PENSIONS: SHAPING NEW LAW INTO SOLUTION-FOCUSED ADVICE FOR CLIENTS

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GMP Equalisations: The experience in Scotland and its broader implications

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Introduction

1. This paper considers the history of recent litigation in Scotland in connection with the application and alteration of rules in occupational pension schemes, primarily related to the need to equalise retirement ages between men and woman following the decision of the European Court of Justice ("ECJ") in *Barber* v *Guardian Royal Exchange Assurance Group*.[1]

2. The nature and effect of that decision will be well known to my audience and need be summarised only briefly. *Barber* was decided on 17th May 1990 and the effect of the decision was that it was no longer lawful in accordance with what was then Article 119 of the EEC Treaty to discriminate on grounds of sex in setting the normal retirement age in pension schemes. In the subsequent case of *Coloroll Pension Trustees Limited* v *Russell*,[2] the ECJ decided that in the period following the decision in *Barber*, that is to say from 17th May 1990 until the date when there was a subsequent decision on retirement ages in a particular pension scheme, the retirement ages of men and women would be equalised at the age which was most advantageous to the class of member concerned. This period is generally referred to as "the Barber window".

3. In order to address the history of events in Scotland and its consequences, I begin by summarising the relevant legal framework which exists in Scotland, I then look at the principal decided authorities, and I conclude by considering the potential implications.

The legal framework in Scotland

4. For those unfamiliar with the legal landscape north of the Border, it is necessary to give a little background. The starting point is that Scotland has its own legal system and its own courts which are quite distinct from those in the other parts of the United Kingdom. Unlike the legal systems in England, Wales and Northern Ireland which are based on the English common law, the origins of Scots law lie in civilian continental and Roman law. This is not a phenomenon brought about by devolution

[1] [1990] ECR I-1889, [1991] 1 QB 344.
[2] [1994] ECR I-4389, [1995] All ER (EC) 23.

but has existed since the creation of the United Kingdom over three hundred years ago.[3] The distinction has perhaps been emphasised by the creation of a devolved parliament at Holyrood with full primary and secondary legislative powers, but the distinct nature of Scots law has not been affected by that as a matter of general principle.

5. Since the creation of the United Kingdom, the distinctions between the laws of England and Scotland have to a significant extent disappeared as a result of the substantial amount of legislation which now exists within the law overall. Where legislation applies throughout the United Kingdom, its effect in Scotland will be the same as that elsewhere, albeit that it will be interpreted and applied by the courts in Scotland.

6. Examples of UK national legislation which are relevant for present purposes are the Pension Schemes Act 1993, the Pensions Act 1995 and the Pensions Act 2007, as well as the Equality Act 2010. Although the Scottish Parliament has power to legislate on all aspects of the law other than those which are reserved to Westminster, the regulation of occupational pension schemes is a reserved matter and thus remains as a United Kingdom legislative regime irrespective of devolution.[4]

7. The supreme civil court in Scotland is the Court of Session which sits only in Edinburgh. It comprises the Outer House, where single judges sit at first instance, and the Inner House, where panels of judges, normally three, sit to consider appeals as well as other particular procedures which are reserved to the Inner House. A judge sitting in the Outer House is known as a Lord Ordinary, and the parties to a claim are normally referred to as the "pursuer" and the "defender". An appeal in the Inner House is normally referred to as a "reclaiming motion", and a particular panel of judges sitting in the Inner House is known as a "Division".[5] A judgment given in either House of the Court of Session is known as an "opinion".

[3] The Union with Scotland Act 1706 which was an Act of the Parliament of England, and the Union with England Act 1707 (customarily referred to in Scotland as the "Act of Union") which was an Act of the Parliament of Scotland. The distinct legal system and courts of Scotland were preserved by Articles XVIII and XIX of the Act of Union.
[4] Scotland Act 1998, Schedule 5, para F3.
[5] There is a "First Division" and a "Second Division" to each of which particular judges are appointed permanently, and otherwise judges sitting in the Inner House will comprise an "Extra Division".

8. In cases before the Court of Session, authorities from England are cited regularly, not least in areas such as the present where there is a common legislative regime. English authorities are always treated as persuasive although such authorities are technically not binding on the Court of Session.

9. One aspect of the procedure before the Outer House which may be noted is that in Scotland there is much less emphasis at the early stage of proceedings on the existence of evidence. Cases of all sorts are often decided at what is known as a "debate", where the legal argument for both parties is presented upon the basis of the pleadings and the documents which are referred to, but without formal evidence, and the Court makes a decision as to whether or not a claim can be sustained as a matter of law. It is not unusual for cases to be determined finally at this stage, or to be subject to appeal after debate to the Inner House and even to the Supreme Court of the United Kingdom, and thus for the law to be determined without any actual findings in fact. This procedure is relevant because it has been adopted in some of the cases referred to below.

10. In relation to occupational pension schemes, a scheme will be subject to Scots law and to the jurisdiction of the Court of Session where the trust in question is regarded as being a Scottish trust, where its deed or rules specify that the law of Scotland is to apply, or where it is made subject to the jurisdiction of the courts in Scotland. It is not intended to address these aspects in any more detail.

The decided cases

11. The cases in the Court of Session to which reference will be made have almost all been decided within the past seven years. This is notwithstanding that the events in question have generally occurred in the early 1990s and following upon the decision in *Barber*. This is not unique to Scotland as there has been an apparent increase in equivalent litigations in England during the same period. Why it should be that the exercise of powers by trustees along with employers more than twenty years ago should have led to an upsurge in litigation only recently is a matter of speculation and not a topic for this paper. It is nevertheless interesting and the best explanation which I have heard is that it is the result of a general and recent increase in the rigour of auditing.

