a challenge to the validity of lifetime gifts made by the deceased.

³⁴ Office of National Statistics Wealth and Assets Survey (Round 8), covering the period April 2020 to March 2022

(<https://www.ons.gov.uk/peoplepopulationandcommunity/personalandhouseholdfinances/incomeandwealth/bulletins/totalwealthingreatbritain/april2020tomarch2022>).

³⁵ This is independent of the inheritance tax treatment of such pension savings, and so is unaffected by the proposal to subject certain pension savings to inheritance tax with effect from April 2027.

³⁶ For an overview of the principles governing the validity of wills see *Theobald on Wills* (19th Ed.) Ch. 3 and Ch.4; for an overview of the rules of intestate succession, see *Williams, Mortimer & Sunnucks, Executors, Administrators and Probate* (22nd Ed.) Ch 9 and Ch 73.

Why? Principally because the law of succession – and any dispute which may arise concerning the deceased's estate – will affect the exercise of trustees' discretionary powers regarding death benefits.

Although the existence and scope of such powers will depend upon the governing documents of the relevant pension scheme, in our experience most pension schemes will provide that a benefit becomes payable on a member's death and is subject to a discretionary power vested in the trustees. The trustees can then choose one or more persons to pay it to, and if they are paying it to more than one person, they can choose the amount each person gets.

As with the exercise of any discretionary power, the trustees' decision about who gets the death benefit can be analysed in three stages. First, the pre-conditions for the power being exercised; second, the scope of the power; and third, the proper exercise of the power itself.

Disputes regarding the deceased's estate may be relevant to each of these three stages, and failing to take into account such disputes may invalidate the trustees' exercise of their powers. We will consider each stage in turn.

Pre-conditions

The necessary circumstances for the power to appoint a death benefit to arise will depend on the governing documents of the relevant pension scheme. In general, the necessary conditions will each either concern the existence of a state of affairs as a matter of fact (e.g. that a member has died) or the existence of a state of affairs as a matter of judgment (e.g. that a member is incapacitated).

Should the trustees purport to exercise the power in circumstances where it has not in fact arisen as one of the factual preconditions has not been fulfilled, the trustees will act in breach of trust, however innocent the trustees' mistake as to the facts may be.³⁷

In most cases, there will be no difficulty in establishing whether or not the necessary factual preconditions (e.g. the death of a member) exist. In an unusual case, the trustees

³⁷ See *Lewin on Trusts* (20th Ed.) at 29-014.

could seek the determination of the court as to the existence of a primary fact or to bless the basis on which the trustees propose to act (i.e. a “*Re Benjamin* order”).

More unusually, should the exercise of the power depend on the existence of a state of affairs as a matter of judgment, the trustees are subject to the usual duties of trustees in reaching a judgment as to whether the relevant condition is fulfilled.³⁸

Scope of the power

The trustees may only exercise their discretion in favour of persons who fall within the class of objects. This concerns the scope of the power, rather than the exercise of a discretion; paying the wrong person – even if done reasonably – would in itself be a breach of trust.³⁹

Separately, the trustees are under an obligation to survey the class of beneficiaries. That is not a duty to search out every single person in what might be a very broad class. Rather, it is to make reasonable enquiries and at least to identify the main potential beneficiaries.

⁴⁰

A dispute regarding the deceased’s estate may affect the class of beneficiaries.

For example:

- the class will often include those with an interest in the deceased’s estate, which may be affected by whether the estate passes by will (and if so, which will and the proper construction of the terms of that will) or by intestacy;
- the class will often include the deceased’s personal representatives, which likewise may be affected by who (if anyone) is an executor and/or who is entitled to seek letters of administration;
- the class will often include “dependants”, and the factual question of dependency may arise for determination in the context of a claim under the 1975 Act.

Unless the intended recipient of the death benefit would on any view fall within the class of beneficiaries, the trustees will not be safely able to exercise their discretion until such dispute is resolved.

³⁸ The trustees must act honestly and in good faith, ask themselves the correct question, take into account all relevant matters and only relevant matters, and reach a decision open to a reasonable body of trustees.

³⁹ See *Lewin on Trusts* (20th Ed.) at 24-005.

⁴⁰ *Re Hay’s Settlement Trusts* [1982] 1 W.L.R. 202 at 209H-210D.

Relevant considerations

When approaching an exercise of discretion, trustees are required:⁴¹

- (a) to act responsibly and in good faith, giving genuine and responsible consideration to the exercise of their powers rather than acting irresponsibly, capriciously or irrationally;
- (b) to take only relevant matters into account, having taken reasonable steps to inform themselves of relevant matters and having taken appropriate advice;
- (c) to act impartially; and
- (d) not to act for an ulterior purpose.

