Neutral Citation Number: [2013] EWHC 2536 (Ch)

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION

Claim No: HC11C02515

Rolls Building,
Royal Courts of Justice,
London EC4A 1NL

MR EDWARD BARTLEY JONES QC (sitting as a Deputy High Court Judge)
Thursday 15 August 2013

IN THE MATTER of The Konica Minolta Business Solutions (UK) Pension Plan

BETWEEN:-

KONICA MINOLTA BUSINESS SOLUTIONS (UK) LIMITED

Claimant

and

(1) MERRILINA LUCY APPLEGATE
(2) PHILLIP LLOYD JOHN
(3) PETER RAYMOND HOLTON
(4) PETER MARGRAVE
(5) ERIC GREEN
(6) DIANA RUTH BRUMMELL
(7) AMARNATH ANTHONY MISTRY
(As trustees of The Konica Minolta Business Solutions (UK) Pension Plan)
(8) RANDAL HUGHES
(As representative beneficiary)

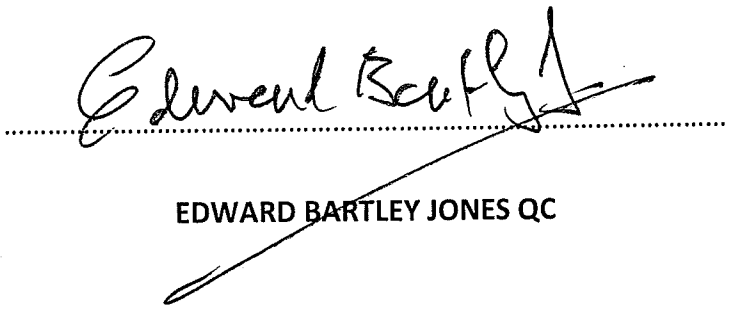
Defendants

Mr Fenner Moeran (instructed by Shoosmiths LLP) for the Claimant
The First to Seventh Defendants did not appear and were not represented
Miss Emily Campbell (instructed by DLA Piper UK LLP) for the Eighth Defendant

Hearing date: 8 May 2013

APPROVED JUDGMENT

I direct that no official shorthand note should be taken of this Judgment and that copies of this version as handed down may be treated as authentic.



EDWARD BARTLEY JONES QC

1. **Introduction**

This is an application for summary judgment under CPR Part 24 for rectification of a definitive deed which formerly governed an occupational pension scheme. It would appear that summary judgment applications of this nature are becoming a relative commonplace (see, eg, Industrial Acoustics Company Limited v. Crowhurst [2012] Pens. L. R. 371 (Vos J) and Misys Limited v. Mysys Retirement Benefits Transfers Limited [2012] EWHC 4250 (Ch) (Briggs J)).

2. The scheme in question is now known as the Konica Minolta Business Solutions (UK) Pension Plan. It has, in the past, gone through a whole variety of changes of name. None of these changes of name are of any relevance. I shall refer to it as "the Scheme". The Scheme is a defined benefits (colloquially "final salary"), Revenue registered (formerly Inland Revenue exempt approved) occupational pension scheme. It also provides defined contribution (colloquially "money purchase") benefits but these are not relevant to the claim for rectification.

3. The Scheme was constituted by a Declaration of Trust dated 8 October 1973 as amended by a Deed of Amendment dated 12 May 1994. New Rules were adopted on 23 February 1987. However, under powers of amendment contained within the Scheme the primary documentation of the Scheme was amended in 2006 by a new Definitive Trust Deed and Rules dated 23 January 2006 ("the 2006 Rules").

4. It is Rule 12.3 of the 2006 Rules which is said to contain a manifest error which requires rectification. The alleged error is said to lie in the conferring of a wholly unintended windfall benefit on Category B Members.

5. The parties to the 2006 Rules were (1) Konica Minolta Business Solutions (UK) Limited ("Konica") and (2) the then trustees of the Scheme. Konica entered into the 2006 Rules as the sponsoring employer of the Scheme. It is the claimant in the present proceedings. The first to seventh defendants to the present proceedings are the present trustees of the Scheme (there have been amendments to the parties during the course of these proceedings to reflect changes in the trustees of the Scheme). The eighth defendant ("Mr Hughes") is a Category B member of the Scheme who would undoubtedly be prejudiced by the rectification sought. Konica seeks (and none of the defendants oppose) the making of a representation order under CPR Part 19.7(2) whereby Mr Hughes is appointed for the purposes of this summary judgment application to represent all persons who are or may be or become entitled to an interest in the assets of the Scheme and in whose interest it may be to argue against the rectification sought. Such a representation order was made by Asplin J on the hearing of the Preliminary Issues (to which I shall refer

below) but limited to those Preliminary Issues. I shall make such a representation order subject to being satisfied that Mr Hughes receives adequate protection in costs (a matter not addressed in the present draft Order before me). I will also appoint Konica under CPR Part 19.7(2) to represent all other persons who are or may be or become entitled to an interest in the assets of the Scheme and who are not represented by Mr Hughes.

