

Case No:

NEUTRAL CITATION NUMBER: [2007] EWHC 711 (Ch)
IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION

Royal Courts of Justice
Strand
London WC2A 2LL

Tuesday, 13 March 2007

BEFORE:

THE CHANCELLOR OF THE HIGH COURT

BETWEEN:

SCANIA LIMITED

Claimant

- and -

WAGER & OTHERS

Defendant

MR MICHAEL FURNESS QC appeared on behalf of the CLAIMANT

MR KEITH BRYANT appeared on behalf of the DEFENDANT

JUDGMENT

(As Approved by the Court)

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1. **THE CHANCELLOR:** This is an application of the claimant, Scania of Great Britain Limited, for summary judgment under Civil Procedure Rule 24 for an order for rectification of the executive plan rules and the staff plan rules relating to the Scania pension schemes of those names in the manner set out in the minute of order attached to the application notice.
2. The claimant is the principal employer in respect of both those schemes. The first, second, third, fourth and fifth defendants are the present trustees of each of them. They quite properly have submitted to act as the court may direct and have taken no further part in these proceedings. The sixth and seventh defendants are respectively members of the executive and staff plans. They have been joined to represent all those members of the respective schemes in whose interest it is to oppose the orders sought. On the advice of counsel who has assisted the court with his submissions and observations, they have not opposed the order sought.
3. Scania was a part of the Saab Group and a participating employer in the Saab Scania pension plan, to which I shall refer as SSPP. This was constituted by a definitive trust deed dated 1 July 1988 and made between Saab Scania Great Britain Limited, Scania, Saab Aircraft International Limited, the SSPP trustee and thereby brought into force the SSPP rules. On 30 December 1994 Scania demerged from the Saab group. In consequence it ceased to be eligible as an employer under the SSPP and needed a pension scheme of its own.
4. In December 1997 Scania determined to set up new schemes. The task of doing so was delegated to Mr Alf Blundell, the managing director, Mr William Campbell, the chief financial officer and company secretary, and Mr Frank Andrew, then a non-executive director and ultimately one of the trustees of the new plans. The effective date was 30 April 1998. On that date the employees of Scania ceased to accrue service under the SSPP and interim trust deeds were executed constituting the executive plan and the staff plan and the Scania employees started to accrue service thereunder with effect from 1 May 1998.
5. The relevant deeds referred to the employer's determination to establish new retirement benefit schemes in accordance with an announcement letter circulated to various employees and provided for the execution within a period of two years of a definitive trust deed to give effect to the proposals in that letter. The letter has been identified as one dated 30 June 1998 and signed by a Mr Campbell. It provides as follows. It is headed "Information for the employees of

Scania Great Britain Limited and its subsidiary companies who are members of the Saab Scania pension plan". In paragraph 1 it sets out the proposals for the demerger and then continues:

"The new Scania Pension Plans (the Scania Staff Pension Plan, the Scania Executive Pension Plan and the Scania Reliable Vehicles Staff Pension Plan) are presently being set up to provide all existing Scania members of the Saab Scania Pension Scheme with the same level of pension benefits as they were entitled to under the Saab Scania Pension Plan.

"You will therefore cease to be a member of the Saab Scania Pension Plan when the new Scania Pension Plans have been set up. You will still receive the same level of pension benefits and life assurance cover in respect of service after the set up date of the new Scania Pension Plans, as you previously received within the Saab Scania Pension Plan.

"2. The New Scania Pension Plans (the New Plan)

"The level of benefits provided for members of the New Plan will be the same as under the Scania Saab Pension Plan."

6. The letter went on to refer to contribution rates, interim pension plan contributions and other such matters.
7. On 22 September 1998 bulk transfer payments were made by the SSPP trustee company to the trustees of the new plans in respect of the past service benefits of transferring members, in anticipation of the execution on 25 March 1999 of the pension scheme transfer agreement and made between Saab Great Britain Limited, Saab Aircraft International Limited, Scania Great Britain Limited, the SSPP trustee, the new trustees and the trustees of the Scania Reliable Vehicles staff pension plan. This document provided by clause 2 for the transfer of the relevant assets and liabilities of the SSPP to the trustees of the new schemes. The transfers were expressed to be subject to a number of conditions precedent of which one, contained in clause 4.1.5, is as follows:

"Notice has been given to the Pensions Scheme Officer, in a form consistent with paragraph 2.3 of actuarial guidance note GN16, of the intention of the Staff Plan and the Executive Plan to maintain SSPP discretionary early retirement practices for active employees retiring after the age 60."

