IN THE HIGH COURT OF JUSTICE claim no: HC12E02792 2013 EWHC 2203 (CH)

CHANCERY DIVISION

Royal Courts of Justice

The Rolls Building

110 Fetter Lane EC4A 1ES

Thursday 25th July 2013

BEFORE MISS PENELOPE REED QC SITTING AS A DEPUTY JUDGE OF THE CHANCERY DIVISION

BETWEEN : —

(1)PELL FRISCHMANN CONSULTANTS LIMITED

(2)PELL FRISCHMANN CIVIL AND STRUCTURAL ENGINEERING LIMITED Claimants

– and –

(1) MR ASHU PRABHU

(2) MR RICHARD LOCK

(3) MS LINDA ROBERTS

(4) DR RICHARD LAMB Defendants

Mr. Robert Levy QC and Mr. James Rickards (instructed by Messrs Olephants Solicitors) for the Claimants

Mr. Andrew Short QC (instructed by Bevan Kidwell LLP) for the First, Second and Third Defendants

Mr. David E. Grant (instructed by Shoosmiths LLP) for the Fourth Defendant

Hearing dates: 9th and 10th July 2013

Judgment (as approved by the Judge)

Miss Penelope Reed QC

Background

1. The Claimants ("the Companies") are the sponsoring employers of the Pell Frischmann Retirement Benefits Scheme ("the Scheme") of which the First to Third Defendants ("the Trustees") are the present trustees. The Fourth Defendant ("Dr. Lamb") was an employee of one or other of the Companies from 1987 to December 2011 when he retired. He was a director of Pell Frischmann Civil and Structural Engineering Limited ("Engineers") from 3 May 1990 to 15 October 2003.

2. This is an application brought byDr. Lamb to strike out the Companies' claim on the grounds of abuse of process or in the alternative for a prospective costs order against either the Scheme or against the Companies.

3. The Scheme is a registered balance of cost final salary defined benefits scheme which closed to future accrual in June 2010 and Dr. Lamb became a member of that Scheme in 1988. The dispute between Dr. Lamb and the Companies and Trustees is a simple one. He claims to be entitled to an enhanced pension from the Scheme of two-thirds of his final salary rather than the one-third everyone accepts he is entitled to.

4. These proceedings are at an early stage in that Dr. Lamb has not yet served his defence. There is a defence from the Trustees but the application is made at a time when the issues between the parties are not clear. I have therefore proceeded on the basis of the issues as presently pleaded and indeed the application was argued before me on that basis.

5. It is accepted by all parties that there is power under Clause 8 of the Trust Deed dated 28 May 1991 ("the Trust Deed") which governs the Scheme to augment benefits. It may be that there are other powers which are relevant but they are not currently in play. Clause 8 reads as follows:-

"SUBJECT to the payment by the Employer of such additional contributions (if any) as the Trustees on the advice of the Actuary may consider appropriate and subject to any undertakings given by the Trustees to the Board of the Inland Revenue the Trustees may with the consent of the Employer and (if appropriate) the Member augment any of the Relevant Benefits to which any person may be entitled... as the Trustees may determine but so that the amount of any Relevant Benefits shall not exceed the appropriate maximum referred to in Part I of the Schedule to the Rules."

6. Therefore the Trustees have to agree to exercise their power under clause 8, and under the Trust Deed they may do so by majority; the Employer has to consent to their doing so and the exercise is subject to any additional contributions being made by the Employer as the Trustees on the advice of the Actuary may consider appropriate. There has been some question raised as to whether the Trustees are obliged to seek actuarial advice as a matter of construction of the clause but my understanding is that this is no longer a live issue in this claim. The Companies are prepared to accept for the purpose of this claim that the Trustees were not obliged to seek actuarial advice before exercising their powers.

7. On 28 June 1991 a letter was written to Dr. Lamb by one of the then trustees of the Scheme, Mr. Jeffery Goodwin. I will quote it in full as it is the central plank of Dr. Lamb's claim:-

"The Trustees have received a request from your Employer, Pell Frischmann Consulting Engineers Ltd. to enhance your pension benefits with effect from 1st of April 1991.

I am now pleased to inform you of the Trustees' approval to the request and to confirm the change as follows:-

With effect from the 1st of April 1991, the annual rate of accrual for pension benefit is increased from one sixtieth of final pensionable salary to such factor as necessary in order to achieve at age 65, the maximum pension entitlement of two-thirds of final pensionable salary. The enhancement will accrue at an equal annual rate between the 1st of April 1991 and the 19th February 2012.

This letter should be retained by you with your other Pension Scheme documents as confirmation of your enhanced future entitlement."