12. The first preliminary observation to be made about the cases in Scotland is that, as will be obvious, they have all concerned occupational pension schemes whose defining deeds, and whose particular provisions and rules, are unique. Most of the decisions have turned to some extent upon the particular provisions which were applicable, whether regarding amendment or alteration, or the ability in some schemes to apply special terms to members. In this paper, it is not appropriate to examine in any detail the particular provisions which applied in each case and these should obviously be borne in mind in further consideration of any decision. Nevertheless, it can be suggested that the range of decisions does demonstrate a consistency of approach.

13. Secondly, the result in an individual case will depend upon the evidence which exists of what steps were taken by those involved at the material time. Once again, it is not intended to discuss the detailed circumstances of any case although the approach which the Court of Session has taken where records can be seen to be incomplete is an important aspect of what will be discussed.

14. The third preliminary observation about the decisions in Scotland is that they have generally involved disputes initiated by scheme trustees, often along with principal employers, who have claimed that as a result of a failure lawfully to bring about equalisation and close the Barber window, a scheme has been administered in such a way that contributions have been inadequate and pension payments have been calculated incorrectly, with the result that there is a shortfall in the fund which requires to be made up. Whilst not all of the cases are in this form as will be seen, a number have been contested actions raised against pensions advisers who are claimed to have been in breach of duty, either in contract or in delict (as tort is known in Scots law), with the result that the advisers are liable for damages. The nature of such claims gives rise to a number of additional issues such as the extinguishment of claims by the operation of prescription (as limitation is known in this context in Scotland) and in the assessment of what might be the appropriate quantum of damages in the event that liability were to be established. Whilst these aspects are of potential interest, they are not related to the topic of this paper and indeed they have not been the subject of definitive determination in the Court of Session. This is because the cases which are referred to have almost all been determined upon consideration and application of the provisions applicable to the scheme in question.

15. The final preliminary observation to be made is that the Court of Session has not generally been involved in cases where pensioners or members in a scheme have been engaged. The Court has also not required pensioners or members to be represented in disputes involving trustees, employers and advisers.

16. It is appropriate to refer to the decided cases in the Court of Session in chronological order. In summary, and as will be seen, there are three elements which can be discerned for wider consideration from these decisions. The first case is *Low & Bonar plc* v *Mercer Limited*[6] and it demonstrated two of those elements. This was a case decided after debate, that is to say following legal argument only based on such documents as were referred to, and its circumstances related to steps which had been taken to equalise the "normal retirement date" (or "NRD") for male and female members as a consequence of *Barber*. The Court addressed two issues. The first issue concerned an alteration to the relevant scheme rules and the second concerned the application to members of special terms. The case was decided on the first issue but the judge also made observations on the second which have been picked up in subsequent cases.

17. In relation to the first issue, the scheme rules required that the power of alteration or amendment had to be exercised "by deed", a requirement which was not unique and which can be seen also in a number of the cases in England. In describing the approach to be taken, the Lord Ordinary (Drummond Young) said:

> "[8] Pension schemes are almost invariably set up using the medium of a trust. Nevertheless such trusts are different in a number of important respects from ordinary private trusts. They are essentially commercial in nature, and the benefits provided form an important part of employees' remuneration. Because such trusts are designed to exist for long periods and are likely to affect a substantial number of beneficiaries, they invariably include powers of amendment and modification, both general and particular. Such powers enable the pension scheme to adapt to changing circumstances, which is perhaps the most serious problem that confronts long-term trusts. They also permit a scheme to deal with the requirements of individual employees or groups of employees. The present case is concerned with the construction of powers of that nature.

[6] [2010] CSOH 47.

"[9] Because of the essentially contractual nature of pension schemes, I am of opinion that the correct approach to interpretation is that applicable to contracts rather than the approach used for private trusts. Thus the scheme documentation and any other documents prepared for the purposes of administering the scheme must be construed objectively. The words used must be given their natural meaning in the context of the scheme documentation and in the light of the underlying commercial purposes of the scheme. A commercially sensible construction will be preferred because that accords with the intention that a reasonable person involved with the scheme, whether as member, employer or trustee, is likely to have had. The court must in particular attempt to give practical effect to the scheme. In this connection, the administration of pension schemes is frequently conducted without elaborate legal advice, and in my opinion it is inappropriate that an over-legalistic approach should be taken to the niceties of the wording that is used: the practical effect of what is done is important. In construing a provision of the scheme, it is legitimate to consider the general factual and background [sic] at the time when the provision was introduced. Apart from the foregoing considerations, if the power of amendment or alteration imposes particular conditions for its valid exercise, these must obviously be satisfied. In considering such conditions, however, I am of opinion that the paramount consideration is that the exercise of the power should be clear and certain and that it should be put into some sort of permanent form; pension scheme trusts typically have a long life, and changes in the scheme and rules must be properly recorded. If, accordingly, a purported exercise of the power is clear and certain, looked at objectively, and it is put into written form, I do not think that there is any need for the court to be unduly technical or restrictive in considering the niceties of its manner of exercise."

18. These paragraphs have been quoted at length because they give a comprehensive account of how the exercise of a power for the amendment of pension scheme rules is to be judged in any particular case, and this is the first element to be discerned from the Scottish decisions. It means that in considering what has been done to bring about formal alteration or amendment of a scheme, the Court will construe the scheme documents objectively and will not adopt an "over-legalistic" approach, it will focus on the practical effect of what has been intended to be done, and it will require that the exercise of the power has been put in some sort of permanent form. Beyond that, and whilst also ensuring that any necessary protections have been observed, the Court will not be "unduly technical or restrictive in considering the niceties of its manner of exercise."