6. The first to seventh defendants adopt a neutral position on the application for summary judgment and, with a view to saving costs to the Scheme, did not appear and were not represented before me. Mr Hughes, after having taken detailed legal advice and, in particular, obtaining the Opinion of Miss Emily Campbell of counsel did not oppose Konica's application for summary judgment. In a way that was not surprising since the true battle had already been fought on the trial of the Preliminary Issues before Asplin J. Mr Hughes had argued before Asplin J that the rectification now being sought would cause the method of calculation of pension benefits in respect of early leavers to contravene the preservation requirements as contained in section 74 of the Pension Schemes Act 1993. Therefore, the rectification being sought could not be granted. Mr Hughes' contentions were rejected by Asplin J in a detailed reserved judgment ([2012] EWHC 3741 (Ch); [2013] ICR 625).

7. In a witness statement dated 3 May 2013, made in response to the summary judgment application, Mr Hughes indicated that he had been provided with the confidential Opinion of Miss Campbell and that, having read and understood Miss

Campbell's Opinion, he had instructed his solicitors not to oppose the summary judgment application. The Opinion of Miss Campbell was provided as a sealed confidential Exhibit to Mr Hughes' witness statement. Mr Fenner Moeran (who appeared before me on behalf of Konica) expressed himself to be perfectly content that I should read Miss Campbell's Opinion on a confidential basis without he, or Konica, having any sight thereof. He also indicated that he would withdraw from open Court when Miss Campbell came to address me (which is exactly what he and all his clients did). I must confess that I had an initial degree of unease with this procedure which, as I now understand the position, is becoming increasingly frequent on applications for summary judgment for rectification of pension schemes. A similar course, I subsequently discovered, had been followed in Industrial Acoustics Company Limited v. Crowhurst (see paragraph 34) and in Misys Limited v. Mysys Retirement Benefits Transfers Limited (paragraph 20). Neither Vos J nor Briggs J sought in any way to criticise this practice. Thus I was content to adopt this practice when each of Mr Moeran and Miss Campbell informed me that it had been adopted in these two cases.

8. Finally, I must remind myself that I am not conducting a trial of the rectification claim. I am hearing a summary judgment application. I can grant summary judgment only if I consider (1) that Mr Hughes has no real prospect of successfully defending Konica's claim for rectification and (2) that there is no other compelling reason why the rectification claim should be disposed of at a trial.

The Konica Peter Llewellyn Retirement Benefits Scheme

9. The catalyst for the error said to have occurred in Rule 12.3 was the merger into the Scheme of another occupational pension scheme known as the Konica Peter Llewellyn Retirement Benefits Scheme ("the Llewellyn Scheme").

10. The Llewellyn Scheme was also a defined benefits scheme. It was created by an Interim Trust Deed dated 3 October 1975 and was at all material times governed by the revised rules adopted by Deed of Amendment dated 18 October 1982 ("the 1982 Rules"). The benefits taken by the members of the Llewellyn Scheme under the 1982 Rules are of considerable importance to the present matter.

11. Rule 1 of the 1982 Rules defined "Normal Retirement Date" ("NRD") as meaning the 65th birthday of a male member and the 60th birthday of a female member. In fact, there were never any female members of the Llewellyn Scheme.

12. Rule 1 of the 1982 Rules also:-

(1) defined "Service" as meaning permanent employment with any Participating Employer; and

(2) defined "Future Service" as meaning the period of continuous Service from the first day of the month in which a member became a member of the Llewellyn Scheme until the last day of the month in which he ceased to be in Service or reached NRD (whichever was earlier). It follows from the terms of

this definition that "Future Service" included within itself (but was in no way limited to) completed Service.