Provided that these requirements are met, trustees have considerable latitude as to the conclusion they reach, which will not be lightly interfered with by the courts.⁴²

A dispute regarding the deceased's estate may affect the considerations to be taken into account under the second of these requirements.

For example:

- the deceased's wishes will usually be a relevant consideration,⁴³ and a dispute as to the validity of a will may affect whether or not (or the extent to which) that will can be taken to be a proper expression of such wishes⁴⁴; and
- the financial needs and circumstances of the beneficiaries will usually be relevant considerations,⁴⁵ and a dispute as to the validity of a will, a claim under the 1975

⁴¹ *Lewin on Trusts* at 29-033 – 29-064

⁴² *Edge v Pensions Ombudsman* [1999] Ch. 512 at 534

⁴³ *Lewin on Trusts*, 20th Ed (2020) at 29-045 to 050.

⁴⁴ NB: Trustees should generally be cautious about extrapolating from a deceased's wishes as to the estate that passes under his will to the deceased's wishes as to benefits that do not pass under his will. Whilst the contents of the will *might* be an indication of his wishes with regards to death benefits, this will not always be so and it may be that the deceased wished for those who do *not* receive legacies under his will to receive death benefits under the pension scheme.

⁴⁵ *Lewin on Trusts*, 20th Ed (2020) at 29-045 to 050.

Act or a challenge to the validity of lifetime gifts may affect those needs and the extent (if any) to which they will be met from the estate.

Depending on the circumstances, it may be possible to proceed notwithstanding the dispute, provided that the existence of the dispute and the possibility of either outcome is taken into account.

How should trustees respond?

There is no one-size-fits-all solution, and trustees should always consider taking advice. But we would suggest that the following are useful practical points for the trustees to bear in mind.

First, trustees should not rush to a decision.⁴⁶ They should take the time to investigate the circumstances, keeping an eye out for potential red flags which might make a dispute more likely. For example: is there an ex-spouse or ex-partner; is there a “blended” family with groups of step- or half- siblings; was the deceased elderly or unwell, so that there might be questions about capacity?

Second, trustees can take comfort from the probate process. A grant of probate, or of letters of administration with the will annexed, is conclusive as to the validity of the will (subject to any subsequent revocation).⁴⁷ And a claim under the 1975 Act may only be brought within 6 months of the grant.⁴⁸ If there is no pressing need to distribute funds, allowing this time to elapse may provide the trustees with a more stable basis for taking a discretionary decision.

Third, trustees should remain neutral in any underlying dispute. They should not seek themselves to determine disputed factual or legal issues, such as the validity of a will.

Fourth, where trustees have taken a decision and then become aware of new information, they should consider whether or not that gives rise to any claim to set aside the decision, whether on the basis of mistake or inadequate consideration.⁴⁹

⁴⁶ Whilst it will usually be tax-efficient for the trustees to exercise their discretion within two years of the deceased’s death (at least until the planned changes to the inheritance tax treatment of pension savings), this relative time-pressure should not drive the trustees into making an unsafe decision. They should at the very least seek advice on potential alternative options before doing so.

⁴⁷ *Theobald on Wills* (19th Ed.) at 37-010

⁴⁸ s.4: permission of the court is required for any applications after this 6-month period.

⁴⁹ Both of these grounds were considered by the Supreme Court in *Pitt v Holt* [2013] UKSC 26.

Finally, where there appears to be a real risk that trustees' exercise of discretion may be challenged, or where there is an uncertainty which requires resolution, they may wish to consider proactively raising the matter with the Court.⁵⁰

For richer, for poorer: pensions and divorce⁵¹

There are two key ways in which pension savings may be targeted in divorce proceedings. One is through a pension sharing order, which requires part of one spouse's pension savings to be transferred to the other spouse. Another is by way of enforcement of a financial order such as a lump sum or periodical payments order.

Pension sharing orders⁵²

A pension sharing order is an order requiring part of one spouse's pension savings to be transferred to the other spouse.⁵³ The receiving spouse's right to receive a share of the paying spouse's pension savings is known as a "pension credit."

When deciding whether or not to make a pension sharing order, the court will take into account the usual factors under the Matrimonial Causes Act 1973. That will not usually be a matter for the trustees, albeit that they may be asked to provide information (for example regarding the value of a member's pension benefits) in order to inform the court's decision.

The pension sharing order will say something like:

⁵⁰ In *Punter Southall Governance Services Limited v Benge* [2022] EWHC 193 (Ch), the trustee took the initiative and sought blessing of the challenged decision under the *Public Trustee v Cooper* jurisdiction. An alternative in some cases might be to seek a *Re Benjamin* type order for liberty to distribute on an assumed factual basis.