19. After describing the approach, Lord Drummond Young then referred in paragraph [10] of his opinion to decisions in England as providing a "degree of guidance as to the general approach to be taken to construction". He referred to the decision of the Court of Appeal in *Stevens* v *Bell* (also known as *British Airways Pension Trustees Ltd* v *British Airways plc*)[7] per Arden LJ at paragraphs 26 onwards, and to the decision of the High Court in *Bestrustees* v *Stuart*[8] per Neuberger J (as he then was) at paragraph 33. In other words, Lord Drummond Young drew support from the equivalent approach which is adopted in England (and it may be noted that in argument he was referred to further English decisions including in particular the decision of the House of Lords in *National Grid Co plc* v *Mayes*[9]).

20. Lord Drummond Young then went on to address what had actually been done in *Low & Bonar*. At paragraphs [15]-[18] of his opinion, he considered what was meant in Scots law by the expression "deed", and having referred to a number of older authorities in Scotland, he concluded that it is not a term of art and that "the significant characteristics of a deed are first that it should have some degree of formality and secondly that it must demonstrate a need to create a legal relation." He also considered the status of a company board minute by reference to section 382 of the Companies Act 1985 (which applied when the relevant decision in the case had been made) and he decided that such a minute fulfilled those two characteristics. Lord Drummond Young then said:

> "[19] … the purpose of requiring any change in the Rules to be carried out by deed is clearly to ensure that the decision is clear and definite and is adequately recorded; that is essential to achieve certainty as to the rights of members and as a point of reference for the future conduct of the Scheme, which may well subsist for many years in the future. These considerations are fully satisfied by recording the alteration in a board minute which, as I have already remarked, is an important document. The solicitor acting for the pursuers submitted that holding that a minute could amount to a deed could have undesirable consequences. There was good reason to have formal procedures to amend a pension scheme; in particular, that would avoid the necessity of hunting through the minute books of the Company to discover what had happened. While I agree that some degree of formality is clearly contemplated, I do not think that the difficulty of searching the Company's

[7] [2002] EWCA Civ 672, [2002] Pens LR 247.
[8] [2001] Pens LR 283.
[9] [2001] 1 WLR 864, [2001] Pens LR 121.

> minute books is a serious problem; the obvious procedure would be to lodge a copy of the relevant portion of the board minute as part of the Scheme documentation. That should fully protect the interests of the Trustees in ensuring proper administration in the future, and it should make the rights of the members of the Scheme quite clear."

21. Lord Drummond Young therefore found that there had been amendment sufficient to achieve equalisation by a "deed". This was constituted by a signed company minute because the expression "deed" is not a term of art in Scots law. In doing so, his Lordship nevertheless emphasised the need for sufficient compliance with the specified procedures when amendments to occupational pension schemes were being made. The decision in *Low & Bonar* on the first issue therefore turned upon a particular aspect of general Scots law, namely the significance of the expression "deed": see his opinion at para [16]; it did not turn upon any aspect of the law of occupational pension schemes which was peculiar to the law of Scotland.

22. The second issue in the decision in *Low & Bonar* concerned a particular rule in the scheme in question which is once again not uncommon in pension scheme rules. This was Rule 16(B) and it provided that the principal employer might determine in relation to a new or existing member of the scheme that "his membership thereof may be continued on special terms as to contributions, benefits or other relevant matters." Consideration of that issue provides the second element which may be discerned from the decision.

23. It was a matter of agreement before the Court by reference to a particular proviso that the rule might be used to alter members' NRDs and it was submitted for the defenders that the rule could be used to modify the rules applicable to any group or class of members, or even of all of the members of the scheme. Lord Drummond Young recognised that the application of this procedure was only relevant in the event that he was wrong in finding that a valid amendment to the rules had been made, and indeed that the two arguments were contradictory. Nevertheless, he observed that if he were to be wrong in holding that the board minute in question did amount to a "deed", he was satisfied that the board's decision was sufficient to amount to a valid exercise of the power to admit members to special terms: see in his opinion at paragraph [24]. In explanation of this conclusion, his Lordship said:

"[25] In the first place, the critical qualification in Rule 16(B) is that a member or group or groups of members should be admitted to "special" terms. The word "special" does not impose a rigorous criterion, however; it can apply to groups of members, and even large groups of members. In the present case the whole of the existing contributing membership was included, the men because their NRD had been reduced to 60 immediately following the Barber decision. Nevertheless, the membership of the scheme would include retired members, enjoying their pensions, and probably also deferred members, who had contributed to the scheme and then gone to work for another employer, so that their benefits were preserved but not yet in payment. The latter two categories would have had benefits that were already defined, and consequently would not be affected by the equalization at 65. Thus equalization was not universal, and it can be said that groups of members were admitted to special terms.

"[26] In the second place, the court must be careful to ensure that any safeguards for members in relation to amendment or alteration of the scheme are properly preserved; that is clear, for example, from the passage from Lord Hoffmann's [speech] in *National Grid* cited above… In the present case, under the amendment procedure in Rule 4 there is a requirement that the Trustees should consent to the determination of the Principal Employer, and there are certain protections designed to preserve the tax exempt status of the Scheme. The tax status of the scheme is not in issue. So far as the position of the Trustees is concerned, they expressly consented to the alterations determined by the Company. Thus the critical protection available under clause 4 was in fact satisfied in the present case. In the third place, the proviso to Rule 16(B) contemplates that modification of the Rules can be made under that Rule in such a way as to alter members' NRDs. That suggests that the Rule is intended to be fairly general in application. There are no express restrictions on the use of the Rule apart from the word "special" and in my opinion there is no objection to using the Rule to alter the NRDs of members, even large classes of members. I can see nothing in Rule 16 taken as a whole that is inconsistent with this view. In the fourth place, while the board resolution of the Company… does not refer to rule 16(B), that is not necessary. When trustees exercise a power it is not necessary that they should do so expressly; it is sufficient if the use of the power can be inferred from what the trustees have done: *Davis* v *Richards & Wallington Industries Ltd* [1990] 1 WLR 1511, at 1530-1531 per Scott J. In the present case, what the Company intended to do is in my opinion quite clear from the terms of the board minute…, and accordingly it is unnecessary that the Company should refer to the particular power that was being exercised.