8. Dr. Lamb was employed by Engineers at this time and indeed was a director of that company. The Companies say that Dr. Lamb is not entitled to an enhanced pension because the trustees at the material time did not agree to exercise their powers and did not delegate their functions to Mr. Goodwin; the Companies did not consent to the power being exercised and the trustees did not seek actuarial advice although in light of the concession made by the Companies in respect of the construction of Clause 8, that point may not be material.

9. The Companies have brought a claim seeking a declaration that Dr. Lamb is only entitled to his basic pension and not an enhanced pension, that the Clause 8 power has not been exercised in his favour and/or that the 1991 letter has no legal effect. In that claim the Trustees are neutral. They simply wish the matter to be decided one way or another so that they can pay out whatever pension is due. As explained below they have played an active role in respect of some parts of this application.

The Lead up to the Proceedings

10. On 12 January 2012 Linda Roberts ("Ms. Roberts") one of the present trustees and the Third Defendant to this claim wrote to Dr. Lamb indicating that apart from the 1991 Letter there was no record of any decision being made by the then trustees in respect of

the enhanced pension and that the Companies were clear they had not approved it. There has been some criticism as to the tone of this letter but Ms. Roberts wrote towards the end:

> *"I am writing in the hope that you may be able to shed further light on this matter. If you have any further documentation or information regarding the award of this enhancement please let me have it as soon as possible. I stress that this is not an attempt to deny you what is properly due. We simply need to satisfy ourselves as to what is properly due..."*

11. She then asked for a response by the end of the week. The letter does not strike me as unreasonable, particularly in light of the words quoted above although the request for a response might be regarded as setting too short a time scale.

12. In fact Dr. Lamb responded by e-mail the following day saying that he did not have any records and asked Ms. Roberts to forward minutes and correspondence to him. On 1 February 2012 it seems that in response to a request from Dr Frischmann who is a director of the Companies, and a letter from Olephants Solicitors for the Companies, Mr. Goodwin by then nearly 87 e-mailed to say the 1991 Letter was genuine, that he would not have written it if the employer had not asked him to do so and perhaps Dr. Lamb could tell the Trustees with whom he had agreed the enhancement.

13. This was sent to Dr. Lamb on 2 February 2012 with a request for more information particularly about any discussions Dr. Lamb had had at the relevant time with the directors of Engineers. On 5 February Dr. Lamb responded that he had had no such discussions with Dr. Prabhu and Dr. Frischmann the then controlling directors of Engineers.

14. On 16 February Olephant Solicitors wrote a long letter to Dr. Lamb. That letter which is the subject of criticism by Dr. Lamb does not identify itself as a letter of claim but sets out a number of allegations against Dr. Lamb; not only that he is not entitled to the enhanced pension but also that he was in breach of his fiduciary duties to Engineers with regard to agreeing the enhanced pension. None of these additional allegations has found its way into the present claim.

15. On 7 March 2012 Dr. Lamb invoked the Internal Dispute Resolution Procedure ("IDRP") set up in respect of the Scheme. Section 50 of the Pensions Act 1995 requires trustees of schemes to set up dispute resolution arrangements. The IDRP set up for the Scheme provides for the matter to be considered as a two-stage process: first, by a specified person, in this case Ms. Roberts and then if the member is dissatisfied by her decision by the Trustees. Decisions must be taken within a reasonable period and the IDRP in this case specified 4 months. Ms. Roberts was obliged to notify the member if a decision within that time was not possible. Section 50 (3)(c) provides that the IDRP does not apply to an exempted dispute which is defined as a dispute where proceedings have been commenced in any court or tribunal or the Pensions Ombudsman has commenced an investigation in respect of a complaint made or dispute referred to him (section 50(9)). The IDRP set up under section 50 is specific to the trustees and members of the scheme in question and does not cover disputes with employers. Therefore the Companies were not bound by any decision either Ms. Roberts or the Trustees reached.

16. Ms. Roberts acknowledged Dr. Lamb's complaint on 9 March 2012 referring to the "investigations" which were underway into the circumstances in which the enhanced pension was claimed. On 3 April Ms. Roberts wrote to Dr. Lamb stating that she expected to have received legal advice by the middle of May 2012 shortly after which she would provide her decision. In that letter she also asked for information from Dr. Lamb.

There is criticism of that request which mainly related to discussions he might have had with the directors of Engineers. I confess that I see nothing wrong with her request for information in that it clearly related to the issues she was required to resolve but it is perhaps unfortunate that in asking for it she referred to the letter from Olephant Solicitors of 16 February which made serious allegations against Dr. Lamb. Ms. Roberts asked for that information to be provided by 27 April.