⁵¹ This section applies equally to the dissolution of civil partnerships, in which case references to spouses should be read to include civil partners.

⁵² Pension sharing orders were introduced from 1 December 2000 by the Welfare Reform and Pensions Act 1999. This included the addition of a new section 24B to the Matrimonial Causes Act 1973, giving power to make such an order. Some of the key relevant legislation (both primary and secondary) is summarised in the appendix to this paper. It is full of procedural trip-wires and time-limits, so it is – unfortunately – worth reading in full.

⁵³ Prior to the Welfare Reform and Pensions Act 1999, the longstanding (since 1859) jurisdiction to vary a nuptial settlement had been held to apply to a pension scheme in the seminal case of *Brooks v Brooks* [1995] 2 FLR 13. However, this more wide-ranging power is now no longer available where the pension scheme is a "pension arrangement" within the meaning of section 25D(3) of the Matrimonial Causes Act 1973. Query whether such an order may still be made to vary other pension schemes, such as those based offshore.

“There shall be a Pension Sharing Order in favour of the Applicant as to [X]% of the Respondent’s rights in the [X] Pension Scheme in the terms of the Annex to this Order.”⁵⁴

This is usually accompanied by a standard-form Pension Sharing Annex (known as Form P1) which is intended to provide the person responsible for the pension arrangement – usually, the trustees – with the information required by virtue of the Family Procedure Rules and the relevant legislation. (Unfortunately, these are not always fully completed, leaving the trustees to chase the member or the receiving spouse for the relevant information.)

The point at which a pension sharing order is likely to become relevant to the trustees is when it is served upon them. Disputes are most likely to arise regarding two issues: first, the valuation of the pension credit, and second, the mode of implementation. We will touch on each of these in turn.

As to valuation:

- There is little room for dispute where the relevant pension arrangement is an “ordinary” defined benefit or money purchase scheme, holding a diversified portfolio of investments.
- More interesting is where the relevant pension arrangement is a SSAS or SIPP, where the underlying investments may be more concentrated, more illiquid, or more specialist than in an “ordinary scheme.”
- To take one example—many SSASs hold as their primary asset the freehold or long leasehold of the sponsoring employer’s premises. An up-to-date expert valuation of that freehold or long leasehold interest will be required. But in the context of what will often be a family business, alongside a SSAS with family trustees, the receiving spouse may seek to contend that the family’s valuation cannot be trusted.

⁵⁴ Percentage based orders mean the risk of changes in pension values between the date of the order and the date of implementation is shared between the spouses. Nevertheless, as cases such as *T v T* [2021] 11 WLUK 216 make clear, significant changes in values of pension rights can cause disputes as to the fairness of the overall division of assets between the spouses.

- One solution to this, for trustees and their advisors, is to rely upon section 22(3) of the Trustee Act 1925.⁵⁵ That provides:

Trustees may, for the purpose of giving effect to the trust, or any of the provisions of the instrument, if any, creating the trust or of any statute, from time to time (by duly qualified agents) ascertain and fix the value of any trust property in such manner as they think proper, and any valuation so made shall be binding upon all persons interested under the trust if the trustees have discharged the duty of care set out in section 1(1) of the Trustee Act 2000.

- Note that the valuation will only be binding if:
 - the valuation is ascertained by duly qualified agents; and
 - the trustees have discharged the duty of care set out in section 1(1) of the Trustee Act 2000.

- That latter duty is to take:

“...such care and skill as is reasonable in the circumstances, having regard in particular—(a) to any special knowledge or experience that he has or holds himself out as having, and (b) if he acts as trustee in the course of a business or profession, to any special knowledge or experience that it is reasonable to expect of a person acting in the course of that kind of business or profession.”

- If the trustees purport to obtain such a binding valuation, the obvious potential lines of attack would be:
 - to allege that the trustees have acted under a conflict of interest (though it should be borne in mind that pension scheme rules often seek to exclude the application of the “no conflict” rule, at least to some extent); and/or
 - to allege that the trustees have breached their duty of care in instructing the valuer, for example by providing inaccurate or incomplete instructions.

⁵⁵ We have not been able to find a single reported case referring to section 22(3) of the Trustee Act 1925. However, each of the leading trusts textbooks refers to it as a means of trustees fixing the value of trust property, and we see no reason to doubt that it applies in this context.

