Neutral Citation Number: [2014] EWCA Civ 437

Case No: A3/2013/3344

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT, CHANCERY DIVISION
Mrs Justice Asplin
HC12F04112

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: Friday 11th April 2014

Before :

LORD JUSTICE MAURICE KAY, VICE PRESIDENT OF THE COURT OF APPEAL
LORD JUSTICE LEWISON
and
SIR STANLEY BURNTON

- -

Between :

(1) HONDA MOTOR EUROPE LIMITED **(2) HONDA OF THE UK MANUFACTURING LIMITED**	**Appellants**
- and -	
(1) TONY POWELL **(2) HONDA GROUP – UK PENSION SCHEME LIMITED**	**Respondents**

(Transcript of the Handed Down Judgment of
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Official Shorthand Writers to the Court)

Mr Brian Green QC & Mr Andrew Mold (instructed by Sacker & Partners LLP) for the **Appellants**
Mr Andrew Simmonds QC (instructed by Osborne Clarke) for the **First Respondent**
Mr James Clifford (instructed by Burges Salmon LLP) for the **Second Respondent**

Hearing dates : 2 and 3 April 2014

Judgment

As Approved by the Court

Lord Justice Lewison:

The issue

1. Until 1986 Honda Motor Europe Ltd ("HME") was the sole participating employer in the Honda Group UK Pension Scheme. By a Deed of Adherence dated 6 October 1986 Honda of the UK Manufacturing Ltd ("HUM") became a participating employer in the scheme and membership of the scheme was opened to its employees ("HUM members"). The question is whether the Deed of Adherence conferred scale benefits on the HUM members ("the HUM scale benefits") which differed from (and were much less generous than) those in the existing scheme, or whether further documentation was required to produce that result. This turns on the meaning of the provision in clause 1 of the Deed of Adherence which stated that:

> "[HME] … hereby extends the benefits of the Scheme to all eligible employees and directors of [HUM] with effect from [1 August 1986]"

2. A lot of money (at least £47 million) turns on the answer.

3. The judge (Asplin J) held that the Deed of Adherence did not confer scale benefits on HUM members which differed from those under the existing scheme. Her judgment is at [2013] EWHC 3149 (Ch); [2013] Pens LR 417.

4. HME and HUM, represented by Mr Brian Green QC and Mr Andrew Mold, appeal. Mr Powell (a representative HUM member) appears by Mr Andrew Simmonds QC to resist the appeal. The trustee of the scheme, represented by Mr James Clifford, takes a neutral position. HME and HUM have indicated that if unsuccessful on this appeal, they may bring proceedings for rectification of the Deed of Adherence. It was agreed between the parties that that claim would be parked for the time being, and that the current proceedings would be limited to questions of interpretation. In retrospect that was an unfortunate decision.

5. For the reasons that follow, I would dismiss the appeal.

The relevant terms of the scheme

6. The Scheme was established in 1973. It was governed by a Definitive Trust Deed and Rules dated 24 November 1981 ("the 1981 Trust Deed and Rules"). The relevant provisions of the 1981 Trust Deed and Rules are:

> "Any employer which desires to become a party to the Scheme at any time after the date hereof and is associated with the Principal Employer and the participation of which therein is approved by the Principal Employer the Trustees and the Commissioners of Inland Revenue shall enter into an agreement with the Principal Employer and the Trustees supplemental hereto binding itself to observe and perform the provisions hereof and of the Rules and shall thereby become a

> party to the Scheme and to this Deed as from a date to be specified in such agreement." (Clause 15)
>
> "The Principal Employer may from time to time without the concurrence of the Members authorise the Trustees in writing to alter or add to the terms and provisions of the Rules and/or the trusts powers and provisions of this Deed and any such alteration or addition may have retrospective effect. The Trustees shall forthwith declare any such alteration or addition to the Rules in writing under their hands and any such alteration or addition to this Deed in writing under their hands and seals … This Deed and/or the Rules shall stand amended accordingly with effect from the date of such declaration or from such other date (whether future or past) as is stated in such declaration. In the event of the Trustees making any such alteration or addition to the Rules the Trustees shall forthwith notify or arrange for the notification of each Member affected thereby individually in writing of the effect thereof …" (Clause 16)

7. Rule 3(a) dealt with admission of new members and provided for completion of "a written application in such form (if any) as the Trustees may require".