17. Dr. Lamb asked for time to respond and said he would be replying shortly after 6 June. In fact Dr. Lamb instructed Shoosmiths who wrote to Olephant Solicitors in response to their letter of 16 February. On 26 June Ms. Roberts chased Dr. Lamb for the information she had sought at the beginning of April. He provided an interim response on 3 July 2012 where he referred to his e-mail of 5 February (in which he said he had not discussed the enhanced pension with Dr. Frischmann and Dr. Prabhu) but said he was taking advice on the relevance of some of the questions from the Pensions Advisory Service. ("TPAS"). TPAS in fact wrote on 6 July 2012 although the letter did not really progress matters. Ms. Roberts wrote on 11 July expressing her disappointment that the questions raised in her April letter had not been addressed.

18. Dr. Lamb's response on 13 July was to the effect that he considered that the advice from TPAS was that the questions raised in April were not relevant.

19. On 20 July the Companies issued these proceedings. Ms. Roberts informed Dr. Lamb of that on 25 July and said that the Trustees were taking advice and then on 5 September informed him that on the basis of legal advice the Trustees had received, the issue of proceedings suspended the IDRP.

Strike out: Preliminary Points

20. Dr. Lamb's primary case argued for by Mr. Grant was that the claim should be struck out as an abuse of the process of the Court. CPR rule 3.4(2) provides:-

The court may strike out a statement of case if it appears to the court –

(a) that the statement of case discloses no reasonable grounds for bringing or defending the claim;

(b) that the statement of case is an abuse of the court's process or is otherwise likely to obstruct the just disposal of the proceedings; or

(c) that there has been a failure to comply with a rule, practice direction or court order.

21. Mr. Grant relies on (b) and (c) and in particular relies on the breach by the Companies of the Practice Direction Pre-Action Conduct Protocol ("the Protocol"). He has set out in his skeleton argument a number of grounds for asserting that the Court ought to strike out this claim and I will deal with them in turn.

22. However first I should say something about a point which pervaded a good deal of Mr. Grant's argument to the effect that the actions of the Companies in bringing proceedings had the effect that Dr. Lamb could no longer complain to the Pensions Ombudsman. The Pensions Ombudsman is a creature of statute. Section 146 of the Pension Schemes Act 1993 provides that the Pensions Ombudsman may investigate and determine certain matters. The relevant type of matter in issue in this case is covered by section 146 (1)(c):-

"any dispute of fact or law [...] [5] in relation to an occupational or personal pension scheme between—

(i) a person responsible for the management of the scheme, and

(ii) an actual or potential beneficiary.

23. A person responsible for the management of the scheme includes the employer (sub-section 146(3)). The Pensions Ombudsman cannot investigate a complaint under sub-section 146(1)(c) unless it is referred to him by or on behalf of the actual or potential beneficiary who is a party to the dispute (sub-section 146(1A)(a)). There was a dispute between Mr. Grant for Dr. Lamb and Mr. Levy QC for the Companies as to whether employers could ever bring a complaint to the Pensions Ombudsman. I do not intend to express a view on that as it is unnecessary to do so to decide this application. However Mr. Grant's position was that the employer could never make a complaint.

24. Section 146(6) provides:-

"The Pensions Ombudsman shall not investigate or determine a complaint or dispute—

(a) if, before the making of the complaint or the reference of the dispute–

(i) proceedings in respect of the matters which would be the subject of the investigation have been begun in any court or employment tribunal, and

(ii) those proceedings are proceedings which have not been discontinued or which have been discontinued on the basis of a settlement or compromise binding all the persons by or on whose behalf the complaint or reference is made;

Therefore once proceedings have been issued the Pensions Ombudsman is prevented from investigating a complaint unless the proceedings are discontinued other than as part of a compromise. As Lewison J (as he then was) stated in Arjo Wiggins Limited v Henry Thomas Ralph [2009] EWHC 321 the existence of the Pensions Ombudsman does not oust the jurisdiction of the Courts. The matter is quite the reverse: his ability to investigate a dispute is precluded when an application to the Court is made.

25. Section 148 goes on to provide what should happen in the event that proceedings are commenced when a complaint is already being investigated by the Pensions Ombudsman. The Court in those circumstances can stay the proceedings in order to allow the Pensions Ombudsman to go ahead (subsections 148 (2) and (4)) and all parties before me accepted that the section is heavily weighted in favour of such a stay being granted.

26. One of Mr. Grant's central complaints about the issue by the Companies of the proceedings is that by doing so before Dr. Lamb has had the opportunity to complain to the Pensions Ombudsman, his right to do so has been lost. As the IDRP had not run its course and no decision had been provided, the trigger had not occurred which would have spurred him to make a complaint to the Pensions Ombudsman and the Companies unfairly took the initiative and brought proceedings to prevent him making use of the Ombudsman.