13. Rule 4(a)(1) of the 1982 Rules provided that a member who retired from Service at NRD should be entitled to a pension of such an amount as was necessary to provide an Aggregate Pension of two-thirds of his Final Scheme Salary, provided that he had completed at least 10 years' Service. A member who had completed less than 10 years' Service when he retired at NRD was to be entitled to a pension of such amount as was necessary to provide an Aggregate Pension in accordance with the Table set out in Rule 4(a)(1). That Table was set out in paragraph 14 of the judgment of Asplin J and I need not repeat it. However, for members joining the Llewellyn Scheme after 17 March 1987 the Table set out in Rule 4(a)(1) did not take effect according to its terms. The accrual of pension benefit under the Table was capped at no more than 1/30th of Final Scheme Salary for every year of pensionable service. This was because of an Inland Revenue restriction on benefit accrual introduced in 1987.

14. Rule 4(b)(1) governed the position of members who retired from Service at any time before NRD owing to Incapacity (as defined). Such a member was to be entitled to an immediate pension calculated in accordance with Rule 4(a)(1) as if he were retiring at NRD, but reduced in the ratio of his completed Future Service to his potential Future Service to NRD ("the ratio reduction"). Again, of course, the Aggregate Pension was not to exceed two-thirds of Final Remuneration.

15. Finally, and most importantly, Rule 13 governed the position of members of the Llewellyn Scheme who withdrew from Service before NRD. Rule 13(4) provided for the circumstances where a member left Service, otherwise than by retirement or death, and where the provisions of Rules 13(1) to (3) were not engaged. Such a member was to be entitled to a pension at NRD of an annual amount equal to the immediate pension to which he would have been entitled if at the time of his leaving Service he were retiring from Service owing to Incapacity.

16. So Rule 13(4) differed from Rule 4(b)(1) in that the Rule 13(4) pension was only payable at and from NRD (whereas the pension payable under Rule 4(b)(1) was payable as and from the date of retirement owing to Incapacity). But, subject to this, the pension payable under Rule 13(4) was calculated in the same way as the pension payable under Rule 4(b)(1) so that both the pensions payable under Rule 4(b)(1) and Rule 13(4) were subject to the ratio reduction.

The 2002 Transfer

17. In 1987 Konica acquired the whole of the share capital of Peter Llewellyn (Photocopying) Limited which was the Principal Employer of the Llewellyn Scheme.

18. In 2002 the Llewellyn Scheme was merged into the Scheme by a bulk transfer as recorded in a Transfer Deed dated 10 January 2002 ("the 2002 Deed"). Clause 3.2 of the 2002 Deed provided that the Scheme would provide the former Llewellyn Scheme members with "the Benefits" (as defined) as and from the Merger Date (11 January 2002). Clause 1.1 of 2002 Deed defined "the Benefits" as follows:-

".. the same benefits and entitlements (subject to the same terms and conditions) as those being or to be provided to and/or in respect of the Transferring Members under the provisions of the Transferring Scheme in force on the Merger Date.."

Clause 1.1 also defined "the Transferring Members" as meaning the pensioner, deferred and active members of the Transferring Scheme as at the Merger Date (so that there would be no members remaining under the Transferring Scheme) and also defined "the Transferring Scheme" as meaning the Llewellyn Scheme.

19. Accordingly, as and from 11 January 2002 the former members of the Llewellyn Scheme enjoyed benefits as members of the Scheme which entirely mirrored the benefits they had enjoyed under the Llewellyn Scheme.

The 2006 Rules

20. It is clear that, objectively analysed, the 2006 Rules were adopted for the purpose of consolidating the various separate Rules and other provisions of the Scheme in force immediately prior to the adoption of the 2006 Rules.

21. "Category B Members" were defined in Schedule 1 to the 2006 Rules as members who were entitled to benefits under the Scheme determined on the basis of the benefit structure that was in place under the Llewellyn Scheme before its merger with the Scheme on 11 January 2002. So Category B Members comprised, and

comprised only, those members of the Scheme who were pensioner, deferred or active members of the Llewellyn Scheme as at 11 January 2002.

