



Neutral Citation Number: [2019] EWHC 2743 (Ch)

Case No: PE-2019-000009

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

**In the matter of the Chas A Blatchford & Sons Limited Group Pension Scheme (“the Scheme”)**

Rolls Building, Fetter lane,  
London EC4A 1NL

Date: 24/10/2019

Before:

**CHIEF MASTER MARSH**

-----

Between:

**BLATCHFORD LIMITED (formerly  
Chas A Blatchford & Sons Limited)**

**Claimant**

- and -

**(1) BRIAN STEPHEN BLATCHFORD**

**(2) PETER ALAN LEWIS**

**(3) RICHARD PRIBORSKY**

**(4) KEVIN BYRNE**

**(5) PAUL JAMESON**

**(6) ZOE STEPHENS-TRUMAN**

**(7) MIR SAEED ZAHEDI**

**(as Trustees of the Scheme: “the Trustees”)**

**(8) ALAN TANNER**

**Defendants**

**(as “the Representative Beneficiary”)**

-----

-----

**Andrew Short QC** (instructed by **Eversheds Sutherland (International) LLP**) for the  
**Claimant**

**Thomas Robinson** (instructed by **BDM Pitmans LLP**) for the **Trustees**  
**David E Grant** (instructed by **Pinsent Masons LLP**) for the **Representative Beneficiary**

Hearing date: 18 September 2019

-----

## **Approved Judgment**

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

.....

CHIEF MASTER MARSH

## **Chief Master Marsh:**

1. At the disposal hearing of this Part 8 claim on 18 September 2019 I made an order for rectification of Rules 39.6.3 and 39.6.4 of the governing documentation of the Chas A Blatchford & Sons Limited Group Pension Scheme (“the Scheme”) comprising part of the definitive deed and rules made on 22 October 1996 (“the 1996 Rules”). This judgment provides my reasons for making that order.
2. The claimant (“the Company”) is the principal sponsoring employer of the Scheme. The first to seventh defendants are the current trustees of the Scheme (“the Trustees”). Under a representation order made on the same occasion as the order for rectification, I appointed the Company to represent all employers, members and other beneficiaries of the Scheme in whose interests it is to argue that the 1996 Rules should be rectified in the form sought by the Company. The eighth defendant (“Mr Tanner”) was appointed to represent all members and other beneficiaries of the Scheme in whose interests it is to argue that the 1996 Rules should not be rectified in the form sought by the Company.
3. The 1996 Rules provided four categories of member of the Scheme who were identified in terms of their seniority and value to the Company. In descending order, they are categorised from A to D. Category A comprised the directors of the Company, Category B its senior management and Category C its “Key Employees”. Category D, which included by far the largest group, comprised staff employees, or former employees, who received the least beneficial terms under the Scheme. The issues in this claim affect only them and their survivors. As at August 2017 there were 238 Category D members in the Scheme comprising 107 deferred members and 131 members with pensions in payment.
4. Capita Employee Benefits Limited, which is the current administrator of the Scheme, has estimated that without rectification the additional cost to the Scheme from Rules 39.6.3 and 39.6.4 in their unrectified form is between £9 and £10 million.

### **Scheme History**

5. The Scheme commenced on 1 April 1961 having been established by an Interim Trust Deed dated 10 February 1961. The relevant history starts with the adoption on 11 September 1989 of the “1990 Rules”. Under those rules, Category D members, unlike other members of the Scheme, had no entitlement to increases on their pension in excess of their Guaranteed Minimum Pension (GMP).
6. Rule 17 of the 1990 Rules permitted the Scheme’s trustees to augment pensions with the consent of the Company and under Rule 49 the Company, with the consent of the Scheme’s trustees, the Company was permitted, subject to some restrictions, to alter the rules. Alterations could be made by a resolution of or a written memorandum signed by the Company.
7. On 10 April 1992, the Company announced a beneficial change to the Scheme as it affected Category D members and their survivors from 6 April 1991. The genesis of the change appears to have been provisions in the Social Security Act 1990, albeit that they were not subsequently brought into force. The announcement, which was signed by Sandra Bishop who was the Company’s Personnel Manager, stated that with effect

from the alteration date staff entitlement in excess of GMP would "... increase by 5% compound or the increase in the Retail Price Index (RPI) if less, every year for which it is paid." In pension jargon this is known as "5% Limited Price Indexation" or more commonly "5% LPI". The wording of the announcement made it clear that the increase would be the lesser of 5% or the increase in the RPI. In other words, 5% was a cap on the amount by which pensions could increase. Thus, in periods of high inflation rises would be no greater than 5%; and, in periods of low inflation, rises would be no greater than increases in RPI.