27. There is also an allegation contained in the witness statement of Paul Milford on behalf of Dr. Lamb that the Companies in concert with the Trustees ensured that the IDRP ran past the 4 month deadline without resolution and at the end of the deadline the Companies issued proceedings. I will say at once that having read the correspondence the overriding impression I derive is that Ms. Roberts was trying to push the matter on but Dr. Lamb was not prepared to provide her with the information she requested from him and any delay was really caused by him. Apart from the fact that I think it is unfortunate that Ms. Roberts referred to Olephant Solicitors' letter when seeking information from Dr. Lamb, I do not consider that Mr. Milford's allegation can be sustained. This was one point on which Mr. Short QC on behalf of the Trustees entered the fray and I accept his submissions on this issue.

28. I have also been referred by Mr. Short QC to Regulation 3 of the Personal and Occupational Pension Schemes (Pensions Ombudsman) Regulations 1996 which provides that the Pensions Ombudsman can investigate a complaint before a decision has been given under the IDRP if there is no real prospect of a notice being issued within a reasonable period from the date on which the complaint or dispute was received by him in writing and it is reasonable in the circumstances that he should investigate and determine the dispute or complaint. It is not suggested that test would apply here. Mr. Short QC also told me that a complaint could be made to the Ombudsman before a decision had been reached under the IDRP although it would not be investigated. In doing so the member would acquire the advantage that any subsequent court proceedings would be likely to be stayed. I do not doubt that this course could be taken by a member of a pension scheme but how likely such a tactical move would be seems to me to be doubtful.

29. The reason why Dr. Lamb wishes to bring his complaint before the Pensions Ombudsman is because costs cannot be awarded against him and neither will he be liable to pay the Companies' costs if his claim fails. The Companies on the other hand have very frankly said that they wish the matter to be dealt with by the Court because they do want the opportunity to seek costs against Dr. Lamb if his claim fails (although they acknowledge they expose themselves to liability for costs if he is the successful party) and wish to have the matter dealt with by oral evidence. All parties agree that the Pensions Ombudsman does occasionally have hearings at which he receives oral evidence and submissions but these are rare. He deals with most complaints on paper.

30. There has also been some debate before me about the relative speed at which the Court and the Pensions Ombudsman operate. I cannot see how I can make any findings about that.

31. I turn now to the grounds upon which Mr. Grant invites me to strike out the claim as being an abuse of the process of the Court.

Striking Out for Abuse

32. I was helpfully referred by Mr. Levy QC to a number of cases on abuse of process and in particular cases referring to the use of proceedings for an improper or collateral purpose. Before turning to them I should say that Mr. Grant expressly stated that he was not relying on the principles set out in those cases but a wider jurisdiction of the Court. However, it is instructive to give a brief summary of the principles which emerge from those authorities.

(a) It is clear that if a party has a genuine grievance for which he is entitled to seek redress, the use of all remedies available to him by the law cannot be an abuse of process (Goldsmith v Sperrings Ltd [1977] 1 WLR 498)

(b) Motive and intention are irrelevant except where malice is in issue. The fact that a party who asserted a legal right was activated by feelings of personal animosity, vindictiveness or general antagonism was irrelevant. (Broxton v McClelland [1995] EMLR 485)

(c) An action was only an abuse if the Court's processes were being misused to obtain something not properly available to the claimant in the course of properly conducted proceedings either by achieving a collateral purpose beyond the proper scope of the proceedings themselves or the conduct of the proceedings so as to cause the defendant problems of expense, harassment, commercial prejudice or the like beyond those normally encountered in the course of properly conducted litigation (Broxton)

(d) A purpose will not be regarded as illegitimate if it is no more than the natural consequence of the action succeeding and if the claim is commenced with a legitimate and an illegitimate purpose the fact that there one purpose is legitimate justifies the claim continuing. (JSC BTA Bank v Ablyazov (No. 6) [2011] 1 WLR 2966)

(e) Only in the clearest and most obvious case will the Court strike out the claim as an abuse (Broxton).

33. As I have said Mr. Grant did not put his case on the basis of these authorities. However, they are instructive in demonstrating that the Court should not strike out save in the most clear and obvious cases and the fact that the issue of proceedings might have been motivated by an improper motive is beside the point if the claimant has a genuine claim.

