



SHEPHERD+ WEDDERBURN

A black and white photograph of chess pieces on a board. In the foreground, a dark wooden king piece is in sharp focus. To its left, a white knight piece is visible but out of focus. In the background, another white knight piece is also out of focus. The lighting is dramatic, highlighting the textures of the wood.

PENSIONS DISPUTE RESOLUTION

shepwedd.com

About us

Pensions disputes can be complex, time consuming and expensive. Resolving pensions disputes is an area in which we have particular recent expertise, having acted on the successful side of Scottish cases concerning the validity of pension scheme amendments. The decisions in those cases changed the landscape in Scotland in this area, developing the law and altering practice in a way that has been beneficial to Trustees, Companies and Scheme Administrators alike.

Pension scheme amendments

We act for a number of pension administration and actuarial firms, as well as providing litigation support to our Pension Team Trustee clients. We acted in relation to a number of Scottish professional negligence claims concerning pension scheme amendments and the requirement to equalise Normal Retirement Dates (“NRD”). Applying English authorities there was little hope of avoiding liability. However, we took a fresh look at the issues, applied a rigorous and tenacious approach, and developed arguments that were ultimately successful, resulting in our client being absolved of any liability.

Equalisation - The Barber Window

The decision in Barber v GRE 17 May 1990 created a lot of uncertainty, the fall-out of which is still being felt today. Scheme audits frequently uncover longer ‘Barber windows’ than was intended, with the potential financial consequences often running into millions of pounds. A series of decisions from the English courts established that scheme amendment provisions must be adhered to strictly. Even where it was clear that the trustees and the company intended to equalise the scheme and that all the members had been advised of the change, if the formalities were not complied with the court would determine that the scheme had been left unequal until a formal amendment deed was signed years later. This left many schemes with a serious funding gap, which the company and/or trustees often look to the administrators to fill.

Innovative approach

Minutes Construed as Deeds

In Low & Bonar v Mercer [2010] CSOH 47, we argued that signed minutes of a meeting of the Company Board, at which the decision to equalise NRD had been taken, could constitute a ‘Deed’ as there is no technical definition of deed in Scotland, unlike in England. This was accepted by the Scottish Court of Session and the scheme was held to have been validly equalised on the date of the signed Minute, thereby avoiding any need to revisit benefit calculations and the consequent funding gap.

In discussing amendment of pension schemes Lord Drummond Young noted that “it is inappropriate that an over-legalistic approach should be taken... the practical effect of what is done is important” and “there is [no] need for the court to be unduly technical or restrictive” in approach.

This decision led to the settlement of a number of other equalisation claims in Scotland, with Company and Trustee legal advisors applying a much more pragmatic approach to amendments in light of the guidance from the Court of Session.

While the deed argument is particular to Scots law, other arguments we have used could also work under English law.

Membership on special terms

An alternative argument was run in *Low & Bonar* that if the scheme had not been validly equalised in accordance with the amendment provision, equalisation had been effected by way of the 'membership on special terms' provision. This provision commonly allows for terms applicable to particular members to be altered by a decision of the Company and Trustees followed by notification to the member. Again, the traditional view following English decisions is that equalisation cannot be effected by announcement using the 'membership on special terms' provision. However, in *Low & Bonar* Lord Drummond Young took the view that the 'membership on special terms' provision could be used as a way of changing NRD for all female members (increasing their NRD to 65). Although the English courts have rejected this argument in the past, recent obiter comments in a High Court case refer to this aspect of the *Low & Bonar* decision and indicate that the door may not have been finally closed on this line of argument in England.

The arguments that succeeded in relation to equalisation related amendments could of course be equally applicable to other scheme amendments, such as those related to converting Defined Benefit schemes to Defined Contribution schemes.

Other arguments

The decision that the scheme was validly amended when intended has meant that the Scottish courts have not yet considered a number of other defences that could be run in relation to professional negligence claims, including defences related to prescription (time-bar), that the terms of appointment did not cover the services referred to, and that there was no negligence given the general approach adopted at the relevant time. In Scotland the courts require those pursuing a claim of professional negligence to produce an expert report addressing the negligence test early on in the procedure.

Other pensions related disputes

We act for both pursuers and defenders in relation to their disputes, and our clients include pension scheme administrators, actuaries, Trustees and Company employers. We have acted in relation to a range of disputes concerning pension schemes, including:

- rectification applications to remedy errors in scheme documents
- member claims
- Pension Ombudsman complaints
- applications for directions on the proper running of schemes
- professional negligence claims against professional advisors, actuaries, administrators and solicitors
- advising Trustees in relation to their duties

How we will support you

We can assist you in handling pensions disputes, whether that is by providing advice on resolving an issue out of court, assisting in identifying relevant information or guiding you through Scottish court procedure. We know from experience that challenging traditional assumptions and careful consideration of the facts and law can provide a solution.

We work closely with colleagues from our top ranked Pensions team, the largest Pensions team in Scotland.

Key Contact



Elaine Brailsford

Partner

T +44 (0)131 473 5287

E elaine.brailsford@shepwedd.com

Edinburgh Glasgow London Aberdeen

shepwedd.com