22. As to the benefits and entitlements conferred on Category B Members under the 2006 Rules I need deal only with the provisions of Rule 12.3(since this is the only provision in the 2006 Rules where it is said that an error occurred in the consolidation process). The context for Rule 12.3 is Rule 12.1 which reads as follows:-

> *"Subject to rule 23 (individual transfers out) and rule 26 (bulk transfers out), an Active Member who leaves Pensionable Service and does not receive an immediate pension will become a Deferred Pensioner and will instead be granted a deferred pension provided that he has completed at least 2 years' Qualifying Service or in such other circumstances as are permitted under the Preservation Laws."*

23. Clause 12.3 was in the following terms:-

> *"The deferred pension will be payable for life from Normal Pension Date and:-*
>
> - *[Irrelevant as it relates only to Category A and Category C Members]*
> - *For a Category B Member will be the higher of:*
>
> *(a) a deferred pension calculated at the date of leaving as described in rule 9 (normal retirement) and then increased before payment by the percentage required by the Regulation* [sic] *Laws; and*

(b) a deferred pension calculated at the date of leaving as described in rule 9 (normal retirement) but using the Final Pensionable Salary at the date of leaving Pensionable Service and the Pensionable Service he would have received had he retired at Normal Pension Date multiplied by

$$\frac{CPS}{PPS}$$

where:

CPS = is the Pensionable Service the Category B Member completed at the date of leaving; and

PPS = is the Pensionable Service he would have received had he retired at Normal Pension Date."

24. Under Rule 9 (normal retirement) Category B Members' Benefits are as they were under the Llewellyn Scheme. (I should, perhaps, point out that Rule 9 was not an absolute mirror of rule 4(a)(1) of the 1982 Rule so far as those who joined the Llewellyn Scheme on and after 17 March 1987 and had less than 7 years' Service were concerned. However, there were no Category B Members who were affected by this as no-one joined the Llewellyn Scheme after 1 June 1989).

25. Sub-paragraph (b) of Rule 12.3 conferred an equivalent deferred pension to that payable under Rule 13(4) of the 1982 Rules. But sub-paragraph (a) conferred on Category B Members the entitlement to a deferred pension (calculated at the date of leaving as described in rule 9 (normal retirement)) without any ratio reduction whatsoever. Accordingly, it is clear that the introduction of sub-paragraph (a) into

Rule 12(3) (when combined with the words "will be the higher of") undoubtedly increased deferred pensions for Category B Members from:-

(1) a deferred pension calculated using final pensionable salary as at the date of leaving pensionable service but reduced in the ratio of (a) completed future service to (b) potential future service to NRD; to

(2) a deferred pension calculated at the date of leaving pensionable service calculated in accordance with the payment of pension for active members who retire at NRD.

26. The problem with sub-paragraph (a) can be easily illustrated. Postulate a Category B Member with 10 years' pensionable service (pre-1987 Members) or 20 years' pensionable service (post-1987 Members). Such a Category B Member who withdraws from Service immediately after 10 or 20 (as the case may be) years of pensionable service is entitled to a pension (albeit deferred to NRD) calculated in the same way as for a Category B Member who remains in pensionable service throughout his working life up to NRD. Ratio reduction is negated.

27. On its face Rule 12.3 is not happily drafted. Sub-paragraph (a) refers to the "Regulation Laws" whereas this should have been a reference to the "Revaluation Laws" (something required for all deferred pensions under the Pensions Schemes Act 1993). And sub-paragraph (b) does not refer to the "Revaluation Laws" at all but they were equally applicable to sub-paragraph (b). But, more importantly, Rule 12.3

purports to create an alternative between (a) and (b) with the higher of the two being chosen. But it is difficult, indeed I think impossible, to conceive of circumstances in which the deferred pension calculated in accordance with sub-paragraph (b) would be higher than the deferred pension calculated under sub-paragraph (a). So (a) and (b) are not true alternatives at all. Sub-paragraph (a) will always trump sub-paragraph (b).

28. The alleged error in Rule 12.3 no longer infects the Scheme. On 1 November 2007 yet another pension scheme (The Minolta (UK) Limited Retirement and Death Benefit Plan) was merged into the Scheme. Following this merger there was yet another consolidation of the governing documentation of the Scheme. During the course of this consolidation the alleged error in Rule 12.3 was noted and corrected for future service going forward in a new definitive Trust Deed and Rules for the Scheme executed on 21 April 2009. Nevertheless, rectification of 2006 Rules is still necessary because of the manner in which the Scheme was administered up to 21 April 2009 and because the 2007 merger and subsequent harmonisation of benefits proceeded on the basis that the 2006 Rules had effected no change whatsoever to the calculation of deferred pensions for Category B Members.

