The Pensions Ombudsman

Ombudsman's Determination

Applicant	Mr E
Scheme	Bic UK Pension Scheme (**the Scheme**)
Respondent	Trustees of the Bic UK Pension Scheme (**the Trustees**)

Complaint Summary

1. Mr E's complaint concerns an overpayment of pension benefits, amounting to £90,934 built up over a period of over 24 years, which the Trustees are seeking to recover through recoupment from future pension payments. The Trustees have subsequently confirmed that they are not seeking recovery of any overpayments from Mr E's estate which have not been recouped by the date of his death.

Summary of the Ombudsman's Determination and reasons

2. The complaint is partially upheld against the Trustees. I am satisfied that:-

    2.1. It is not equitable for the Trustees to recoup the overpayments that built up before 1 August 2019.

    2.2. Mr E also has a defence of laches to the recovery of the overpayments that built up from 22 February 2013 to, and including, 31 July 2019.

3. Consequently, the Trustees shall refrain from taking any recovery action in respect of the overpayment that built up between 1 December 1996 and 31 July 2019, which amounts to £84,380.

4. In relation to the part of the overpayment which built up on or after 1 August 2019, the Trustees may, subject to first obtaining the approval of the County Court for the purposes of section 91(6) of the Pensions Act 1995 (**PA 95**), commence recovery of the remainder of the overpayment of £6,554 at the rate of £200 per calendar month.

5. In addition, the Trustees shall pay Mr E £1,000, in recognition of the significant non-financial injustice (distress and inconvenience) he has sustained as a consequence of their role in the matter.

Detailed Determination

Terminology

6. In this Determination I have used the following terminology:-

    6.1. The "**recovery**" of an overpayment is a general term and covers any method under which overpaid pension benefits are returned to the Scheme.

    6.2. "**Equitable recoupment**", or "**recoupment**", describes the recovery of overpaid pension benefits through the reduction of future pension instalments. This is how the Trustees are proposing to recover the overpayments from Mr E.

    6.3. "**Repayment**", describes recovery directly from the member (for example, a bank transfer from the member to the Scheme, or a payment from the member's estate), under the legal principles of unjust enrichment.

History of court proceedings

7. The overpayment arose as a result of the events described in the *Burgess v BIC UK* case (**Burgess**).[1] The Burgess case concerned a legally ineffective attempt to document a decision made in 1991 by the then Trustees of the Scheme (who included the then managing director and other directors of BIC UK Limited (**BIC UK**)). The parties intended to introduce an improvement to provide increases to pensions in payment equal to the lower of 5%, or the increase in the retail prices index (**RPI**), on the pension in excess of the guaranteed minimum pension (**GMP**). A key issue was whether increases which had been applied to the element of a member's pension in excess of their GMP, in respect of pensionable service before April 1997 (**the Pre 97 Increases**), had been validly granted.

8. The High Court held in 2018 that the Pre 97 Increases were validly granted, but the decision was reversed by *BIC v Burgess* [2019] 051 PBLR (026) in the Court of Appeal (**Burgess (CA)**) in 2019 on application by BIC UK. This had the effect of reducing the Scheme liabilities by just over £5 million based on the Scheme's then ongoing funding basis. The *Burgess (CA)* decision potentially affected 194[2] pensioners whose pensions were already in payment (both in respect of past and future pension payments) and 104 deferred members (in respect of future pension payments). For some pensioners, this meant that overpayments had been made for

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[1] *Burgess v BIC UK* [2018] 054 PBLR (040). The High Court decision on the question of whether the benefit increases were validly granted was reversed by the Court of Appeal in *BIC v Burgess* [2019] 051 PBLR (026) on 10 May 2019.

[2] See paragraph 11 of the Court of Appeal judgment in *BIC v Burgess* which states that, as at 6 April 1997, there were 219 pensioners of whom 25 did not have pre-6 April 1997 benefits so are not affected by the decision. Of the 158 deferred members, 54 would not receive pension increases if the Pre 97 Increases were reinstated.

over 25 years and very significant amounts have built up. In Mr E's case, the overpayment has accrued over a period of 24 years and 8 months.

9. In the *Burgess* case (at first instance) it was confirmed by Mr Justice Arnold that members of the Scheme could not rely on a group estoppel as a defence to recovery of the overpayments. He held that the Court cannot, or should not, determine these questions on a group basis – but should leave it to be determined between the trustees and the individual members of the Scheme. The starting point is that, prima facie, it would be the Trustees' duty and not inequitable to seek to recover the overpayments and thereby increase the assets available for the benefit of all the members. However, it may be inequitable for the Trustees to do so in a particular case. This will depend, as indicated by Lord Neuberger in the *Steria* case (see paragraphs (173 to 175 below), on whether in particular there has been "detrimental reliance" by the individual in question. The issue of detrimental reliance is considered, among other issues, in this Determination.

10. The current case is one of several disputes which have been referred to The Pensions Ombudsman (**TPO**) since the *Burgess* decision where members contend that the overpayments should not be recovered. TPO is currently considering four other cases. Although BIC UK is not formally a party to the complaint, I have given BIC UK the opportunity to make legal submissions in the current case and I have considered those very detailed representations as well as the representations of the Trustees in this Determination.

11. TPO's understanding is that in the remaining cases affected by the *Burgess* judgment (other than the four TPO is currently considering and a few cases where members have since died), members have accepted that the overpayments should be recovered from future payments of pension and have agreed recovery plans with the Trustees.

12. For the reasons set out in the *Burgess* decision, in each of the remaining cases where the liability to repay the overpayment is disputed, it is necessary to look at whether the member has defence(s) to recovery of all or part of the Pre 97 Increases on an individual basis. Although there are a number of common legal and factual issues, the circumstances of the individual case may differ (in particular whether material detriment has been sustained), so the conclusion may not be the same in each case. The need to examine those defences, coupled with the very detailed submissions by the parties, has led to a much longer and more legal Determination than I would like, or expect to produce in the future.

Material facts

13. Mr E was employed by BIC UK and is receiving a pension from the Scheme. At the time of the original decision relating to pension increases, referred to in paragraphs 20 to 22 below, the Scheme had individual trustees, who included the managing director and two directors of BIC UK.

14. Noble Lowndes (later Sedgwick Noble Lowndes, and then Mercer) (**Mercer**) were the actuaries and administrators of the Scheme from February 1984 to 31 December 2003.

15. Alexander Forbes Group (**Alexander Forbes**) were later appointed as advisors, administrators and actuaries of the Scheme in place of Mercer on 31 December 2003.

16. Atkins & Co (**Atkins**) have provided administration and actuarial services to the Scheme on behalf of the Trustees since 2011 in the place of Alexander Forbes.

17. Dalriada Trustees Limited (**Dalriada**) is a former independent trustee of the Scheme, having been appointed as a trustee on 30 May 2006.

18. Mr E is represented by his daughter, Ms E, in connection with this dispute.

19. In 1991, the rules of the Scheme did not provide that increases in payment would automatically be granted on pensions in excess of the GMP. The rules, however, did give the Trustees a discretion to increase pensions in payment if BIC UK agreed and sufficient funds were available.

20. In the minutes of a meeting of the then Trustees of the Scheme on 18 February 1991, it was noted that:

> "The Chairman reported that the pension fund was in surplus and that steps had to be taken to reduce this surplus. Several options had been considered and it was proposed that part of the surplus be used to enhance the pension of existing pensioners and improve future benefits for both them and the members of the pension scheme.
>
> The proposals would involve increasing pensions in payment in line with inflation since the commencement of their payment and increasing future payments by RPI or 5% whichever was the lower.
>
> The increasing of pensions in payment would be made at the discretion of the Trustees.
>
> It was RESOLVED that the proposed action be carried out as soon as possible [**the Trustee Resolution**]."

21. On 19 March 1992, an announcement (**the March 1992 Announcement**) was issued "for and on behalf of the trustees". It stated that:

> "There is proposed legislation to increase pensions in payment, to reduce the effect of inflation on their buying power. The Trustees have decided to implement the proposal now rather than wait for the requirement to come into effect. Moreover, due to the strength of the Fund it will not be necessary at present to seek additional contributions from the members towards the extra cost of this improvement.

Therefore, all pensions commencing after 6th April 1992 will be increased each year by 5% or the Retail Prices Index, whichever is the lower. The increase will be applied to the part of the benefit in excess of the Guaranteed Minimum Pension."

22. Mr E was a member of the Scheme at the time and would have been sent a copy of the March 1992 Announcement. An announcement was also issued in December 1992 (**the December 1992 Announcement**) which said:

"Pension increases

The way pensions are increased in payment is described in the Explanatory Booklet and an announcement dated 19th March 1992.

The Trustees have power if the company agrees and if sufficient funds are available to provide further increases.

Under these powers all pensions in payment were increased on 6th April 1992 in line with increases in the Retail Prices Index for each year since the pension started to be paid."

23. At the time, the Explanatory Booklet referred to in the December 1992 Announcement would not have referred to the fact that increases in payment would be granted on pensions in excess of the GMP. However, it referred to the Trustees' discretion to increase pensions in payment if the company agreed and sufficient funds were available. The two documents, in my view, need to be read together to understand the increases payable under the Scheme provisions at the time.

24. The *Burgess* judgment at first instance records that:

"With effect from 6 April 1992, all pensions in payment, whenever they commenced and including the pensions of former Works Scheme members, were increased by 5% LPI."[3]

25. It is understood that this practice continued until 2013, when the Pre 97 Increases were suspended going forward. This was following the identification in 2011, of the issue concerning the validity of the documentation of the decision (see paragraphs 52 and 53 below).

26. New trust deed and rules were executed on 29 May 1993 (**the 1993 Deed and Rules**). Rule 9(a) and paragraph 8 of Part III of the 1993 Deed and Rules provide that pension increases only apply to the portion of the pension which represents the GMP (and not the excess). Clearly, this is not consistent with the increases that were notified to members in the March 1992 Announcement or the December 1992 Announcement, and the discrepancy appears to have gone unnoticed at the time.

[3] LPI stands for Limited Price Indexation and is used to describe increases payable by reference to a price index, subject to a fixed percentage cap.

27. It was accepted by Mr Justice Arnold in *Burgess* at first instance that the fact that the Pre 97 Increases are not mentioned in the 1993 Deed and Rules and the subsequent Deed and Rules from 2006 (see paragraph 49 below) was simply oversight. There appears to have been at least two separate occasions where it should have been identified that the Trustee Resolution had not been documented in the Scheme provisions. The 1993 and 2006 Deeds and Rules were drafted by the Trustees' then professional advisers.

28. Before Mr E retired from the Scheme, he built up various savings by making contributions to several insurance Policies (**the Policies**). Contributions to these Policies came from his income from his employment, and he saved the increases granted to his salary from time to time. Mr E retired in December 1995, and his pension came into payment at an initial rate of £11,559.84 per annum (see Appendix B). I do not have a copy of the retirement statement that was issued to Mr E at the time (**the Retirement Statement**). However, TPO has been provided with a copy of the retirement statement that Mercer issued to a "Mr D" whose pension from the Scheme came into payment in 1997. The retirement statement shows the annual rate of Mr D's pension, his tax free lump sum, and the annual rate of increase that will be applied to his pension in payment. The notes accompanying the retirement statement explain that:

> "The annual rate of 5% increase is limited to a maximum of the increase of the retail prices index each year. If increases in this index fall below this rate the increase to pension will be adjusted to reflect this increase."

29. I am satisfied that Ms E is an honest and credible witness. TPO has clarified with Ms E that following Mr E's retirement he used his pension (as increased from time to time) towards living expenses "as an income". In other words, he spent up to his available income. Ms E's original understanding was that, following Mr E ceasing to work at BIC UK, he no longer made contributions to the Policies. Ms E also confirmed that the way he saved into the Policies before retirement was to contribute the increases in his salary each year, rather than spending them. Following the additional representations from BIC UK (see below), I sought to confirm specifically with Ms E whether any further contributions were made to the Policies after retirement. However, Ms E cannot say conclusively whether any contributions to the Policies were made following his retirement (as the bank and other financial records were destroyed when Mr E returned from Spain).

30. Between 6 April 1992 and March 2013, increases in payment were granted by the Scheme on the basis described in paragraphs 20 and 21 above.

31. Mr E's pension increased each year on the assumption that Pre 97 Increases should apply each year at the rate of 5% or RPI if less. As a result of these increases, by December 2012 his pension had increased to £18,625.79 per annum. If the Pre 97 Increases had not been applied, the pension would have amounted to £12,111.17 per annum (See Appendix B). After 1 March 2013, further Pre 97 Increases were

suspended and increases were only applied to the GMP (see paragraphs 53 to 57 below).

32. The Trustees of the Scheme are responsible for ensuring that the correct benefits are paid in accordance with the Scheme rules. In their role as the “Scheme Administrator” for tax purposes they are responsible for ensuring that the correct tax is deducted under the Pay as You Earn (**PAYE**) system.

33. Mr E would have received a payslip each month setting out his pension entitlement and the income tax deducted from his pension. He would also have received an End of Year Certificate (**P60**) each year setting out his total pension and the income tax deducted. Both the payslips and P60s would have been issued on behalf of the Trustees as the Scheme Administrator for UK tax purposes.

34. Mr E moved to Spain with his wife, Mrs E, in March 2003. Mr E has confirmed that the approximate price for which their property was sold in 2003, when they moved to Spain, was £250,000. Mr E has also confirmed that they purchased their first property in Spain for £265,000. Following his move to Spain, Mr E’s pension was paid gross of tax. However, he would have continued to receive a payslip each month. Mr E returned to the UK in June 2016, at which point the Trustees started deducting tax from his pension payments as required under PAYE.

35. During the investigation,TPO requested copies of Mr E’s payslips and was advised that Atkins only hold payroll records going back to 2011. However, I have seen and reviewed copies of payslips pre-dating and post dating the announcement that was subsequently issued on 22 February 2013 (see paragraphs 36 to 39 below) in respect of Mr E and four other members of the Scheme.