8. Although documentary evidence from the early 1990's is sparse due the passage of time, it is clear that the change was put into effect in accordance with the announcement and it must, therefore, have had the consent of the then trustees. Implementation of the change can be seen from a number of sources including the 1993 and 1995 staff booklets which both include reference to the increase in the same terms as the announcement. At the time, Pointon York provided administration and actuarial services to the Scheme and their reports for the period that followed the announcement in 1992 refer to Category D members benefitting from 5% LPI.
9. A new set of rules, the 1996 Rules, running to more than 100 pages, were implemented by a definitive trust deed made between the Company and the Trustees on 22 October 1996. The deed did more than update the 1990 Rules because the Company had decided in early 1996 to close the final salary scheme and to commence a money purchase scheme for new employees. The deed therefore contained rules for the continuation of the Scheme and the creation of a new scheme.
10. The issue before the court arises from the 1996 Rules and is apparent from the following extract from Rule 39 of the Scheme that deals with pension increases:

"Rule 39 Payment of pensions and lump sum benefits

[...]

39.6 Any pension ... payable to a Member ... shall be reviewed annually by the Trustees and shall be increased on the Anniversary Date by:

39.6.1 in the case of a pension for or in respect of a Category A Member or a Category B Member eight and a half per cent (8½%) per annum

39.6.2 in the case of a pension for or in respect of a Category C Member five per cent (5%) per annum

39.6.3 in the case of a pension for or in respect of a Category D Member (other than a pension payable under Rule 18) the greater of five per cent (5%) per annum and the increase in the Retail Index in respect of that part of the pension which exceeds the Guaranteed Minimum Pension and which relates to Pensionable Service after 6<sup>th</sup> April 1991, and

39.6.4 in the case of a pension in respect of a Category D Member payable under Rule 18 the greater of five per cent (5%) per annum and the increase in the Retail Index if less" [emphasis added]

11. Several points are immediately noticeable about Rule 39.6.3:
  - (1) Category A, B and C members were entitled to a fixed increase that is not related to RPI. The increase was not subject to either a collar or a cap.
  - (2) There was a significant increase in the benefit attributable to Category D members. Under the 1992 Announcement they were entitled to the lesser of 5% or RPI. This was transformed in the 1996 Rules into an entitlement to a minimum 5% increase. What had been a cap of 5% was changed into a collar of 5%. In periods of high inflation, Category D members would receive increases at the rate of RPI but in periods of low inflation they would receive increases of not less than 5%.
  - (3) By contrast, Category A, B and C members remained entitled only to a fixed increase. It follows that in a period of high price inflation, Category D members might be entitled to a greater increase than employees who were regarded as being key to the business.
12. Similar observations can be made about Rule 39.6.4, if the final puzzling words “if less” are ignored. When they are taken into account, the meaning of Rule 39.6.4 is far from clear. Indeed, it is not easy to see how Rule 39.6.4 could be construed to make any sense without undertaking radical linguistic surgery.
13. Later, with effect from 8 October 2008, the Scheme was governed by a new Supplementary Deed and Rules. These new rules were several years in gestation and during that period what are said to be errors of drafting in Rules 39.6.3 and 39.6.4 were discovered. An attempt was made to change the 1996 Rules in the Supplemental Deed and Rules made in 2008. Recital C and clause 1 of the 2008 deed provided:

“(C) The Principal Employer and the Trustees agree that Rules 39.6.3 and 39.6.4 of the 1996 Definitive Deed do not correctly reflect the common intention of the Principal Employer and the Trustees when adopting the 1996 Definitive Deed nor the past and present practice of the Plan. The Principal Employer and the Trustees accordingly now wish to confirm and rectify Rules 39.6.3 and 39.6.4 of the 1996 Definitive Deed in the manner specified in this Deed.

