



## Rectification

---

A scheme's governing documentation dictates the benefits payable to its members and the manner in which the trustees must administer the scheme. If there is a mistake with this documentation, such that the document does not state what the trustees and employer intended it to say, then the trustees and employer may want to 'rectify' that document so that it gives effect to their true intention. If they do not do this, then the trustees may be bound to administer the scheme in a way that the parties had not originally intended.

### **What is rectification?**

Rectification is a discretionary, court-ordered remedy which allows the claimant, usually the employer, to fix a mistake in the trust deed or rules with retrospective effect. By granting rectification, the court is attempting to ensure that the deed and rules reflect the parties' intention at the time the document was drafted.

Rectification is often sought in cases where, because of a mistake in the drafting, beneficiaries are entitled to more benefits than were actually intended. These mistakes cannot be remedied by way of amendment because section 67 of the Pensions Act 1995 broadly prevents changes being made to the trust documents which would adversely affect the benefits or entitlements that members have already earned under the rules of the scheme.

### **When can a claimant obtain rectification?**

In order to obtain rectification, the claimant must demonstrate the following:

- that the parties had a common intention, whether or not amounting to an agreement, in respect of a particular matter in the document to be rectified;
- the intention continued at the time of the execution of the document; and
- by mistake, the instrument did not reflect that common intention.

### **Issues for an employer to consider when deciding whether to pursue rectification**

#### *Evidential issues*

The employer, as the claimant, will need to establish the common intention of itself and the trustees at the time the document was drafted. This will often require a substantial amount of evidence to be submitted to the court, namely:

- witness statements of the trustees and representatives of the employer involved in the discussion and drafting of the document before it was formally entered into; and
- contemporaneous documentary evidence, such as scheme booklets and announcements, minutes of trustee meetings, minutes of board meetings of the employer, internal memoranda and reports showing the employer's intention in relation to the issue at hand, notes of meetings and telephone conversations between the employer and trustees and any advice from, and instructions to, professional advisers.

It may be necessary for witnesses to appear in court to be cross-examined, although if the written evidence is particularly strong, the court may be prepared to deal with the matter without it going to a full hearing on the strength of this evidence, in what are called summary proceedings. To read more, visit [www.allenoverly.com/highcourt](http://www.allenoverly.com/highcourt).

## Cost

Many pensions rectification cases are resolved by summary judgment, a much quicker and cheaper alternative to a full hearing. Nonetheless, as collating the evidence will still involve time and money, rectification is rarely sought where the error has caused minimal loss.

## Alternative remedies to rectification

Given the evidential burden, an employer may want to consider alternatives to rectification:

- Construction: can the court correct the mistake through construction of the particular provision? This does not require the court to know the parties' intentions, however it must be very clear as to what has gone wrong and what the provision should have said. To read more, visit [www.allenoverly.com/interpretation](http://www.allenoverly.com/interpretation).
- Doctrine of mistake: this has been severely limited in the pensions context following *Pitt v Holt/Futter v Futter*. In these cases, the courts held that mere ignorance, inadvertence or misprediction will not be sufficient to have a provision or document set aside – it must be a mistake of sufficient gravity, such as a mistake as to the legal nature of the transaction or some matter of fact or law which is basic to the transaction, and of a sufficiently serious nature that it would be unfair for it not to be undone.

- Rule in *Hastings-Bass*: previously, the court could intervene to correct trustees' actions, if they would not have taken that action had they taken full account of all relevant factors and disregarded all irrelevant ones. Use of this rule has been limited in recent cases, especially in the pensions context.

The above methods do require applications to be made to court, however, they may involve less work for the employer and trustees.

## Limitation periods and delay

Although there is no strict limitation period applying to rectification claims, the courts may not grant rectification if the employer or trustees have delayed bringing the claim and the members might suffer as a consequence of that delay. In pensions cases, courts have so far not found that a claimant should be barred from bringing a rectification action due to delay.

## Professional negligence

The employer and/or the trustees may also consider bringing a professional negligence action against the advisers who drafted the trust deed/rules containing the error. If rectification is granted, the claim will be for costs incurred in the rectification action. If rectification is not granted, the claim will be for the increase in scheme liabilities due to the error. To read more about professional negligence claims, visit [www.allenoverly.com/profneg](http://www.allenoverly.com/profneg).

For more information on avoiding and managing pensions disputes, please visit our Pensions in Dispute site at [www.allenoverly.com/pensionsindispute](http://www.allenoverly.com/pensionsindispute)

## Key contacts



**Neil Bowden**  
Partner  
+44 20 3088 3431  
[neil.bowden@allenoverly.com](mailto:neil.bowden@allenoverly.com)



**Jane Higgins**  
Partner  
+44 20 3088 3161  
[jane.higgins@allenoverly.com](mailto:jane.higgins@allenoverly.com)



**Andy Cork**  
Partner  
+44 20 3088 4623  
[andy.cork@allenoverly.com](mailto:andy.cork@allenoverly.com)



**Jason Shaw**  
Counsel  
+44 20 3088 2241  
[jason.shaw@allenoverly.com](mailto:jason.shaw@allenoverly.com)



**Jessica Kerslake**  
Counsel  
+44 20 3088 4710  
[jessica.kerslake@allenoverly.com](mailto:jessica.kerslake@allenoverly.com)

Allen & Overy means Allen & Overy LLP and/or its affiliated undertakings. Allen & Overy LLP is a limited liability partnership registered in England and Wales with registered number OC306763. Allen & Overy (Holdings) Limited is a limited company registered in England and Wales with registered number 07462870. Allen & Overy LLP and Allen & Overy (Holdings) Limited are authorised and regulated by the Solicitors Regulation Authority of England and Wales.

The term partner is used to refer to a member of Allen & Overy LLP or a director of Allen & Overy (Holdings) Limited or, in either case, an employee or consultant with equivalent standing and qualifications or an individual with equivalent status in one of Allen & Overy LLP's affiliated undertakings. A list of the members of Allen & Overy LLP and of the non-members who are designated as partners, and a list of the directors of Allen & Overy (Holdings) Limited, is open to inspection at our registered office at One Bishops Square, London E1 6AD.

© Allen & Overy LLP 2019. This document is for general guidance only and does not constitute definitive advice. | CO:27910479.9