- So the two key points for advising trustees in this scenario are to deal appropriately with any conflicts of interest and to take care in drafting instructions to the valuer.⁵⁶

As to implementation:

- The key here is the difference between “internal” and “external” implementation.
- The first option is for the trustees to provide the receiving spouse with pension benefits within the existing scheme (this may be particularly desirable where the spouse is already a member of that scheme).
- The second option is for the trustees to transfer the receiving spouse’s pension credit to another pension arrangement in the name of the receiving spouse. This may be an existing scheme, or one set up specifically for that purpose.
- Pension scheme rules often purport to provide a discretion for the trustees as between these two modes of implementation, but such discretion is constrained by the applicable secondary legislation. In practice:
 - If the receiving spouse (perhaps unusually) consents to both internal and external implementation, then the trustee may do either.
 - If the receiving spouse only consents to an external implementation, then the trustees must proceed with that external implementation.
 - If the receiving spouse only consents to an internal implementation, then the trustees must proceed with that internal implementation.
 - If the receiving spouse does not consent to either an internal or an external implementation then the trustees have a choice between the two.
 - However, without the cooperation of the receiving spouse, it is unlikely that an external implementation will be possible because the trustees will not have the details of the receiving scheme.
- The result – particularly in the context of a SSAS or SIPP linked to a family business – is that family trustees may find themselves required to proceed with an internal implementation for a receiving spouse, even where the relationship between the (ex-)spouse and the family has broken down.

⁵⁶ An attack on the valuer as not being a “duly qualified agent” would seem unlikely to succeed in all but the most egregious cases (e.g. instructing someone who is not in fact a valuer at all).

- An internal implementation is also more likely where a scheme is underfunded and only reduced cash equivalents are available for the purposes of external transfers.⁵⁷

Whilst pension sharing orders are a powerful tool in the hands of the court for effecting wealth redistribution between spouses, the burden of implementing them falls squarely upon pension scheme trustees. The complex primary and secondary legislation is fertile ground for disputes to arise, with the trustees as the immediate targets even where the underlying tension is between the two divorcing spouses.

Enforcement against pension savings⁵⁸

Where a financial order gives rise to an enforceable debt, the receiving spouse might seek to enforce against the paying spouse's pension savings.

The principal means of doing so is through an injunction requiring the member to draw down their benefits.⁵⁹

The seminal case on this is *Blight v Brewster* [2013] EWHC 165 (Ch), where Gabriel Moss QC (sitting as a deputy High Court Judge) decided that a member who was a judgment debtor could be compelled to take his pension lump sum so that it could be claimed by his creditors. The member was entitled to draw his pension (being over the minimum pension age) but had elected not to do so. The precise procedural mechanism was that the member was ordered to delegate his power of election to the judgment creditor's solicitor, whom the court authorised to make the election in the member's name. Immediately following the election, the sum payable from the pension fund would be subject to a third-party debt order.

⁵⁷ As was the case in *T v T* [2021] 11 WLUK 216.

⁵⁸ For a much more detailed treatment of this topic, see David Pollard & Joseph Steadman "*Pensions, personal bankruptcy and creditor recovery: recent developments*" (2023) 37(2) Trust Law International 89. Note that this article must now be read in light of *Cohen v O'Leary* [2023] EWHC 2939 (Ch) and *Manolete Partners Plc v White* [2024] EWCA Civ 1418, which we consider below.

⁵⁹ Many of the other usual enforcement routes are unavailable, for one reason or another. Charging orders cannot be made against rights under occupational pension schemes because of the prohibition on assignment section 91(1) of the Pensions Act 1995, and will often result in the automatic forfeiture of rights under the rules of personal pension schemes. Third party debt orders cannot be made because the member's rights do not give rise to a debt: they are contingent on the member electing to draw down benefits under the scheme. Attachment of earnings orders and income payments orders are only of practical use where there is a pension already in payment, and only then where there is sufficient income.

The same principle has been applied and extended in several cases.

- In *Bacci v Green* [2022] EWHC 486 (Ch) (upheld by the Court of Appeal [2022] EWCA Civ 1393), the order required not only an election to draw down benefits but also an election to revoke the member's enhanced protection.
- In *Brake v Guy* [2022] EWHC 1746 (Ch), HHJ Paul Matthews rejected a submission that a *Blight v Brewster* order was only available where there had been fraud.
- In *Maughan v Wilmot* [2020] EWHC 885 (Fam), Mostyn J affirmed that such an order was available in the Family Division.

Many of the cases emphasised the importance of assisting judgment creditors in recovering their debts. For example:

- In *Lindsay v O'Loughnane* [2022] EWHC 1829 (QB), Simon Birt QC held that there was a "starting presumption" in favour of enforcement and that it would be very unlikely that the judgment debtor's impecuniosity would be "decisive of the outcome."
- These points were cited with approval by HHJ Hodge KC at first instance in *Manolete Partners v White* [2023] EWHC 567 (Ch) and by Nicholas Thompsell in *Cohen v O'Leary* [2023] EWHC 2939 (Ch).