...

OPERATIVE PROVISIONS

  1. The Principal Employer and the Trustees declare that with effect from the date of the 1996 Definitive Deed and by way of rectification and clarification Rules 39.6.3 and 39.6.4 as they currently appear in the 1996 Deed shall be construed as if the word “greater” in each case were replaced by the word “lesser”.
14. Rules 9.2.1.3 and 9.2.1.4 of the 2008 Rules were in a similar form to Rules 39.6.3 and 39.6.4 of the final salary section of the 1996 Rules other than “lesser” was substituted for “greater” and “if less” was removed. The relevant wording includes other changes, which are immaterial for the purposes of this claim, to reflect the fact that as from 1

November 2003 the Scheme's final salary section closed. No further employee contributions became payable and benefits ceased to accrue to members.

15. The approach adopted in 2008<sup>1</sup> to resolve the perceived difficulty was ineffective to change the drafting of the 1996 Rules. It has subsequently taken 11 years to bring the issue before the court.
16. The Company's case for rectification is that the very substantial change to the benefit received by Category D members in 1996 when the Scheme rules were redrafted is only explicable by it being a drafting error. I will come to the evidence that the Company relies on but in essence no-one who had any involvement with drafting and approving the 1996 Rules has any positive explanation about why "greater" appears instead of "lesser" and why what is on one view an obvious error was not noticed. The drafting change in 1996 was completely ignored and the Scheme was administered as if the 1992 announcement remained in force. Leaving aside the problematic drafting of rule 39.6.4, as is not uncommon in cases of changes made to pension schemes, what is said to be an error is said to have crept into the rules entirely unnoticed and, therefore, the evidence that is relied on is essentially negative: no change was intended to the Scheme and neither the Company nor the Trustees addressed their minds to the relevant words. This is a relevant consideration when the legal principles are considered.

#### **Rectification as an alternative to construction**

17. In some cases, it is appropriate to ask the court to construe the offending clause as a starting point and, only if it proves impossible to construe the clause in a manner that the Company says reflects its proper meaning, to consider rectification. The Company has chosen in this case to make its claim solely based upon rectification. The reason for this approach is clear in relation to Rule 39.6.3 because there is no obvious basis for construing "greater" as meaning "lesser". There is an easier jumping off point in relation to Rule 39.6.4. It may be arguable that the greater of 5% and RPI can be construed as meaning the lesser of 5% and RPI in view of the puzzling words with which the rule ends. There is, however, very real uncertainty about the meaning of the rule.
18. The approach adopted by the Company is supported by authority: see *Re Hampel Discretionary Trust 1999* [2012] EWHC 2395 (Ch) at [16] per Henderson J which was followed in *MNOPF Trustees Ltd v Bryan Watkins* [2013] EWHC 4741 (Ch) at [11] by Mr John Martin QC sitting as a Deputy High Court Judge. It is legitimate to leave aside a doubtful case on construction where there is, or at least the claimant contends there is, a strong case for rectification. This is a sensible pragmatic approach because, amongst other reasons, it avoids the court having to undertake two separate and conflicting exercises. The court will usually have received a good deal of evidence about why there is said to be an error in the drafting, how it came about and what was intended. Having read this evidence, the court is required to ignore much of this evidence for the purposes of the case on construction.
19. There is a further reason to adopt the Company's approach in this case where there are two clauses that are said not to reflect the parties' intentions. They are closely

---

<sup>1</sup> Unkindly characterised in some quarters as 'correctification'.

linked in the structure of the Scheme, both were drafted on the same occasion and suffer from a similar, but not matching, defect. However, only one of the clauses is possibly amenable to argument about its construction. In these circumstances it would be even more artificial than normal for the court to require the Company to pursue a dual approach (construction or rectification if construction fails) in relation to one clause but not the other.

