



In the matter of the OSM Provident Fund
Royal Court
7th August, 2018

JUDGMENT
33/2018

Rectification relief granted to the amendment to the Definitive Trust Instrument and Rules of an occupational pension scheme.

IN THE ROYAL COURT OF GUERNSEY
(ORDINARY DIVISION)

IN THE MATTER OF THE OSM PROVIDENT FUND

INTERBEN TRUSTEES LIMITED
OSM CREW MANAGEMENT LIMITED
OSM CREW MANAGEMENT, INC.

Applicants

Date of hearing: 15th December 2017

Judgment delivered: 18th January 2018

Reasons handed down: 7th August 2018

Before: Richard James McMahon, Esq., Deputy Bailiff

Counsel for the Applicants: Advocate C H K Friedlaender

Cases, Texts & Legislation referred to:

In the matter of the Colour Trusts (unreported, 24 May 2012)

In re Gamble (unreported, 6 February 2003)

In the matter of the Pelican Trust [2005-06] GLR 20

Allnutt v Wilding [2007] EWCA Civ 412

Lewin on Trusts (19th ed)

Lansing Linde Limited v Alber [2000] Pens LR 15

Introduction

1. On 18 January 2018, I granted the rectification relief sought by the Applicants pursuant to their Application dated 6 September 2017, as subsequently amended, by which they sought a declaration that the amendment to the Definitive Trust Instrument and Rules of an occupational pension scheme known as the OSM Provident Fund that had been made prospectively with effect from 16 December 2015 be made effective retrospectively to the effective date of establishment of the Fund. I indicated that I would give my reasons for granting that relief as and when I could. This judgment sets out those reasons.

2. The Application came before me on a number of occasions. The last occasion was 15 December 2017. At that hearing, I informed Advocate Friedlaender, who represented the Applicants, that it was most likely that I would be content to grant the relief sought without needing to resume the oral hearing once the evidence on behalf of the Applicants was supplemented by some further details. In the event, a further Affidavit and a revised Skeleton Argument dated 16 January 2018 were lodged and I was satisfied from all the material before me that I could and should grant the Application.
3. The first hearings in September 2017 focused on the steps to be taken by the Applicants to notify those affected by their Application so as to provide them with the opportunity to make any representations they wished. The three Applicants are the trustee of the scheme, Interben Trustees Limited, OSM Crew Management Limited, which in 2014 had succeeded to the role of employer from the final Applicant, OSM Crew Management, Inc. The members of the Fund number in the thousands. They are seafarers. Once the operation of the Fund was adequately clarified, on 25 October 2017 I gave leave for the Applicants to provide details of the Application to approximately 7,500 members by e-mail. Bearing in mind that those members are spread across the globe, and comprise multiple nationalities, I was satisfied that this was the most expedient course of action to make them aware that their employer and others concerned were making this Application. In the event, there were only 23 of them who made any contact with their employer (or former employer) and no one raised any opposition to the course of action proposed by the Applicants nor was there any request for any additional information about the Application. Instead, the responses all related to issues about the ongoing operation of the Fund as it affected the member in question or were simply to acknowledge receipt, all as set out in the short Affidavit of Nicholas Slinn, the Chief Executive Officer of the trustee, sworn on 8 December 2017. Accordingly, no one has made any submissions contrary to those advanced by Advocate Friedlaender on behalf of the Applicants.
4. The Applicants elected that their Application should be heard by the Court sitting without Jurats. All of the evidence before the Court was in the form of Affidavits. The evidence originally submitted was the First Affidavit of Paul Cutter, sworn on 26 July 2017. Mr Cutter is a director of the First Applicant, the trustee. His First Affidavit is the most substantial item of evidence because it also exhibits much of the documentation relevant to the issues before the Court. There were shorter Affidavits from Jørgen Baade, Jan Morten Eskilt, Nina Bolge and Marianne Lund, all sworn on 15 August 2017, save for Mr Eskilt's, which was sworn three days later. Subsequently, Marianne Lund swore a Second Affidavit on 26 September 2017, dealing with issues relating to the notification question, and a Third Affidavit on 15 January 2018, which provided the final piece of the factual jigsaw associated with the Application. In the interim, Mr Cutter swore his Second and Third Affidavits on 17 October and 11 December 2017 respectively.