> "[26] [sic] I was referred to cases on the application of powers to create special terms. In *Capital Cranfield Trustees Ltd* v *Beck*, [2008] EWHC 3181 (Ch), Morgan J held that NRDs could not be equalized generally under a power that permitted the alteration of NRDs in "any particular case". In my opinion that power is distinct from that in the present case. In any event, in *Capital Cranfield* the procedure used by the employer was defective in a number of other respects: see paragraphs 46-48. In *Hodgson* v *Toray Textiles in Europe Ltd*, [2006] Pensions LR 253, Lewison J held that the equalization of NRDs at 65 involved the alteration in the terms of the scheme for all members, because following *Barber* male members' NRDs had been automatically reduced to 60. That is clearly correct, and I have taken it into account in the above analysis."

24. Thus the second element which may be discerned from the decision in *Low & Bonar* is that Lord Drummond Young decided that where there is an appropriate provision in the scheme rules, "special terms" may be applied to a large number of members, and even the vast majority of members. Although this was expressed *obiter* because his Lordship had decided the case on the first issue, nevertheless his conclusion is significant and in reaching it he did take into account English authorities.

25. Although the decision in *Low & Bonar* was only at first instance in the Outer House, and in the case of the second element what was said was *obiter*, nevertheless it may be observed at this stage that the decision in practical terms set the tone on the two elements identified for the consideration of subsequent cases on alteration and equalisation in Scotland, and Lord Drummond Young's approach has in effect been vindicated since. The third element in the approach of the Court of Session was to come later.

26. The next decision in the sequence of authorities is *William Grant & Sons Limited and Others* v *Mercer Limited*[10] which, although decided afterwards, was heard before the opinion of Lord Drummond Young in *Low & Bonar* had been issued. *William Grant* was again decided following debate in the Outer House in an action against pensions advisers, and it concerned a scheme which was in relevant respects in the same terms is that in *Low & Bonar*. In his opinion, the Lord Ordinary (Menzies) was not prepared to hold at that stage that equalisation had been effected, but he also noted that there was an equivalent argument under what was also Rule 16(B) in which the then recently-issued decision in *Low & Bonar* was relevant: see his opinion at paragraphs [5] and [22]; and consideration of further procedure was deferred.

[10] [2010] CSOH 52.

27. Although it is obviously one of the cases in the sequence of authorities which I discuss, the decision in *William Grant* has not featured in subsequent authorities and, as there is no reference to any further substantive decision in the case, it may be assumed that the proceedings in *William Grant* were resolved by agreement, whether by reference to Rule 16(B) following the decision in *Low & Bonar* or otherwise.

28. The next substantial case to be noted is that of *Trustees of the Scottish Solicitors Staff Pension Fund* v *Pattison & Sim*[11] which was a decision in the Inner House of the Court of Session (that is, a decision on appeal) and it provided the third element to be identified from the cases in Scotland. This was an action by the trustees of the fund who were seeking to recover contributions from solicitors who were employers of beneficiaries under the fund. The solicitors as defenders resisted the claim upon the basis that the rules under which the payments were claimed were invalid because the trustees had failed to establish in respect of amendments to the rules from 1990 that the proper amendment procedure had been followed. That procedure required a series of formal steps to be taken including the approval of any amendment by two-thirds majorities of employers and members at three specified meetings to be held to approve the proposed amendment. This procedure was described in the opinion in the Inner House referred to below as a "triple-lock" mechanism. The defenders had called upon the trustees to produce documentation to vouch that the specified procedures had been followed and that the meetings had been held, but searches had been largely unsuccessful. At first instance and following debate, the Lord Ordinary rejected the defenders' arguments and granted decree in favour of the trustees for payment of the contributions claimed. The defenders appealed by way of a reclaiming motion.

29. The appeal was heard by an Extra Division of the Inner House and the opinion of the Court was given by Lord Drummond Young. He began by confirming the approach to be taken:

[11] [2015] CSIH 96, 2016 SC 284.

> "[18] The general approach to the interpretation of pension scheme documents should in our opinion reflect the fact that pension schemes and the trusts under which they operate are designed to exist for long periods and are likely to affect a substantial number of beneficiaries: *Low & Bonar PLC* v *Mercer Ltd…*, at paragraphs [8]-[9]. Consequently such schemes invariably include powers of amendment and modification, which enable the scheme to adapt to changing circumstances. In particular, changes in the legislation that regulates pension schemes, in relation to both general administration and taxation, are relatively frequent, and all schemes must be able to respond to such changes in such a way as to secure the benefits due to members. The same is true of changes in investment conditions; schemes must be able to adapt. Subject to these considerations, if a power of amendment imposes conditions for its valid exercise, these must obviously be satisfied. In considering such conditions, however, we are of opinion that the primary aim is that the exercise of the power should be clear and certain and should be put into some sort of permanent form. Provided that that is done, we do not think that the court should be unduly technical or restrictive in considering the niceties of its manner of exercise."