Rectification – The Law

29. At paragraph 80 of his judgment in Daventry DC v. Daventry & District Housing Limited [2012] 1 WLR 1333 Etherton LJ re-phrased Peter Gibson LJ's summary of the requirements for rectification for mutual mistake as set out in Swainland Builders Limited v. Freehold Properties Limited [2002] 2 EGLR 71. The reformulation was in

the context of the observations of Lord Hoffman on rectification in Chartbrook Limited v. Persimmon Homes Limited [2009] AC 1101. Thus Etherton LJ said:-

> *"I suggest that Peter Gibson LJ's statement of the requirements for rectification for mutual mistake can be rephrased as:*
>
> *(1) the parties had a common continuing intention, whether or not amounting to an agreement, in respect of a particular matter in the instrument to be rectified;*
>
> *(2) which existed at the time of execution of the instrument sought to be rectified;*
>
> *(3) such common continuing intention to be established objectively, that is to say by reference to what an objective observer would have thought the intentions of the parties to be; and*
>
> *(4) by mistake the instrument does not reflect that common intention."*

At paragraph 207 Lord Neuberger of Abbotsbury MR approved Etherton LJ's formulation.

30. The need for the parties' common intention to be ascertained on an objective basis has, most recently, been restated by the Court of Appeal in Ahmad v. Secret Garden (Cheshire) Limited [2013] EWCA Civ 1005 (per Arden LJ at para 30).

31. But, as it seems to me and without resiling in any way from these principles, care needs to be taken when applying these basic principles to a set of circumstances

where a written instrument was intended to produce Result A but has, in fact, produced Result X. The parties may never have addressed Result X because it may have come as a total shock to them. But, on objective analysis, it can clearly be seen that there was no common intent to achieve Result X and that any outward expressions of accord between the parties are wholly inimicable to Result X. If so, as I understand the position, there is no bar whatsoever to rectification occurring. None of this involves any enquiry into uncommunicated subjective intentions of the parties. It was, as I understand the position, issues such as these that Vos J was addressing when he said at paragraph 45 in Industrial Acoustics Company Limited v. Crowhurst:-

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

32. In paragraph 80 of Daventry Etheron LJ identified "an outward expression of accord" and "common continuing intention" as not being separate conditions but, rather, two sides of the same coin. This followed what Mummery LJ had said in Munt v Beasley [2006] EWCA Civ 370 at [36] where he identified the trend in recent cases as being to treat the expression "outward expression of accord" as no more than an evidential factor rather than a strict legal requirement for rectification. This led

Warren J in In the matter of The IBM Pension Plan [2012] Pens L.R. 469 to say at [18]:-

> *"Since an outward expression of accord and an objectively established common intention are two sides of the same coin, proof of one will almost inevitably result in proof of the other. It is not correct that a burden lies on the party seeking rectification to prove two entirely unrelated facts."*

33. Accordingly, as I understand matters, if on an objective analysis of the evidence I find there was never any common continuing intention to achieve Result X then I am entitled to find, objectively, that there was a common continuing intention not to achieve Result X. And, thus, rectification becomes an available remedy.

34. On this objective approach the subjective (but uncommunicated) intentions of the parties to the 2006 Rules (Konica and the then trustees of the Scheme) and, indeed, of the draftsman of the 2006 Rules become irrelevant. As it happens I have ample evidence before me from all of these parties that the inclusion of sub-paragraph (a) in Rule 12.3 was an unintended error. In particular, the actual draftsman (Mr Sabel) has produced a witness statement indicating that it was never his intention to create the outcome achieved by the insertion of sub-paragraph (a) into Rule 12.3. Rather, he says, it was his intention in drafting the 2006 Rules to replicate the benefit entitlement of the former Llewellyn Scheme Members as described in the Llewellyn Scheme Deed and Rules. But all this I ignore.

35. However, I should record that in The matter of The IBM Pension Plan Warren J (at paras 19ff) went somewhat further and indicated that in the case of a document such as the 2006 Rules it might not even be necessary to ascertain, objectively, a common intent. Rather it would be sufficient if the parties to the 2006 Rules (Konica and the then trustees of the Scheme) both had independent intents (those independent intents to be ascertained objectively) which happened to be common. A document such as the 2006 Rules, he indicated, was fundamentally different from a contract. In a document such as the 2006 Rules (in which one party exercised a power of amendment with the consent of the other party) then if the evidence showed what each of the parties, objectively, intended and if they both executed the relevant amending instrument with the same intention, even if not communicated to each other, then that would be enough. Coinciding, but uncommunicated, identical intentions (objectively ascertained) would be sufficient.