The law

5. As Advocate Friedlaender points out, the legal test for rectification is well established. It makes sense, therefore, to rehearse the legal principles before turning to the evidence and the manner in which I found that it satisfied the test.
6. The position was most recently set out in *In the matter of the Colour Trusts* (unreported, 24 May 2012). It derives from the principles that had been established as a matter of English law, which were clearly adopted in Guernsey in *In re Gamble* (unreported, 6 February 2003) and applied in *In the matter of the Pelican Trust* [2005-06] GLR 20. Accordingly, in order to succeed in a claim for rectification of a trust instrument arising from mistake, an applicant must demonstrate that:
 - (a) there is sufficient evidence that an error has been made so that the document does not carry out the true intention of those involved;

- (b) to the highest degree of civil probability, a genuine error has been made;
- (c) there has been full and frank disclosure;
- (d) there is no other practical remedy; and
- (e) there has been no undue delay in seeking relief.

I have found it helpful as well to remind myself of what was also set out in the *Colour Trusts* case (at para. 44) from the judgment of Mummery LJ in *Allnutt v Wilding* [2007] EWCA Civ 412 (at para. 11):

“... rectification is about putting the record straight. In the case of a voluntary settlement, rectification involves bringing the trust document into line with the true intentions of the settlor as held by him at the date when he executed the document. This can be done by the court when, owing to a mistake in the drafting of the document, it fails to record the settlor's true intentions. The mistake may, for example, consist of leaving out words which were intended to be put into the document; ... Mistakes of this kind have the effect that the document, as executed, is not a true record of the settlor's intentions.”

7. Advocate Friedlaender also referred to the summary of the position set out in *Lewin on Trusts* (19th ed, at para. 4-061):

“It is well established that voluntary settlements can be rectified or set aside as a result of an operative mistake. The court may, in its equitable discretion, rectify or rescind a settlement where there is a voluntary transaction by which one party intends to confer a bounty on another, where the donor did not intend the transaction to have the effect it did. For this purpose a unilateral mistake on the part of the settlor suffices since gifts are outside the law's special concern for the sanctity of contracts.”

The latter point is potentially important because, if it is sought to rectify a bilateral transaction for value, the mistake needs to have been a mutual one (see, eg, *Lewin*, at para. 4-083). In order to show that the situation in the present Application was not faced with that difficulty, Advocate Friedlaender cited what he considers to be the leading English case on occupational pension schemes, *Lansing Linde Limited v Alber* [2000] Pens LR 15 (albeit supplying only a copy of the judgment, rather than this report), in which Rimer J found that there needed to be an outward expression of accord. However, I was satisfied that the Fund established in the present case arose from the unilateral decision of the Third Applicant, so the alternative approach was not engaged. The Applicants merely needed to establish the elements derived from the previous Guernsey cases.

Facts

8. The Third Applicant is a company registered in the Cayman Islands and it has a correspondence address in Norway. It operated a maritime management service business, employing seafarers and seconding them to clients which conducted shipping business worldwide as part of the OSM Maritime Group, which is one of the world's leading providers of crew, management and technical services in the sector. It employs in excess of 10,000 people worldwide. As a result of a restructuring within the Group in 2014, the Second Applicant, which is a company established in Cyprus, had transferred to it the functions previously undertaken by the Third Applicant as the employer of the seafarers, and so became the Principal Company and therefore the Employer for the purposes of the Fund. Some of the seafarers concerned were employed by subsidiary companies within the Group.