The Fourth Defendant's case on Abuse of process

34. Mr. Grant's first point is that no explanation has been given for issuing the proceedings before the conclusion of the IDRP and for the lack of compliance with the Protocol . I am not convinced that supports these proceedings being struck out. Mr. Levy QC has made the point that the IDRP does not bind the Companies and whatever its outcome they would have been able to bring a claim in respect of the enhanced pension. There is therefore no reason why the Companies should wait until the IDRP is complete. While it might be considered sensible for the Companies to see what the outcome of the IDRP is before taking the matter to court it does not seem to me to be an abuse not to do so.

35. Mr. Grant's real complaint about the timing of the proceedings is of course that it is designed to prevent his client being able to make a complaint to the Pensions Ombudsman. Mr. Grant's position during the course of argument was that the Companies have no right to make a complaint to the Pensions Ombudsman. While Mr.

Levy QC disagrees with that construction of the Pension Schemes Act 1993it does not perhaps matter: if the Companies are not bound by the IDRP and cannot themselves go to the Pensions Ombudsman then there is nothing else they can do to progress matters other than wait for Dr. Lamb to take action.

36. Mr. Grant has submitted that there is a statutory preference for complaints to go to the Pensions Ombudsman rather than be dealt with by the Court. Certainly if a complaint is ongoing as set out above, the statutory provisions are weighted in favour of court proceedings being stayed. However, if there is no complaint in play the statute seems clear that the Pensions Ombudsman is prevented from entertaining a complaint. In light of the clear terms of section 146, I find it difficult to discern any statutory preference for the Ombudsman.

37. The Companies are quite open about the fact that their motive for issuing the proceedings from the point of view of timing is to ensure the claim is dealt with by the Court rather than by the Pensions Ombudsman. They wish to be in a jurisdiction where costs can be awarded against the losing party. They also wish the evidence as to what occurred in 1991 to be tested by cross examination: something they would be entitled to before the Court but not necessarily if the matter were dealt with by the Pensions Ombudsman.

38. While stating that he does not rely on the improper purpose cases, it seems to me that is what Mr. Grant's case on this issue amounts to. His argument is that the Companies have only issued proceedings with the improper motive of preventing his client from complaining to the Pensions Ombudsman. However as set out above, it is not an abuse of the process if there is also a genuine right to be vindicated.

39. The Companies clearly do have such a right. Mr. Grant has pointed to the odd nature of the proceedings in the sense of seeking a negative declaration but the Companies are

entitled to have decided by the Courts the dispute which has arisen as to whether Dr. Lamb is entitled to an enhanced pension. If he is so entitled, that will require the Companies, as I understand it, to contribute to the fund. Estimates of how much the enhancement will cost to fund are between £420,000 and £520,000

40. Mr. Grant also relies on the fact that the claim was issued for "purposes antithetical to the overriding objective" in that it was issued to take advantage of the parties' inequality of power and resources and prevent access to the Pensions Ombudsman which was created as a proportionate procedure (CPR rule 1.1(2)(a); in order to increase expense (contrary to CPR rule 1.1(2)(b)) and forcing Dr. Lamb to incur costs disproportionate to his financial means contrary to CPR rule 1.1(2)(c)(iv).

41. The overriding objective commences with the words: "*These Rules are a new procedural code with the overriding objective of enabling the court to deal with cases justly and at proportionate cost.*" They are rules about case management of cases brought in the civil courts. I do not see how the Court can rely on the overriding objective as a reason to strike out a case because there is an alternative procedure more in line with the overriding objective. In any event, I have no evidence that the parties are on an unequal footing, that this claim will increase the costs rather than the matter being dealt with by the Ombudsman and no evidence at all as to Dr. Lamb's financial position.

42. Indeed that last point also deals with a further submission by Mr. Grant that Dr. Lamb finds himself in an invidious position in that he cannot afford properly to defend the claim but cannot afford not to argue for the enhanced pension which he thought he would receive. That is simply an assertion made in Mr. Grant's skeleton argument unsupported by any evidence from Dr. Lamb and I cannot see how I can place any reliance on it.

43. Mr. Grant also relied on a passage from the judgment of Lord Woolf in Clark v University of Lincolnshire and Humberside [2000] 1 WLR 1988 where he said:-

The court's approach to what is an abuse of process has to be considered today in the light of the changes brought about by the C.P.R. Those changes include a requirement that a party to proceedings should behave reasonably both before and after they have commenced proceedings. Parties are now under an obligation to help the court further the overriding objectives which include ensuring that cases are dealt with expeditiously and fairly: C.P.R., rr. 1.1(2)(d) and 1.3. They should not allow the choice of procedure to achieve procedural advantages. The C.P.R.are, as r. 1.1(1)states, a new procedural code. Parliament recognised that the C.P.R. would fundamentally change the approach to the manner in which litigation would be required to be conducted. That is why the Civil Procedure Act 1997(section 4(1) and (2)) gives the Lord Chancellor a very wide power to amend, repeal or revoke any enactment to the extent he considers necessary or desirable in consequence of the C.P.R.