However, the recent case of *Manolete Partners plc v White* [2024] EWCA Civ 1418 identifies an important restriction on the ability to require a debtor to draw down benefits from their pension:

- The Court of Appeal held that section 91 of the Pensions Act 1995 prevented a *Blight v Brewster* order from being made against rights under occupational pension schemes (save where any of the exceptions in section 91(5) apply).
- The reason for this was that the effect of the order was to restrain the member from receiving their pension, because it would in practice be received by the judgment creditor, and this was not permitted under section 91.
- Lady Justice Asplin noted separately that the Judge's order had failed to take into account the trustees' discretions under the rules of the relevant scheme. The member in fact had no right to require the trustees (i) to sell the property which was the scheme's principal asset or (ii) to pay any particular level of income in any given year.
- That said, none of the judges sought to resile from the principle that the courts should in general seek to assist judgment creditors in recovering their debts. Rather, the point was that broad merits-based considerations could not override the protections created by Parliament applicable to occupational pension schemes (see [84]).

From the perspective of pension scheme trustees who are on the receiving end of these sorts of applications, the usual course will be a neutral one which seeks to ensure that the scheme can be administered in accordance with its governing provisions but without taking sides in the underlying dispute.⁶⁰

As recognised by Lady Justice Asplin in *Manolete*, trustees who have a discretion whether to accede to a member's request to draw down benefits will also have to decide whether, on the particular facts of each case, it is in the member's interests for benefits to be drawn down should an order be made compelling the member to make such a request. The question of whether it is in a member's interest for sums to be paid out to satisfy creditors is discussed in *Grupo Torras SA v Al-Sabah (No 6)* [2002] WTLR 337 (a case concerning a non-pension trust governed by Jersey law). Whilst this question will invariably be fact sensitive, considerations such as the likely treatment of pension rights in a bankruptcy and the alternative courses of action available to trustees (e.g. paying benefits to a spouse or family member) will usually be relevant.

Don't SSAS me: pensions and shareholder disputes

As we mentioned briefly above, it is fairly common for family (and similar) businesses to operate from premises which are owned by a related pension scheme, which will usually be either a small self-administered scheme (a "SSAS") or a self-invested personal pension (a "SIPP"; or sometimes several linked schemes known as a "group SIPP").⁶¹ The business pays rent to the pension scheme, and the rent provides an income to fund the members' pension pots.

This is all well and good (as well as being tax-efficient) when everyone is getting along. However, it can cause considerable headaches when disputes arise. For example:

- An individual who is in control of the company – perhaps the sole director, or the majority shareholder – may fail to make rental payments on time or at all to the pension scheme trustees. Cue a landlord and tenant dispute.
- A departing director or employee – perhaps a divorcing spouse, as alluded to above – may dispute the valuation of their benefits or the rate at which their pension is paid. Cue a pensions dispute.

⁶⁰ For an example of this, see *Bacci v Green* at [43].

⁶¹ The former is categorised as an occupational pension scheme, while the latter is – as the name suggests – categorised as a personal pension scheme.

- A departing shareholder – again, perhaps a divorcing spouse – may seek to complain about the past relationship between the company and the scheme. Cue a corporate dispute.
- A key individual may die, giving rise to a question of who should benefit from their estate and/or their interest under the scheme (and whether the answer to these two questions should be the same). Cue a probate dispute.

Moreover, it is entirely possible for some or all of these types of dispute to arise simultaneously. One big falling out with an influential individual – who perhaps has had *de facto* control over the company and the scheme for a long time – can quickly result in legal battles opening up on multiple fronts.

The key in these sorts of cases is to keep distinct in the legal analysis the various “hats” which each individual is wearing. Different principles are likely to apply in each case, be they principles of company law, landlord and tenant law, pensions law or something else. Then, having broken the dispute down into its component parts, come up with an overarching strategy to resolve each part of it. That is – of course – easier said than done. But that is what we lawyers are for!

Conclusion

Although pension scheme trustees will naturally wish to avoid becoming drawn into litigation involving their members, the significance of pension savings as private client assets means that they are a tempting target for various kinds of dispute. The key is to be aware of when and how such disputes might arise, and to take care – and take advice – when they do.

Appendix: summary of pension sharing legislation

By section 28 of the Welfare Reform and Pensions Act 1999, upon the taking effect of a pension sharing order (amongst other orders), section 29 applies.

Section 29 provides (in part):

(1) On the application of this section—

(a) the transferor's shareable rights under the relevant arrangement become subject to a debit of the appropriate amount, and

(b) the transferee becomes entitled to a credit of that amount as against the person responsible for that arrangement.

(2) Where the relevant order or provision specifies a percentage value to be transferred, the appropriate amount for the purposes of subsection (1) is the specified percentage of the cash equivalent of the relevant benefits on the valuation day.