### **The law**

20. I received helpful submissions from counsel concerning the principles upon which the court may wish to exercise its discretion to grant rectification and the evidence that should be considered on an application for such relief. The jurisdiction to grant rectification in pension cases is long established. But for the recent decision of the Court of Appeal in *FSHC Group Holdings Ltd v GLAS Trust Corporation Ltd* [2019] EWCA Civ 1361 any review of the authorities would have been unnecessary, or at least confined to the headline principles. However, the legal tests for obtaining an order for rectification was thoroughly reviewed in *FSHC* and it is useful to consider briefly where it leaves a claim for rectification of the deed and rules relating to a pension scheme.
21. The Court of Appeal took the opportunity to clarify at [146] that the test for intention in the case of the existence of a common continuing intention (if it is not based on there being a concluded prior contract) is subjective. This departed from the approach derived from dicta in Lord Hoffmann’s judgment in *Chartbrook Ltd v Persimmon Homes Ltd* [2009] 1 AC 1101 and Etherton LJ’s formulation of the test in *Daventry District Council v Daventry and District Housing Ltd* [2011] EWCA Civ 1153. The position is summarised in the judgment at [176] under the heading: “Conclusion on the law”.

“For all these reasons, we are unable to accept that the objective test of rectification for common mistake articulated in Lord Hoffmann’s *obiter* remarks in the *Chartbrook* case correctly states the law. We consider that we are bound by authority, which also accords with sound legal principle and policy, to hold that, before a written contract may be rectified on the basis of a common mistake, it is necessary to show either (1) that the document fails to give effect to a prior concluded contract or (2) that, when they executed the document, the parties had a common intention in respect of a particular matter which, by mistake, the document did not accurately record. In the latter case it is necessary to show not only that each party to the contract had the same actual intention with regard to the relevant matter, but also that there was an “outward expression of accord” – meaning that, as a result of communication between them, the parties understood each other to share that intention.”
22. This summary closely follows the well-known test for rectification formulated by Peter Gibson LJ in *Swainland Builders Ltd v Freehold Properties Ltd* [2002] EWCA Civ 560 at [33] although greater emphasis is placed by Peter Gibson LJ on the common intention continuing at the time of execution of the instrument sought to be rectified.
23. At an earlier point in the judgment, explicit consideration is given to cases in which rectification is considered in relation to amendments made to employee pension

schemes. The judgment at [78] and [79] recognises that where the trustees have power to alter the rules of a pension scheme with the consent of the employer<sup>2</sup>, “it is unnecessary to show that the trustees and the employer had a common intention as a result of communication with each other because the validity of the amendment does not depend on the parties having mutually agreed it – only on one having approved what the other has done.” The judgment then cites with approval a passage from the judgment of Warren J in *Re IBM Pension Plan* [2012] Pens LR 469 at [19] in which he distinguishes the ‘consensus’ that is needed between the trustees and the employer from that which is needed (whether called an agreement or consensus) in what he describes as a “contractual case”. I take that to be a reference to a claim to rectification in a commercial context where the contract that the parties, or one party, seeks to rectify was the product of arm’s length negotiation.

24. The circumstances in which rectification may be sought in pension cases vary. However, it is commonly sought in the case of two types of error:
- (1) The Employer and Trustees intended to make a particular amendment but the intended change was incorrectly reduced to writing;
  - (2) The Employer and the Trustees did not intend to make the amendment so that they did not address their minds at all to the relevant words.
25. The second category of case was recognised by Vos J (as he then was) in *Industrial Acoustics Company Ltd v Crowhurst* [2012] EWHC 1614 (Ch); [2012] Pens. L.R. 371 at [45]:
- “... 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 the change was not in any form discussed.”
26. This is a category 2 case. The Company says the Scheme contains an amendment that was not intended and it was an amendment of which the Company and the Trustees were unaware. Their mutual intention was that the status quo that persisted before the new deed and rules, so far as it related to payments to Category D members, was to remain unchanged. It seems to me that in such cases that concern pension schemes the legal requirements for rectification can be simplified to:
- (1) Did the Company and Trustees have a common intention for there to be no change to the relevant part of the Scheme? It is their subjective intention that is considered.
  - (2) Did that common intention persist up to the execution of the relevant instrument.
  - (3) Was a change made to the Scheme that conflicts with their continuing common intention that no change should be made.

