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The cost of rectification

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Once errors in pension documents are spotted, the consequences can be serious for those involved in the scheme who must correct these mistakes.

From time to time, pension scheme deeds contain drafting errors. The trustees and employer understood the deed to mean one thing, but in fact, it was ambiguous or required them to do something else.

The problem with errors in pension documents is that they may not come to light until many years later. During that time the scheme will have been run on a basis which turns out not to be reflected in the deeds, potentially leading to extra cost and time dealing with administrative remedial measures.

The error is usually spotted when a thorough review of documents is carried out, such as when a new administrator is instructed; where an independent trustee is appointed; when a member raises a complaint; or it comes to light when the scheme has to be wound up.

Once spotted, however, the consequences can be serious for those involved in the scheme who need to decide what to do to correct the error, or face potential claims that they have committed a breach of duty or maladministration in continuing to carry out work under a mistaken basis.

One solution is to try to rectify the deed. Rectification is a remedy available through the courts which results in the intended effect of the deed being written into the deed and the error removed. Significantly, it is effective from the date of the deed so that the rectified wording is deemed to have been in the deed all the time.

In the latest judgment in this area, Justice Etherton faced an application for rectification brought by Gallaher Limited. Gallaher amended its schemes in 1987 to provide for increases to "pensions in payment from the fund... at the rate of the lesser of 2% and RPI [retail price index]." Pensions increases had always been understood by the company and trustee, notified to members, costed by the actuary and paid on the basis that increases were awarded only on the pension in excess of guaranteed minimum pension (GMP).

Gallaher sought to introduce the words "in excess of GMP" into the meaning of the 1987 deeds. As a matter of construction, however, the judge held the words were to be given their natural meaning and could not be implied. Gallaher further claimed rectification of the 1987 deeds on the grounds that the common continuing intention of the company and trustee was that the increases would not apply to the GMP element. The judge held that, on the evidence, the 1987 deeds should be rectified.

On the facts of the case, this was a just result but it came at a cost. A successful decision for Gallaher, but the procedure for bringing an application to court for rectification is complicated and lengthy. Rectification would be far more accessible to those facing difficult decisions when dealing with errors in their scheme documents if the procedure was simplified and made less costly. In this case, Gallaher was willing and able to take the case to the High Court, even though on the evidence the position was obvious.

In other equally obvious cases, a scheme may be faced with a difficult and expensive process to correct an obvious mistake, but may have insufficient resources to fund it. Clearly, all parties have a role to play in relation to rectification, but a streamlined, less expensive procedure would be beneficial to all concerned.