36. I have also seen documentary evidence that payslips and P60s were issued, on behalf of the Trustees, by Alexander Forbes and then Atkins since at least 2004. The payslips and P60s I have seen are not qualified and do not contain any caveats. Another member (“**Mr L**”) has supplied copies of his payslips and P60s from June 2006 to June 2014, these documents do not indicate that the pension is subject to certain conditions or caveats.

37. Mr E’s payslip that was issued by Atkins on 6 October 2011 shows “Total Gross Pay” of £1,412.96 in respect of his pension from the Scheme. No income tax was deducted as he was living in Spain at the time. The payslip does not contain any caveats.

38. Atkins has also provided copies of Mr E’s payslips for April 2012, April 2013 and April 2014 and copies of the payslips that have been issued to Mr E each month from April 2015 to date. The pension detailed on these payslips can be found in the table at Appendix A.

39. Mr E’s payslips do not include information on the pension increases that were applied to his pension. However, comparing the pension on the payslip issued in December each year with the pension on the payslip in December of the previous year, it would

have been clear to a layman that the pension had increased each year, even though it would not have been possible to work out the amount of pension increases attributable to the individual tranches of his pension.

40. I have also seen evidence that letters were sent to members each year (by Alexander Forbes and then by Atkins) giving details of the annual increases that had been applied to their pension. It is reasonable to conclude that, on the balance of probabilities, Mr E would have received similar letters notifying him of the annual increase that had been applied to his pension.

41. I have reviewed a letter Alexander Forbes issued on 5 July 2010, to the member referred to in paragraph 36 above, Mr L, notifying the pension increase due to him from May 2010. The letter states:

> Re BIC UK Pension Scheme
>
> I am writing regarding your pension increase, which is due from May 2010.
>
> The revised amount has been calculated in accordance with the scheme rules. The rates of increase for 2010 are:
>
> the Pre 1997 excess element of your pension will increase at the rate of the Retail Prices Index (RPI) or 5% if less;
>
> the Post 1997 excess element of your pension will increase at RPI or 5% if less.
>
> Please note that RPI is currently running at negative and as such no increase will be applied.
>
> Your pension is set up as below:

	2009	2010
Pre 88 GMP	[ ]	[ ]
Post 88 GMP	[ ]	[ ]
Pre 97 Pension	[ ]	[ ]
Post 97 Pension	[ ]	[ ]
AVC Pension	[ ]	[ ]
Total		

42. I find on the balance of probabilities that Mr E received similar letters in a similar format. There is a representation in this letter that the increases granted had been

calculated in accordance with the Scheme provisions: “The revised amount has been calculated in accordance with the scheme rules”.

43. Following its appointment in 2011, Atkins continued with the Trustees’ practice of issuing annual increase letters to pensioners. The examples I have seen are in the following format:

26 April 2012

Dear Mr [L]

BIC UK Pension Scheme

I write to inform you of the annual increase which is due on your pension from May 2012.

The increases are paid in accordance with the Scheme rules and your current and new pension amounts are as follows:

	Annual	Monthly
Current Pension before tax	[ ]	[ ]
New Pension before tax	[ ]	[ ]

If you have any queries please do not hesitate to contact me

Yours sincerely

[ ]

44. Similarly, I note that these annual increase letters do not contain any caveats and included a further statement that the increases were calculated in accordance with the Scheme rules. I find on the balance of probabilities that Mr E was issued with letters in a similar format.

45. TPO has been provided with copies of sample announcements issued to members relating to the discussions and court proceedings about the validity of the rule amendment from 2013 onwards.

46. The *Burgess* judgment confirms that a possible issue concerning the basis for granting the increases was identified as early as 20 October 2004. This was after Alexander Forbes queried with Hewitsons (the lawyers appointed by the then Trustees) the basis on which the Pre 97 Increases were provided. Hewitsons referred

to Rule 9(a) of the 1993 Deed and Rules (which as mentioned in paragraph 26 above did not provide for any increases other than on the GMP element) and to the March 1992 Announcement but observed the documents were not conclusive.

47. The *Burgess* judgment records that on 20 April 2005, Hewitsons sent Alexander Forbes a draft copy of the updated Trust Deed and Rules (which were later finalised and executed in 2006). It also records that Hewitsons provided Alexander Forbes with a comparative audit trail of the trustee powers, which stated that any increases on pension in excess of the pre 1997 GMP were discretionary. It was noted in the *Burgess* decision at first instance that there is no evidence that this information was shared with BIC UK at the time; although I assume (and it has not been challenged at the Preliminary Decision stage of this complaint) it was shared with the Trustees.

48. At a Trustees' meeting on 10 May 2005, increases were discussed and the Trustees considered reducing the rate of increases on pensions in payment to 2.5% per annum or RPI if less[4].

49. On 16 January 2006, the Trustees and BIC UK executed a new Definitive Deed and Rules. However, again, it did not include any provisions stating that there was an entitlement to the Pre 97 Increases, or any change to the discretionary increase power. It was accepted in the *Burgess* case by the Judge at first instance that "the most likely explanation" for the failure to mention the Pre 97 Increases in the April 1991 members' booklet, the 1993 Deed and Rules or the 2006 Deed and Rules was "simply oversight" (see pagraph 89 of the judgment).

50. On 13 March 2007, Alexander Forbes emailed Hewitsons and queried whether it should continue with the administrative practice adopted by the previous administrators and apply the Pre 97 Increases. Hewitsons replied that the previous administrators had correctly paid the increases relying on Rule 9(a) and the March 1992 Announcement. There is no evidence this advice was shared with BIC UK at the time. However, I assume that it would have been shared with the Trustees (and, again, it has not been challenged at the Preliminary Decision stage of this complaint).

51. Mr and Mrs E sold the first property they purchased in Spain for approximately 300,000 euros in 2008. They then bought a new property in Spain for largely the same amount, approximately 305,000 Euros, in 2008.

52. In 2011, Atkins were appointed by the Trustees in place of Alexander Forbes. The *Burgess* judgment indicates that Atkins investigated the basis on which Pre 97 Increases were granted and BIC UK was contacted about the increase rule. During a Trustee meeting on 20 December 2011, BIC UK challenged the validity of the Pre 97 Increases.

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[4] Presumably in line with changes to the statutory minimum increase that was required for pensions in payment (and attributable to service on or after 6 April 2005) – although I note that this statutory minimum still did not apply to the pension accrued in excess of GMP prior to 6 April 1997.

53. On 22 February 2013, Dalriada wrote to pensioners of the Scheme, including Mr E, on behalf of the Trustees (**the February 2013 Announcement**). It advised that:

> "Following the transfer of the administration services to Atkins & Co, a discrepancy had been identified between the Scheme's governing documentation and the administrative practice adopted for pension increases in payment."
>
> …
>
> "Since 1992, the administrative practice has been to increase Pre 97 and Pre 97 Excess by 5% per annum or the increase in the Retail Prices Index ("RPI") if less. However, the Trustees and the Employer have received opposing advice as to whether the payment of these increases was in accordance with the Scheme Rules and therefore uncertainty has arisen as to whether members were entitled to be paid these increases."

54. The letter goes onto say that:

> "The Trustees are investigating this matter and are taking appropriate legal advice. The Company, BIC UK Ltd, is also taking legal advice independently and we are working together to come to a conclusion.
>
> As the Trustees can only pay benefits in line with the Scheme rules, it will be necessary to suspend increases to Pre 97 and Pre 97 Excess pensions until the matter is resolved. The suspension is effective from 6 March 2013 and will only affect future increases. The Company has agreed that there should be no deductions, at this time, for increases already applied that may not have been in line with Scheme Rules…[However], Should it be concluded that members are entitled to the suspended increases they will be re-instated and fully backdated."

55. The Trustees concluded the letter by stating:

> "We would like to make it clear that your retirement pension will continue to be paid in the usual way. The suspension of payments only relates to future increases to Pre 97 and Pre 97 Excess pensions at this time."

56. The full text of the February 2013 Announcement is set out in Appendix E.

57. The suspension remained in force until the Court of Appeal decision in *Burgess (CA)*, which concluded that the increases had been improperly paid in breach of the Scheme Rules. However, during the period between the date of the February 2013 Announcement and the Court of Appeal decision in 2019, overpayments continued to build up relating to past increases. Indeed, a very significant proportion of the overpayment which the Trustees are now seeking to recover built up after 6 March 2013, as indicated in the breakdown of the overpayments set out in Appendix B.

58. In April 2015, Dalriada was replaced by MJB Independent Trustee (**the Independent Trustee**).

59. In August 2015, the Independent Trustee issued a note to Scheme pensioners to the effect that:

> "This note is being issued on behalf of the Trustees to provide you with an update. A letter was issued by Dalriada in February 2013 explaining that due to legal uncertainty as to whether members are entitled to pension increases it has been decided to suspend those increases.
>
> …
>
> We do now have a meeting booked for 3rd September 2015 to be attended by the Trustees and BIC UK Limited, and the legal advisers. The aim is to reach some degree of understanding and if it is deemed necessary apply to court to resolve any matters which cannot be agreed. This process may take some time, possibly another 12 months.
>
> We will issue another note as soon as we have something positive to report."

60. In the Scheme Annual Report and Accounts for 2015, the Trustees included the following statement:

> "Increases in pensions in payment
>
> Since 1992, the majority of pensions in excess of the Guaranteed Minimum Pension (GMP) have been increased on the anniversary of commencement in line with the rise in the Retail Prices Index (RPI) for the year ending with September, prior to the current Scheme year, subject to a maximum of 5% per annum. The Trustees and the Employer are currently investigating whether increases to pensions earned before 6th April 1997 are valid and the Employer has requested that pre-6th April 1997 pensions in excess of GMP do not receive further increases until the matter is resolved. The Trustees have accepted the Employer's request and increases were suspended from March 2013."

61. Mr and Mrs E moved back to England in June 2016, and purchased a small bungalow (**the Bungalow**) for £267,000. Mr E no longer has the paperwork relating to the transaction. However, Ms E recalls that they sold the second property in Spain for approximately 305,000 euros[5] (See paragraph 51 above). Ms E recollects that Mr and Mrs E lost a lot of money on the move back to the UK and Mr E had to encash all but one of the Policies to cover the cost of the move. Ms E has confirmed that Mr and Mrs E were stressed and worried, because of the letters regarding his pension, and they were both older and wanted to return to the UK to be nearer to their family. I

[5] The exchange rate varied in 2016 between the Euro and Sterling and the note of the spot rates I can find on the internet show there was an average rate of about 0.9034 GBP and a worst exchange rate of 0.727 and a best rate of 0.9034 GBP.

accept Ms E's evidence on this issue. In relation to the remaining insurance policy (**the Policy**), Ms E explained that Mr E had put it to one side to help Ms E with a house purchase or towards the cost of her wedding. However, she did not need the money and did not want to spend it. The Policy was later encashed in 2017, and the proceeds were paid into Mr E's bank account, as displayed on his bank statements.

62. In March 2017, the Independent Trustee issued an announcement to Scheme members (**the March 2017 Announcement**). It advised that the Trustees had applied to the Court for a ruling on whether the Pre 97 Increases were validly granted and whether the members were entitled to those increases. It also advised that the case would be heard by the High Court in 2017. The March 2017 Announcement explained that:

> "You may be aware that the increases to pensions in payment in respect of pensions accrued prior to 6 April 1997 ("Pre-97 increases") are presently suspended. The suspension took effect from 6th April 2013.
>
> The reason for this suspension is that it remains unclear whether there was a valid grant, under the rules of the Scheme at the relevant time, of the Pre-97 Increases and therefore there is uncertainty as to whether these Pre-97 Increases should have been paid to relevant members and whether they should be reinstated.
>
> A note was issued to pensioners in August 2015 and is enclosed by way of further background."

63. The March 2017 Announcement stated that:

> "The case is directly relevant to members who accrued pensions in the Scheme prior to 6th April 1997 (Pre-97 Member). The suspension in relation to pre-1997 Increases will continue until the court process is concluded meaning that a Pre-97 Member whose pension is in payment will not have any Pre-97 Increases applied. Any Pre-97 Member whose pension is due to come into payment prior to the conclusion of court proceedings will also be treated in the same way."
>
> …
>
> The Trustees will update the Scheme membership in due course and in particular once the High Court proceedings have concluded and the judgment is delivered in that case".

64. The March 2017 Announcement did not explain that overpayments were potentially continuing to build up following the suspension of further increases (in that the pension being paid continued to include pension that resulted from increases applied prior to the suspension). It also did not explain the possible implications for pensioners if the court held that the increases had not been validly granted. There

was no clear indication that, if they spent any of the overpayments, which were continuing to build up, they might have to repay the money.

65. On 17 April 2018, the High Court ruled in *Burgess* that the increases were validly granted. However, BIC UK was given leave to appeal.

66. On 21 May 2018, Atkins issued an announcement to members. It said that it would provide an update once the appeal proceedings had been concluded.

67. On 10 May 2019, the Court of Appeal overturned the High Court decision in *Burgess*.

68. In May 2019, Atkins issued an announcement to members (**the May 2019 Announcement**). It explained that the Trustees were in discussions with their legal advisers concerning how to implement the *Burgess (CA)* decision and would contact the members impacted by the decision in due course. The May 2019 Announcement did not explain that the overpayments made both before and after the date of the February 2013 Announcement (that is, those relating to increases already granted before the suspension of future increases, which were then 'baked-in' to the pension that continued to be paid) would or could be recovered by deduction from future pension payments.

69. On 30 March 2020, the Trustees notified Mr E that, after taking legal advice, they had to reduce the amount of his pension. Briefly, the Trustees explained that:-

    69.1. The High Court had found that the Pre 97 Increases "had been validly granted." However, this was overturned by the Court of Appeal.

    69.2. The Court of Appeal ruled that the Pre 97 Increases were not "validly granted." The Trustees had to implement this decision.