---

<sup>2</sup> In this case it is the Employer which has power with the consent of the trustees but nothing turns on the difference.



27. It is clear from the judgement in *FSHC* that an outward expression of accord is not required in pension cases. If there was a joint continuing common intention to make no change, the consensus (albeit a negative one) is established.
28. It will not usually be difficult to show by reference to documents what was the status quo before the new deed and rules were executed and how it has changed. Although the court will consider evidence from witnesses saying no change was intended, that evidence can be tested against the contemporaneous documents. The absence of any mention in the documents of a proposed change, the absence of any discussion about and approval of what are said to be the offending words and the absence of any change to the administration of the Scheme after execution of the revised scheme documentation will be powerful evidence to establish the claim that a mistake that ought to be rectified was made.
29. I need only mention two further propositions that are well established:
  - (1) There is a need for convincing proof on the balance of probabilities of the common continuing intention of the Company and the Trustees.
  - (2) It is legitimate to have regard to what happens after the deed is executed in order to ascertain the intention at the time of execution.

#### **The witnesses**

30. The claim is supported by comprehensive evidence that is the product of a very careful review of the relevant history, some of which dates back to the early 1990's. The 1996 Rules were drafted by Eversheds (as they then were) and Richard Bacon who is a solicitor with Eversheds Sutherland (International) LLP has made a witness statement explaining the efforts the firm has made to locate its files and relevant papers. Evidence has been provided by four witnesses:
  - (1) Stephen Blatchford who was a director of the Company and a trustee of the Scheme throughout the material period. He is clear that had a decision been taken at any time significantly to improve the benefits payable to Category D employees he would have known about it; and he is clear that no such decision was taken by the Company.
  - (2) Sandra Bishop was the Company's Personnel Manager. She provided administrative support to the trustees from April 1992 and was appointed a trustee on 22 February 1996. The first meeting of the trustees she attended as a trustee took place on 24 May 1996 when a draft of the 1996 Rules was reviewed.
  - (3) Kenneth Bisset joined the Company on 1 March 1996 and was appointed its Finance Director and Company Secretary on 29 March 1996. He was appointed a trustee on 24 May 1996 with effect from 29 March 1996.
  - (4) Lisa Gillespie was the solicitor at Eversheds who provided legal services to the Trustees in connection with the preparation of the 1996 Rules.

31. It has not proved possible to produce evidence from an employee of Pointon York who were the Scheme's administrators in the 1990's. They provided most of Eversheds' instructions at the time and may have been able to provide some illumination about the process of drafting the 1996 Rules and obtaining approval to an apparently radical change.

### **The representative defendant**

32. Mr Tanner was joined for the purpose of seeking an order (now made) that he acts in a representative capacity. He is a deferred Category D member who was in pensionable service from April 1978 to January 2016. He is plainly a suitable person to act as a representative.
33. There is a helpful summary of the role of a representative beneficiary set out in the judgment of Master Teverson in *Nomura International Plc v Nomura London Retirement Benefits Plan Trustees Ltd and another* 18 March 2019, unreported at [18] where he said:

“The role of those acting for the representative beneficiary is to satisfy themselves, both legally and evidentially, that the requirements for the rectification sought are met. There is a need in carrying out that role for the investigation to be carried out with rigour, because the representative beneficiary is in effect acting on behalf of a significant number of members.

...

... once those investigations and enquiries have been made, it seems to me that, whether in response to a Part 8 claim or in response to a summary judgment application made under Part 24 in relation to a Part 7 claim, if those acting for the representative beneficiary have reached the clear and definite view that the representative beneficiary does not, on behalf of those whose interests lie in opposing rectification, have a realistic prospect of defending the claim and that there is no other compelling reason for the matter to go to trial, then it is proper and indeed right for them not to continue to defend the claim. Each case will, of course, depend on its own particular circumstances, and there will be cases in which it is necessary for a more nuanced approach to be taken. There may, for example, be cases in which, because of a significant gap in documentation, for example as to the intentions of a significant number of those who executed the relevant Trust Rules or other deed, it is reasonable and appropriate for the matter to be defended so that it goes to trial so that questions can be asked of those who are available to give evidence. There may be other cases in which, because the application has been made so long after the mistake has come to light, there is a prospect of an equitable defence such as laches being raised. Those are likely to be exceptional cases, but of course each case is potentially different and may require a different approach.”