As an opinion delivered in the Inner House, that passage may be taken as providing a definitive statement of the law as it is to be understood and applied in the Court of Session. As will be apparent, it supports the approach set out more extensively in *Low & Bonar* and thus endorses the first element identified above.

30. The second aspect of the decision in *Scottish Solicitors Staff Pension Fund* concerned the application of the maxim *omnia praesumuntur rite esse acta¸* otherwise referred to as the presumption of regularity. This is the third element to be identified from the decisions of the Court of Session on pension scheme amendment. It was important in the circumstances of the case in question given the absence of documents demonstrating the following of the triple-lock mechanism, but it is relevant more generally because the absence of contemporaneous documents has been a regular feature of the Scottish cases. It had been referred to before Lord Menzies in *William Grant* but no definitive view was expressed on the basis of what was pled in that case: see his opinion at paragraph [26].

31. In dealing with this issue in *Scottish Solicitors Staff Pension Fund*, Lord Drummond Young said:

> "[19] In considering transactions that have taken place a significant time in the past, there is a general presumption that all the necessary procedures have been properly followed, the result being that the burden of proving otherwise rests on any party who challenges the transaction. The presumption is generally referred to by the Latin maxim *omnia praesumuntur rite esse acta…:* all things are presumed to have been done duly and in the usual manner. The principle is of wide application…"

His Lordship then referred to a number of Scottish and English authorities, in particular a passage in the speech of Lord Halsbury LC in the House of Lords in *Bain* v *Assets Co*[12] where he referred to the matter resting "upon broad common sense". Lord Drummond Young continued:

> "[20] In our opinion four main reasons may be said to justify the application of the maxim. First, in practice those who carry out transactions generally ensure that at least the substance of the transaction is properly decided and recorded. Consequently any defect in procedure tends to be a matter of form rather than substance. The maxim thus reflects the underlying principle that substance is more important than form. Secondly, if there is a substantial objection to the transaction, it is likely that there will be an immediate challenge, at least on an informal basis. The result is that any defects in procedure that are serious and material, in the sense that they affect the end result, are likely to be addressed at the time. Thirdly, when a considerable time is allowed to pass after a transaction has been carried out, evidence will frequently be lost. If the onus fell on those who carried out a transaction to prove, possibly many years after the event, that it had been carried through according to proper form, the practical difficulties might be enormous…
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> "[21] Fourthly, and perhaps most importantly, transactions do not stand alone. The parties to them, and third parties affected by them, rely on the existence and validity of a transaction in their future dealings. If a transaction were open to challenge, possibly long after it was carried out, on the ground that it was impossible to prove that proper procedures had been used, all subsequent dealings that proceeded on the faith of that transaction would also be potentially open to challenge. That would be an intolerable situation, both in the commercial world and elsewhere. This is well illustrated by the facts of the present case. To take the adoption of the 1990 Rules as an example, if that transaction were now open to challenge because it could not be proved that the

[12] (1905) 7F (HL) 104, at p 106.

> "triple-lock" procedures had been followed, all of the subsequent transactions of the Fund, involving employers, members and others, would also be potentially open to challenge. No pension fund could seriously carry on its administration under such a threat. As Lord Halsbury states, the matter is common sense."

32. Once again, that is an opinion given in the Inner House and it may be taken as a definitive statement of the law as it will be applied by the Court of Session, and it has been adopted and applied in subsequent cases. It describes what is the third element for present purposes which is that where there is an absence of contemporaneous evidence that the formalities of a decision-making process have been followed, the Court will presume that the procedure has been regular and compliant unless there is something which can be identified to the contrary. In such a situation, the burden of proof lies on the person seeking to challenge the regularity of the procedure.

33. The first of those subsequent cases is *Bett Homes Limited* v *Trustees of the Bett Limited Superannuation and Life Assurance Scheme*.[13] This case concerned a dispute between the principal employer and the trustees of a fund as to whether the scheme had been lawfully amended on dates in 1992 and 1993 in two respects, namely the so-called escalation of benefits and the equalisation of a common pension age. If no such amendment had taken place in either respect, the principal employer would become liable for substantial additional contributions.

34. The nature of the proceedings was in the form of a special case. This is a procedure used rarely in which competing parties present an agreed statement of facts and address one or more questions for the opinion of the Court. A special case is presented in the Inner House and there is no right of appeal to the Supreme Court. The opinion expressed by the Court on the questions will determine the issues raised but no other order or judgment is given. In *Bett Homes*, the statement of facts narrated the steps which had been taken and the documents which had been located at the material times and asked the Court two questions which were respectively whether escalation of benefits and equalisation of the normal pension date had been achieved at the intended dates. The principal employer contended that in each case

[13] [2016] CSIH 26.

the necessary changes had been effected, and the trustees, although essentially neutral, contested that. Both parties wished the definitive views of the Court so that the scheme could be administered lawfully in the future. The most important aspect to note is that in the case of neither change did the parties contend that the rules of the scheme had been altered by the applicable amendment procedure which was provided in clause eighteenth of the relevant trust deed and rules. This was because the parties had agreed based upon such documents as had been found that this could not be supported: see the opinion of the Court given by Lady Clark of Calton at paragraph [3]. The case therefore turned upon whether it could be said that the same result had been achieved by the intimation of special terms to the members concerned in accordance with the procedure provided in clause nineteenth (d). This was, of course, to adopt the second element which was described obiter by Lord Drummond Young in *Low & Bonar.*

35. The special case was heard before an Extra Division of the Inner House. In considering whether clause nineteenth (d) was capable of providing a legal basis for administration of the scheme in terms of the changes, Lady Clark said:

> "[21] Detailed provision is set out in clause eighteenth to ensure that amendment of any of the Trusts, powers or provisions of the Trust Deed or amendment of any of the rules should be done by way of the specified formalities set out in said clause. We accept that an obvious way of making changes in this case in relation to escalation of benefits and equalisation of pension age would be by way of amendment in terms of clause eighteenth by complying with the necessary formalities, that is, by deed or resolution as specified therein. Clause nineteenth… gives the Trustees useful powers to augment benefits, commute pension, terminate contributions and determine special terms in relation to "any Member" without the necessity of going through the formalities required in clause eighteenth. We have no doubt that under clause nineteenth (d) the Trustees have power in relation to "any Member" to grant special terms, in relation to escalation of benefits or pension age, which are not in accordance with the terms of the Scheme and rules. To achieve that, all that is required is a determination of the Trustees, consent of the principal employer… and intimation to the Member. Clause eighth which refers to the conduct of business by the Trustees does not specify any formalities. The Trustees may meet together and may regulate their business as they may decide. Decision making is by majority voting. No documentation is specified. A written resolution signed by all the Trustees is effective as an alternative to a meeting of the Trustees, but such a written resolution is not mandatory. We accept that there is a marked contrast in the formality specified in clause eighteenth and clause nineteenth. We consider that

clause nineteenth provides a way for the Trustees to operate outwith the terms of the Scheme and the rules in determining various arrangements devised in relation to the circumstances of "any Member". There are obvious advantages, when the Trustees are dealing with the special circumstances relating to individual Members, of permitting the Trustees to act without requiring the Trustees to use the formal amendment provisions of clause eighteenth.

"[22] Counsel for both parties submitted that clause nineteenth should not be given a restricted meaning and that, in particular, clause nineteenth (d) should be read as giving power to the Trustees to apply special terms, not merely in relation to any individual Member but to a very large class or classes of Members which may affect most, if not all, Members of the Scheme. We consider that the terms of clause nineteenth (d) are drafted in the widest possible terms. There is no restriction relating to: the circumstances in which the Trustees may operate said clause; the nature of "such special terms"; and the power refers to "any Member". Even interpreting the clause strictly, we do not consider that any restriction is implied about the number of Members, or the type of Member (for example, existing or future), to which special terms might apply. In our opinion, it is for the Trustees, with the consent of the Company, to make the determination and there is nothing in clause nineteenth to define or restrict that determination. We note that rule 16(B), considered in *Low & Bonnar Plc* [sic] is framed in terms different from those to clause nineteenth (d) and we therefore do not draw assistance from the observations of the Lord Ordinary about the ambit of rule 16(B). We consider that the terms of clause nineteenth (d) are more general than the terms of rule 16(B). We conclude that although clause nineteenth (d) may have been designed to give powers to the Trustees to deal with the circumstances of individual Members without requiring any formal change to the rules, the generality of the language used in said clause gives Trustees extensive powers of decision making, with no restrictions relevant to the present case. However the determination of the Trustees alone is not sufficient: there must be consent of the principal employer… We also consider that intimation to the member or members of the Scheme is essential to give effect to the words … "that his membership shall be on such special terms as are intimated to him…". There are no requirements about the form or source of intimation. As clause nineteenth (d) does not amend the rules of the Scheme, the only way in which a member is to be made aware of the special terms is by intimation to the member. The language of clause nineteenth (d) in our opinion leads to the conclusion that there are three essential elements (and not only two) required by this clause. In contrast, the wording of clause eighteenth implies that amendment is completed by following the specified formalities for amendment procedure and that the amendment does not fail because of a lack of intimation. Clause eighteenth, in our opinion, is akin to the provisions considered by Lightman J in *Betafence Ltd* and referred to by counsel

for the Trustees.[14] In addition, under the Scheme, provision is made for a Member to obtain a copy of the applicable rules which would include any amendment made to the rules.

"[23] We accept that clause nineteenth (d) is capable of providing a legal foundation for the administration of the Scheme provided that the three essential elements of the clause were fulfilled before the two changes were made to the administration of the Scheme in respect of escalation of benefits and equalisation of pension age."

36. That passage is significant for a number of reasons. In the first place, it represents an endorsement of the approach taken by Lord Drummond Young in *Low & Bonar* in relation to special terms, even if Lady Clark considered that the scope of the relevant clause was rather wider than that in the earlier case. This means that the approach may now be accepted as a part of the law of Scotland having been expressed definitively in the Inner House in order to decide a case before it. Secondly, the availability of the approach is not universal but will depend upon the terms of the particular provision in the deed or rules in question. It is an approach which will only be available where there is an appropriate special terms provision. Finally, it may be seen to echo what might be done in England in an equivalent situation by reference to the decision in *Betafence Limited*.

37. In relation to the arguments which had been presented, Lady Clark noted in her opinion at paragraph [10] that the Extra Division had been referred to the unreported decision of the First Division in 1992 in the case of *Trustees of the J & A Ferguson Pension Fund* v *Readman*[15] which concerned a dispute as to whether a scheme had been operated under rules which had been amended. In his opinion, the Lord President (Lord Hope) is quoted as saying:

> "The proper test of whether the previous documentation had been superseded by the new draft documentation is whether the inferences can be drawn from the actings of the Trustees, known to and not objected to by the Participating Companies, that all these parties were agreed that the Trustee should operate the Scheme in all respects as if the Deed of Variation and the New Rules had been formally executed…"

[14] *Betafence Limited* v *Veys and others* [2006] EWHC 999 (Ch), at paras 66-67.
[15] 31st December 1992, Unreported, digested at 1993 GWD 4-275.