70. The Trustees also explained that they would reduce Mr E's pension to the correct level from 6 July 2020, and recoup the overpaid pension over a period of 24 years and 8 months, the same period over which the overpayment had accrued. The recovery of the overpayments would commence from 6 October 2020, unless Mr E disputed the Trustees' power to recover the overpayments. A form was provided to Mr E, so that he could confirm whether he accepted or disputed that the overpayments could be recovered.

71. On 1 May 2020, Ms E complained under the Scheme's internal dispute resolution procedure (**IDRP**) on behalf of Mr E. Ms E advised the Trustees that her father accepted the Trustees' decision to reduce his pension to the correct level from July 2020. However, he disputed that the Trustees should recover the overpayments they had made to July 2020 by deduction from future pension payments. Ms E considered that the past overpayments should be written off by the Trustees. Ms E disputed the period of recovery proposed by the Trustees and said that it should be a longer period.

72. On 22 July 2020, following exchanges with the Independent Trustee, Ms E provided a summary of Mr E's monthly income and expenditure.

73. Immediately before 6 July 2020, Mr E’s pension was paid at a rate of £1,552 per month (gross) (**the Increased Pension**). From 6 July 2020, this was adjusted to £1,055 per month (gross) to reflect his correct entitlement under the Scheme.

74. Under the recovery plan (**the Recoupment Plan**) proposed by the Trustees, £307 would be recouped from Mr E’s corrected pension each month. This would have reduced his pension to £748 per month (gross) (**the Reduced Pension**).

75. On 31 July 2020, the Independent Trustee issued a response under the IDRP on behalf of the Trustees. The response said that the Independent Trustee did not consider the “level of hardship necessitated an adjustment” to the Recoupment Plan. The Independent Trustee said that the Trustees had tried to “alleviate the difficulties” the proposed recovery action may cause Mr E by recouping the overpayment over a period of 24 years and 8 months. It advised that any debt outstanding on Mr E’s death would not be considered a debt owed to the Scheme.

76. At or around the same time, Ms E made a complaint to TPO on Mr E’s behalf. The complaint form stated that:

> “My father has accepted the overpayment correction amount [sic] which started in July. The repayment of the overpayment was meant to start in October 2020 for the recoupment of £90,000 and this is what is wrong [sic]. My parents have suffered enough from this mistake with all the holding letters etc so [the overpayments should be written off].”

77. Ms E explained that:

> “This [matter] has caused my father and mother a great deal of stress. They have had to move from their home in Spain to be near me in the UK as their nerves and anxiety are through the roof through worry. This has been going on for far too long and has affected their health over the years.”

78. Ms E has explained that when her parents sold their property in the UK, and purchased the properties in Spain, her father’s pension, which had been inflated by the Pre 97 Increases, would have contributed towards their day to day expenditure in Spain.

79. When her father started receiving correspondence from the Trustees about changes to his pension, Ms E says they were getting older, were “stressed” regarding the situation, and concerned for their health. So, they moved back to the UK and downsized from a three-bedroom villa to the Bungalow. As the property market had deteriorated in Spain, they did not make any profit on the sale.

80. In July 2021, Ms E obtained a mortgage of £155,999 (**the Mortgage**) towards the purchase of a new home for her parents (**the Property**). The Property cost £465,000 and was funded by the proceeds of the sale of the Bungalow, which was purchased by Cala Homes in part exchange for the Property, and the Mortgage. Ms E believes that they were paid £295,000 by Cala Homes. The Mortgage is repayable in 59

monthly payments of £747, followed by 181 payments of £871. I am satisfied on the basis of statements from Ms E (which I accept as providing sufficient evidence of this fact) that Mr E had a serious medical condition prior to moving to the Property in 2021 and this influenced his decision to move to the Property.

81. Ms E has explained that the Property was more suitable to her parents' needs and they have legal title to the Property. She used the Mortgage as a means of lending her parents the "shortfall" of £155,999 required to purchase the Property, which they are paying back in monthly instalments.

82. TPO has been provided with copies of Mr E's bank statements in respect of the period 1 July 2016 to June 2021. A summary of the transactions over the period 1 July 2016 to 31 March 2000, are set out at Appendix C. For example, Mr E's bank statements for October and November 2021 show a standing order payment of £747.75 in favour of Ms E.

83. A breakdown of Mr E's current monthly household income and expenditure is set out at Appendix D. Based on the breakdown, Mr E's income exceeds his monthly outgoings by approximately £170.

84. Mr E had an obligation to declare his income and pay tax on it in Spain to the extent that it is not deducted at source. Ms E has confirmed, on behalf of Mr E, that he did indeed declare his pension and pay tax on his pension during the period he lived in England and also during the period he was living in Spain.

The submissions made by Mr E, the Trustees and BIC UK

85. The parties made their submissions in two stages. I initially gave both Mr E and the Trustees an opportunity to make submissions and considered these when drafting the Preliminary Decision.

86. The Trustees requested that BIC UK be given the opportunity to comment on the Preliminary Decision, as BIC UK would ultimately be required to fund the extra cost if the Ombudsman determined that all or part of the overpayments should not be recovered. I agreed to the Trustee's request, as I considered that this was appropriate in terms of fair process. I have a general discretion as to TPO's procedures, except to the extent that the procedures are set out in the Pension Schemes Act 1993 (**PSA 93**) and the Personal and Occupational Pension Schemes (Pensions Ombudsman) (Procedure Rules) 1995 (SI 1995/1053).

Mr E's submissions

87. Ms E made the following submissions on Mr E's behalf:-

Recovery of overpayment and proposed Recoupment Plan

87.1. Her father accepted that his pension would be corrected going forward. His issue is the proposed recoupment of the overpayments.

87.2. Her father considers that the total amount of the overpayments should be written off and that it is unfair that the Trustees are seeking to recover it.

87.3. If it is not written off, it should be noted that the Reduced Pension is less than 50% of the Increased Pension.

87.4. While she appreciates the Trustees' position, her father's circumstances are now very different. Her father is in his 80s; he would need a life expectancy of 106 years to repay the total overpayment. Her parents were vulnerable to Coronavirus (**COVID-19**) as well as suffering severe distress and she was worried about their health.

87.5. In May 2021, her father suffered a large clot in his lung and was in intensive care for ten days; he still has to undergo surgery. This was the result of him being very stressed because of the overpayments and living under COVID-19 restrictions.

87.6. She searched for a new home for her parents so they could move closer to enable her to care for them; this matter has taken a "toll" on them.

87.7. To enable her parents to move into suitable accommodation, she had to take out the Mortgage on the Property to help with the purchase, as her father was unable to obtain a mortgage. This was the only option available to her parents. They had to live in a property convenient for their lifestyle and their monthly expenditure has now changed.

87.8. Her father had to encash the Policies to cover the cost of moving back to the UK. All the paperwork relating to the Policies was shredded when her parents moved house in 2021.

87.9. The fact that the Mortgage was taken out in 2021, a year after her father was notified that he had been overpaid, is irrelevant. Her father's health was deteriorating following the blood clot. His health "came first".

87.10. The only available properties within budget needed major renovations, which would have further affected her parents' health. So, she helped them buy a brand-new house that provided "easy access" and was low maintenance as their health was getting worse.

87.11. Her father is not responsible for the fact that the Scheme has potentially lost out on the pension that it could have recouped but for TPO's investigation of the dispute. Any delays that have occurred during the investigation have not been caused by either her or her father. Although she considers that the overpayments should not be repaid, if the Ombudsman determines otherwise the recovery period proposed by the Trustees should be extended accordingly.

Financial hardship

87.12. The Recoupment Plan would be unaffordable based on her father's current monthly income and expenditure.

Non-financial injustice

87.13. This issue has caused her parents considerable distress and has affected their health.

Variation of Mr E's original complaint

88. Most applicants who refer a dispute to TPO concerning an overpayment are not lawyers, often they are not represented and complain in general terms that it is 'unfair' that the overpayments should be recovered. Most applicants do not have the legal expertise to set out in detail the various legal defences which may be available to them. As a result, it is of considerable assistance to all parties if trustees and managers of schemes explore whether a defence may be available to an overpaid member during the scheme's own dispute resolution process – and, in my view, that is good practice for trustees and managers. To the extent that has not happened, the courts have held in the past that where a specific legal defence has not been raised, generous allowance should be made by TPO for the fact that they are unrepresented, while noting that the process of complaining to TPO is an informal process.[6]

89. It has also been acknowledged by the courts that investigations are informal and there are no pleadings. The issues are defined by the complaint and the other party's response to that complaint. While the Ombudsman (**the PO**) is limited to the investigation of the complaint actually made to TPO, the courts recognise that the PO can invite the applicant to add to his complaint and suggest new matters of defence, and/or other parties, to extend the scope of the enquiry. However, the PO is not bound to do so.[7]

90. Mr E is not a lawyer and complained to TPO, in general terms, that the overpayments should not be recovered on grounds of fairness and equity. I invited Mr E during the process to expand his complaint to cover the various potential defences to recovery of the overpayments on grounds of repayment and recoupment. Mr E agreed to this, although in my view, his basic complaint that the recovery of the overpayment was unfair is already wide enough to cover all these potential defences.

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[6] See *Grievson v Grievson* [2011] 066 PBLR at paragraph [28]

[7] *Hamar v French* [1998] PLR 321 (CA) at paragraph [73]

The Trustees' submissions

91. The Independent Trustee made the following submissions on the Trustees' behalf:-

The fact there had been an overpayment was not conclusively determined until the Court of Appeal decision

91.1. The Trustees at the time introduced the Pre 97 Increases in good faith and with the knowledge of the directors of BIC UK. However, the current Trustees accept that with the benefit of hindsight the change to the increase rule was not properly documented. Despite their efforts on behalf of the members to retain the benefit improvement, the Court of Appeal overturned the High Court decision in *Burgess*.

91.2. It was only from 20 December 2011, when BIC UK challenged the validity of the Pre 97 Increases, that the Trustees were in a position to start taking steps to communicate the issue to members.

91.3. Until the date *Burgess (CA)* was decided, it remained uncertain whether the Pre 97 Increases were validly granted. The position was not certain at the time that the February 2013 and the March 2017 Announcements were issued. Consequently, it would have been premature to say to members that there may be a recovery exercise in respect of any overpayments. It is difficult to see what else the Trustees could have included in the announcements to flag the fact that any pension that had been overpaid might have to be repaid.

91.4. The Trustees questioned how the fact that the pension increased each year, when no representation was made as to what tranches of pension that increase related to, would have given rise to any form of legal right for the member to assert that they had the right to keep those overpaid Pre 97 Increases.

91.5. The Trustees did not consider that the Retirement Statement, monthly payslips and annual P60s could amount to representations that members were entitled to Pre 97 Increases. Moreover, it is difficult to see why these documents needed to include caveats. They were simply factual statements of amounts and did not go into detail as to how the amounts have been calculated by reference to the benefit structure of the Scheme. A P60 would not contain a caveat that it must be read subject to the rules of the relevant scheme.

91.6. The Trustees questioned how a conclusion could be drawn, that the Trustees could not recover the overpayments, from the fact that they operated PAYE and deducted income tax from pension payments. The Trustees effectively questioned whether payment of pension at a given rate, and deduction of income tax under PAYE, could amount to an implied representation that Mr E was entitled to the pension at that rate.

Laches

91.7. There was uncertainty as to the validity of the Pre 97 Increases and this was only finally resolved by the Court of Appeal decision in May 2019. Consequently, the Trustees did not see how it could be said they delayed their right to recover the overpayments, as it was only once the Court of Appeal handed down its judgment that the Trustees had certainty on whether or not there had been an overpayment.

The Recoupment Plan

91.8. "The Trustees consider that they followed a fair and reasonable process in terms of effecting recovery of the overpayment".

91.9. The Trustees were required to proceed with the recoupment exercise in the light of the *Burgess (CA)* decision. Mr E was one of the members of the Scheme that was affected by this decision. The Trustees carefully conducted the exercise mindful of their fiduciary duties to the membership while aknowledging their overarching duty to pay the correct benefits to members.

91.10. The members were given three months' notice that their pension would be corrected, with effect from 6 July 2020, and six month's notice of the Trustees' decision to recoup the overpayment from October 2020. They were also given the opportunity to make representations to the Trustees so that the Trustees could assess whether there was a valid legal defence against recovery of all or some of the overpayments.

91.11. The Trustees are concerned that delays in recouping the overpayments is proving costly for BIC UK, as the employer, and will adversely impact its funding of the Scheme liabilities. The Trustees have suspended recovery of the overpayment while TPO's investigation of Mr E's complaint is ongoing. As a result, the Scheme has not been able to recoup "some £5,837" (as at the date of the Trustee's submission. The amount will be higher at the date of this Determination);

91.12. The Trustees would prefer to treat Mr E in a similar way to the other affected members. Consequently, the Recoupment Plan still stands. However, the Trustees initially reserved the right to change their position on this.

Potential claim against Mr E's estate

91.13. The Trustees originally sought to reserve their position on whether any of the overpayments should be recovered from the estate.

91.14. Following the issue of the Preliminary Decision, in order to treat Mr E the same way as the other members who were affected by the Pre 97 Increase issue, the Trustees confirmed that they would not seek to recover any outstanding overpayments from the estate after Mr E's death.

91.15. In light of this, the Trustees considered that the PO’s Determination of the complaint could be restricted (unlike the Preliminary Decision) to the Trustee’s ability to recoup from Mr E’s pension, and not deal with the right of repayment after his death (with the separate legal mechanisms and defences that engages).

Financial hardship

91.16. The Trustees have a legal obligation to reduce Mr E’s pension payments from 6 July 2020, and to recover the overpayments. The Trustees proposed a recovery period of 24 years and 8 months to alleviate any financial difficulties Mr E might otherwise suffer.