8. The judge set out the benefits to which members of the scheme were entitled under the 1981 Trust Deed and Rules ("the HME scale benefits"). The details do not matter. All that matters is that they are much more generous than the benefits intended to be conferred on HUM members.

The facts

9. The principal facts are uncontroversial, and I take them more or less verbatim from the judge's judgment. Until the Deed of Adherence was executed the only employer participating in the Scheme was HME (then known as Honda (UK) Ltd). HME was Honda's sales and marketing arm in the UK and was based in Chiswick, West London. Its employees were predominantly office and administrative staff. However, around 1985 Honda in Japan decided to establish a manufacturing base in the UK. HUM was incorporated for this purpose and a manufacturing plant was acquired at Swindon, Wiltshire. It was intended that workers would be recruited by HUM from August 1986 in order to operate the Swindon plant.

10. After discussion, it was decided by HME and HUM (with approval from Honda Head Office in Japan) that pension benefits for HUM employees would be provided via the Scheme rather than by establishing a new pension scheme; and that the benefit scale for HUM employees should be less generous than the benefit scale provided for HME employees. The Minutes of a meeting of 2 July 1986 record:

> "The concept of [HUM] benefits being provided in the HUK Scheme is accepted as is the contracting-out basis. The only matter to resolve is the actual level of benefit provision. It is clear that the MD of Honda UK is also interested in operating

on a contributory basis for future HUK people. An early decision is expected on the level of benefit provision.

In the meantime, a Deed of Adherence and Notice of Intention should be prepared."

11. After discussion and detailed costings of various benefits packages, on 23 July 1986 Mr Webster, HUM's HR Manager, and Mr Stanfield of pensions consultants Noble Lowndes Pensions Ltd ('NLP'), which supplied the then corporate trustee of the Scheme, had a telephone conversation recorded in the following note:

> "Telephone conversation with Jeremy Webster
>
> Jeremy contacted me today to confirm that a decision has now been reached as to the form of Scheme required.
>
> We are to proceed on basis b (as per copy statement attached) looking at an effective date of the 1 August 1986.
>
> Martin confirmed this will be on the 'joint' basis i.e. under the umbrella of the current Honda definitive documentation.
>
> We discussed the action that is now required to be taken and the following was agreed:
>
> 1) Jeremy will write today confirming decision to proceed.
>
> 2) We will progress position on Deed of Adherence and inclusion on the Honda Holding Company contracting out certificate.
>
> 3) A short snappy initial announcement letter will be required.
>
> Jeremy wishes to be in a position to deduct reduced rate National Insurance Contributions when he does his August payroll round about the 15 August and I explained to him the requirement for inclusion on the contracting out Certificate and the three month notice period. It was agreed, in practical terms, that reduced rate contributions would be deducted from the commencement date and that Honda would take their chances if things didn't go according to plan."

12. Basis b referred to in that note is equivalent to the HUM scale benefits.

13. As envisaged in Mr Stanfield's note Mr Webster wrote to him on the same day. By a letter dated 23 July 1986 Mr Webster confirmed that HUM wanted NLP to proceed with 'the preparation of a Pension Scheme' on the basis of 'Basis B', the details of which were duly set out. The letter concluded:

> "Therefore, further to Mr Koch's letter of 4th July, could you now proceed as soon as possible with the preparation of the Deed of Adherence for our Company to participate in the

> existing Honda UK Pension arrangements. Further, you should proceed with the Notice of Intention to contract out on the understanding that our scheme start date is August 1st 1986.
>
> Please provide as suggested, the draft of an appropriate letter to our staff explaining our new pension arrangements."

14. Mr Webster did not specify what the letter should say, or from whom it should come. That, apparently, was left to NLP as the pensions experts. In his response of 30 July 1986, Mr Stanfield pointed out a typographical error in the description of the proposed benefits. He said that the necessary steps would be taken to put the arrangements into effect and confirmed that he had arranged for life assurance and disability benefit cover to come into effect from midnight on 31 July 1986. He was not specific about what the necessary arrangements were.

15. Following on from Mr Webster's letter of 23 July 1986 an announcement to employees was produced and signed by Mr Webster. It is dated 1 August 1986 (i.e. two months before the Deed of Adherence was executed). It read as follows:

> "The Company [i.e. HUM] are pleased to announce that arrangements have been made for all full-time permanent employees under age 60 to be included in the Honda (UK) Limited Pension and Assurance Scheme with effect from 1st August 1986.
>
> This announcement gives brief details of the benefits which will be available to you and your dependants. A booklet giving full details of the benefits will be issued in due course."