36. In my judgment, on the facts of the present case there is more than adequate evidence of the existence of an objectively established common intention which continued up to execution of the 2006 Rules. This is not a case where there just happened to be two individual intentions (objectively ascertained) and which just happened to be common (but not communicated). I need not, therefore, travel down the additional road identified by Warren J. But, as it seems to me, in many ways that road merely reflects and fortifies the ascertainment of a true continuing common intention from an objective analysis of the facts.

37. I remind myself that the standard of proof required for rectification is the ordinary standard on the balance of probabilities:-

> *"But as the alleged common intention ex hypothesi contradicts the written instrument, convincing proof is required in order to counteract the cogent evidence of the parties' intention displayed by the instrument itself.."*

see per Brightman LJ in Thomas Bates & Sons Limited v. Wyndham's (Lingerie) Limited [1981] 1 WLR 505 at page 521 – referred to, again, by Arden LJ in Ahmad v. Secret Garden (Cheshire) Limited at paragraph 26. Nevertheless, it does seem to me that the very nature and quality of the written instrument will affect the cogency of the evidence of the parties' intention as contained therein (and, hence, the degree of convincing counter-proof required). It is easy to see how a short, and perfectly clearly drafted, instrument offers the most cogent proof of the parties' true intentions. Less so a lengthy, highly complex and poorly drafted instrument where the alleged error is deeply hidden in the small print.

38. Finally, I also remind myself that that the Court must be cautious of rectification claims of this nature since the effect may well be to relieve solicitors who have made an error from the consequences of that error. That is not to say that rectification should not be ordered. But it does mean that the Court should look astutely at the evidence, since such evidence, although honestly given, is capable of being warped by a subconscious wish to avoid liability for professional negligence.

Rectification – Analysis

39. The parties to the 2006 Rules were (1) Konica and (2) the then trustees of the Scheme. It is clear that, following the transfer of the Llewellyn Scheme into the Scheme as effected by the 2002 Deed, both Konica and the trustees shared the common intention of introducing new Rules for the Scheme to take into account the newly joined members from the Llewellyn Scheme. Thus on 8 March 2002 a Mr Codd of Heath Lambert Consulting, Actuaries and Benefit Consultants, wrote to a Mr Giles of Hammond Suddards Edge indicating that the outstanding item was the drafting of a new Definitive Trust Deed and Rules to take into account the Peter Llewellyn category. On 17 April 2002 Mr Giles wrote back acknowledging his instructions and indicating that the work required was to draft a new Definitive Deed and Rules providing two categories of membership following the merger of the Scheme with the Llewellyn Scheme.

40. On 6 June 2002 a Mr David Wilson, the Legal Counsel and Company Secretary at Konica, wrote to Mr Giles (with a copy to Mr Codd) querying the fees which Mr Giles had quoted in his letter of 17 April 2002. As part of his argument for reducing the quoted fees Mr Wilson said this:-

> *"There is an existing trust deed and I do not suppose that it needs a great deal of redrafting and you have also advised on the scheme and the merger with the [Llewellyn Scheme] previously and so the matter should be fresh in your mind and so it is not as though it is starting as it were from scratch."*

41. On 24 June 2002 Mr Giles wrote to Mr Wilson indicating that he had been personally involved in the recent merger and that he would be carrying this knowledge forward from that merger to the drafting of the new Definitive Deed. He indicated that in respect of both categories of membership (i.e former members of the Scheme and former members of the Llewellyn Scheme) *"we will have to ensure that all previous benefits are carried forward into the new documentation."*

42. And there matters seem to have lain in abeyance until early 2004. At that point Mr Giles seems to have commenced his drafting work. On 23 April 2004 he e-mailed what he described as the "first draft" of the new Definitive Deed together with a drafting report to a Mr Ashton of Buck Consultants Limited who were by then the pension and benefit consultants to the Scheme. The drafting report makes no reference whatsoever to Rule 12.3. But the first draft of Rule 12.3 was in the form (and solely in the form) of the present sub-paragraph (a). This was clearly a major change to the benefit entitlements of Category B Members. So if this change were intended it is, at the very least, surprising that it was not referred to by Mr Giles in his drafting report. On 13 December 2004 Mr Ashton sent back to Mr Giles a detailed analysis of the terms of the first draft. In respect of Rule 12.3 Mr Ashton said this:-

> *"We believe that the pension applicable on leaving service for ex-[Llewellyn Scheme] members should be their prospective pension at their Normal Retirement Date, based on current Final Pensionable Salary, reduced by the*

ratio of the completed Pensionable Service to the total prospective Pensionable Service to their Normal Retirement Date."