8. The deed goes on to provide in clause 8.1 that:

"Subject to receipt by the New Plans' Trustees of the Scania Assets, Scania and the New Plans' Trustees undertake that all pension and lump sum benefits payable from the SSPP to or in respect of the Scania Beneficiaries as at the beginning of the Payment Date shall, with effect on and from that date, be transferred to and be payable from the applicable New Plan. The pension and lump sum benefits so payable shall be:

"8.1.1 of the same amount and with the same right as to the date on which payments commence and to pension increases in payment, in postponement or in deferment, as the case may be; and

"8.1.2 payable to the same persons as they would have been payable to,

"as under the SSPP but for the transfer to the New Plans but otherwise on the terms and subject to the conditions of the provisions of the New Plans as from time to time in force."

9. On 9 April and 14 April 1999 there were executed by the relevant trustees and other parties the Executive Plan deed and the Staff Plan deed made in each case between Scania of the one part and the relevant trustees of the other. These were designed to bring the Staff Plan and the Executive Plan rules into force. In May 2003 the Executive and the Staff Plans were closed to any further accruals. It was not until late 2004, on the investigation by the new firm of solicitors recently instructed by the trustees of the new plans, that it was discovered that because of differences in wording between special rule 1(h) and 7 and rules 7 and 14 of the executive and staff schemes, when compared with the definition of normal pension date

in rule 2 and rules 7 and 9 of the SSPP, that there were two discrepancies and one additional consequence.

10. They may be summarised as follows. (i) Transferring members had obtained the right to an unreduced pension at age 60 without the employer's consent, as opposed to a reduced pension if the employer consented. (ii) A deferred member who wished to take an early deferred pension required his employer's consent but his pension would necessarily be actuarially reduced, as opposed to requiring the trustee's consent, and a pension which on the advice of the actuary might or might not be a reduced amount. (iii) In consequence of sections 70, 71(1) and 180 of the Pension Schemes Act 1993 the first of those consequences required that deferred members must be given the right to retire at age 60 with reduced benefits.
11. In the light of the discovery of those discrepancies on 30 June 2006 the claim form in this action was issued together with points of claim seeking rectification of the rules of both plans in a manner considered appropriate to remedy the discrepancies. This was followed on 13 December 2006 by the issue of an application for summary judgment under part 24 and on 9 February 2007 by the service with consent of amended Particulars of Claim.
12. In those amended Particulars of Claim the following material allegations are made. (i) It was the intention of Scania and the new trustees that the benefit to be provided by the new plans should be a mirror image of those provided under SSPP rules. (ii) Neither Scania nor the new trustees intended to make the changes in fact effected by special rules 1(h) and 7 and by rules 7 and 14. (iii) In March/April 1998 those responsible for implementing the decision of Scania, namely, Messrs Blundell, Campbell and Andrew, decided in the light of advice from Mercers, the consulting actuaries, to mirror the benefit structure of SSPP. (iv) That remained their intention down to the execution of the new plans in April 1999, as evidenced by a number of documents and events in 1998 and 1999 fully particularised in paragraphs 27 to 31. (v) The new trustees shared that intention, as evidenced by the instruments and events particularised in paragraphs 32 to 34. (vi) That the benefits under the one would and should mirror those under the other was the belief of the relevant professional advisers, as indicated in the documents or by the events particularised in paragraphs 35 to 38. (vii) Were it otherwise it would have needed extra funding for the new plans and specific documents would have been in a different form, as particularised in paragraphs 39 to 40. (viii) The benefits under the new plans do not mirror those under SSPP because of a mistake and should be rectified so as in the case of all transferring members to make 65 the normal pension date

and to require the consent of the employer to payment of a pension before that date.