9. In 2005 and 2006, there was a trend throughout the seafaring community to provide better terms and conditions of employment for those working on-board ships. Although Mr Cutter does not expressly say as much, many of these developments, including those that have been introduced in the last few years, have arisen from the activities of organisations such as the International Labour Organisation and the International Maritime Organisation. As a member of the Norwegian Shipowners Association, the OSM Maritime Group was covered by the collective bargaining arrangements of that Association. That Association had established a provident fund in Guernsey in the 1990s and so part of the Group's response to the developments taking place was to consider establishing its own provident fund covering all its seafarers rather than just the largest tranche, who were Filipino, who enjoyed benefits under the Association's fund in return for the modest contributions required.
10. The chairman of the Third Applicant at the time was Mr Eskilt. He wished to incentivise the seafaring employees of the Group by having a more generous scheme of benefits, but to enable a pension benefit to be payable only following a period of service. Disability and death benefits would be available without the need to demonstrate loyalty to the Group. Because of the fairly informal way in which management decisions were taken, there is no formal record of what was determined, but Mr Eskilt was effectively delegated with authority to progress the Group's new provident fund. He had in mind something with which he was familiar by reference to Norwegian pension schemes. He hoped that the scheme would make the Group competitive and sufficiently attractive to seafarers that they would not wish to change employer. Accordingly, he had in mind that the longer an employee stayed in continuous employment the greater the pension benefit, but that a minimum period of three years' service was needed before any such right would be obtained. He referred to this principle as being "the vesting rules" and referred to the contributions required as "premiums". Thereafter, there would be incrementally enhanced rights until completing ten years of service. The contributions rates would be higher than under the Association's fund. However, it was also his intention that contributions that were not then needed to meet benefits under the Fund would be available for a number of other uses, including reducing the amount of employer contributions to the Fund. Mr Eskilt has described this arrangement as affording the employer a "*contribution holiday*".
11. Mr Eskilt generally dealt with Jørgen Baade at Storebrand Livforsikring AS, a Norwegian financial services company, with whom there was already a relationship arising from the Association's fund. Mr Eskilt left Mr Baade to have dealings with the Guernsey-based trustee he considered should be used on the basis that the Association's fund was administered well in this jurisdiction. There was no contact between Mr Eskilt and anyone at the trustee.
12. The minutes of a meeting held on 14 September 2006 between Mr Eskilt and Bente Nilsen and Anne Grethe Moe of Storebrand state (in translation) under a heading "5 year incentive plan":

"To be converted to a 10-year incentive plan, where the first three years do not create any entitlement to payment. Evenly staged increases over the next seven years.

- Exception for disability. If disability is approved by a doctor appointed by OSM they shall be entitled to payment from the first paid contribution (min \$50).

- Possible own saving can take place once one has worked for 10 years and is entitled to 100% payment.

- What is not paid out to the members shall go into a premium fund. The premium fund shall pay for the administration of the fund + premium. As time passes, the investment return from the premium fund can cover the administration. Bente will check that this is not at variance with the Trust rules."

Mr Nilsen corresponded with Mr Slinn at the trustee on 21 September 2006. His e-mail also raised the question whether it would be possible to transfer the bonus from the savings of the plan Storebrand and the Third Applicant had in mind, known as a Triple C product, to a separate fund to provide money for the administration charges.

13. Mr Cutter sent Mr Baade a letter dated 21 November 2006, with which he enclosed *inter alia* the trust instrument the trustee, then known as Nordben Pension Trustees Limited, intended to use, adding that “*This will need to be amended for “vesting”.*” That document had been prepared for the trustee by its Advocates and what Mr Cutter did was to start modifying the pro forma so provided to suit this client's needs and wishes. This letter refers to earlier correspondence, copies of which have not been found. Mr Baade forwarded certain documents to Mr Eskilt on 27 November 2006. Although the intention had been to establish the Fund so that it would commence on 1 January 2007, that deadline was not met and Mr Eskilt asked on 2 January 2007 if he could meet with Mr Baade in Oslo on 8 January 2007. On 4 January 2007, Mr Eskilt sent an e-mail to Mr Baade, which in translation into English reads:

“You must include that the payments for personnel who do not meet the “vesting rules” can be used by us as premiums in the future. We do not want to end up in the position that NR accepted in the AMOSUP Agreement where all the money goes into the fund.”

When he was working on the project, Mr Cutter was unaware of this communication from Mr Eskilt and was also unaware of the earlier meeting in September 2006.