91.17. The Trustees consider that the income and expenditure analysis that they undertook in July 2020, when the complaint was first raised, was carried out at the correct point in time. This remains appropriate when forming a view on whether the Recoupment Plan is reasonable. The Trustees consider that the Recoupment Plan should come into effect from the date the complaint is determined by the PO. The Scheme is carrying a potential financial loss while this matter is ongoing, and this will increase over time.

91.18. The Trustees did not consider that the representations made by Mr E provided sufficient grounds to allow the Trustees to ignore their duty to recover the overpayments. They also do not consider that the Recoupment Plan would cause him significant financial hardship.

91.19. The Trustees accept that financial hardship is a distinct question from whether Mr E has a change of position defence. Due to the timing of the Mortgage, Mr E’s “repayment obligation” to Ms E should be disregarded when considering his affordability under the Recoupment Plan and the question of financial hardship.

91.20. The Trustees do not consider that changes in Mr E’s circumstances since 2020, should be “levied” against the Scheme. The monthly mortgage payments are allowing for the acquisition of a larger asset than Mr E could otherwise have acquired in 2020, while the Scheme has yet to recover any of the overpayments.

91.21. The Trustees note that Ms E took out the Mortgage and that Mr E is reimbursing Ms E on a monthly basis. The Trustees do not consider that the monthly amount payable under the Recoupment Plan should be reduced to give Mr E the flexiblity to acquire property. At the time of entering into the arrangement with Ms E, Mr E was aware of the amount of the overpayments and the Trustee’s request for him to repay it.

91.22. The Property is also an asset which should form part of Mr E’s estate on death (assuming he has legal title to it) whereas the Recoupment Plan was prepared on the basis that recovery would cease on his death.

91.23. If the Trustees were to reduce the monthly amount, for example to £250, it would take 30 years and 4 months to recover the sum of £90,934 owed to the Scheme. This would exceed Mr E's expected life expectancy.

91.24. Notwithstanding this, the ownership and the current market value of the Property had yet to be confirmed at the time the Trustees made its initial representations and could change over Mr E's lifetime.

Non-financial injustice

91.25. The Trustees would consider paying Mr E an award of £1,000, in recognition of the distress and inconvenience he has suffered. However, the Trustees require clarification on his income and expenditure so that it is clear to all parties how much should be recovered monthly and over what timeframe.

Representations

91.26. The Trustees also asked that BIC UK should be given an opportunity to comment on the representations, given that the decision could potentially impact on the funding position of the Scheme. TPO had agreed to this in relation to a previous case concerning the Scheme, which was discontinued following the member's death. In that case, the Trustees did not seek recovery of the overpayment from the estate.

BIC UK's submissions

91.27. Following the Preliminary Decision, BIC UK made extensive legal submissions about the Trustees' ability to recover overpayments by way of repayment under the principles of unjust enrichment and the principles of equitable recoupment. The submissions sought to analyse the Trustees' rights of recovery of overpayments from first principles and took issue with my conclusions in a number of important respects. I therefore need to address these submissions in similar detail, and set out where I agree and disagree with BIC UK's analysis. I have to a large extent included these submissions in the same form that were addressed to me.

The law relating to unjust enrichment

91.28. BIC UK accepts that, in the context of repayment, the Ombudsman can properly look at the defences of estoppel, change of position and limitation. In the context of change of position, however, BIC UK does not accept that Mr E has suffered any detriment, or that a limitation defence applies in this case.

91.29. BIC UK accepts that the judgment of Neuberger LJ in *Steria Limited v Hutchinson* [2006] EWCA Civ 1551, [2006] Pens LR. 291 (**Steria**) gives guidance on the principles of an estoppel defence (relevant extracts from Steria are set out at paragraphs 173 to 175 below). It highlights that, while the judgment confirms that a member asserting an estoppel by representation does not have to satisfy a strict "but for" test, the member does have to show

that the representation was a significant factor, taken into account when deciding to take the course of action which allegedly led to the detriment.

91.30. BIC UK sets out that estoppel by representation is a rule of evidence; it precludes one party from denying the matter which has been represented. In *National Westminster Bank Plc v Somer International (UK) Limited* [2001] EWCA Civ 970, [2002] QB 1286 (**National Westminster Bank v Somer**), Potter LJ stated that in his view it was not open to the Court of Appeal to depart from that analysis, although clearly there was an effect on substantive legal rights. In the present case, if an estoppel defence is available it will operate by precluding the Trustees from denying that Mr E was entitled to the sums paid to him. Since it is an essential part of the cause of action that the recipient was not entitled to the relevant sums, if an estoppel is established, the Trustees' claim to that money will fail.

91.31. BIC UK accepts that:

91.31.1. A representation that the recipient is entitled to the payment may arise where the payer has a duty to calculate the payments correctly; and

91.31.2. A rise in the recipient's general standard of living may give rise to an estoppel defence.

91.32. For estoppel by convention, BIC accepts that the relevant principles are those stated by Briggs J in *Revenue and Customs Commissioners v Benchdollar Limited* [2009] EWHC 1310 (Ch), [2010] 1 All ER (**Benchdollar**), modified as explained by the Supreme Court in *Tinkler v Revenue and Customs Commissioners* [2021] UKSC 39; [2022] AC 886. See paragraph 200 for details of those principles.

91.33. For change of position, BIC UK notes that the defence finds its origin in the decision of the House of Lords in *Lipkin Gorman (A firm) v Karpale* [1991] 2 AC 548 HL **(Lipkin Gorman**). It was made clear in that case that it is a defence, only available where the member has acted in good faith, and where the position of the defendant has so changed that it would be inequitable to require him to make restitution, or restitution in full.

91.34. BIC UK notes that subsequent decisions have developed the principles by which it is to be determined whether that broad test is satisfied. As explained in Goff and Jones, the Law of Unjust Enrichment 10th edition (**Goff and Jones**) at paragraph 27.03, it will generally be available where the benefit has been irretrievably lost and the courts must choose who must bear the loss. The claimant is left to bear the loss where the defendant has suffered detriment that was causally linked with the receipt of the benefit and has proved that case. The point is made in Goff and Jones at paragraph 27-09 that, generally speaking, evidence that the defendant received a benefit will not suffice to prove it affected the defendant's spending plans - rather it is necessary to

provide evidence of income and expenditure from which it can be seen that the benefit was material to those plans. In addition to the good faith requirement, there are requirements to show detriment and to show a causal link.

91.35. BIC UK contends that, to show detriment, the defendant would have to be worse off as a result of having to make restitution than if the benefit in question had not been conferred: see the approach of Henderson J in *Test Claimants in the FII Group Litigation v Commissioners for Her Majesty's Revenue and Customs (No2)* [2014] EWHC 4302 at paragraph 350. In assessing whether the test is met, it is relevant to consider whether money has been spent, whether an asset has been acquired and retained, and if so, how readily a transaction can be reversed.

91.36. BIC UK accepts that there must be a causal link between the change of position and receipt of the overpayment at least on a "but-for" basis (and points to the *Scottish Equitable v Derby* and the *FII Group Litigation* cases).

The law relating to equitable recoupment

91.37. BIC UK agrees that the PO is right to consider the equitable defence of laches, but wrong to consider the equitable defences of estoppel or change of position, either as specific defences or by way of analogy (as I had in the Preliminary Decision), when determining whether the overpayments were recoverable on general equitable principles.

91.38. BIC UK notes (as I had also noted in the Preliminary Decision) that the origin of the right to recoup is helpfully explained in the judgment of Neville J in *Re Musgrave* [1916] 2 Ch 417 (**Re Musgrave**). This was a case in which the trustees of a will trust had paid annuities without deducting income tax which ought to have been deducted.

91.39. BIC UK suggests that it is clear from this case that the origin of the right of equitable recoupment lies in the practice of the courts of equity when administering estates and trusts. It is entirely distinct from the common law.

91.40. BIC UK argues that this is demonstrated by *Livesey v Livesey* (1827) 3 Russ 287, decided in the Court of Chancery, in which an annuity was paid to the annuitant for two years before he became entitled to receive it.

91.41. BIC UK notes that recently the position was explained as follows in *CMG (CA)*:

> "the payment of benefits in error leads to a monetary obligation owed to the scheme, even though that obligation may be remedied by recoupment rather than repayment by the member. The member or beneficiary has received benefits early by way of the overpayments. These overpayments are then subject to equitable recoupment against future pension."

91.42. BIC UK accepts that *Re Musgrave* recognised the existence of an equitable constraint on the circumstances in which trustees would be permitted to exercise the right of recoupment and that there appears to be no subsequent case law developing the principles by reference to which it is to be determined that the right cannot be exercised. BIC UK contends that the situation is analogous to the situation in relation to the change of position defence immediately after *Lipkin Gorman* was decided (before more detailed tests were developed in later cases). Importantly, BIC UK strongly disputes that, as suggested by the PO in the Preliminary Decision, the development of the principles should take place through the importation (as BIC UK puts it) into the law relating to equitable recoupment of the "legal defences" of estoppel and change of position considered in relation to a repayment claim.

91.43. BIC UK argues the essential features of those defences are that they are (1) a defence (2) to a claim for repayment. BIC UK submits that the exercise of the right of recoupment is not a claim to repayment. In consequence, estoppel and change of position arguments are not being deployed as a defence, but as a ground for a claim - specifically an assertion that the applicant has the right to receive from the trustees a greater amount being paid or proposed to be paid.

91.44. BIC UK says that this is clear in relation to the change of position defence, which the PO did not consider as a "specific relevant defence". Rather, the Preliminary Decision had set out that the *Re Musgrave* approach includes similar circumstances to a change of position. BIC UK says this is wrong – and that Lewin on Trusts[8] is of the view that there is no defence of change of position in respect of equitable right of recoupment, at least in the absence of special circumstances. It also points to other academic texts in support of its proposition.

91.45. Lewin's approach, BIC UK says, comes from the framing of the defence in the *FII Group Litigation* case. This, in contrast, is a reduction in future income. It does not affect in any way the past benefits which the defendant has received; the defendant remains in full enjoyment of those benefits, whether in the form of an increased standard of living during the period of the overpayment or in any other form. All it does is suspend or reduce future payments until the amount received by the defendant is no more than the amount which ought to have been received up to that point. The only special circumstances in which Lewin envisages that a change of position might be relevant (albeit not as a defence) are illustrated by the example of a case "*where a beneficiary…has committed himself to spend the amount to which he would be entitled apart from the recoupment*". To treat the general equitable exception in *Re Musgrave* as covering circumstances to a radically different context where the principles ordinarily stated, have no relevance.

[8] 20th edition paragraph 42-013

91.46. On estoppel by representation, BIC UK argues that estoppel is a rule of evidence which, where applicable, precludes a claimant from alleging a fact relevant to the claim. However, in seeking to exercise the right of recoupment, trustees are not required to prove any facts. Rather, it is for the person seeking a higher payment to prove, on the examination of the trust accounts, that the higher amount claimed is properly due.

91.47. Similarly in relation to estoppel by convention, the defendant must show that it would be unjust or inequitable for the claimant to assert the true legal or factual position. The true legal or factual position being contemplated there is that the money in question was paid under mistake and is therefore repayable. Where the claim is for repayment, the trustees do need to assert a mistake or money is repayable. Where the claim is for recoupment, the trustees do not need to do that. They need only to assert that a certain amount has been paid and that it is in excess of the amount which ought to have been paid, so far, to the defendant under the trust.

Laches

91.48. BIC UK agrees that the Ombudsman is entitled to consider laches as a possible defence. However, it argues that the starting point is that there has been a delay on the part of a person seeking a remedy in enforcing the right to that remedy. It is essentially a defence and its effect in relation to the assertion of the right to recoup, which does not in principle require an order of the court before the right may be exercised, must be considered with that fact in mind. BIC UK submits that, analogously to the change of position defence, the question is whether it would be inequitable to suspend or reduce future payments.

91.49. BIC UK notes that, perhaps not surprisingly, the authorities do not appear to address laches in relation to the right of recoupment, but rather are couched in terms more suited to the assertion of a claim, and in some of the cases cited by the PO in his Preliminary Decision a claim to a beneficial interest in property.[9]

91.50. BIC UK agrees with my statement in the Preliminary Decision that mere delay without knowledge cannot by itself give rise to a defence of laches. However, importantly, it submits that the knowledge required is knowledge of the relevant rights; the existence or otherwise of an error is relevant only in so far as knowledge of the error also gives knowledge of the rights.

[9] See for example *Frawley v Neill* [2000] CP Reports 20. *Harrison (Properties) Limited v Harrison* [2001] EWCA Civ 1295 and *Patel v Shah* [2005] EWCA 157, referred to in paragraphs 172 and 173 of the Preliminary Decision

Final observations on Re Musgrave

91.51. Finally, BIC UK submits that in the context of pensions, adequate protection under the *Re Musgrave* principle is provided to members and beneficiaries who have been overpaid through the PO's approach of adopting, as a starting point, that overpayments should be recouped over an equivalent period to the period of the overpayments, and by reducing the rate of repayment if it would impose undue financial hardship. BIC UK notes that the approach is well suited to the particular task of assessing unfairness when no capital repayment is being required, and all that is in prospect is the suspension or reduction of future payments.

Ombudsman's findings of fact

91.52. BIC UK then sets out the relevant findings of fact which it understood I had made in the Preliminary Decision. It went on to make representations about some additional questions of fact and findings it considered that I needed to make to determine the complaint, including various findings about the sale of the various properties.

91.53. Following the receipt of BIC UK's representations, I made some further enquiries of Mr E and have made additional findings of fact on certain issues on which BIC UK considered I needed to make additional findings of fact. I have incorporated the additional information in the summary of the factual background, set out earlier in this Determination. None of these additional issues of fact have made any material difference to my conclusions. I did not however seek specific documentation confirming the evidence of Mr E's medical condition. As stated in paragraph 80 above, I am prepared to accept the statements from Ms E as evidence of her father's medical condition. In particular, that he had a serious medical condition prior to him moving to the Property in 2021, and that this influenced his decision to move property.