43. So the error in Rule 12.3 as then drafted (i.e the failure to include a ratio reduction) was expressly drawn to Mr Giles' attention. And the very fact that this point was drawn to Mr Giles' attention in this way shows, objectively, that there was then no common intention to create some additional windfall benefit for Category B Members.

44. At this point Mr Giles handed over drafting responsibilities to his colleague, Mr Sabel. Mr Sabel did, indeed, take note of Mr Ashton's concerns and made some amendments (initially in his handwriting) to Rule 12.3. In Mr Giles' first draft Rule 12.3 had applied to all Categories of members. Now it was divided up into separate provisions for (1) Category A and Category C Members and (2) Category B Members. For Category B Members only, the original wording was placed into sub-paragraph (a) and Mr Sabel then added sub-paragraph (b) and the introductory words "will be the higher of". So, now, for Category B Members what had been contained in the first draft became an alternative, with the other alternative being the new sub-paragraph (b). Self-evidently, Mr Sabel's amendments did not address, either adequately or at all, the actual point being made by Mr Ashton. And, yet, Mr Sabel must have addressed the terms of the Llewellyn Scheme because otherwise he would not have inserted sub-paragraph (b). Mr Sabel's mistake lay in leaving in sub-paragraph (a) as an alternative (doubly so when sub-paragraph (a) was bound to trump sub-paragraph (b)). It is difficult to understand why he made this mistake but

that it must have been a mistake is self-evident. As such, therefore, he was not following either his Instructions or anyone's common intention (objectively ascertained). Why insert sub-paragraph (b) at all when it was always bound to be otiose? And this obvious error remained in the 2006 Rules, unnoticed by anyone, until they were adopted.

45. Thus, I have no difficulties whatsoever in finding that the continuing common intention of the parties to the 2006 Rules, up to their adoption, was that in terms of benefit entitlement for Category B Members the 2006 Rules should merely replicate the benefits payable to Category B Members under the Scheme and, before that, the Llewellyn Scheme. In particular:-

(1) the ultimate form of Rule 12.3 was self-evidently erroneous, with the newly inserted sub-paragraph (b) being entirely otiose;

(2) there was absolutely no reason whatsoever why Category B Members should, suddenly, have been favoured with an enhancement of their benefits for the calculation of deferred pensions;

(3) it is striking that there are no Minutes of meetings of the Trustees nor internal documentation of Konica which address the conferment of additional benefits on Category B Members (or, indeed, the financial consequences to the Scheme of conferring such windfall benefits). On the contrary, the documentation before me is only consistent with the existence

of the continuing common intention which I have identified. Indeed, it is clear that from that documentation that at no material time did anyone know, or appreciate, that enhanced benefits were being conferred on Category B Members;

(4) the Scheme Actuary was never consulted about, or informed of, any intended conferment of enhanced benefits on the Category B Members. In particular, the Scheme Actuary did not provide any certificate under section 67 of the Pensions Act 1995 in respect of these enhanced benefits. In strict legal terms section 67 applies only to "modifications" and in Aon Trust Corporation Limited v. KPMG [2005] EWCA Civ 1004 the Court of Appeal (whilst leaving the point open) did indicate that it had reservations about whether an enhancement of benefits would be a modification requiring a section 67 certificate from the Actuary. Indeed, by the date of the adoption of the 2006 Rules, section 67 had been amended (with effect from 1 November 2005) so that it would, in practice, have required any modification to affect adversely the benefits of members generally for a section 67 certificate to be required. But legal requirement and practical realities are different things. I find it, at the very least, surprising that if Rule 12.3 were intended to confer enhanced benefits on Category B Members then the question of a section 67 certificate was not even addressed and that the Actuary was left in total ignorance of what was occurring. Rather, as it seems to me, the failure to address a section 67 certificate, or to consult the Scheme Actuary, is a strong indication

that the true common intention was simply to replicate in the 2006 Rules the existing benefits for Category B Members.

46. In these circumstances, it seems to me that all the requirements for rectifying Rule 12.3 are met. Whilst rectification is a discretionary remedy, I can see no reason whatsoever why I should exercise my discretion against rectification. Nor has any such reason been suggested by anyone. Accordingly, subject to the form and terms of rectification, I am satisfied that this is an appropriate case to grant summary judgment for rectification in that (1) the defendants have no real prospects of successfully defending the claim for rectification and (2) there is no other compelling reason why the rectification claim should be disposed of at a trial.