16. The announcement then set out the HUM benefit scale. It also stated that an application form should be completed in order to join the Scheme.

17. Also in August 1986 Mr King, the company secretary of HME, signed a Notice of Intention to Elect to Add a Company to the Coverage of a Holding Company Certificate. The relevant parts of that read as follows:

> "1. This notice is addressed to employees of [HUM] in the employments covered by the Honda (UK) Limited Pension and Assurance Scheme. It affects those who qualify (or will qualify) for pension benefits under the scheme at the level required for contracting out.
>
> 2. We [HME] give notice that, in accordance with Part III of the Social Security Pensions Act 1975 … we intend to elect that the contracting out certificate issued to us be varied from 1 August 1986 so that it shall also apply to employments with [HUM].
>
> 3. The benefits provided by, and any employee contributions payable to, the scheme are described in the attached

announcement dated 1 August 1986 a copy of which is obtainable from Jeremy Webster.

4. No change will be made to scheme benefits and contributions as a consequence of varying the certificate."

18. The announcement, setting out the HUM benefit scale, was attached to that notice. But it was common ground that this notice did not itself alter the benefits provided under the scheme.

19. A draft Deed of Adherence was then prepared by NLP and was vetted by Honda's solicitors. It was eventually executed on 6 October 1986. The parties were HME, HUM and the then trustees. The Deed of Adherence recited:

> "(A) By an Interim Trust Deed … dated [13 November 1973] … the Principal Employer [i.e. HME] established a retirement benefits scheme called "The Honda (UK) Limited Pension and Assurance Scheme" (hereinafter called "the Scheme")
>
> (B) By a Definitive Deed … dated [24 November 1981] and the rules attached (hereinafter called "the Rules") … the provisions of the Scheme as required by the Interim Deed were set out
>
> (C) By Clause 15 of the Definitive Deed the Principal Employer may with the consent of the Trustees extend the benefits of the Scheme to the employees and directors of any Employer which is or may become associated in business with or which is directly or indirectly controlled by the Principal Employer subject as therein provided (herein called 'the Associated Employer')
>
> (D) The New Participant [i.e. HUM] is an Associated Employer and the Principal Employer is desirous of extending the benefits of the Scheme to the employees and directors of the New Participant who are or may become eligible for and admitted to membership of the Scheme."

20. Clause 1 provided:

> "The Principal Employer with the consent of the Trustees as witnessed by the execution of this Deed hereby extends the benefits of the Scheme to all eligible employees and directors of the New Participant with effect from the first day of August one thousand nine hundred and eighty six."

21. Clause 2 provided:

> "The New Participant hereby covenants with the Principal Employer and as a separate covenant with the Trustees to comply with and observe such of the provisions of the Interim Deed the Definitive Deed and the Rules as are or may be applicable to the New Participant as an Associated Employer."

22. The Scheme Booklet was subsequently amended to contain the HUM scale benefits in respect of HUM members and the scheme was administered on that basis. However the HUM scale benefits structure, in the form set out in the announcement, was not formally incorporated into the scheme's Trust Deed and Rules until 1998. It is common ground that the Consolidating Trust Deed and Rules dated 10 December 1998 incorporates that scale and governs the accrual of benefits by HUM employees from 10 December 1998 onwards. So the importance of the question of construction relates to the benefits to which HUM employees are entitled in respect of service from 1 August 1986 (or, if later, the date on which they joined the scheme) to 9 December 1998. If they are entitled to the more generous benefits under the original scheme, the additional cost has been estimated at about £47 million on the statutory ongoing funding basis and around £70 million on a discontinuance basis.

Two questions

23. It is, I think, common ground, that there were potentially two questions for the judge to consider:

    i) What does clause 1 of the Deed of Adherence mean? and

    ii) If the reference to the "benefits of the Scheme" means the HUM scale benefits, was there an effective exercise of the power of amendment contained in clause 16 of the 1981 Trust Deed and Rules?

24. There is no serious dispute about the principles of interpretation to be applied. The judge set them out at [22] to [26] and there is no criticism of her self-direction. 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 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.