The circumstances in that case did not concern the amendment of rules to achieve equalisation but the passage quoted may be interesting as an early example of the approach of the Court of Session to the amendment of rules generally (although Lady Clark found the passage to be of limited assistance in *Bett Homes*: see her opinion at paragraph [28]). Lady Clark also noted in paragraph [10] of her opinion that the Court had been referred to the English case of *Vaitkus and Others* v *Dresser-Rand UK Limited*[16] which included as an issue whether a notice had been effective to introduce a special term affecting members' retirement dates in accordance with a "special terms" provision in the rules similar to that in *Low & Bonar*. Although *Vaitkus and Others* was accepted to be of limited assistance in *Bett Homes*, it did refer to *Low & Bonar*, and although distinguished on its facts, *Vaitkus and Others* does not disapprove of or disagree with the approach to special terms described in *Low & Bonar*, and indeed may be said to have adopted it.

38. On the merits of the questions before the Court in *Bett Homes Limited*, and having regard to the agreed documentary material which was available, the Court went on to find that there had been a determination of special terms in compliance with clause nineteenth (d) in respect of escalation of benefits, but that there was insufficient evidence from which to infer that the trustees had made a decision in accordance with clause nineteenth (d) in respect of equalisation: see the opinion of the Court at paras [27]-[30] and [31]-[34] respectively.

39. The final case to be noted is the decision of the Outer House in *Trustees of the Johnston Press Pension Plan and others* v *Sedgwick Noble Lowndes Limited and Mercer Limited*.[17] That decision concerned four separate occupational pension schemes which were the subject of four individual actions in each of which the trustees and the principal employers disputed that the equalisation of retirement ages for men and women had been achieved at various dates in the early 1990s. The actions were actions of damages raised against pensions advisers. The cases were determined after proof upon agreed evidence, rather than at debate, but the reasons for that procedural difference are not material for present purposes.

[16] [2014] Pens LR 153, per the Deputy Judge (HHJ Jarman QC) at paras 67-69.
[17] [2017] CSOH 21.

40. In each of the four cases, the Lord Ordinary (Tyre) held on the evidence that the defenders were entitled to rely upon the presumption of regularity. In doing so, he referred to what had been said by Lord Drummond Young in *Scottish Solicitors Staff Pension Fund* in the passages quoted above, and Lord Tyre himself referred again to *Bain* v *Assets Co*[18] and to the English cases of *Morris* v *Kansen*[19] and *Harris* v *Knight*,[20] each of which vouches the existence of the presumption of regularity in the laws of both Scotland and England: see his opinion at paragraphs [8]-[11]. Lord Tyre then considered the evidence which was available in respect of each of the four schemes and found that there had been a valid equalisation in each case having applied the presumption of regularity whilst noting that there had been no evidence provided to rebut the presumption.

The potential implications

41. Having considered the relevant decisions of the Court of Session in some detail, I turn to discuss the potential implications for those dealing with occupational pension schemes throughout the United Kingdom. In doing so, it need hardly be emphasised that in relation to the decisions above which dealt with equalisation, these dealt only with the equalisation of normal retirement ages between men and women. They did not consider the further issues arising from equalisation of benefits whether as a consequence of the equalisation of retirement ages or otherwise as required by law. This means that I do not address the implications referred to in the recent government consultation paper on matters including equalisation of pension benefits as required under the Equality Act 2010.[21] Likewise, I do not address a number of other features of the many reported decisions in England which have featured to some extent in the cases decided in Scotland but which do not relate to the three elements which have been identified. These include the need for sufficient

[18] (1905) 7F (HL) 104, at p 106.
[19] [1946] AC 459, per Lord Simonds at p 475.
[20] (1890) 15 PD 170, per Lindley LJ at pp 179-80.
[21] Dealt with in Chapter 3 of the paper entitled *Occupational pension schemes draft amendments to contracting out regulations, Occupational pensions legislation subject to review, A proposed methodology for equalising pensions for the effect of GMPs, Public consultation*, published by the Department of Work & Pensions, November 2016.

notification to members,[22] the need for the proper vouching of the consent of the principal employer,[23] and the fact that an alteration to the normal retirement age cannot take effect retrospectively.[24]

42. What then are the potential implications? In looking at these, I refer to each of the three elements which have been identified as discernible from the decisions made in Scotland. The first of the elements is the approach to the construction of pension scheme deeds and rules and the consideration of what may have been done in an effort to alter or amend these. The approach was set out by Lord Drummond Young in his opinion in *Low & Bonar* at paragraphs [8] and [9], and endorsed in the Inner House in the opinion of the Court which he gave in *Scottish Solicitors Staff Pension Trustees* at paragraph [18]. In saying what he did, his Lordship took into account as a guideline the English cases which he referred to and he did not purport to adopt any different approach himself. As already noted, the result in relation to the first element in *Low & Bonar* was a consequence of a difference in general Scots law, not any difference in relation to pensions. In England, the decision in *Low & Bonar* was referred to in the case of *Vaitkus and Others* (albeit in relation to special terms) without any adverse comment, nor, so far as I am aware, has any adverse comment been made in any other case south of the Border.

43. Furthermore, a similar approach may be said to have been stated in more recent decisions in England. In the decision of the Court of Appeal in *Honda Motor Europe* v *Powell*,[25] Lewison LJ said:

> "24 The task is to determine what the words of the instrument, read against the relevant background, would have meant to a reasonable reader. It is an iterative process in which possible meanings are checked against their likely consequences and the background facts. If the language is reasonably susceptible of two or more meanings, the court should choose that which best serves the object or purpose of the transaction, objectively ascertained. Any

[22] See *Betafence Limited* v *Veys* [2006] Pens LR 137, per Lightman J at para 67; and *Bestrustees v Stuart* [2001] Pens LR 283, per Neuberger J at para 38.
[23] See, for example, *Bestrustees,* per Neuberger J at paras 32 and 34.
[24] See *Harland & Wolff Pension Trustees Limited* v *AON Consulting Financial Services Limited* [2006] Pens LR 201, per Warren J at paras 43-45, by reference to the principles set out by the ECJ in *Smith* v *Avdel Systems Ltd* [1994] ECR I-4389, [1995] 3 CMLR 543.
[25] [2014] Pens LR 255.