14. There were further exchanges between Mr Cutter and Mr Baade in the summer of 2007 with a view to finalising the documentation, including Mr Cutter commenting on the wording to be used in the Booklet to provide to members of the Fund, with which Mr Baade informed Mr Cutter on 22 August 2007 Mr Eskilt was content. Further, on 21 August 2007, the Third Applicant transferred US\$937,349 to the trustee in respect of the Fund, although the documentation at that time had not been executed. By the summer of 2008, further progress had been made, but the delay in finalising the documentation meant that the trustee instructed its Advocates to insert provision into the instrument to reflect that an initial contribution had already been received.
15. The Definitive Trust Instrument and Rules were executed on 29 September 2008. They are expressed to be effective from 21 August 2007, being the date on which the first contribution by the Third Applicant had been made. Clause 2.1 of the Instrument provides:

“The Trustees shall hold the Trust Fund and any funds or property received upon and subject to the trusts powers and provisions of this Instrument or as are imposed by law, and for the sole purpose of providing by means of lump sums, the Beneficiaries with the Benefits to which they become entitled.”

Under the sub-heading “*Payments conditions*”, clause 2.5 provides:

“Payment of all Benefits under the Rules will be subject to a claim being made to the Administrator for such payment by the appropriate Beneficiary or Beneficiaries. It shall be the responsibility of the Administrator to ensure that proper procedures are in place to enable Beneficiaries to make such claims.”

The first basis on which entitlement to benefit is dealt with is covered in clause 2.6, which was in the following terms in 2008:

“In cases where the Member concerned retires or becomes permanently disabled, if no claim to Benefit has been received from the Member by the Administrator within five (5) years after the day on which the event giving rise to a claim under the Policy

occurred, all entitlement to the resulting benefit shall be lost and the Member's Retirement Account shall be applied by the Trustees either:

- (a) for the benefit of any Nominated Dependant of the Member; or*
- (b) to meet any expenses of the Plan; or*
- (c) as an accretion to the Annual Interest to be applied in accordance with Clause 2.11.”*

The second basis is in clause 2.7, which was in the following terms in 2008:

“In cases where either

- (a) the Member dies, and no notification is made by the Administrator to the Trustees under Clause 2.3 within five (5) years after the date of death, so that all entitlement to the resulting Benefit shall be lost; or*
- (b) any part of a Member's Retirement Account remains after all Benefits have been provided to or in respect of the Member in accordance with the Rules,*

then in either event the balance of the Member's Retirement Account then remaining may be applied in accordance with sub-Clauses 2.6(b) or 2.6(c) above as the Trustees shall decide.”

16. The various terms to make sense of these provisions are defined in clause 1. The “Administrator” is Storebrand. The “Beneficiaries” means the Members and Nominated Dependants, being the person or persons nominated to receive benefits on a Member's death. “Benefits” are the benefits to be provided under the Plan detailed in the Rules. A “Member” is an Employee (ie, a person in service) who has been admitted to the Plan under Rule 1. The phrase “Member's Retirement Account” means:

“... the notional proportion of the Trust Fund calculated by the Administrator to represent from time to time the value of a Member's Contributions aggregated with Annual Interest credited in respect of the Member on each 1 January in accordance with Clause 2.11 and when calculating the benefits under the Rules multiplied by the factor if any specified in the Rules.”

17. The Rules commence with the conditions for entry in Rule 1. For an Employee below Normal Retirement Age, upon completion of one contract with the Employer, the Employee joins the Fund as a Member, the earliest date being 1 January 2007. For an Employee who leaves Service with the Employer but is re-employed, the condition of having to complete a contract is waived and membership commences immediately in accordance with Rule 1.3. The Fund is non-contributory to Members (Rule 3.4), although once a Member has completed more than ten years of Service, that Member is permitted to make additional voluntary contributions pursuant to Rule 4. The Normal Retirement Age of a rating is the end of the month preceding that Employee's 50th birthday, and for an officer it is his 60th birthday (Rule 5). Rule 2 provides:

“If a Member leaves Service his Member's Retirement Account subject to rule 6.1. will remain in the Fund to be applied on his attaining Normal Retirement Age or (if sooner) on the date of his death or permanent disablement and as though Rules 7.1, 7.3 or 7.5 then applied mutatis mutandis to the Member.”

(The cross-referencing here went awry. Mr Cutter acknowledges that, when making the changes he thought were necessary to give effect to the vesting rules, he slipped up and should have referred to clause 6 where this Rule 2 refers instead to clause 7.)

