

## There Is a Mistake in a Document – What Do I Do?

You have realised that there is a drafting error in a scheme’s trust deed and rules that no one intended. What can you do? Can it be corrected? This guide explains how you can go about correcting that error. If in any doubt, please contact your Squire Patton Boggs lawyer for help.

## Can the Deed and Rules Be Amended Using the Scheme’s Amendment Power?

In order to effectively correct an error in a trust deed and rules, it is important to understand the type of error that has been made. If, for example, the error lies in the balance of powers between the employer and trustees, the error can be corrected by using the scheme’s amendment power. If, however, an error relates to a scheme’s benefit structure, such that a beneficiary could argue that any proposed change might reduce their benefits, or if making an amendment using the scheme’s amendment power might infringe statutory protections, a different method of correction would be required. This method is commonly referred to as “rectification”.

## What Is Rectification?

Rectification is an equitable remedy, which allows for the correction of mistakes made in a written agreement. In pensions, rectification is most often sought in cases where, because of a mistake in the drafting, beneficiary entitlements are overstated. Rectification has the effect of correcting the document retrospectively from the date of the original error.

True rectification can only be achieved by court order. Where the parties to the trust deed and rules do not want to incur the cost of going to court, but (1) agree that the trust deed and rules do not reflect the intentions of the original parties and (2) agree on what were the intentions of the parties, they may enter into a supplemental deed. A supplemental deed is helpful, but can be challenged. The failsafe way to amend a scheme in these circumstances is to seek a court order. If the matter is pursued to court, any supplemental deed would, however, add to the weight of evidence in support of rectification.

Rectification can be used to address:

- Typos
- Incorrect cross-references
- Omissions
- Wrong use of definitions

Rectification is available at the court’s discretion. It is unlikely to be granted if the mistake in the trust deed and rules is too fundamental or extensive. If you are unsure, take advice.

## What Considerations Would the Court Take Into Account?

Members might be affected by a decision to rectify a pension scheme’s trust deed and rules. It is unlikely that the courts would rectify a scheme’s trust deed or rules without the interests of third parties (i.e. members and beneficiaries) being considered.

The general rule is that the court will assume that individuals who sign written documents intend to be bound by the contents of those documents and, in this case, the trust deed and rules. To succeed in a rectification claim, you would need to convince the court that the trust deed and rules do not reflect the intentions of all signatories at the time the deed and rules were entered into and that the signatories had a common intention as to what they should say. A court would need to see evidence of those intentions.

## What Types of Evidence Should I Have?

The parties seeking rectification should gather as much documentation as possible that evidences the original intentions of the parties. Evidence may take the form of some or all of the following:

Witness statements	Internal documents
Notes from telephone conversations	Trustee and board meeting minutes
Scheme booklets and announcements	Documented advice from professional adviser

## What Sort of Witness Statements Would I Need?

The most valuable type of witness statement is one that is made by an individual who can state with personal knowledge what the intentions were at the time at which the trust deed and rules were executed.

It is helpful if each of the trustees who signed the trust deed and rules containing the error (assuming they are able to do so) can provide a witness statement and be available for cross-examination. Witness statements will generally also be required from individuals who were representatives of the employer or advisers at the time the original trust deed and rules were entered into – this is to show the shared intention of the parties.

**Tip:** Even if the parties do not plan on seeking a court order at this stage, it may be helpful to prepare these witness statements as they help to justify the parties signing up to a supplemental deed and address the risk of witnesses becoming unavailable for later court proceedings.

## Is Rectification Expensive?

In a pensions context, many rectification cases are resolved via summary judgment. This is a simpler form of court procedure commonly used where the facts are not in dispute. Compared to the costs attached to a full hearing, a summary judgment is a much quicker and cheaper way because the court will only consider paper based evidence. Remember, however, that collecting the evidence will involve a potentially significant investment of time and money.

An alternative method would be to consider an Administration of Justice Act application. This is where a barrister of 10-years' standing gives an opinion on the interpretation issue at hand and the court orders that the trustees administer the scheme on that basis.

You could also consider bringing a professional negligence claim against the professional advisers who drafted the trust deed or rules containing the mistake. A claim could be perhaps brought for the costs incurred in bringing the rectification action if rectification is granted, and if it is not granted, the claim could be for the increase in scheme liabilities brought about by the mistake.

## Why Does Rectification Matter?

Unless rectification is granted, the trustees will have to run the scheme in accordance with the trust deed and rules, even if that is not in a way that the parties had originally intended.

## Some Practical Points

Do	Don't
<b>Do</b> correct a mistake. If the mistake can be amended using the scheme's amendment power, do that. If not, consider carefully whether you need to apply to court for rectification and whether a court would be likely to grant it. Consider entering into a supplemental deed (even if it is just an interim measure before getting a court order).	<b>Don't</b> simply annotate, remove or change pages of the original deed.
<b>Do</b> bring a claim for rectification as soon as reasonably practical. The court can refuse to grant rectification if there has been unreasonable delay in pursuing the claim, particularly if any disputing/third parties' interests are significantly affected. (See our <a href="#">quick guide</a> on limitation periods for other limitation periods.)	<b>Don't</b> go to The Pensions Ombudsman – He does not have the power to grant rectification.

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