Interpretation of clause 1

25. The critical phrase is that HME:

    "extends the benefits of the Scheme"

26. The "Scheme" is a term which is defined by recital (A). It means the Honda (UK) Limited Pension and Assurance Scheme, established by the interim deed. It is common practice in the pensions world (as happened in our case) for an interim deed to be superseded by a definitive deed, executed in pursuance of the interim deed itself. Recital (B) tells us that the definitive deed and the rules set out the provisions of the Scheme, as required by the interim deed. It is therefore the definitive deed and the

rules attached to it, to which the reasonable reader would look to find out what are the provisions of the Scheme (as defined). I also agree with Mr Simmonds that the verb "extends" points strongly towards the conclusion that a pre-existing benefit is being offered to a new category of potential members. Clause 1 also speaks of "all eligible members and directors." That phrase is not defined by the Deed of Adherence itself. However, as noted, recital (B) directs attention to the rules; and rule 2 defines who is eligible to benefit under the Scheme. Thus is it clear that the rules must be used as an aid to the interpretation of the Deed of Adherence. It is also, in my judgment, appropriate to recognise that the Deed of Adherence does more than merely extend "the Scheme" to HUM members. It extends "the benefits" of the Scheme to them. I agree with Mr Green that the benefits of the Scheme must be the pension entitlement of members of the Scheme, rather than some form of "feel-good factor" conferred by membership of the Scheme without any actual entitlement to anything. However, in addition to containing the definition of who is eligible to benefit under the Scheme, the rules also define what those benefits are. It does so by reference to the HME scale benefits. They are an integral part of the rules. I cannot see anything in the Deed of Adherence which would, on the one hand, incorporate the definition of eligibility contained in the rules but, on the other hand, exclude the scale benefits contained in those rules. In addition, the instrument itself is called a "Deed of Adherence" and no more.

27. Simply as a matter of what the deed actually says, I cannot draw from it the conclusion that it varied the Scheme (as defined) except by extending it to a new participating employer and a new category of potential members.

28. In addition to what the deed says, Mr Simmonds also relied on what it did not say. Although it recited the interim deed and the 1981 Trust Deed and Rules, it did not refer to the announcement of the HUM scale benefits, either by reciting it or in any other way. In addition although it recited a paraphrase of clause 15 of the 1981 Trust Deed and Rules which allows the extension of existing benefits to new categories of member, it neither recites nor refers to clause 16. It is the latter clause and not the former that allows amendments to the benefits to be made. Clause 1 of the Deed of Adherence tracks precisely the paraphrase of clause 15 contained in the recital.

29. It is of course necessary to check this provisional conclusion against the background. At the meeting in July 1986 it is, in my judgment, clear that adherence to the scheme and the level of benefits were treated as two separate questions. The level of benefits had still to be agreed, but the Deed of Adherence was nevertheless to be prepared "in the meantime." That envisages that the Deed of Adherence could be prepared in ignorance of what the ultimate decision on the level of benefits would be. It does not, of course, tell us what the contents of the Deed of Adherence would be. The letter of 23 July 1986 which contained the instructions to proceed with the Deed of Adherence described it as:

> "the preparation of the Deed of Adherence for our Company to participate in the existing Honda UK Pension arrangements"

30. It also asked for a suitable letter to be prepared. If a letter setting out the HUM benefits had been signed by the trustees it would have satisfied the formal requirements of clause 16 which only required writing under hand of the trustees. This

too is at least not inconsistent with an intention that participation in the existing arrangements and identification of the scale benefits would be dealt with separately.

31. There is nothing else in the background which might lead one to suppose that the Deed of Adherence was to effect any more than the exercise of the power under clause 15 to extend the existing scheme to a new participating employer and a new category of member. Exercise of the power to amend the rules under clause 16 could have been achieved either by a modified form of announcement (signed by the trustees) or by a separate writing signed by the trustees which could have come into existence contemporaneously with the Deed of Adherence, or at any time thereafter. If either had happened the Deed of Adherence would have been drafted in exactly the same way. In my judgment, therefore, there is nothing, so far, to displace the provisional conclusion I have reached on consideration of the language.

32. Mr Green stressed the principle that any interpretation must, so far as possible, be one that is not impractical or over-restrictive or technical in practice. However, I cannot see what is impractical, over-restrictive or technical about this interpretation. Any problem would have been instantly cured if the 1981 Trust Deed and Rules had been amended by the exercise of the power of amendment contained in clause 16. This is not a question of the interpretation of the Deed of Adherence. It is the consequence of the parties' omission to follow through the whole of what they intended to do.

33. That, unfortunately, is all too common in pensions cases. There are many cases in which the courts have held that an attempt to amend the benefits (typically to equalise benefits between men and women) has failed because of a failure to comply with the formal requirements of the definitive deed and rules.