34. Mr Tanner has received advice from specialist solicitors and from counsel, David E Grant. They have taken the opportunity to analyse the claim and to test it in exchanges with the Company's advisers. The upshot is that Mr Tanner has been advised not to defend the claim. The trustees are neutral and so the claim is undefended. The court has, however, at the request of the parties, followed the procedure outlined in

*Sovereign Trustees Ltd v Lewis* [2016] EWHC 2592 (Ch); [2016] Pens. L.R. 345 at [35] – [38] and *Unipart Group Ltd v UGC Pension Trustees Ltd* [2018] EWHC 2124 (Ch); [2018] Pens. L.R. 18 at [7] – [10]. The court was provided with a confidential opinion produced by Mr Grant and had the opportunity to discuss it with him in the absence of the other parties. As on previous occasions where this procedure has been followed, I have found it useful because it provided an opportunity to discuss the Company’s evidence and to consider its strengths and weaknesses with a view to considering how close it comes to meeting the standard that is required. This can be done with greater candour in a reduced forum. This is particularly important where the firm of solicitors acting for the Company, as here, is the same as acted when what is said to a mistake occurred.

35. In addition, although there is no obligation to do so, an announcement was sent to Category D members in July 2019 explaining in clear terms what the nature of the claim was and giving them an opportunity to raise any points they wished to put forward. No responses were received.
36. It has been recognised in a number of cases that it is a good idea for members of the scheme who may be affected by the claim to be notified of the proceedings – see *Industrial Acoustics Company Limited v Crowhurst and others* at [58] – [60] and *Citifinancial Europe Plc v Davidson and others* [2014] EWHC 1802 (Ch); [2014] Pens. L.R. 625 at [7]. I agree, however, with Mr Grant’s observation that although at a general level notifying affected members is a good idea, because it does something to dispel the notion of a ‘private deal’, it comes with the risk that it could lead to a substantial response. If that were to happen the court would have to consider how to deal with an uncontested claim in which the interests of all affected parties are already catered for by the representation order. It might require no more than the court having regard to the additional representations and giving them appropriate weight. It is possible to conceive, however, that substantial informed objection to rectification might necessitate additional parties being joined, whether in a representative capacity or otherwise. Happily, such concerns do not arise in this case.

### **The evidence**

37. It is right to record that the Company’s evidence has been prepared with meticulous attention to detail and it comprehensively covers the relevant period, to the extent that the surviving documents and memories permit. The crucial events took place more than 20 years ago and it is inevitable that first hand recollections are limited. A review of the documentary evidence about what was said and, crucially, what was not said, is the best evidence about what the intention of the directors and the trustees must have been. There are, however, some aspects of Mr Blatchford’s evidence, to which I will return, that are helpful.
38. The context in which steps were taken to draft the 1996 Rules are not in doubt. It includes:
  - (1) The clear hierarchy of benefit under the Scheme between Category A to D members.
  - (2) The announcement in 1992 of a change to the benefit for Category D members and the implementation of that change.