18. Rule 6 deals with Benefits. Rule 6.1 relates to the lump sum cash payment receivable at Normal Retirement Age:

“Upon reaching Normal Retirement Age the Member's Retirement Account will be paid by the Trustees to the Member as a lump sum in accordance with Rule 7.2, and will be increased with interest at the annual percentage rate agreed between the Administrator and Employer from 1 January in the year of payment to the first of the month that payment shall be paid to him and multiplied by the appropriate factor ...”.

There follows a table listing the number of years of completed service deemed continuous by the Employer, running from zero to ten, against which is shown a factor. The lowest factor is zero, for service of 0, 1 and 2 years. At 3 years' continuous service, the factor jumps to 30%, and increases by a further 10% for each completed year thereafter until, at ten years' continuous service, the Member is entitled to a factor of 100%. Rule 7.2 provides that *“Payment from the Fund shall be effected in arrears in the second month following the calendar quarter in which the right to the benefit occurs.”* The benefit payable following the death of a Member is principally set out in Rule 6.3:

“In the event of death of a Member prior to his Normal Retirement Age, the Member's Retirement Account will be paid by the Trustees to such one or more of the Nominated Dependants as the Trustee decide, as a lump sum in accordance with Rule 7.2, and will be increased with interest at the annual percentage rate agreed between the Administrator and Employer from 1 January in the year of payment to the first of the month that payment shall be made.”

Finally, Rule 6.5 covers the payment following permanent disablement:

“A Member who is permanently disabled prior to his Normal Retirement Age, is entitled to the Member's Retirement Account as a lump sum, in accordance with Rule 7.2, together with interest at the annual percentage rate agreed between the Administrator and Employer from 1 January in the year of payment to the first day of the month in which payment is made.”

19. The Member Booklet of the Fund explained these provisions and Rules in simpler language. For example, section 10 clarified that *“The Member has to serve a period of 3 years in order to be entitled to any part of the contributions paid into the Fund. From 3 years on there will be a progressive earning of entitlement which is dependent of the length of service at OSM. ... In the case of permanent disability approved by OSM the member is entitled to accrued contributions in full.”* Section 13 sets out that *“If a member terminates his employment with OSM prior to retirement age, the retirement account will be retained in the Fund until he reaches age of 50 or 60 ... Members can claim their entitlements when reaching age 50 or 60, see section 19 for guidance in doing so. If a member dies prior to age 50 or 60, the Beneficiaries are eligible to claim the member's entitlements immediately as set forth in Section 19.”* (The most up-to-date Member Booklet was exhibited by Mr Cutter to his Second Affidavit and uses slightly different wording, albeit to the same effect.)
20. There was a meeting between representatives of OSM and of Storebrand on 14 May 2009. Nina Bolge of Storebrand prepared the minutes. According to Mr Cutter, those minutes refer to one aspect of the discussion relating to how to distinguish between that part of a Member's account that is the Member's property and that part that has not accrued to the Member. In particular, it was questioned as to what rules were to be followed to make it possible to utilise part of a previous Member's account, which is not an accrued entitlement, to finance the fund. However, it appears that no further progress was made on this topic until in 2014, when it was re-visited on the re-structuring within the OSM Group. Ms Bolge's minutes of a meeting she attended with representatives of OSM on 7 May 2014 refer to OSM wishing to use money that had been earmarked as *“back-to-fund”* and querying whether this was possible.

21. When this enquiry was relayed to Mr Cutter, he pointed out that the Instrument did not permit such a use of those moneys. Accordingly, an amendment to the Instrument and Rules document would be required. This was achieved in the Instrument of Amendment executed on 16 December 2015. By this time, Nordben Pension Trustees Limited had retired as trustee in favour of Nordic International Benefits Trust Limited. This occurred on 7 November 2014. The principal changes brought about by this amendment were to substitute clause 2.6 and clause 2.7. The new clause 2.6 provides:

“In cases where the Member concerned retires or becomes permanently disabled, if no claim to Benefit has been received from the Member by the Administrator within five (5) years after the day in which the event giving rise to a claim under the Policy occurred, all entitlement to the resulting Benefit shall be lost and the Members Retirement Account shall be applied by the Trustees by transferring the same to the Reserve Account which may be applied by the Trustees as follows:

- (a) to meet any expenses of the Plan;*
- (b) the [sic] apply the same as Principal Company contributions under Clause 2.2 and to grant the Principal Company a contribution holiday to the extent of such application;*
- (c) with the consent of the Company, to apply the same for the benefit of any Nominated Dependant of the Member.”*

Substituted clause 2.7 provides:

“In cases where either:

- (a) the Member dies, and no notification is made by the Administrator to the Trustees under Clause 2.3 with [sic] five (5) years after the date of death, so that all entitlement to the resulting benefit shall be lost; or*
- (b) any part of the Members Retirement Account remains after all Benefits have been provided to or in respect of the Member and in accordance with the Rules,*

then in either event the balance of the Member's Retirement Account will be applied by the Trustees by transferring the same to the Reserve Account which may then be applied in accordance with the provisions of Clause 2.6 above as the Trustees shall decide.”

22. There has been a subsequent Instrument of Amendment dated 24 May 2016, the only relevant aspect of which is that in clause 2.6 the words *“the day on which the event giving rise to a claim under the Policy occurred”* have been deleted (because references to *“the Policy”* were no longer appropriate because of the changes being effected to the Trustee's powers of investment) and instead the words *“the date on which the Member retired or became permanently disabled”* have been substituted therefor.
23. With effect from 31 December 2016, Nordic International Benefits Trust Limited amalgamated with Nordben Pension Trustees Limited and became known as Interben Trustees Limited, the First Applicant.
24. Marianne Lund, who was the Chief Financial Officer of the Second Applicant, has helpfully provided a summary of the way the Fund has been operated and Storebrand were able to calculate the consequences of the moneys that had been termed *“back-to-fund”* building up. Initially, of course, there were few claims from Members for payment of any benefit, because nothing vested until three years after the stated commencement date at the beginning of 2007,

even for the longer-serving employees. However, by the time of the Instrument of Amendment in 2015, the total amount in question was in excess of US\$7.5 million. The effect of the amendment up to the end of June 2017 has been calculated at almost US\$2.5 million. This gives some indication of the importance of the issues to the OSM Group because the scale of contribution holiday from which it can now benefit is clearly significant. In her Third Affidavit, Marianne Lund also confirmed that there had been approximately 168 Members who had reached Normal Retirement Age more than five years previously without making any claim for benefit of what had vested in their favour. The aggregate amount is approximately US\$168,000. She confirmed that the way of dealing with those moneys pursuant to the original clause 2.6 had not been followed. In respect of Members dying, there are a handful of claims that have not been made within the period permitted and the balances of those Member's Retirement Accounts have not been dealt with in accordance with clause 2.7.

Analysis

25. Against those facts, I considered the matters about which I had to be satisfied before granting the Applicants the relief that they sought. I decided it made sense to consider them in a slightly different order from how they had been set out in the *Colour Trusts* case.
26. Although it was not something that had been particularly addressed by Advocate Friedlaender, I started with consideration of whether the Applicants had unduly delayed bringing the Application. It might be said that the time from identifying the problems to actually doing anything about it was longer than might appear desirable. Further, the time from the execution of the Instrument of Amendment giving prospective effect to the changes thought necessary (and I glossed over the typographic errors appearing in that document) to making the Application might also be regarded as longer than really desirable. However, I was prepared to recognise that no one, save perhaps the Applicants themselves, were disadvantaged by any delay. The position of the Members of the Fund continued unaffected. In those circumstances, some time for reflection before taking further action was perhaps understandable. I concluded that I did not have to worry any further about any timing issue.
27. I next considered whether the Applicants had given full and frank disclosure. It was acknowledged by those who gave Affidavit evidence that they had not located all the documents that they know had existed at some point. Each explained that they had conducted as full a search as they were able to. It is unfortunate that some of the documentation that clearly should have been in existence, eg, because it is referred to in other documents, copies of which have been produced, is not available, but I concluded that I should not regard this as falling short of what is required for full and frank disclosure. In particular, I felt that the fact that each had been candid about not being able to find certain documents was preferable to them pretending that they had never existed. In all the circumstances, I was satisfied that they had all done their best and that this was not a good reason to decline to grant the relief sought. Indeed, the documents that had been produced were, in my view, sufficient to corroborate what had been in Mr Eskilt's mind.
28. The totality of the evidence was such that I was satisfied that it had been the intention of the Third Applicant, principally through Mr Eskilt, that there would be the type of Reserve Fund that has now been achieved by the 2015 Instrument of Amendment. This was part of his overall plan and he had taken steps to let Mr Baade know what he had in mind. I am satisfied that he wanted to create a provident fund for the benefit of OSM's seafaring employees that would set it apart from what some of them had previously enjoyed but that, in return for these enhanced benefits, OSM wanted to find a way to incentivise its employees to be loyal to them. This was to be achieved by having a three-year vesting period for pension benefits. It would then take a further seven years before the entirety of the Member's Retirement Account plus accrued Annual Interest would be allocated to the Member on retirement. The position in the event of death or permanent disablement was different, with those benefits becoming available, provided they were claimed, however long the Member's service with OSM. The arrangement was for OSM to make contributions to the Fund that would be available in the