BIC UK's alternative analysis and conclusions

92. BIC UK then put forward an alternative analysis of the law which should be applied to Mr E's case.

Repayment – defence of estoppel by representation

92.1. BIC UK accepts that the documentation Mr E received up to 22 February 2013 contained representations as to his income and that it was reasonably foreseeable he would regard the documentation as correct statements of his entitlement. BIC UK also accepts that a rise in the recipient's general standard of living may give rise to an estoppel defence.

92.2. However, BIC UK disputes that Mr E relied on those representations by spending amounts equivalent to the Pre 97 Increases on general living expenses during the whole of the period from 1995 to 2019 (or any particular

part of that period). It specifically disputes that he did not acquire any assets through money derived from the Pre-97 Increases.

92.3. BIC UK submits that, when looking at whether detriment has been suffered, it is not correct to say that there is detriment if the overpayments for the period up to 22 February 2013 are recouped because it would reduce Mr E's income over his remaining period of retirement. BIC UK suggests that this is the wrong question. The question is whether Mr E would suffer detriment if he had to repay the amount of the overpayment. That question must be answered, BIC UK says, having regard to his acquisition of the Property and in the light of the Trustees' stated intention not to enforce recovery of the overpayments before death, if at all.

92.4. The position in fact is that although the Trustees have a claim against Mr E for £90,394, Mr E's current expenditure includes sums paid to Ms E in reimbursement of expenditure undertaken to provide him with the Property which, in all probability, is an appreciating asset. There is no evidence to show that it would be inequitable for the Trustees to recover the amount of the debt from Mr E's share of the Property on his death, or potentially, if Mrs E survives him, to have a charge over his interest in the Property which would be enforceable after her death. Such an arrangement would protect the interests of Mr E and Mrs E, while satisfying the basic obligation of the Trustees to seek to recover the overpaid assets in the interests of all the Scheme members and avoiding the continuation of the enrichment to the benefit of Mr E's estate.

92.5. BIC UK submits that with respect to the increases paid in the period from and after 22 February 2013 I rightly concluded in the Preliminary Decision, in the light of the February 2013 Announcement, that there was no sufficiently clear representation to find an estoppel defence. However, BIC UK goes on to argue that in my analysis of the February 2013 Announcement I gave insufficient weight to the clear statements that:

92.5.1. "Uncertainty has arisen as to whether members are entitled to be paid these increases." The phrase "these increases" clearly meaning the increases of pension earned by service before 6 April 1997 by 5% per annum or the increase in RPI if less;

92.5.2. Those were the increases in respect of which there were no deductions "at this time"; and

92.5.3. The suspension only related to future increases "at this time".

92.6. In the light of those clear statements, BIC UK argues that a lay pensioner receiving the February 2013 Announcement would reasonably have understood that:

92.6.1. The increases that had been applied since 6 April 1992 might not have been validly applied, so that members might not be entitled to those increases; and

92.6.2. There might be deductions in future of the increases already applied.

Repayment – defence of estoppel by convention

92.7. BIC UK argues that the *Benchdollar* principle requires that there should be a common assumption about a matter: that is, each party independently assumes a matter to be the case and the assumption is then shared. As explained by Lord Burrows in *Tinkler* the party alleging the estoppel is strengthened in the assumption already made by the knowledge that the other party shares the assumption, and the other party must intend that will be the effect of its conduct. He has relied on the common assumption rather than his own independent view.

92.8. BIC UK argues that in this case one of the parties has no independent view on the matter and the content of the assumption is based entirely on information received from the other party. To the extent that it is estoppel at all, it is a case of estoppel by representation, the essence of which is that relevant information is communicated by one party to the other. BIC UK contends that Mr E has no means of forming an independent view. It follows that there is no common assumption.

92.9. Additionally, there is no evidence of mutual dealings based on the Trustees' representation of Mr E's entitlement. The dealings were all one way, in the form of actions by and communications from the Trustees.

92.10. For those reasons, BIC UK contends that there is no room for the application of the principles of estoppel by convention. Even if that is wrong, BIC UK submits it would not be inequitable for the Trustees to enforce the right to seek repayment after Mr E's death, as explained in connection with estoppel by representation. This submission applies to overpayments made before and after 22 February 2013.

Repayment – defence of change of position

92.11. BIC UK states, as is the case with estoppel by representation, that it disputes that Mr E changed his position by spending amounts equivalent to the Pre-97 Increases on general living expenditure for the whole period 1995 to 2019 (or any particular part of that period), and it specifically disputes that he did not acquire any assets through income derived from the Pre-97 Increases. It further disputes that Mr E's decision to return to the United Kingdom (**UK**) was

significantly affected by the communications from the Trustees or that there was any causal connection between the overpayments and the expenses associated with the sale of the property in Spain.

92.12. In those circumstances, BIC UK submitted that, in the absence of any further findings of fact, it cannot be said that if Mr E were required to make restitution he would be worse off than if the overpayments had not been made.

92.13. In any event, for the reasons given previously, Mr E had sufficient knowledge from and after 22 February 2013 to be aware that he might not be entitled to such part of his future pension payments as represented increases and that if he were not so entitled this pension might be subject to deductions. In those circumstances, Mr E does not satisfy the good faith requirement applying to the change of position defence.

Repayment – limitation

92.14. BIC UK made various submissions on the applicability of limitation as a defence. However, I have not repeated those here, given that the Trustees have now confirmed that they are no longer seeking to recover repayment of any part of the overpayments from Mr E's estate on his death. Limitation is not relevant to the ability of the Trustees to recover an overpayment on grounds of recoupment, although laches may apply.

Recoupment – hardship

92.15. BIC UK submits that the Trustees were not wrong in their assessment in July 2020, that the Recoupment Plan would not cause Mr E financial hardship. "Any hardship which he may suffer is the result of his decision to acquire the [Property], for reasons unconnected with the issues in this case and after he was aware of the amount of his pension after exercise of the right of recoupment. This cannot form the basis of a decision that the Trustees have no right of recoupment on equitable grounds".

Recoupment – laches as a defence

92.16. BIC UK noted that a claim of laches starts from the basis that there has been a delay in pursuing rights. However, it submits that the alleged delay occurred during a period in which those rights were not known to exist. Furthermore, the Trustees were advised that the Scheme was being administered correctly. This cannot form the basis for a conclusion that it is not equitable to allow the Trustees the right of recoupment, whatever steps were taken by Mr E during that period. Mr E must make an independent case for equitable relief on the basis of those steps; they cannot be introduced into the assessment of the Trustees' conduct during the period up to 22 February 2013.

92.17. As to the lack of clarity in the March 2013 Announcement, BIC UK repeats its position outlined in paragraph 90.6 above. Namely, "what it ought reasonably

to have conveyed to a pensioner." It is submitted that there is no conduct on the part of the Trustees which could reasonably lead Mr E to proceed on the basis that the Pre-97 Increases would not be removed from his pension, if BIC UK's legal advice as to the validity of their grant, rather than the Trustees' legal advice, was found to be correct. The proposed recoupment plan was a proposal for taking exactly the action identified in the March 2013 Announcement.

92.18. For these reasons, BIC UK submits that Mr E is not entitled to any laches to resist the right of recoupment.

Recoupment – period of recovery

92.19. BIC UK noted that I concluded in the Preliminary Decision, to the extent recoupment is possible, the rate of recovery should be £200 a month rather than £307 as proposed by BIC UK.

92.20. The reasons for this conclusion related to Mr E's decision to return to the UK owing to concerns about his health, which I described as a 'reasonable decision'. However, BIC UK pointed to the period between Mr E's return from Spain, and the acquisition of the Property, during which Mr E had acquired and lived in the Bungalow. By moving to the Property, it appears, they say, that Mr E chose to increase his expenditure by £745.75 a month.

92.21. BIC UK submitted that, although this may have been a reasonable decision from Mr E's point of view, the strain on his domestic budget comes from that decision, and not from the Trustees' assessment that a payment of £307 a month would not cause financial hardship. In those circumstances, the Trustees should be entitled to recoup at the original proposed rate.

BIC UK's conclusions in its submissions

92.22. As a result of its analysis, BIC UK invited me to revise my Preliminary Decision in the light of its submissions and to instead substitute the following directions in my Determination of the complaint:-

92.22.1. The Trustees are at liberty to take steps to recover the sum of £90,934 (**the Monetary Obligation**)

92.22.2. If the Trustees take steps to enforce recovery of the Monetary Obligation prior to Mr E's death (and Mrs E if she survives him), they may then recover the outstanding balance of the Monetary Obligation from Mr E's estate if they see fit to do so.

92.22.3. The Trustees may take such reasonable steps as are necessary to protect their rights referred to in the previous sub-paragraph pending the death of the survivor of Mr E and Mrs E.

The Ombudsman's powers

93. Under section 146 of the PSA 93, I have the power to determine, among other things:-

    93.1. a complaint that an actual or potential beneficiary of an occupational pension scheme has sustained injustice as a consequence of maladministration by the trustees or managers of an occupational pension scheme (section 146(1)(a) of PSA 93); and

    93.2. any dispute of fact or law between an actual or potential beneficiary of an occupational pension scheme and the trustees or managers or an employer of an occupational pension scheme (section 146(1)(c), PSA 93).

94. My determinations on the above issues are binding on the person by whom the reference to TPO was made and also any person responsible for the management of the scheme to which the complaint or reference relates subject to an appeal to the High Court on a point of law (section 151(3), PSA 93).

95. It is well established that I must determine a complaint of maladministration involving an infringement of a legal right or any dispute of law in accordance with established legal principles and I should not generally come to a different conclusion than a court would on the same issue. However, I do have discretion to make reasonable awards for non-financial injustice (distress and inconvenience) sustained as a consequence of maladministration in circumstances where a court could not make a similar award.[10]

TPO's powers to determine overpayment cases

96. Given that I am able to determine any dispute of law, it follows that I am able to determine whether as a matter of law an overpayment made by trustees of an occupational pension scheme is recoverable:

    96.1. directly from the member under the unjust enrichment remedy of repayment of money paid by mistake; and/or

    96.2. by way of deduction from future payments under principles of equitable recoupment, subject to section 91 of the PA 95.

97. In relation to any claim to recover money on grounds of unjust enrichment via repayment, I can also determine whether any of the defences of change of position, estoppel (by representation and convention), or limitation is available.

98. In relation to the remedy of recoupment, it was recently confirmed by Lady Asplin in *CMG (CA)*[11] at paragraph 50 that:

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[10] See the analysis of case law in *Arjo Wiggins Limited v Ralph* [2009] 079 PBLR at [12] and [13]

[11] *The Pensions Ombudsman v CMG Pension Trustees Ltd and CGI IT UK Limited* [2022] EWHC 2130 (Ch)

"In a case which falls within section 91(5)(f) of the PA 95, the Pensions Ombudsman might determine that there has been an overpayment and direct that the overpayment in a specified sum might be recouped at a particular rate. His reasons would be likely to relate to the sums paid to the member, his entitlement under the scheme, whether there were any defences to an equitable right of recoupment and what would be appropriate in relation to the rate of recoupment in all the circumstances. The distinction between the reasons and the determination should be made clear."

Which "defences" should the Ombudsman consider?

99. The Trustees have now confirmed that they are not seeking to recover, by way of repayment, any outstanding part of the total overpayment which has not been recouped at death. Consequently, I agree with the Trustees that I do not need to reach a conclusion on whether any of the specific defences of change of position, estoppel (by representation or convention) and limitation are available to a 'repayment' claim by the Trustees in this case.

100. That leaves equitable recoupment, and for that I need to consider:

    100.1. First, whether it is equitable, under general equitable principles, to permit recoupment in the circumstances; and

    100.2. Second, whether a defence of laches is available.

101. In my Preliminary Decision, I set out how *Re Musgrave* recognised that equitable recoupment was not available if it was inequitable to rely on it as a remedy, and that recoupment should be used in a just and equitable manner. Specifically, I pointed to the statement of Neville J, that: "*It appears to me, that in accordance with the practice that has always existed; the court in a proper case –* ***of course there may be cases in which it would be most inequitable to do it*** *– will adjust the rights between the cestui que trust and the trustee who has overpaid through an honest and, so to speak, permissible mistake of construction, or of fact. I think, therefore that the trustees in the present case are entitled to deduct from future payments the income tax which they have been overpaid*" (with my emphasis in bold). I also highlighted the lack of subsequent case law developing this 'general equitable principle'. BIC UK agreed with these statements (and it was not disputed by the Trustee), although BIC UK subsequently disagreed with how I went on to apply that general equitable principle (see paragraph 91.37 above).

102. In particular, in my Preliminary Determination, I had explored how I should operate the general equitable principle in practice and what enquiries I should make in order to determine whether the recoupment is, in this case, "equitable". Specifically, I looked at whether similar legal principles to those used to determine whether a member has a legal defence to a 'repayment' claim (as opposed to recoupment) in cases of unjust enrichment might be a sensible starting point to add structure to those enquiries.

103. I accept, in the light of the submissions from BIC UK, that change of position and estoppel may not be available as <u>specific</u>, free-standing defences to a claim to recover overpayments through equitable recoupment. However, for the reasons discussed below, I <u>do not</u> agree with BIC UK that the principles underlying those defences are not relevant when determining, on general equitable principles, if it is appropriate to deny the remedy of equitable recoupment to the Trustees. While they may not be available as formal, free-standing defences to recoupment, equitability still underlies their application – and so the equitable principles underlying change of position and estoppel can therefore be of assistance to me when I am asked to assess whether or not it is inequitable to permit recoupment (see paragraphs 104 to 122 below).

What factors should I consider when determining whether it is equitable to permit recoupment?

104. *Re Musgrave* recognises the existence of an equitable constraint on the circumstances in which trustees would be permitted to exercise the right of recoupment. There would appear to be no subsequent case law developing the principles which should be applied to determine when trustees should not be able to recoup, other than *Burgess* itself.