> interpretation must, so far as possible, be one that is not impractical or over restrictive or technical in practice. But three further points are of importance in this case. First, the question is not what the parties meant to say; but what is the meaning of what they did say. Second, the language that they used is likely to be the most important factor, unless the court can conclude that something has gone wrong with the language. Third, where the parties have themselves defined their own terms, the court must give effect to those definitions."

It is evident from this passage that the courts in England will follow the language of a document where that language is clear and unambiguous. Where multiple meanings are available, the court will follow that meaning which is closest to the "purpose of the transaction". This many include construing an ambiguous provision to save an amendment, rather than adopting a technical interpretation which would prevent it: see *Premier Foods Group Services* v *RHM Pension Trust Limited*,[26] per Warren J at paragraph 30. The question as to whether a notice complies with the requirements for the amendment of a scheme is one to be judged objectively, based on all of the surrounding circumstances and the position of a reasonable recipient: see *Sovereign Trustees* v *Glover*,[27] per Sir Andrew Morritt C at paragraph 28.

44. As a consequence of these comparisons, it may be said in relation to the first element that the approach of the Court of Session in relation to the construction and application of pension deeds and rules is no different to that adopted by the courts in England.

45. The second element identifiable from the Scottish decisions relates to the availability of special terms provisions in order to identify a different normal retirement age for a number of members than that provided in the scheme. Once again, the Court of Session adopted an approach by reference to authorities in England: see the opinion of Lord Drummond Young in *Low & Bonar* at the two paragraphs numbered [26]. In that passage, his Lordship referred to the fact that the potential application of special terms had been considered in England in *Capital Cranfield Trustees Ltd* v *Beck*[28] and

[26] [2012] Pens LR 151.
[27] [2007] Pens LR 277.
[28] [2008] EWHC 3181 (Ch).

Hodgson v *Toray Textiles in Europe Ltd*[29] albeit that these decisions were distinguished. In relation to *Hodgson*, this was distinguished because it purported to apply special terms to all members of a scheme, something which Lord Drummond Young himself regarded as unacceptable. In the English case of *Vaitkus and Others*, the approach of Lord Drummond Young on this element was referred to directly without criticism as just referred to. Once again, therefore, the Court of Session may be said to have adopted an approach in relation to the second element no different to that adopted in England.

46. Finally, in relation to the third element which is the application of the maxim *omnia praesumuntur rite esse acta*, otherwise the presumption of regularity. In regarding that presumption as available, the Court of Session relied on authorities of the highest order in both Scottish and English cases. The presumption has been referred to as being of possible application in English pension scheme cases: see *Harwood-Smart and others* v *Caws*,[30] per Rimer J at paragraphs 29-30, and *Entrust Pension Limited* v *Prospect Hospice Limited*, per Henderson J at paragraphs 39-40, which latter passage was referred to in argument in *Johnston Press Pension Plan.* The issue in *Entrust Pension* was whether trustees had ever validly exercised a particular discretion in a situation where there was a lack of clear documentary evidence, and although Henderson J found the presumption of regularity to be "of only marginal assistance" in the circumstances before him, nevertheless the fact that the presumption has been recognised as being of potential significance by the High Court may suggest once again that there is no fundamental distinction on the third element between the approach of the High Court and Court of Appeal and the approach of the Court of Session.

47. Overall, therefore, it may be said that the decisions in the Court of Session have suggested on all three elements that there is no difference in the approach of that Court to that of the equivalent courts in England. Having said that, it could be that there is a perception that the Court of Session has striven to take a pragmatic

[29] [2006] Pens LR 253.
[30] [2000] Pens LR 101.

approach where its equivalent in England would have refrained from doing so.[31] A reference to "pragmatic" may be said not to reflect a difference of approach in terms of strict legal principles, but more an underlying difference in attitude whereby the Court of Session has seen the most desirable outcome in any case such as those discussed as being to bring about a situation whereby the previous and subsequent administration of a pension scheme should not be disrupted if at all possible. Whether this may be a result of the historical differences in approach between the Scots civil law and the English common law, and not least the existence of a distinct Chancery jurisdiction south of the Border, is open to debate.

48. Further, it might be that the more pragmatic approach of the Court of Session has influenced judges south of the Border whether consciously or subconsciously in more recent decisions, and that for example the passage quoted above from the judgment of Lewison LJ in *Honda Motor Europe* reflects more of the Scottish approach than might have been apparent in English cases previously. That is a potentially more controversial position than I would feel able to advance and, on these possible comparisons and conclusions, I leave it for others to judge.

49. Finally, and as an afternote, it will be observed from the citation of each of the Scottish cases on occupational pension schemes referred to above that only one has been reported in Scotland (*Scottish Solicitors Staff Pension Fund*) and none has been reported in the specialist pension reports. Given that we are dealing with a legislative regime which applies consistently in the United Kingdom for the reasons already explained, it appears to me at the least to be unfortunate that a strand of legal thinking on a matter which is equally relevant on each side of the Border has received no recognition in reports used by pension practitioners throughout the United Kingdom.

[31] Reference to the approach of the Court of Session in *Low & Bonar* as being "pragmatic" may be found in the article *Scottish court takes pragmatic approach to Barber equalisation,* Occ Pen 2010, 276,1.