34. At [38] the judge recorded Mr Simmonds' preferred interpretation; namely that the phrase "the benefits of the Scheme" was simply a generalised reference to the advantages of being able to accrue benefit under the existing scheme and was not intended to refer to any particular scale of benefits. The judge accepted this interpretation at [62] to [71]. At [63] she said that the critical phrase was an "indicator of an intention to make available a pre-existing state of affairs rather than to create a wholly new and detailed category of benefits." I agree. But the pre-existing state of affairs was entitlement to pension in accordance with the existing rules of the Scheme. She went on to say that the benefits of the scheme did not refer to precise details of the benefit scale. That is true; but clause 1 did not need to because recital (B) had already informed the reader that the provisions of the Scheme were to be found in the rules. The definitive deed (which was part of the documentation containing the provisions of the Scheme referred to in recital (B)) also contained the power to amend the rules. It is possible that the judge to some extent misunderstood the interpretation for which Mr Simmonds contended (in that she may have thought that he was arguing for a construction that said nothing about scale benefits) or that Mr Simmonds has to some extent modified his case on appeal. But either way, he made it clear that his submission to this court was that adherence to the Scheme (as defined) entailed adherence to all the provisions of the Scheme including both the scale benefits conferred by the rules and also the power of amendment contained in clause 16, which would have allowed those benefits to be changed as regards HUM members. In my judgment that is the natural meaning of the words used in the Deed of Adherence.

35. Mr Green said that if that was the conclusion to which the court was minded to come, it was an interpretation that was untenable and silly. In that event it was clear that something had gone wrong with the language when considered against the admissible background. In this respect he relied on the well-known statements of Lord Hoffmann in *Chartbrook Ltd v Persimmon Homes Ltd* [2009] UKHL 38; [2009] 1 AC 1101. *Chartbrook* was a case about a formula for calculating the price to be paid for the grant of leases following development. Lord Hoffmann said that:

> "… in some cases the context and background drove a court to the conclusion that "something must have gone wrong with the language". In such a case, the law did not require a court to attribute to the parties an intention which a reasonable person would not have understood them to have had." (at [14])
>
> "… there is not, so to speak, a limit to the amount of red ink or verbal rearrangement or correction which the court is allowed. All that is required is that it should be clear that something has gone wrong with the language and that it should be clear what a reasonable person would have understood the parties to have meant. In my opinion, both of these requirements are satisfied." (at [25])

36. It is noteworthy however that he took the view that to interpret the formula in that case "in accordance with ordinary rules of syntax makes no commercial sense" (see [16]) and that that interpretation was "arbitrary and irrational" (see [20]).

37. In my judgment it is still necessary in order to invoke this principle that something should have gone wrong with the *language*, as opposed to the implementation of the bargain, or the relevant decision to exercise powers: see *Scottish Widows Fund and Life Assurance Society v BGC International* [2012] EWCA Civ 607 at [21] (iii); *Cherry Tree Investments Ltd v Landmain Ltd* [2012] EWCA Civ 736; [2013] Ch 305 at [131] and [144]. The typical case in which the principle applies is where the clause in question is "an obvious nonsense": see *JIS (1974) Ltd v MCP Investment Nominees I Ltd* [2003] EWCA Civ 721 per Carnwath LJ at [17], [18], [19] and [23]. In addition even where the principle is invoked the question remains: what is the meaning that the instrument would convey to the reasonable reader?

38. In my judgment nothing has obviously gone wrong with the language of the Deed of Adherence. It gave effect to a decision made under clause 15 to extend the benefit of the Scheme to HUM members. There is nothing irrational or absurd in the deed as a matter of language. It is not as though clause 1 makes no sense. In my judgment the language of the Deed of Adherence is clear, all the more so since the "Scheme" is a word that the parties have themselves defined. What may have gone wrong was that those charged with implementation overlooked the need for a separate exercise of the power of amendment conferred by clause 16. I do not consider that that omission can change the meaning of the Deed of Adherence. This, as Longmore LJ said in *Cherry Tree* at [144], is "classic rectification territory". Accordingly if there is a remedy, it lies in the remedy of rectification; or in the new point (dealt with below) that Mr Green sought to take.