(7) For the purposes of this section, the valuation day is such day within the implementation period for the credit under subsection (1)(b) as the person responsible for the relevant arrangement may specify by notice in writing to the transferor and transferee.

(8) In this section—

"relevant arrangement" means the arrangement to which the relevant order or provision relates;

"relevant order or provision" means the order or provision by virtue of which this section applies;

"transfer day" means the day on which the relevant order or provision takes effect;

"transferor" means the person to whose rights the relevant order or provision relates;

"transferee" means the person for whose benefit the relevant order or provision is made.

Section 30 provides for the making of regulations about the calculation and verification of cash equivalents for the purposes of section 29. That provision is made in the Pension Sharing (Valuation) Regulations 2000 which in turn provides for valuation to be made by reference to the Occupational Pension Schemes (Transfer Value) Regulations 1996, subject to various refinements. In essence, the valuation should be the same as when a member requests a cash equivalent for the purposes of exercising their statutory right to transfer out of an occupational pension scheme.

Section 33 requires a person subject to liability in respect of a pension credit to discharge his liability before the end of the implementation period for the credit, failing which an extension must be sought from the Pensions Regulator (otherwise a civil penalty may be applied under section 10 of the Pensions Act 1995).

Section 34 provides:

(1) *For the purposes of this Chapter, the implementation period for a pension credit is the period of 4 months beginning with the later of—*

(a) the day on which the relevant order or provision takes effect, and

(b) the first day on which the person responsible for the pension arrangement to which the relevant order or provision relates is in receipt of—

(i) the relevant documents, and

(ii) such information relating to the transferor and transferee as the Secretary of State may prescribe by regulations.

(2) *The reference in subsection (1)(b)(i) to the relevant documents is to copies of—*

(a) the relevant order or provision, and

(b) the order, decree or declarator responsible for the divorce, dissolution or annulment to which it relates [...]

(3) *Subsection (1) is subject to any provision made by regulations under section 41(2)(a).*

(4) *The Secretary of State may by regulations—*

(a) make provision requiring a person subject to liability in respect of a pension credit to notify the transferor and transferee of the day on which the implementation period for the credit begins;

(b) provide for this section to have effect with modifications where the pension arrangement to which the relevant order or provision relates is being wound up;

(c) provide for this section to have effect with modifications where the pension credit depends on a pension sharing order and the order is the subject of an application for leave to appeal out of time.

(5) *In this section—*

“relevant order or provision”, in relation to a pension credit, means the pension sharing order or provision on which the pension credit depends;

“transferor” means the person to whose rights the relevant order or provision relates;

“transferee” means the person for whose benefit the relevant order or provision is made.

Regulations concerning the provision of information by and to the transferee are made in the Pensions on Divorce etc (Provision of Information) Regulations 2000.

Regulation 5 sets out the information which must be provided by the transferee to the person responsible for the pension arrangement before the implementation period may begin under section 34(1). That information includes:

(a) in relation to the transferor—

- (i) all names by which the transferor has been known;*
- (ii) date of birth;*
- (iii) address;*
- (iv) National Insurance number;*
- (v) the name of the pension arrangement to which the pension sharing order or provision relates; and*
- (vi) the transferor's membership or policy number in that pension arrangement;*

(b) in relation to the transferee—

- (i) all names by which the transferee has been known;*
- (ii) date of birth;*
- (iii) address;*
- (iv) National Insurance number; and*
- (v) if the transferee is a member of the pension arrangement from which the pension credit is derived, his membership or policy number in that pension arrangement;*

(c) where the transferee has given his consent in accordance with paragraph 1(3)(c), 3(3)(c) or 4(2)(c) of Schedule 5 to the 1999 Act (mode of discharge of liability for a pension credit) to the payment of the pension credit to the person responsible for a qualifying arrangement—

- (i) the full name of that qualifying arrangement;*
- (ii) its address;*
- (iii) if known, the transferee's membership number or policy number in that arrangement; and*
- (iv) the name or title, business address, business telephone number, and, where available, the business facsimile number and electronic mail address*

of a person who may be contacted in respect of the discharge of liability for the pension credit;

(e) any information requested by the person responsible for the pension arrangement in accordance with regulation 4(2)(i) or (k).