44. This passage has to be read in the context of the case Lord Woolf was deciding which involved a claim against a new university which arguably ought more properly have been brought as a claim in judicial review (with the strict 3 month time limits) rather than the breach of contract claim which had been issued. I do not see that it lends support to the argument that the Court should strike out if there an alternative procedure available outside court proceedings. Notwithstanding the point made in the passage the Court did not strike the claim out.

45. Mr. Grant also relies on a passage of Knox J in Hillsdown Holdings Plc v The Pensions Ombudsman [1996] Pens LR 427 where Knox J considered the interaction of the shared jurisdiction of the Courts on the one hand and the Ombudsman on the other. He said (at para 120)

My second reason is tied up with the first and is that s146(6)(a) of the 1993 Act prevents the Pensions Ombudsman from investigating a complaint if before the complaint is made proceedings have been begun in court in respect of the matters which would be the subject of the investigation. That suggests that the two are intended to be mutually exclusive alternatives and it would be strange if it was contemplated that the alternatives would or might produce different results as to the substance of the dispute. I can well imagine that the two tribunals would be contemplated as having radically different procedures and it may be types of relief but I would not expect differences on such fundamental matters as whether there was a liability to repay capital sums. Also there would be a possibility of abuse if it were possible to avoid an impending complaint to the Pensions Ombudsman by a well timed application for the determination of a dispute of fact or law.

46. That passage merely makes the point that as the Court and the Pensions Ombudsman have mutually exclusive jurisdiction over disputes, it cannot have been intended that the outcome on fundamental matters of fact and law would be different depending on the forum chosen. In other words the Pensions Ombudsman has to apply the law. Otherwise a party would be able try to obtain a different result by (as Knox J puts it) a well timed application to the Court. However, I cannot read that passage a suggesting that it would be an abuse to apply to the Court in circumstances where a complaint could also be made to the Ombudsman.

47. Mr. Grant also submits that if the Companies' actions were to escape censure that would emasculate the role of the Pensions Ombudsman. I do not consider that argument has any merit. Section 146 of the Pension Schemes Act 1993 clearly envisages that the Court and the Ombudsman will share jurisdiction. If the ombudsman was intended to take precedence in given circumstances the Act would have said so.

Lack of Compliance with the Protocol

48. Paragraph 6 of the Protocol provides that unless the circumstances make it inappropriate, before starting proceedings the parties should –

> *(1) exchange sufficient information about the matter to allow them to understand each other's position and make informed decisions about settlement and how to proceed;*
>
> *(2) make appropriate attempts to resolve the matter without starting proceedings, and in particular consider the use of an appropriate form of ADR in order to do so.*
>
> *6.2 The parties should act in a reasonable and proportionate manner in all dealings with one another. In particular, the costs incurred in complying should be proportionate to the complexity of the matter and any money at stake. The parties must not use this Practice Direction as a tactical device to secure an unfair advantage for one party or to generate unnecessary costs.*

49. Paragraph 7.1 provides that:-

> *Before starting proceedings –*
>
> *(1) the claimant should set out the details of the matter in writing by sending a letter before claim to the defendant. This letter before claim is not the start of proceedings; and*
>
> *(2) the defendant should give a full written response within a reasonable period, preceded, if appropriate, by a written acknowledgment of the letter before claim.*

50. Mr. Levy QC argues the Letter of 16 February 2012 from Olephant Solicitors in effect fulfils this role as a letter of claim. In fact that letter contained many more allegations against Dr. Lamb than the claim eventually issued and it does not indicate at any point that the Companies are contemplating issuing proceedings imminently but that they are continuing investigations. Mr. Levy relies heavily on the response to that letter from

Shoosmiths which states that Dr Lamb reserves his right to bring proceedings against the Companies for costs and interest.

51. While I think technically the 16 February letter did set out the issues between the parties, in fact identifying rather more than eventually included the claim, it did not identify itself as a letter of claim nor indicate that proceedings would be brought imminently; simply that investigations were under way. Bearing in mind that the Companies were aware that the IDRP was in progress when they issued proceedings, to do so without any further reference to Dr Lamb strikes me as certainly not within the spirit of the Protocol.