Effective exercise of the power to amend

39. The judge accepted the principle that it is not necessary to refer expressly to a power in order to exercise it: *Davis v Richards & Wallington Industries Ltd* [1990] WLR 1511, 1530 – 1531. In that case Scott J accepted the submission that a disposition of property may be regarded as the implied exercise by the disponor of a power vested in him and the exercise of which would be necessary for the disposition to take effect. He said:

> "A disponor (A) purports to make a disposition of property. The disposition cannot be effective unless associated with the exercise of a power vested in A and that A could properly have exercised in order to make the disposition. The disposition makes no mention of the power and does not purport to be an exercise of it. The effect of the principle and cases to which I have referred is that A's intention to make the disposition justifies imputing to him an intention to exercise the power, provided always that an intention not to exercise the power cannot be inferred. If the requisite intention can be imputed, the court will treat the disposition as an exercise of the power."

40. The judge held at [61] that her first task was to interpret the Deed of Adherence. Unless, properly interpreted, the Deed itself *purported* to incorporate the HUM scale benefits into the Scheme (as defined), the principle in *Davis v Richards & Wallington Industries Ltd* could not apply. I agree with her; and I understood her conclusion in this respect to be common ground. As Scott J's formulation makes clear the first question is: what disposition has the disponor purported to make? That principle only applies where the exercise of a power is necessary to validate the purported disposition. Since I agree with the judge that the purported disposition did not include the incorporation of the HUM scale benefits, I also agree with her that this principle does not apply.

A new question

41. Mr Green sought to advance a new point which was not taken before the judge. The point is this. HUM had agreed to adhere to the Scheme on the basis of the HUM scale benefits; and HME and the trustees had agreed to admit HUM to the scheme on that basis. There was no agreement for HUM to be admitted on any other basis. In those circumstances once the Deed of Adherence had been executed HUM had a right in equity to compel HME and the trustees to exercise the power of amendment in clause 16; and HME and the trustees also had rights in equity, as between themselves, to compel the exercise of that power of amendment. In these circumstances the maxim "equity regards that as done which ought to be done" applies; with the consequence that all parties are treated as having validly exercised the power of amendment in order to incorporate the HUM scale benefits with effect backdated to 1 August 1986.

42. Mr Green accepted, I think, that in order to bring the maxim of equity into play it was necessary to find a specifically enforceable obligation. He said that the trustees had in fact exercised their discretion in accordance with clause 16. They had decided that either set of proposals under consideration would be acceptable and left it to Honda to make the choice between them. Mr Green accepted that the trustees' decision was

initially revocable. But he said that by entering into the Deed of Adherence the trustees had made their decision irrevocable and had made a contract by conduct to make the necessary declaration in accordance with clause 16.

43. It will be appreciated that this way of putting the case is very close to the case on rectification which, by agreement, the parties have hived off from the current litigation. Indeed if anything it requires a stronger case, because whereas rectification can be obtained on the basis of a common communicated understanding falling short of a contract, the application of the maxim of equity requires a specifically enforceable obligation. It would also require a fact finding exercise which the judge did not carry out (because she was not asked to in view of the way in which the case was argued below). Mr Green argued that this point was raised in response to the interpretation of the Deed of Adherence that the judge adopted which was not foreshadowed (or at least not clearly foreshadowed) before trial. But whatever construction the judge adopted (if not the construction for which Mr Green contended) could, at least theoretically, have been outflanked by the application of the equitable maxim. Accordingly if the point was to be taken in the current proceedings it could and should have been taken below. Moreover if the maxim applies, it would not, in my judgment, change the *meaning* of the Deed of Adherence. It would deem a document to have been executed when in fact it had not been. That is not, to my mind, a question of interpretation which, by agreement between the parties, is all that is in issue in these proceedings. In addition, as I have said it is closely related to the rectification claim which has yet to be advanced or decided, and in which this point can be raised. We refused permission to advance this point for the first time on appeal; and these are my reasons for joining in that decision.

Result

44. I would dismiss the appeal.

Sir Stanley Burnton:

45. I entirely agree.

46. As Lord Justice Lewison has stated, there is nothing wrong with the terms of the Deed of Adherence. Its meaning and effect are reasonably clear and sensible. If the rules of the scheme had been separately amended so as to incorporate the intended benefits of the HUM scheme for its employees and directors, the terms of the Deed could have been the same. In order to establish that something went wrong with the Deed of Adherence, it is necessary to investigate facts outside the document. That is the territory of rectification, not of interpretation.

Lord Justice Maurice Kay, Vice-President

47. I agree with both judgments.