Regulation 7(1) sets out the information which must be provided by the person responsible for the pension arrangement to the transferee once a pension sharing order has been received, namely:

(a) a notice in accordance with the provisions of regulation 7(1) of the Charging Regulations (charges in respect of pension sharing activity—postponement of implementation period);

(b) a list of information relating to the transferor or the transferee [...] which—

(i) has been requested in accordance with regulation 4(2)(i) and (k), or, where appropriate, 6(2)(c), or should have been provided in accordance with regulation 5;

(ii) the person responsible for the pension arrangement considers he needs in order to begin to implement the pension sharing order or provision; and

(iii) remains outstanding;

(c) a notice of implementation; or

(d) a statement by the person responsible for the pension arrangement explaining why he is unable to implement the pension sharing order or agreement

Regulation 7(2) provides:

(2) The information specified in paragraph (1) shall be furnished in accordance with that paragraph within 21 days beginning with—

(a) in the case of sub-paragraph (a), (b) or (d) of that paragraph, the day on which the person responsible for the pension arrangement receives the pension sharing order or provision; or

(b) in the case of sub-paragraph (c) of that paragraph, the later of the days specified in section 34(1)(a) and (b) of the 1999 Act (implementation period).

Regulation 9 empowers the Pensions Regulator to impose civil penalties (which may be up to £200 in the case of an individual trustee or £,1000 in the case of a corporate trustee) for failure to provide such information.

Section 35 of the Welfare and Pensions Reform Act 1999 provides that Schedule 5 (which makes provision about how liability in respect of a pension credit may be discharged) has effect.

Paragraph 1 of Schedule 5 is the key paragraph. It provides:

(1) This paragraph applies to a pension credit which derives from—

(a) a funded occupational pension scheme, or

(b) a personal pension scheme.

(2) The trustees or managers of the scheme [...] may discharge their liability in respect of the credit by conferring appropriate rights under that scheme on the person entitled to the credit—

(a) with his consent, or

(b) in accordance with regulations made by the Secretary of State.

(3) The trustees or managers of the scheme [...] may discharge their liability in respect of the credit by paying the amount of the credit to the person responsible for a qualifying arrangement with a view to acquiring rights under that arrangement for the person entitled to the credit if—

(a) the qualifying arrangement is not disqualified as a destination for the credit,

(b) the person responsible for that arrangement is able and willing to accept payment in respect of the credit, and

(c) payment is made with the consent of the person entitled to the credit, or in accordance with regulations made by the Secretary of State.

(4) For the purposes of sub-paragraph (2), no account is to be taken of consent of the person entitled to the pension credit unless—

(a) it is given after receipt of notice in writing of an offer to discharge liability in respect of the credit by making a payment under sub-paragraph (3), or

(b) it is not withdrawn within 7 days of receipt of such notice.

Regulations are made concerning the discharge of pension credits by the Pension Sharing (Implementation and Discharge of Liability) Regulations 2000. In particular, regulation 7 provides:

(1) The circumstances in which the trustees or managers of a scheme may discharge their liability in respect of a pension credit in accordance with sub-paragraph (2)(b) of that paragraph are where—

(a) the person entitled to the credit has failed to provide his consent in accordance with paragraph 1(2)(a) and (4) of that Schedule; and

(b) the circumstances set out in paragraph 1(3) of that Schedule do not apply.

(2) The circumstances in which the trustees or managers of a scheme [...] may discharge their liability in respect of a pension credit in accordance with sub-paragraph (3)(c) of that paragraph are where—

(a) the person entitled to the credit has failed to provide his consent in accordance with paragraph 1(2)(a) of that Schedule; and

(b) the trustees or managers of the scheme have not discharged their liability in accordance with paragraph (1) above.

Wilberforce contacts

Michael Tennet KC

Silk: 2006

Email: mtennet@wilberforce.co.uk

Jonathan Hilliard KC

Silk: 2016

Email: jhilliard@wilberforce.co.uk

Tom Robinson KC

Silk: 2025

Email: trobenson@wilberforce.co.uk

Jennifer Seaman

Call: 2007

Email: jseaman@wilberforce.co.uk

Jonathan Chew

Call: 2010

Email: jchew@wilberforce.co.uk

Ram Lakshman

Call: 2020

Email: rlakshman@wilberforce.co.uk

Paul Newman KC

Silk: 2009

Email: pnewman@wilberforce.co.uk

Andrew Mold KC

Silk: 2020

Email: amold@wilberforce.co.uk

Edward Sawyer

Call: 2001

Email: esawyer@wilberforce.co.uk

James McCreath

Call: 2009

Email: jmccreath@wilberforce.co.uk

Joseph Steadman

Call: 2015

Email: jsteadman@wilberforce.co.uk

Benedict Evans

Call: 2024

Email: bevans@wilberforce.co.uk

For information about Wilberforce Chambers and our services please contact:

Nicholas Luckman (Practice Director)

Direct: +44 (0) 20 7304 2856

Mobile: +44 (0) 7964 101 636

Email: nluckman@wilberforce.co.uk

Hayley Duggan

(Head of Marketing & BD)