event of full vesting. However, in respect of any Member leaving before the full vesting was achieved, the balance of the Member's Retirement Account should not simply be left in abeyance within the Fund but be capable of being used for a number of different purposes. One of those purposes was not relayed to the trustee by Mr Baade, namely the one that was rectified prospectively by the 2015 Instrument of Amendment, although other mechanisms to put the moneys not needed to positive use were included in the original 2008 Instrument.

29. In my view, there is no question that this was Mr Eskilt's intention. When comparing what he wanted to achieve with the document that was executed, I was further satisfied that there had been the type of error capable of being rectified by this Court. Although clause 2.6 enabled these surplus moneys to be used to meet the expenses of the Plan, or to be used as an accretion to the Annual Interest to be applied, these are both quite different concepts from the Employer being able to contribute a smaller amount in any subsequent year than would otherwise have to be paid into the Fund. The contribution holiday by reference to what Mr Eskilt described as the premium, meaning those contributions, was omitted from the original terms of the Fund.
30. Having regard to the financial consequences, it was apparent to me that this was a significant error. I was, therefore, quite satisfied that a genuine mistake had been made. It arose, it seems, from the omission to communicate what Mr Eskilt had wished to be included to the trustee. That was something that only came properly to light some time later. It was helpful to see the manner in which the error had been corrected by the Instrument of Amendment. If it had been open to the parties to have made that correction have retrospective effect, I was sure it would have been done once those potentially affected by it had been alerted and given the opportunity to comment. However, in order to have retrospective effect, an application to the Court was required and the same process has been followed. I was satisfied that the many Members who had been communicated with had chosen not to object or even to make any critical comments. I regarded the absence of opposition as indicative that the Members were content. This is not surprising because none of them will, as far as I could work out, suffer any prejudice if the Reserve Account is to operate across the lifetime of the Fund rather than just since the latter part of 2015. I was satisfied that the Applicants had discharged the burden of proof resting on them.
31. In respect of whether there was any other practical remedy, I did not consider that there was any.
32. On the final issue of whether I should exercise the Court's discretion to grant relief to the Applicants, I did balance what would be the position if I refused the Application, thereby effectively forcing the parties to draw on the moneys that would otherwise be transferred to the Reserve Account in order to meet those expenses and other payments that could properly be made under the terms of the original clauses 2.6 and 2.7. However, I was persuaded that this would entail many years of complicated accounting before the substantial "pot" were to be exhausted, and without that really having any effect on the Members themselves. In those circumstances, I was satisfied that there was no reason to refuse the Application and indeed every reason to recognise that it was desirable to put the Applicants in the position that they wanted to be in, treating the Fund as if it had been established from the outset in accordance with the wishes and instructions of Mr Eskilt.

Conclusion

33. For all these reasons, I granted the Application and, as set out in the Act of Court, ordered that the Trust Instrument of the OSM Provident Fund established on 29 September 2008 pursuant to a Definitive Trust Instrument and Rules be rectified by declaring that the amendments made to the Trust Instrument by way of the Amendment Instrument dated 16 December 2015 were effective from the date of the effective establishment of the Fund on 21 August 2007. I also granted the Applicants' application that the costs of the application be taken from the Fund.