105. BIC UK submits that, in determining whether it is equitable to allow the Trustees to proceed with recoupment, it is <u>not</u> appropriate to have regard to the equitable principles underlying the defences which may apply in relation to claims for 'repayment', including change of position and estoppel. Moreover, neither of these defences can be relied on as specific legal defences in relation to a claim to recoup an overpayment on grounds of unjust enrichment.

106. Instead, BIC UK submits it would be equitable to permit recovery of overpayments by the Trustees through recoupment so long as I apply "the rule of thumb" I generally apply. Specifically, that the period of recovery is at least as long as the period over which the overpayments arose.

107. I consider that the approach BIC UK advocates is unduly restrictive and is not consistent with *Re Musgrave* - which confirmed that "*there may of course be cases in which it would be most inequitable to do it*" (namely, to permit recoupment at all). This statement in *Re Musgrave* implies that equitable recoupment could be denied in full, in appropriate cases, if it is equitable to do so.

108. Moreover, Lady Asplin indicated in the *CMG(CA)* case at paragraph 50 of her judgment that I am required to consider, when determining whether an overpayment is recoverable, "*whether there are any defences to the equitable right or recoupment and what would be appropriate in relation to the rate of recoupment in all the circumstances.*" This indicates that (a) whether there are any defences in law to the equitable right of recoupment, and (b) what would be appropriate in relation to the rate of recovery in all the circumstances, are separate issues. The approach advocated by BIC UK is, effectively, that I should find that an overpayment can

always be recouped as long as I give the member a suitable period to repay the money. This approach conflates two separate issues.

109. This then still leaves me with a need to determine when it may be equitable to deny recoupment in the absence of any direct authority on the subject. In doing so, my view is that I should, as far as possible, have regard to the same or similar approach as a court would apply in similar circumstances so that I can benefit from their analysis of when it is equitable to recover overpayments.

110. I do not consider that BIC UK is correct that a court would be in the same position as immediately following the case of *Lipkin Gorman,* where the detailed principles by which a claim for unjust enrichment had yet to be developed by the courts. Faced with a similar overpayment case, it would be open to the judge to consider the approach the courts have taken in the nearest analogous circumstances to whether it is equitable to recover overpayments, and could have regard to the underlying equitable principles applied by the courts generally in other contexts, including those applied in change of position and/or estoppel defences in repayment claims on grounds of unjust enrichment.

111. Accordingly, I consider it is also open to me (as it would be to a court) to have regard to the underlying equitable principles applied by the courts in determining whether it is equitable to permit a change of position or estoppel defence to recovery of an overpayment. For the avoidance of doubt, this is not on the basis that they are freestanding defences to recoupment, but rather that the factors and equitable principles considered by courts in these cases are also of assistance to me in making a decision under the *Re Musgrave* principle as to whether it is equitable to allow recoupment.

112. Clearly, when looking at whether the principles underlying change of position are relevant as part of any “inequity” enquiry, I need to be satisfied that those principles are consistent with applying recoupment in a fair and conscionable way. I am satisfied, having given considerable thought to the matter, that the principles are consistent, and it is entirely appropriate for me to have regard to the principles underlying a change of position defence as part of any inequity enquiry to allow recoupment. In connection with this, and in part to deal with arguments raised by BIC UK, I note that:

112.1. The defence of change of position is a reaction to the strict liability of a person who has received money by mistake to repay it, irrespective of whether they are innocent or at fault: ‘fairness’ demands that the liability is ameliorated in certain circumstances - change of position being one of them; and

112.2. Indeed, in the leading case on change of position the defence was described in terms of equity: In *Lipkin Gorman* at 580, Lord Goff said:

> "…the defence is available to a person whose position has so changed that it would be inequitable in all the circumstances to require him to make restitution, or alternatively make restitution in full."[12]

113. I do not consider that the points made by BIC UK in relation to the observations in Lewin on Trusts (Paragraph 42-13 – 10th Edition) affect this analysis of whether recoupment should be available or denied on general equitable grounds. The passage referred to is as follows:

> "It has been suggested that there is a defence of change of position in connection with the equitable right of recoupment. But change of position cannot be a defence, since the overpaid or wrongly paid beneficiary is not defending any claim, but rather merely suffering a reduction in the amount which would be paid to him apart from the recoupment. If the overpaid or wrongly paid beneficiary wants to contest the recoupment on ground of change of position, he must claim payment in full, and use a change of position as a sword, not a shield. We consider that in the ordinary course change of position will not prevent recoupment since the beneficiary is not being asked to pay back what he has already received, and the fact that he may already have spent the money wrongly received does not seem to be a good reason why he should not suffer a deduction from future payments. But there may be special circumstances where a change of position is relevant, for example where the beneficiary has not only spent the money wrongly received but also committed himself to spend the amount to which he would have been entitled apart from the recoupment."

114. The first point made by Lewin is a technical one. Essentially, that change of position is not available for recoupment, as it is not being used as a defence. This is because, in recoupment, the member is not 'defending' any claim, but merely suffering a reduction in the amount that would otherwise be paid to him. The member would need to claim the full amount, using change of position as a "sword and not a shield", which Lewin submits is not permitted.

115. However, in my view, here Lewin is considering the narrow question of whether change of position is available as a freestanding defence to recoupment: it is not dealing with the broader question of whether the principles underlying the defence can be used as part of any inequity enquiry, to determine whether it is inequitable to permit recoupment (following *Re Musgrave*). For the latter question, which I am considering, those principles are not being deployed either as a sword or a shield - rather they are part of a more general assessment of whether it is inequitable to permit recoupment.

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[12] Although the restitution claim lies at common law, early decisions on the claim stressed that it would only lie where it was inequitable for the defendant to retain the money: e.g. *Moses v MacFerlan* (1790) 2 Burr 1005 at 1008 per Lord Mansfield CJ.

116. Lewin’s second point is a broader one, directed at the fairness of the situation rather than the technical deployment of the defence, namely:-

116.1. Change of position applies to a claim for repayment, because it involves innocent spending of the very money which was wrongly received and on which the claim is based; however:

116.2. Recoupment does not relate to the money received, but to future sums which have yet to be received: if the beneficiary is not being asked to pay back the money he has already spent, why should he object to not receiving future money that, by definition, he has not already spent (save in unusual situations where he has already committed to spend future money).

117. While this may be a reason to say that a specific, freestanding change of position defence does not apply to recoupment, I do not agree that it limits my consideration of the inequity enquiry required by *Re Musgrave*. In broad terms, the member has put himself in a worse position by spending more in a period than he was actually entitled to receive in circumstances when he would not otherwise have done so. Accordingly, the subsequent reduction puts him in an inequitable position (through no fault of his own he cannot do ‘X’, pay for ‘Y’ or do ‘Z’). The member’s position can be analysed in more detail as follows:

117.1. The future payments which are suspended or reduced can be said, in an economic sense, to represent the money the beneficiary has already wrongly received but innocently spent: and the intention of the remedy is to put the beneficiary back into the position they would have been in but for the overpayment, which is the same economic effect as a claim for repayment;

117.2. If the overall economic effect is to deny the beneficiary the benefit of the overpayment, it is fair, in my view, to take account of their innocent spending of overpaid sums, irrespective of the source of the sums from which the overpayment is sought to be recovered. In other words, it is the beneficiary’s change of position, not the money’s change of position that is relevant in my considerations; and

117.3. This can be tested by considering the source of money which the beneficiary has to repay to the trustee if a claim for restitution is made. It does not have to be the very money that was wrongly paid - rather the repayment could come from a completely different source. If change of position is an available defence in that situation, why should it not be available (or at least similar principles apply) where the source of the money from which the overpayment is recovered happens to be future payments rather than payments already made?

118. In relation to the question of whether the principles underlying estoppel by representation or convention may be relevant to whether it is equitable to recover an overpayment, again in my view this will depend on whether they are consistent with applying recoupment in a fair and equitable way. Both estoppel by representation

and estoppel by convention are based on the principle that it is unjust and inequitable to permit a person from resiling from their promise or representation, or from the erroneous state of affairs that had governed the parties' course of dealings.

119. This is borne out, in my view, by the caselaw:

119.1. In *Moorgate Mercantile Co Ltd v Twitchings* [1976] 1 QB 225, 241, Lord Denning MR describe estoppel as a "principle of justice and equity";

119.2. In *Jordon v Money (1854)* 5 HL Cas 185, 210 estoppel by representation was described by Lord Cranworth LC as: "*a principle well known in the law, founded upon good faith and equity, a principle equally of law and equity…*"[13];

119.3. The test for estoppel by convention, as recently approved by the Supreme Court, requires it to be established that the detriment is sufficient to make it unjust or unconscionable for a party to rely on the true position.[14]; and

119.4. In *Catchpole v Alitalia* [2010] 076 PBLR (**Catchpole v Alitalia**) the judge looks at the availability of estoppel by representation in a pensions context in terms of "unconscionability".

120. I am therefore satisfied that, in appropriate circumstances, the principles underlying estoppel by representation and convention could also be relevant to a determination of whether it is equitable to deny recoupment (even if they are not available as specific defences).

121. I do not consider that the above analysis relating to estoppel is affected by BIC UK's argument against a more general application of estoppel as a defence, on the basis that to do this would be using the defence as a "sword and not a shield":

121.1. For estoppel by representation, BIC UK contends that estoppel is a rule of evidence which precludes a claimant from alleging a relevant fact. However, in seeking to recoup, trustees are not required to prove any facts; rather it is for the person seeking a higher payment to prove that the higher amount is properly due; and

121.2. For estoppel by convention, BIC UK contends that it is for the defendant to show that it is unjust and inequitable for the claimant to assert the true position, and the trustees only need to show that an overpayment has been made to establish its ability to recoup.

122. I agree[15] that these points may be relevant to a situation where a court is considering estoppel as a response to a set of circumstances that have otherwise been made out, which may require the estoppel to be set up as part of a claim rather than as a

[13] See also *Gillett v Holt*, supra, at 232 per Robert Walker LJ; *Steria* at [73] per Mummery LJ; *National Westminster Bank plc v Somer International (UK) Ltd* [2002] QB 1286 at [43] per Potter LJ

[14] *Tinkler v HMRC* [2022] AC 886 at [53]. See also *Steria* at [81] per Mummery LJ

[15] Putting aside any argument on whether there are circumstances where estoppel might, properly, be used as a 'sword not a shield'.

defence. But I do not agree that it is relevant to TPO's consideration of recoupment, in terms of both the nature of that remedy and TPO's procedure:

122.1. As with change of position, where estoppel is considered as part of the general inequity enquiry (that is, as part of the consideration required by *Re Musgrave* of whether it is equitable to allow recoupment), rather than as a freestanding legal defence, its availability involves a consideration of all the relevant circumstances rather than it being used as a sword or a shield; and

122.2. In addition, as a matter of process, my jurisdiction is investigative and largely inquisitorial, and not adjudicatory as with a court. In this context, matters such as the burden of proof do not always operate in quite the same way as a court, as the applicant can rely on any additional evidence I establish during my enquiries.[16]

Applying the above legal principles to the facts – is it equitable to permit recoupment of all or part of the overpayments?

123. In order to reach a conclusion on whether it is equitable to disallow recoupment in this case, I have concluded, for the reasons discussed above, that it would be helpful to consider how the court might approach it by reference to the equitable principles which the courts have developed in relation to the change of position or estoppel defences.

Change of position – using the underlying equitable principles to assist in an examination of whether it would be equitable to allow recoupment

124. Of all the situations where the courts have considered similar issues, the analysis applied by the courts in relation to change of position is arguably the closest to the current situation. It is worth summarising and applying it to this case – reiterating that, for the reasons given above, I am not considering it as a free-standing defence, but rather I am looking at the underlying principles to assist in my inequity enquiry as to whether or not it is equitable to permit recoupment, in accordance with *Re Musgrave.* The starting point in an unjust enrichment claim (that is, a claim for repayment, rather than recoupment) is that generally it is not equitable for an individual to retain money paid by mistake whether or not the person making the payment by mistake was negligent. The defence recognised however that there were circumstances when it was not equitable to recover the overpayment (see *Lipkin Gorman*)[17].

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[16] *McShee v MMC UK Pension Fund Trustees* [2016] PBLR (611) at (13) – "The operation of this burden is not quite as it would be in court proceedings, since the Ombudsman has an investigative function that the court does not (see section 145ff of the 1993 Act). Mr McShee would of course be entitled to rely on any information that the Ombudsman discovered in the course of his investigation which showed that he was a member of the DCF Scheme".

[17] Lord Goff did not provide a comprehensive description of the elements of the defence but stated the principles as follows at page 580C of his judgment:
"At present I do not wish to state the principle any less broadly than this: that the defence is available to a person whose position has so changed that it would be inequitable in all the circumstances to require him to make restitution or make restitution in full".

125. The courts have sought to develop the defence in a principled way in subsequent cases. These circumstances include where an individual has a defence on grounds of unjust enrichment.

126. To demonstrate a change of position defence, it is generally considered necessary to show:

126.1. **Good faith** - The recipient of the overpayment must be acting in good faith;

126.2. **Detriment** - Their circumstances must have changed detrimentally as a result of the overpayment or in anticipation of receiving it. Generally, this means that the money must have been spent and the expenditure cannot be legally or practically reversed, or any asset bought with the overpayment sold; and

126.3. **Causation** - There must be a causal link between the change of position and receipt of the overpayment (as a minimum it is necessary to show at least that "but for" the mistake the applicant would not have acted as they did).

127. If the above tests are met, it will generally be inequitable for the trustees or administrators of the scheme to recover the money, and the complaint should be determined in favour of the applicant.