Direct: +44 (0)20 7304 2899

Mobile: +44 (0)7866 983243

Email: hduggan@wilberforce.co.uk

Wilberforce Chambers

8 New Square

Lincoln's Inn

London, UK

WC2A 3QP

Tel: +44 (0) 20 7306 0102

Fax: +44 (0) 20 7306 0095

wilberforce.co.uk

Members of Chambers

Brian Green KC Head of Chambers	KC 1997	Call 1980	John Child		Call 1966
Jonathan Seidler KC Deputy Head of Chambers	KC 2003	Call 1985	David Pollard	Solicitor 1980	Call 2017
John Martin KC	KC 1991	Call 1972	Gabriel Fadipe		Call 1991
Stuart Isaacs KC	KC 1991	Call 1975	Graeme Halkerston		Call 1994
Lawrence Cohen KC	KC 1993	Call 1974	Edward Sawyer		Call 2001
Ian Croxford KC	KC 1993	Call 1976	Stephen Brown	Solicitor 1991	Call 2013
Robert Ham KC	KC 1994	Call 1973	Daniel Lewis		Call 2003
Terence Mowschenson KC	KC 1995	Call 1977	Emily McKechnie		Call 2005
David Phillips KC	KC 1997	Call 1976	Sebastian Allen		Call 2006
Michael Furness KC	KC 2000	Call 1982	James Walmsley		Call 2007
John Wardell KC	KC 2002	Call 1979	Jennifer Seaman		Call 2007
Alan Gourgey KC	KC 2003	Call 1984	Benjamin Faulkner		Call 2008
John McGhee KC	KC 2003	Call 1984	Anna Littler		Call 2008
Gilead Cooper KC	KC 2006	Call 1983	James McCreath		Call 2009
Michael Tennet KC	KC 2006	Call 1985	Emer Murphy		Call 2009
Thomas Lowe KC	KC 2008	Call 1985	Tom Roscoe		Call 2010
James Ayliffe KC	KC 2008	Call 1987	Jonathan Chew		Call 2010
Lexa Hilliard KC	KC 2009	Call 1987	Harriet Holmes		Call 2011
Paul Newman KC	KC 2009	Call 1991	Alice Hawker		Call 2011
Joanne Wicks KC	KC 2010	Call 1990	Bobby Friedman		Call 2011
Martin Hutchings KC	KC 2011	Call 1986	Simon Atkinson		Call 2011
Thomas Grant KC	KC 2013	Call 1993	Sri Carmichael		Call 2012
Fenner Moeran KC	KC 2014	Call 1996	Jack Watson		Call 2012
Marcia Shekerdemian KC	KC 2015	Call 1987	Jessica Brooke		Call 2012
Clare Stanley KC	KC 2015	Call 1994	Michael Ashdown		Call 2013
Tim Penny KC	KC 2016	Call 1998	James Goodwin		Call 2013
Jonathan Davey KC	KC 2016	Call 2003	Rachael Earle		Call 2013
Jonathan Hilliard KC	KC 2016	Call 2003	Elizabeth Houghton		Call 2014
Max Mallin KC	KC 2017	Call 1993	Tim Matthewson		Call 2014
Julian Greenhill KC	KC 2018	Call 1997	Jamie Holmes		Call 2014
Tiffany Scott KC	KC 2018	Call 1998	Joseph Steadman		Call 2015
Nikki Singla KC	KC 2018	Call 2000	Tara Taylor		Call 2015
James Bailey KC	KC 2019	Call 1999	Mark Galtrey		Call 2015
Zoë Barton KC	KC 2020	Call 2003	Daniel Scott		Call 2016
Andrew Mold KC	KC 2020	Call 2003	Jia Wei Lee		Call 2017
Thomas Robinson KC	KC 2025	Call 2003	Francesca Mitchell		Call 2017
			Roxane Reiser		Call 2017
			Daniel Petrides		Call 2018
			Lemuel Lucan-Wilson		Call 2018
			Caspar Bartscherer		Call 2019
			Ram Lakshman		Call 2020
			Benjamin Slingo		Call 2020
			John Grocott-Barrett		Call 2021
			Samuel Cathro		Call 2021
			Theo Dixon		Call 2021
			Daniel Jukes		Call 2021
			Andreas Giannakopoulos		Call 2022
			Ernest Leung		Call 2022
			James Man	(HK Bar: 2014)	Call 2023
			Benedict Evans		Call 2024
			Caroline Furze (unregistered barrister) Door Tenant		Call 1992

Full-Time Arbitrators:

Jules Sher KC	KC 1981	Call 1968
Sir Paul Morgan	KC 1992	Call 1975

Associate Members

Professor Lionel Smith
Professor Ben McFarlane

+44 (0)20 7306 0102 | wilberforce.co.uk

Find us on [LinkedIn](#) and [YouTube](#)