52. However, it is also clear to me that by the time proceedings were issued, each party knew what the issues between them were in essence although I appreciate because I have not seen Dr. Lamb's defence I cannot judge that fully. In any event I do not consider that a breach of the Protocol would justify striking out the claim. Paragraph 4.6 of the Protocol provides:-

> *If, in the opinion of the court, there has been non-compliance, the sanctions which the court may impose include –*
>
> *(1) staying (that is suspending) the proceedings until steps which ought to have been taken have been taken;*
>
> *(2) an order that the party at fault pays the costs, or part of the costs, of the other party or parties (this may include an order under rule 27.14(2)(g) in cases allocated to the small claims track);*
>
> *(3) an order that the party at fault pays those costs on an indemnity basis (rule 44.4(3) sets out the definition of the assessment of costs on an indemnity basis);*
>
> *(4) if the party at fault is the claimant in whose favour an order for the payment of a sum of money is subsequently made, an order that the claimant is deprived of interest on all or part of*

that sum, and/or that interest is awarded at a lower rate than would otherwise have been awarded;

(5) if the party at fault is a defendant, and an order for the payment of a sum of money is subsequently made in favour of the claimant, an order that the defendant pay interest on all or part of that sum at a higher rate, not exceeding 10% above base rate, than would otherwise have been awarded

53. Therefore the sanctions do not include striking out. Even if they did, I am not convinced that there has been a clear breach of the Protocol in this case which would go anywhere close to justifying such a draconian course of action.

The Global Multimedia Point

54. Although not set out in the Companies' skeleton Mr. Levy QC gave notice that he intended to rely on a further point based on Global Multimedia International Limited v ARA Media Services [2006] EWHC 3107. The issue in that case was what conduct constitutes a submission to the jurisdiction so that the power of the Court to entertain the claim under CPR rule 11 cannot be disputed. Mr. Levy QC relies on the fact that before this application was made Dr. Lamb agreed two stays of the proceedings so that ADR could be explored and agreed to directions for the service of his defence. Certainly if jurisdiction were being disputed under CPR 11, that would be conduct which could amount to a submission to the jurisdiction.

55. However, in this case, Mr. Grant accepts that the Court has jurisdiction to entertain the proceedings brought by the Companies. His case is that the claim should be struck out as an abuse because the dispute ought to be dealt with by the Pensions Ombudsman. His argument is more akin to a forum non conveniens argument rather than the Court not

having jurisdiction at all. I therefore do not find this point helpful in dealing with Dr Lamb's application.

Conclusions on Application to Strike Out

56. This is not a case in my view where the claim should be struck out. The Companies have issued proceedings in the Court in respect of a dispute over Dr. Lamb's pension which they are entitled by statute to do. It may be that their timing was tactical to ensure that the matter came before the Court rather than the Ombudsman but that does not justify their claim being struck out as an abuse for the reasons set out above.

Prospective Costs order

57. As an alternative to his strike out application Dr. Lamb seeks a prospective costs order against either the fund held by the Trustees or against the Companies. In practice this would be an order against the Companies as they are obliged to contribute the funds. However, I have heard from Mr. Short QC on this issue. Dr. Lamb's case is put on various bases:-

(a) That the claim comes within category 2 of Re Buckton [1907] 2 Ch. 406.

(b) By extension of the Buckton categories

(c) On the basis that having regard to the Claimants' conduct or otherwise the likely costs order at trial would be that Dr. Lamb would receive his costs in any event.

(d) Pursuant to the discretion of the court under CPR rule 44.2(4) having regard to the Claimants' conduct and breach of the various provisions of the CPR.

58. In Re Buckton Kekewich J set out three categories of claims. The first category was a claim by Trustees to have an instrument construed or a question determined in relation to the fund. In those cases the costs would come out of the fund. Kekewich J then identified a second class of case into which Mr. Grant says Dr. Lamb falls as follows:-

*There is a second class of cases differing in form, but not in substance, from the first. In these cases it is admitted on all hands, or it is apparent from the proceedings, that although the application is made, not by trustees (who are respondents), but by some of the beneficiaries, yet it is made by reason of some difficulty of construction, or administration, which would have justified an application by the trustees, and it is not made by them only because, for some reason or other, a different course has been deemed more convenient***.**

59. In such cases the Court will order the beneficiary's costs to come out of the fund in the same way that the trustees' costs would be paid in a category 1 case. I do not consider that Dr. Lamb's claim can on any basis be regarded as a category 2 claim. There are no construction points between the parties bearing in mind the concession by the Companies and I am told by Mr. Short QC for the Trustees that there is no general benefit to the body of members for the construction point in respect of Clause 8 to be resolved.