- (3) The change in 1992 retained the hierarchy between members.
- (4) The benefit for Category D members under the 1992 announcement was a cap, not a collar.
39. At a trustees' meeting on 3 March 1995, it was agreed that the Scheme's governing documentation needed to be consolidated and that it would "incorporate the benefit improvements granted". On 11 September 1995 the trustees agreed that quotations should be sought from solicitors to update the Scheme's Trust Deed and Rules. This was the basis upon which Pointon York asked Lisa Gillespie of Eversheds to provide a quotation and the basis upon which Eversheds was appointed. A telephone attendance note of a conversation between Tan Ahmed of Pointon York and Lisa Gillespie on 29 November 1995 records that Lisa Gillespie said she would follow the previous deed and "inform the client of any proposed changes."
40. The draft 1996 Rules were considered at a trustees' meeting on 24 May 1996. There is a detailed minute of the meeting which makes no reference to a change to the benefit obtained by Category D members. By contrast, the minute records discussion about a significant number of other changes. Importantly, in light of the change from a cap to a collar, the trustees did not ask for the likely cost of such a change to be calculated. That would have been a very surprising omission, particularly in a context explained by Mr Blatchford of increasing concern about the cost of the final salary scheme and a decision taken in January 2006 to close the Scheme to new members, except by invitation, from 6 April 1996.
41. Neither Stephen Blatchford, Sandra Bishop nor Kenneth Bissett can recall any discussion of draft Rules 39.6.3 and 39.6.4 at the meeting on 24 May 1996 due to the passage of time. Their absence of recollection is merely neutral. What is telling, however, is Mr Blatchford's unequivocal evidence that had there been a proposal to change the benefit for Category D members he would have been aware of it and had he been aware of Rules 39.6.3 and 39.6.4 he would have drawn them to the attention of his fellow trustees and directors and required them to be altered. This evidence chimes with the Company's wish to control the cost of the Scheme which is recorded in a board meeting on 11 January 1996. The decision taken then to close the final salary scheme because it represented an "open-ended commitment" and an "open cheque book" is inconsistent with the change from a cap to a collar for Category D employees just a few months later.
42. Lisa Gillespie's witness statement candidly accepts that she made a mistake when drafting Rules 39.6.3 and 39.6.4. The reason for making such a mistake is not obvious other than that in drafting a very long document mistakes are likely to occur. There are circumstances in which the court will need to scrutinise evidence provided by the person who drafted the amendment or the new rules because it may be self-serving.<sup>3</sup> There is no concern of this nature about Ms Gillespie's evidence because of the absence of any contemporaneous documents which might shed light on why the rules were drafted to provide a collar rather than a cap.

---

<sup>3</sup> See the remarks of Edward Bartley-Jones QC in *Konica Minolta Business Solutions (UK) Ltd v Applegate (No2)* [2013] EWHC 2536 (Ch) [38]; cited with approval by Henry Carr J in *FSHC Group Holdings Ltd v Barclays Bank Plc* [2018] EWHC 1558 (Ch).

43. The court is entitled to have regard to evidence that post-dates the document that is to be rectified. Here, it strongly supports the Company's case. The Scheme was administered after the 1996 Rules came into effect completely ignoring the terms of Rule 39.6.3 and the ambiguous wording of Rule 39.6.4. The Scheme was administered on the basis of the 1992 announcement.
44. The court has been provided with evidence about the discovery of the mistake and the efforts that were made to correct it. Ms Gillespie says that she drew the error to Mr Blatchford's attention in 2004 and that she believed the 2008 Deed corrected the error. It is a little surprising that the need for rectification was not appreciated but ultimately the period that has elapsed from 2004 until this claim was issued is not of concern because, despite its length, it cannot be said that any significant prejudice has been suffered by the class of employees of which Mr Tanner is a representative. There is no realistic basis for relying on the doctrine of laches.
45. In conclusion, the Company has made out a strong case for rectification of Rules 39.6.3 and 39.6.4 based on convincing evidence. The principal factors that point to a failure of the wording of both rules to accord with the intention of the Company and the Trustees are:
  - (1) The manner in which the Scheme was changed in 1992 was consistent with the hierarchy of benefit between Category A to D employees. However, the drafting of Rule 39.6.3 amounted to a radical change which was inconsistent with the previous structure. It therefore called for an explanation.
  - (2) There was no reason why the Company and the Trustees would have wished to substantially increase the benefits of the Scheme to Category D Members at a time when the Company was concerned about the overall cost of the scheme.
  - (3) There is no evidence that either Rule was given any consideration by the Company or the Trustees and there was no assessment of the costs of the change that was made.
  - (4) The wording of Rule 39.6.4 was at best internally inconsistent. On one view it was nonsensical.
  - (5) The administration of the Scheme took no account of the changes indicated by Rule 39.6.3 and possibly by Rule 39.6.4.