13. In summary, the order, if I make it, would amend the definition of normal retirement age and special rule 1(h) and would replace rule 7 altogether. Those claims were supported by witness statements made in the period September to December 2006 by four deponents in particular, Mr Frank Andrew, who was one of the three directors concerned with the establishment of the new plans in the first place, Mr Roland Coombe, a trustee director of SSPP and of the staff plan until his retirement in April 2000, Mr Brian Merchant, a trustee director of SSPP and a trustee of the staff plan until his resignation in 2000, and Mr Roger McCarthy, a trustee of the executive plan from the date of its establishment until his resignation in November 2001.
14. In addition there are a number of witness statements from the various advisers who were involved in the establishment of the new plans. They comprise one from Mr Ian Gordon, the solicitor responsible for advising the trustees of new plans at the time of their establishment, Mr Douglas Bailey, a pensions consultant who advised Scania on the establishment of the new plans, Mr Andrew McKinnon, an employee of Scottish Life Assurance Company Limited which acted for Scania in the establishment of the new plans, Janet Murray, likewise concerned on behalf of Scottish Life Assurance Company Limited, and Mr Neil Walton, the actuary for the new plans.
15. This formidable body of evidence, both in the form of witness statements and documents, was considered by counsel instructed on behalf of the sixth and seventh defendants. By an opinion dated 23 February 2007 he advised them that the claim only affects transferring members, that the discrepancies alleged are plainly made out and that the order sought as amended would remove those discrepancies. He stated that there is consistent and convincing evidence that Scania and the relevant trustees intended from April 1998 onwards to provide in the new plans exactly the same benefit structure as under the old and he expressed the opinion that there appears to be no defence to the claim and there is no purpose in seeking a full trial in order to cross-examine the witnesses for Scania. This opinion was considered by the representative defendants, Mr Hardy and Mr Bell, and each of them made a witness statement on 2 March 2007. Each of them states that in the light of counsel's opinion he does not intend to oppose the application of Scania.
16. With that background I turn to the law. It is now well established by a series of decisions that pension scheme documents are amenable to rectification like any others. The decisions to which I refer are

Lansing Linde v Alber [2000] Pensions Law Reports 15, AMP v Barker [2001] Pensions Law Reports 77, Gallagher Limited v Gallagher Pensions Limited [2005] Pensions Law Reports 103, Drake Insurance v McDonald [2005] Pensions Law Reports 401 and Lemforder v Lemforder UK Pension Trustee [2006] Pensions Law Reports 85.

17. In the last named case Warren J referred in paragraph 41 to passages in his earlier decision in Drake Insurance at paragraphs 33 to 36 for a summary of the relevant principles. It is unnecessary to quote either passage in full but they show, first, that documents relating to pension schemes, be they trust deeds, rules or amendments to either, are as amenable to rectification as any other document with a legal effect. Second, it is necessary to show that the relevant employer or employers and the trustees shared the same intention, whether or not an outward expression of accord is required, down to the execution of the deed in question. Third, rectification will only be granted if there is convincing proof on a balance of probabilities that the employer and the trustees held the requisite common intention as to the meaning or effect of the relevant documents.
18. Applying those principles to the facts of this case I reach the following conclusions. (i) It was the intention of Scania to produce in the new plans the mirror image of the benefits available under SSPP. This is clearly established by the announcement letter identified as that dated 30 June 1998 which referred in terms to "the same" benefits under the new plans as under SSPP. This intention was carried forward into the interim trust deeds dated 30 April 1998, to which I have referred. Such an intention was clearly affirmed in the terms of the pension scheme transfer agreement dated 25 March 1999, from which I have already quoted. The clear evidence of these three documents is amply supported by the witness statements, to which I have referred, from trustees of the schemes or their advisers and for that matter vice versa.
19. Second, if *pace* Rimer J in Lansing Linde v Alber [2000] Pensions Law Reports 15 at paragraphs 155 to 156 and compare Etherton J in Gallagher Limited v Gallagher Pensions Limited [2005] Pensions Law Reports 103 and the Court of Appeal in Munt v Beasley [2006] EWCA 370 at paragraph 36, it is necessary to show an outward expression of accord, then such an expression is to be found in the pension scheme transfer agreement. Third, the relevant intention continued down to and beyond the execution of the definitive trust deeds in April 1999.
20. Given the interests of so many members of both schemes there is no

effective alternative remedy to that of rectification. Rectification in the form proposed would give effect to the relevant intention and cure the existing discrepancies. The claim is not opposed for the good reasons set out in the opinion of counsel for the sixth and seventh defendants.

21. In the light of the foregoing I have no difficulty in concluding, in the words of Civil Procedure Rule 24.2, that the defendants have no real prospect of successfully defending the claim and there is no other reason, compelling or otherwise, why the case should only be disposed of at a trial. In all these circumstances I will make the order sought by the application in the form of the draft attached to it, subject only to any further submissions as to the form of the representation orders to be made in respect of the sixth and seventh defendants.