60. Dr. Lamb's claim is a personal claim brought by him for his benefit for an enhanced pension. I do accept the general proposition put forward by Mr. Grant that the categories of case set out in Re Buckton are not exhaustive. That was made clear by the Court of Appeal in Singapore Airlines v Buck [2012] Pens LR1. In that case a third party had brought a claim for construction which benefitted it but also was of benefit to the beneficiaries whom it was appointed to represent . The Judge at first instance had ordered all the costs to be paid out of the fund but on appeal Arden LJ giving a judgment with which the rest of the Court agreed allowed only one half of the costs to come out of the fund on the basis that the third party had brought the claim in a dual capacity. However,

in this case Dr. Lamb acts for his own benefit and there is no element of benefitting other members.

61. Mr. Grant also relies on McDonald v Horn [1994] ICR 685. That was a case brought by members of a pension scheme making serious allegations against their employers and the pension fund trustees in relation to the administration of the scheme. Hoffman LJ considered the Re Buckton categories and said at 696:-

> *The court may sometimes feel sufficiently confident that the case is clearly within the first or second category to be able to make a prospective order that parties other than the trustees are to have their costs in any event. Such orders have been made at the request of, or with the support of, the trustee or other fiduciary bringing the proceedings: see In re Exchange Securities & Commodities Ltd. (No. 2) [1985] B.C.L.C. 392, 395. This is not an interference with discretion because it is clear that the discretion can only be exercised in one way. In such cases, however, the parties are by the same token unlikely to require the assurance of a prospective order and they are in practice unusual. In cases in which it is not clear that the judge would be bound to make an order in favour of the applicant, the court is very reluctant to make a prospective order*

62. He then went on to say at p. 697:-

> *I think that before granting a pre-emptive application in ordinary trust litigation or proceedings concerning the ownership of a fund held by a trustee or other fiduciary, the judge must be satisfied that the judge at the trial could properly exercise his discretion only by ordering the applicant's costs to be paid out of the fund. Otherwise the order may indeed fetter the judge's discretion under Ord. 62, r. 3(3)* .

The Court then went on to grant a prospective costs order to the plaintiffs but on the basis not that their claim fell within the Buckton categories because it was hostile litigation

but by analogy with derivative actions. Mr. Grant accepts that Dr. Lamb's claim does not fall into that latter category of case.

63. Therefore the test to be applied is whether the trial Judge can only exercise his discretion in favour of Dr. Lamb's costs coming out of the fund. It is not the test which Mr. Grant has posited in his argument:: that it is likely that a Judge at trial would make a costs order in his client's favour. For this proposition he relies on HR Trustees Ltd v German & Anor (2) [2010] Pens LR 131. However Arnold J in that case considered a number of first instance decisions since McDonald v Horn and reaffirmed that the test was as set out by Hoffman LJ in respect of Buckton type prospective costs orders: namely whether the trial Judge could only exercise his discretion one way in respect of costs. . It was only if the case fell within the second type of case referred to in McDonald v Horn namely a case akin to a derivative action that the Court had a broader discretion and could look at whether it was likely that the trial Judge would make a costs order in the applicant's favour.

64. Mr. Grant has also sought to draw an analogy between costs in this case and the way in which costs are approached in probate cases relying on Kostic v Chaplin [2008] WTLR 655 which considered the older authorities of Spiers v. English [1907] P 122 and Mitchell v Gard (1863) 3 SW & Tr 275. The principles from these cases can be summarised as follows. The Court will depart from the usual costs orders:-

(a) If the testator has been the cause of the litigation, then the costs might come out of the estate;

(b) If there have been reasonable grounds on which to investigate the validity of the will, then the costs lie where they fall.

65. Mr. Grant referred me to Re Lehman Brothers International (Europe)(Costs) [2010] EWHC 3044 where Briggs J (as he then was) extended the probate case principles to insolvency proceedings. I am not entirely sure how, on the facts of this case the probate cases, even if it were right to extend their ambit, might assist Dr. Lamb but in any event I consider that there is a very short answer to the point. It seems to me that while these arguments can be brought to bear after a trial has been fought, the Court would not make prospective costs order in a probate case based on the above exceptions.

66. Finally Mr. Grant asks me to make a prospective costs order on the basis of the misconduct of the Companies in the way in which they have brought this claim. As pointed out by Mr. Grant the Court must have regard to all the circumstances including the conduct of the parries (CPR rule 44.2). Mr. Grant also referred me to paragraph 4.6 of the Protocol which I have set out above which clearly provides for a costs sanction for non-compliance with the Protocol.

67 I have found that there has not been strict compliance with the Protocol although the parties did understand the issues between them in a broad sense before proceedings were brought. I will of course hear submissions on the costs of this application but I fail to see how any failure justifies a prospective costs order in favour of Dr. Lamb.

Conclusions

68. For the reasons set out above I dismiss the Fourth Defendant's application to strike out the claim and his application for a prospective costs order.