128. ***Good faith*** - To demonstrate that the recipient has acted in bad faith it is generally necessary to show that the recipient of an overpayment had actual or "Nelsonian knowledge" that he has been overpaid. If the recipient had good reason to believe that he was being overpaid but did not check the position with the trustees or administrators this will amount to bad faith. However, good faith does not go as far as making of inquiries which a reasonable person would have realised should be carried out but the actual recipient did not realise. Mere carelessness or negligence is not enough to establish bad faith (See *Abouh Ramah v Abaca* [2006] EWHC Civ 1492 and *Armstrong GmBH v Winningham Networks Ltd* [2012] EWHC 10).

129. Bad faith is not synonymous with dishonesty. It can simply mean that, if the recipient knew or had grounds for believing that the payment had been made in error, but could not be sure, the defence would not be open to them. In making a judgment as to the recipient's knowledge of the circumstances in which his pension should cease, it is not a question of deciding what he should have known; rather, it is a question of what he did know.

130. ***Detriment*** – Detriment can normally be demonstrated by the fact that the recipient has spent the money on items which the recipient would not otherwise have bought but for the overpayment. However, it is also possible to demonstrate detriment in other cases. For example, by making gifts in some circumstances.

It is possible to interpret this statement that a decision on whether a payment should be recoverable should be based on broadly principles of fairness or equity. Since *Lipkin Gorman* however the courts have sought to develop specific principles which apply when determining whether a change of position defence can apply.

131. It has been established in a number of cases that a rise in a defendant's general standard of living can give rise to detriment in an estoppel (as conceded by BIC UK, and referred to in paragraph 91.31.2) or change of position defence (which BIC UK did not explicitly concede). I cannot however see any reason why the position should be different between estoppel or change of position – as the issue is linked to detriment. In *Avon CC v Howlett* [1983] 1 WLR 605, Everleigh LJ commented on the earlier cases of *Skyring v Greenwood* (1825) 4 B & C. 281 and *Holt v Markham* 1 KB 504. Everleigh LJ explained the decisions on the basis that the defendant's manner of living generally had been influenced by the payments made to them. Although they had not been able to point to specific items of expenditure amounting to the whole sum in question, the money had nonetheless been spent.

132. In *Scottish Equitable v Derby* [2000] PLR 1, it was also considered that general household expenditure could give rise to an estoppel where the overpayment enabled the complainant to improve the lifestyle of his family in very modest ways. In this case it was decided, on the facts, that it would be inequitable to estop the claimant from reclaiming the whole amount, relying on dicta in *Avon CC*.

133. Also, in determining whether Mr E would not otherwise have spent the money, it was observed by Robert Walker LJ in *Scottish Equitable v Derby* (CA) at [33] that:

> "I would readily accept that the defence is not limited (as it is, apparently, in Canada and some states of the United States: see David Securities Pty Ltd v Commonwealth Bank of Australia (1992) 175 CLR 353 at 385, noted in Goff and Jones p 819) to specific identifiable items of expenditure. I would also accept that it may be right for the court not to apply too demanding a standard of proof when an honest defendant says that he has spent an overpayment by improving his lifestyle, but cannot produce any detailed accounting: see the observations of Jonathan Parker J in Philip Collins Ltd v Davis [2000] 3 All ER 808 at 827 (**Phil Collins case**), with which I respectfully agree. The defendants in that case were professional musicians with a propensity to overspend their income, and Jonathan Parker J took a broad approach (at 830)."

134. In the Phil Collins case, the defendants were not able to point to a particular item of expenditure which they bought as a result of the overpayments. However, they were able to demonstrate that their general pattern of expenditure was higher than it would otherwise have been but for the overpayments. Parker J said in his judgment that:

> "On the basis of the defendants' oral evidence, coupled with such documentary evidence as they were able to produce, I am unable to find that any particular item of expenditure was directly referable to the overpayments of royalties. Their evidence was simply too vague and unspecific to justify such a finding. On the other hand, in the particular circumstances of the instant case the absence of such a finding is not, in my judgment, fatal to the defence of the change of position. Given that the approach of the defendants to their respective financial affairs was, essentially, to gear their outgoings to their

> income from time to time (usually, it would seem, spending somewhat more than they received), and bearing in mind that the instant case involves not a single overpayment but a series of overpayments at periodic intervals over some six years, it is in my judgment open to the court to find, and I do find, that the overpayments caused a general change of position by the defendants in that they increased their level of outgoing by reference to the sums so paid. In particular, the fact that in the instant case the overpayments took the form of a series of periodical payments over an extended period seems to me to be significant in the context of a defence of change of position, in that it places the defendants in a stronger position to establish a general change of position such as I have described, consequent upon such overpayments.
>
> Nor, on the evidence, can the defendants' increased level of expenditure be regarded as consisting exclusively of expenditure which (to use Lord Goff's words) 'might in any event have been incurred in the ordinary course of things'. I am satisfied that had the defendants been paid the correct sums by way of royalties their levels of expenditure would have been lower."

135. In *National Westminster Bank plc v Somer* (CA), Peter Walker LJ also cited the above passage from the Phil Collins case at [26]. The case also confirmed that a change of position defence is not limited to cases where funds have been spent on specific identifiable items of expenditure, and that it may not be right for the Court to apply too demanding a standard of proof when an honest defendant says he has spent an overpayment on improving his lifestyle but cannot produce too detailed accounting.

"Change of position" – the period <u>up to</u> the date of issue of the February 2013 Announcement

Was Mr E acting in good faith?

136. On reviewing the evidence, I find that it was clear that Mr E was acting in good faith in the period up to the issue of the February 2013 Announcement. He would have no reason to suspect, and could not have known, that he was not entitled to the Pre 97 Increases. Furthermore, he could not have known that he should not be spending the money. Mr E had been told these increases were due, received payslips on behalf of the Trustees detailing the increases to his pension, and would have conducted his financial affairs on the basis that he was entitled to the money.

Has Mr E sustained detriment?

137. To demonstrate detriment, Mr E's circumstances must have changed detrimentally as a result of the overpayment or in anticipation of receiving it. Generally, this means that the money must have been spent and the expenditure cannot be legally or practically reversed, or any asset bought with the overpayment sold.

138. I am satisfied that if Mr E and his wife raised their standard of living over and above what it would have been but for the overpayments, this is sufficient to demonstrate detriment.

139. The overpayments span a period of over two decades. I understand that Mr E used his available assets, including any savings (other than the Policies), towards the costs of moving and buying a house in Spain and then used the pension towards his general living expenses while in Spain. Mr E lived in Spain for approximately 13 years until he returned to the UK in June 2016.

140. The Adjudicator assigned to the case made enquiries into Mr E's pattern of expenditure over the period 1 December 1995 to June 2016, and received the following response from Ms E:

> "[Mr E] does not have any earlier copies of bank statements other than what I have given already. All paperwork was destroyed on the move back from Spain to the UK.
>
> [Mr E's] spending never exceeded what he earned, and he did have a credit card which was used for a few purchases but was always paid off. He never had any loans, credit cards, debts etc and they lived within their means. They had nice holidays etc, but this was always paid off and he may have had a few small things on interest free finance but was always paid off.
>
> They have no other assets, just a small car.
>
> [Mr E] did have life insurance policies that he took out over many years these were all cashed in on the move back to the UK from Spain as they lost money on their Spanish house so needed more capital to buy back in the UK as it was so much more expensive [SIC].
>
> When [Mr E] had a pay rise he generally paid this into his pension rather than take the increase. [Mr E] stopped contributing to his pension when he was made redundant at, I think around age 59 and this is when I think he then started to receive his pension."

141. In relation to the Policies, which were cashed in around 2016/2017, Ms E has confirmed that the contributions were made while Mr E was working so he did not contribute to the Policies after retirement. Ms E has advised that each time he received a salary increase, he would invest it in the Policies to save for his retirement. This is consistent with what she stated in an email to TPO on 4 April 2022:

> "My father has also mentioned to me recently that he took out several investment policies over the years with Scottish Widows. He has said that every time he had an increase [in salary], he didn't take the money he invested [it] in another policy [with Scottish Widows]. These were all cashed in when they moved [back to the UK]. When they sold their house in the UK, they

> did buy a big house in Spain that was a 3-bed detached villa with [a] swimming pool etc. [When they moved] back to the UK they were in a 2-bed small bungalow [SIC] and had to cash in these policies to cover all the cost etc to move back as [properties in] the UK [were] a lot more expensive to buy and the property market in Spain at the time was poor and they lost money on the house. I have looked for the paperwork for these policies, but they were all shredded in the move last year."

142. I find the evidence given of Mr E's expenditure patterns during his retirement are credible and consistent with my analysis of the bank statements that are still available. I find as a matter of fact, having regard to the above evidence, that on the balance of probabilities Mr E did raise his expenditure patterns over and above what they would otherwise have been for the period from the date the overpayments commenced in 1996 until the date of issue of the February 2013 Announcement. I am also satisfied that Mr E used the pension towards living expenses.

143. There is no evidence that Mr E had other significant assets or significant sums in his bank account that built up as a result of the overpayments made after he retired, as demonstrated by his opening bank balance in July 2016. The evidence I have seen supports the view that Mr E's only significant assets, apart from the house he bought when he moved to Spain in 2003, were the Policies. Ms E is unable to confirm conclusively that no further contributions were made to the Policies following retirement, and the applicable bank records were destroyed. Mr E's memory is also poor given his age and the time that has elapsed. However, on the balance of probabilities, I consider that this is more likely than not, given the fall in his income following retirement would have given him less scope to save and the previous savings into the Policies had been made out of excess income. Also, the proceeds from his various property sales all seem to have been used to largely finance the further property purchases. In terms of detriment, I am comfortable based on the available evidence that Mr E is the sort of person who lives within his means and would not have spent up to his level of pension (including the overpaid increases) during the period after his retirement if it were not for the fact that he was being overpaid. If he had been told correctly what he was entitled to in terms of pension, he would in my view have adjusted his expenditure down to his available income. Mr E is not in my view the sort of person who would build up a "debt" of £90,000 or so over the period of the overpayments. Accordingly, I am satisfied that Mr E has sustained detriment to the extent that the overpaid pension (which he would not have otherwise spent) has been spent irreversibly on general living expenses.

144. I also do not agree with BIC UK's contention that there is no detriment for the purposes of a change of position defence given that the overall amount of money received by a member is the same if an overpayment is recouped from future pension payments (the economic effect is the same – see my analysis above). If money is spent irreversibly by a pensioner (or musicians with a relaxed lifestyle and propensity to overspend as in the *Phil Collins* case) in circumstances in which they would not otherwise have spent the money but for the overpayment, they still sustain

detriment whether the money has to be repaid out of future pension payments or other income or resources (not purchased as a result of the overpayments).

145. I do not agree with BIC UK's contention that the question of detriment should be answered by reference to the purchase of the Property and/or whether the Trustees intend to recover any remaining overpayments after Mr E's death. The detriment occurred as a result of the fact that Mr E spent money he would not otherwise have spent on general living expenses but for the overpayment which he now has to repay (at least in part).

146. Also, I do not consider, having regard to the evidence of the price paid for the various properties, that Mr E benefitted in terms of capital gains as a result of the enhanced pension payments. I am satisfied that the excess pension was spent on general living expenses. I have found no evidence that Mr E was 'unjustly enriched' as a result of the overpayments being used to finance the purchase of any of the properties Mr E lived in and the expenditure can now be reversed by selling the Property. In essence, the overpayments were not used, so far as I can see, to finance the purchase of the properties.

Causation

147. The analysis of causation is hampered by the fact that Mr E does not have copies of earlier bank statements. This does not however mean that I cannot form a view on Mr E's likely expenditure patterns from the commencement of his pension by reference to other evidence I have of his expenditure patterns from the later records which are still available.

148. My analysis of Mr E's bank transactions from July 2016 onwards supports the view that he is the sort of person who lives within his means and that he would not have spent in excess of his available income but for the overpayments.

149. During the period from July 2016, Mr E spent broadly up to the level of his monthly income. On 25 April 2017 and 25 May 2017, a significant sum was credited into Mr E's bank account in respect of the Policies. I agree with BIC UK that the Policy proceeds were allocated to Mr E's account after the purchase of the Bungalow, so cannot have been used directly towards the purchase of the Property. However, I am satisfied that these were applied to the costs associated with the move back to the UK even if some of the expenditure occurred following the purchase of the Bungalow.

150. In terms of causality, I am satisfied that on 1 August 2019 (which is approximately three months after the date of the Court of Appeal judgment in *Burgess (CA)*), the bank statements show that the level of Mr E's monthly expenditure reduced to below the level of his monthly income. This, on the balance of probabilities, was linked to the uncertainty caused by the Court of Appeal judgment, albeit that the Trustees had not yet adequately explained what it would mean in practice for the pensioners including Mr E.

151. Consequently, I am satisfied on reviewing more recent transactions, and the other evidence provided concerning patterns of expenditure, that generally Mr E is someone who lives within his means. I see no reason why this would be any different in the period from the date of his retirement to the date of issue of the February 2013 Announcement than was the case after the issue of the February 2013 Announcement (when I do have direct evidence of his expenditure patterns).

152. From a causation perspective, in my view it is clear that he would not have irreversibly spent at the level he did, had he not received sufficient pension from the Scheme to do so. I find as a matter of fact that this was the case both before and after the issue of the February 2013 Announcement, and until 1 August 2019.

153. As noted above, various cases have held that a change of position 'defence' is not limited to cases where funds have been spent on specific identifiable items of expenditure, and that it may not be right for the Court (or for that matter the Ombudsman) to apply too demanding a standard of proof when an honest defendant says he has spent an overpayment on improving his lifestyle but cannot produce too detailed accounting.

154. On that basis, I am satisfied, based on the evidence I have seen, that on the balance of probabilities as a matter of fact Mr E would have lived within his means and would not have built up what was effectively a debt of over £50,000 to February 2013.

155. I do not consider, as submitted by BIC UK, the fact that in the period up to Mr E's retirement his expenditure did not always match his income (as evidenced by the fact he saved into the Policies) has any relevance to the issue of whether he is the sort of person who lives within his means. It just assists in demonstrating that Mr E is a prudent person who saved for his retirement. It is consistent with my conclusion that Mr E conducts his financial affairs prudently.