Form and Terms

47. Mr Moeran for Konica initially submitted that the requisite rectification should be effected simply by deleting the words "the higher of:" and the whole of sub-paragraph (a) from Rule 12.3. Miss Campbell submitted that this was not, of itself, enough in that it resulted in there being omitted the (admittedly misnamed) reference to the Revaluation Laws in sub-paragraph (a). I agree. In my judgment there should in addition to the deletions suggested by Mr Moeran be an insertion at the end of what is, presently, sub-paragraph (b) of the following words "such deferred pension as so calculated being then increased before payment by the percentage required by the Revaluation Laws".

48. For the avoidance of any doubt, the Order should provide that such rectification takes effect retrospectively from the date on which the 2006 Rules were adopted (23 January 2006).

49. In Sargeant v. Reece [2007] EWHC 2663 (Ch) I indicated, at para 86, that as rectification was a discretionary remedy then its grant could be made conditional upon the imposition of terms. I then imposed certain terms so as to ensure that the estate of the party against whom rectification was ordered was not prejudiced against what he might reasonably have expected to have occurred if the common intention (which I had found to exist) had been carried into effect at the time of the parties' execution of the relevant document.

50. At paras 121 to 123 of her Judgment on the Preliminary Issues in this case Asplin J specifically referred to my decision in Sargeant v. Reece without any adverse comment. I note that in Hodge on Rectification (2010) para 1-41 it is stated that rectification may be awarded on terms and that in at least one other case rectification was granted on specific terms (Central & Metropolitan Estates Limited v. Compusave [1983] 1 EGLR 60).

51. It seems to me that pensions cases of the present nature are capable of raising issues as to whether rectification should be granted on terms. I see no need to impose terms simply because rectification takes away from, in this case, Category B Members windfall benefits which they were never intended to have and which had been conferred only in error. But if any Category B Members had actually been paid

benefits on the erroneous basis as contained in Rule 12.3(a) then the possibility would have existed that such Category B Members might, following rectification, face a restitutionary claim from the trustees of the Scheme for wrongly paid benefits. I would have wished to consider carefully, had there had been any such Category B Members, whether it would, or would not, have been appropriate to impose a term on rectification that such restitutionary claims be not brought (or that such restitutionary claims be limited in some way). I do not know what view I would have formed on this issue but it was one which I would have felt I needed to address. However, when I raised this question with Mr Moeran he took instructions and was able to assure me that there were no Category B Members who had actually been paid deferred pensions erroneously on the basis of Rule 12.3(a). I asked for his instructions to be confirmed by witness statement. It was not until 3 June 2013 that a Mr Roper of Buck Consultants Limited produced the requested witness statement. It is not quite what I, or I suspect Mr Moeran, had hoped for. Mr Roper indicates that he is the Scheme Actuary. He indicates that Buck Consultants Limited (by whom he is employed) are the parent employer of Buck Consultants (Administration & Investment) Limited who are the appointed third party pension administrators acting for the trustees of the Scheme. He indicates that Buck's duties included administrating the payment of benefits to members of the Scheme. He indicates that it his "*understanding*" that Buck (both before and after it became aware of the drafting error) administered benefits to Category B Members on the same basis as under the Llewellyn Scheme. Therefore, he indicates that if rectification were granted it is his "*understanding*" that there would no basis upon which to claim recovery of monies from any member of the Scheme.

52. I must confess to having hoped for verification of an actuality, not of a mere understanding. Granted the fact that the Scheme Actuary is unable to depose to anything more than a mere understanding in his witness statement then I cannot be certain that there is no Category B Member who has not actually received benefits on an erroneous basis under the terms of the unrectified Rule 12.3(a) (albeit, of course, I accept that this is exceedingly unlikely granted Mr Roper's understanding).

53. In these circumstances I am minded, subject to any submissions I may hear to the contrary, to grant Liberty to Apply to any Category B Member who is faced with a claim from the Scheme to repay any monies actually paid to him from the Scheme where that claim is wholly dependent on (and would not exist apart from) the order for rectification which I make. I express no view whatsoever as to whether any terms would be imposed on the rectification order which I have just made in the event of any Category B Member so applying. I wish, however, to preserve the right of any such Category B Member to argue, in the face of a restitutionary claim, that the rectification order ought to have been granted subject to protective terms.

Conclusion

54. For the reasons set out above, I grant summary judgment to Konica for rectification of Rule 12.3 of the 2006 Rules of the Scheme in form and manner as set out above.