"Change of position" – the period <u>after</u> the date of issue of the February 2013 Announcement

Good faith

156. For the purposes of my inequity enquiries, in relation to the period on and after the date the February 2013 Announcement was issued, the position on good faith requires further consideration. Mr E would have received the February 2013 Announcement notifying him that the Pre 97 Increases would be suspended from 6 March 2013.

157. The February 2013 Announcement advised that the Trustees and BIC UK had received opposing advice concerning the Pre 97 Increases. Consequently, there was uncertainty as to whether pensioners were entitled to the level of pension in payment at that time. The February 2013 Announcement explained that further increases would be suspended until the matter had been resolved.

158. The February 2013 Announcement states that:

> "The Company has agreed that there should be no deductions, at this time, for the increases already applied, that may not be in accordance with the Scheme rules."

159. The February 2013 Announcement is, in effect, claiming to reserve the Trustees' position to make deductions at a future date "for the increases already applied". It attempts to do this through just three words: "at this time" – but does not go on to explain the implications of those rights being reserved (for example, that an amount may have been overpaid and that there was a possibility that there may be a need to seek repayment of that amount in the future). In my view, it was incumbent on the Trustees to spell this out explicitly (ideally with, at least an estimate of, the quantum of 'pension at risk' and that may have to be reclaimed). One should not expect a lay member to "read into" a communication of such importance. Importantly, it is not clear to me that the reference to "for the increases already applied", could also apply to payments still to be made in the future – i.e. those made <u>after</u> the February 2013 Announcement was issued (which were already "baked in" to the then level of his pension). It was in no way clear that the "increases already applied" still formed part of payments made after that date.

160. The fact that the February 2013 Announcement does not explain that by continuing to pay the pension to Mr E at the existing rate, he was continuing to build up further overpayments (as a result of past increases, made before the suspension, being 'baked in') is to me a key issue. It also does not clearly explain that these overpayments may then need to be recovered by the Trustees at a later date (which would have allowed Mr E to factor that into his future spending).

161. I consider that a lay pensioner receiving the February 2013 Announcement may reasonably have understood the following:

    161.1. the pension increase rule may not have been applied correctly in the past;

    161.2. the pension needs to stop increasing until the correct position is determined;

    161.3. BIC UK is proposing that there should be no deductions, at this time, for the increases already applied up to the date of the February 2013 Announcement (but not that it may also catch payments made after that date); and

    161.4. if it later transpires that the increases were correctly applied, the pension will receive backdated increases.

162. The February 2013 Announcement was, in my view, poorly drafted and did not explain that overpayments were continuing to build up even after the suspension of further increases to Mr E's pension and may have to be repaid. I do not agree with BIC UK that the pensioners (who are not lawyers) would reasonably have understood from the words "*The Company has agreed that there should be no deductions, at this time, for increases already applied,*" also extended to further overpayments included

in future pension payments. The wording, in my view, suggests that the 'wound had been staunched', when in fact, as a result of the baked-in increases, the blood continued to flow. Given its importance and implications for the pensioners, the Trustees should have explained this much more clearly and also highlighted the fact that if the Court concluded the increases had not been properly granted, any overpayments which would need to be repaid would extend to both (a) overpayments built up until the date of the February 2013 Announcement and (b) those continuing to build up as a result of "baked in" increases made after the issue of the February 2013 Announcement. By painting an unclear or over-optimistic description of the situation there was a real risk that the pensioners could be seriously prejudiced.

163. Mr E continued to receive payslips showing the same level of pension and would have conducted his tax affairs on the basis that he was entitled to that pension. There were no additional caveats or warnings added to these documents after the February 2013 Announcement to highlight that some of this amount was linked to past increases, the validity of which was uncertain. There was no warning that he should put some of the money aside in anticipation of a possible claim for recovery.

164. Consequently, I am satisfied that Mr E acted in good faith by continuing to spend the pension he was being paid after the date of issue of the February 2013 Announcement up to the date of announcement of the *Burgess (CA)* decision and that Mr E did not have actual or Nelsonian knowledge that he was not entitled to the additional overpayments that were still building up. Had the February 2013 Announcement been clearer, or other communications reinforced the message that the Trustee seemingly wanted to convey, my view may have been different. However, it was not clear. Mr E could not have been, and was not, aware that overpayments were still being made and he was not told he should not spend any of the additional pension payments that continued to be paid.

165. However, once the outcome and implications of the *Burgess (CA)* case was known, and Mr E was notified that any past overpayments would be recovered, a change of position defence could no longer apply as Mr E would have had actual knowledge that he was not entitled to the money. Consequently, any further overpayments made by the Trustees from 31 March 2020 onwards at the latest would be recoverable, unless any other 'defences' apply (recognising that I am applying these principles to the general equitable enquiry I am required to make under *Re Musgrave*). Contrary to the submissions of the Trustees, the fact that Mr E purchased the Bungalow had no bearing to any finding in the Preliminary Decision that there was a change of position defence. My conclusions that it was not equitable for the Trustee to recoup overpayments up to August 2019, was based on my analysis that the overpayments resulted in Mr E raising his standard of living over and above what it would otherwise have been but for the overpayments.

166. Clearly, I do not agree with BIC UK's submissions that it was readily apparent from the February 2013 Announcement that Mr E was building up additional overpayments which he might have to repay, in addition to the possible overpayments he had been notified might have to be repaid in relation to the period

up to the February 2013 Announcement. The February 2013 Announcement was poorly drafted and overly reassuring to the pensioners about the implications of the court proceedings. It was quite reasonable in my view to conclude from the February 2013 Announcement that the only overpayments which might have to be repaid were those which built up until the date of the February 2013 Announcement and that further pension increases would be suspended. It was not apparent that Mr E would potentially build up a further overpayment of approximately £40,000 while the Trustees sought clarification from the Court of the correct legal position.

167. I do acknowledge, as noted by BIC UK, that Mr E moved back to the UK in 2016 before the outcome of the *Burgess (CA)* decision was known. Mr and Mrs E were undoubtedly worried by the various pension announcements they received concerning the litigation. It does not however follow that they were acting in bad faith in continuing to spend up to their income until the outcome of the Court of Appeal decision in *Burgess (CA)* was known, given the inadequacies of the communication material already highlighted.

168. I have considered carefully whether it can be said Mr E ceased to act in good faith by continuing to spend the money on or after May 2019, when the outcome of the *Burgess (CA)* decision was known. However, the May 2019 Announcement, while clearly worrying for Mr and Mrs E, again did not properly explain the implications of the decision. In my view, it was not until March 2020, that it was properly explained to Mr E that he had continued to build up further overpayments after the date of the February 2013 Announcement and that these additional overpayments (amounting to over £40,000) would have to be repaid as well as the earlier overpayments.

Detriment

169. I am satisfied that in respect of the period after the February 2013 Announcement was issued, Mr E will sustain detriment if he has to repay the money he spent on increasing his standard of living up to his available income up to or around August 2019. There is no evidence that the overpayments paid to him on or after the February 2013 Announcement were applied to meet any mortgage payments on the properties. The first and the second property Mr E purchased in Spain appear to have been purchased primarily with capital from the sale of the previously owned property. Similarly, the Bungalow was bought primarily using the proceeds of the sale of the second property in Spain and some of the proceeds of the Policies (which were also used to fund his move to the UK). The Property was purchased in 2021, using the proceeds from the sale of the Bungalow and the Mortgage.

170. Also, looking at Mr E’s bank statements it would appear that from on or around August 2019 he started building up surplus assets in his bank account, so he was no longer living up to the level of his income. As a result, a “change of position” defence would cease to be effective in law to prevent recovery of the overpayments from 1 August 2019 (and, accordingly, I factor that in to the inequity enquiry I am carrying out for the purposes of the equitability test in *Re Musgrave*). Mr E did not sustain

detriment on or after this date as he reduced his expenditure below his income and built up surplus assets.

Causation

171. For similar reasons to those I have discussed in respect of the period up to the date of the February 2013 Announcement, I am satisfied that Mr E would not have spent more than the pension he was entitled to in the period from the date of issue of the February 2013 Announcement until about 1 August 2019. The evidence I have is that Mr E spent up to the level of his pension income during this period (and I find this as a matter of fact) and I am satisfied as a finding of fact that he would not have done so if the February 2013 Announcement had adequately alerted him to the fact that he might have to repay the money back.

Defence to equitable recoupment – applying analogous equitable principles to those applied by the courts in an estoppel by representation defence

172. If I approach the more general issue of whether it would be equitable to allow recoupment by reference to the principles of estoppel, I will come to a similar conclusion to the one that I have reached in relation to change of position in respect of the period up to when the February 2013 Announcement was issued.

173. The requirements for an estoppel by representation defence to succeed were set out in *Steria*. Neuberger LJ stated:

> "…If one had to identify a single factor which a claimant in an estoppel case has to establish in order to obtain some relief from the court it would be **unconscionability** - see per Robert Walker LJ in Gillett v Holt [2000] Ch 198 especially at 225 and 232 [emphasis added in bold]".

174. The above formulation is a useful general guiding principle. However, the question of "unconscionability" can in many cases be an issue where the views of reasonable people can differ on whether the complainant has a valid claim. Similarly, views can differ on how that claim should be satisfied (see above). Neuberger LJ considered that it may be appropriate to have some more specific principles.

175. In the case of estoppel by representation, or promissory estoppel, Neuberger LJ considered that it is very unlikely that a complainant would be able to satisfy the test of unconscionability unless the complainant could also satisfy the three classic requirements. Broadly:

175.1. a clear representation or promise made by the defendant upon which it is reasonably foreseeable that the complainant will act;

175.2. an act on the part of the complainant which was reasonably taken in reliance on the representation or promise; and

175.3. after the act has been taken, the complainant is able to show that he will suffer detriment if the defendant is not held to the representation or promise.

176. Generally, an overpayment of money on its own will not amount to a representation that the member is entitled to the money paid in error. However, sometimes a representation may be implicit in the payment itself in the light of the surrounding circumstances. If the relationship between payer and payee is such that there is a legal obligation on the payer to ascertain the payee's entitlement correctly, payment may give rise to an implied representation that the money is due. As conceded by BIC UK, trustees of an occupational pension scheme have a duty to pay the correct pension benefits and are responsible for deducting PAYE correctly from those pension payments while the member is resident in the UK.

177. It has been established in a number of cases that a rise in a defendant's general standard of living can give rise to an estoppel or change of position defence (see paragraphs 131 to 135 above).

178. In *Steria*, albeit in the context of a discussion of the case law on the difficulties of demonstrating group estoppels (rather than on an individual basis, as is the case here), Neuberger LJ said that an additional reason why the court should lean against an estoppel in favour of one, or only some, of the members of a pension scheme, is that it involves favouring only one or some of the members of the scheme over the other members of the scheme". I concluded that I needed to consider whether estoppel is inappropriate on general equitable grounds because it involves "favouring" one or some members of the Scheme.

The position before the issuance of the February 2013 Announcement

The first Steria test – a clear representation on which it was reasonably foreseeable Mr E would act

179. In relation to the period before the February 2013 Announcement was issued, Mr E would have received the Retirement Statement, monthly payslips and annual P60s, which were issued on behalf of the Trustees. I consider that those statements amounted to unambiguous representations that he was entitled to the pension specified in his payslips and P60s. They did not contain caveats of the type that may render them ambiguous (for example, that the Trustees could only pay the benefits set out in the Rules of the Scheme).

180. Moreover, even in the absence of the statements I am satisfied that the payment of the pension amounted to an implied representation that Mr E was entitled to the pension payments given that the Trustees were under a legal obligation to pay the correct amount of pension and to deduct the correct PAYE. I would observe that:

    180.1. Generally, the payment of money per se will not amount to a representation that the sum paid represented the recipient's true entitlement;

    180.2. However, sometimes such a representation may be implicit in the payment itself in the light of the surrounding circumstances (see paragraph 176 above);

180.3. Specifically, if the relationship between the payer and payee is such that there is a legal obligation on the payer to ascertain the payee's entitlement correctly, the payment may give rise to an implied representation that the money is properly due; and

180.4. The trustees of an occupational pension scheme have a duty to pay the correct pension benefits and deduct PAYE correctly from those pension payments while the member is resident in the UK.

181. I am therefore satisfied that the Trustees' obligation to pay the correct pension and deduct the correct PAYE amounts to an implied representation that the amount paid is correct for the purposes of estoppel by representation.

182. It was reasonably foreseeable that Mr E would rely on these express and implied representations that he was entitled to the money and the statements to determine his available income, to spend accordingly on general living or other expenses, and to conduct his tax affairs in the UK and in Spain. If an individual is told each month, without caveat, that they are entitled to a pension of £X and/or there is an implied representation that they are entitled to the pension payments, and if they have no reason to suspect the figures are incorrect, I consider it is reasonable for them to rely on those statements. Consequently, I conclude that there were sufficiently clear express and implied representations made by the Trustees upon which it was reasonably foreseeable that Mr E would act. The first test in *Steria* is satisfied.

The second Steria test - did Mr E act on the representation and was the expenditure reasonably made in reliance on the representation?

183. I am satisfied, for similar reasons to the reasons I considered in relation to change of position, that Mr E did indeed spend up to his income in reasonable reliance on the representation. The second test in *Steria* is satisfied.

The third Steria Test - detriment

184. I am satisfied that Mr E will sustain detriment if the Trustees are not held to the representation or promise for the reasons already discussed in relation to change of position. The third test in *Steria* is satisfied.

Wider equitable principles

185. Although all three tests in *Steria* are met in relation to this period, and feed into my inequity enquiry for the purposes of *Re Musgrave*. I also need to determine the more general question of "unconscionability".

186. Mr E will suffer detriment if the overpayments are recouped. As a result of his reliance on the relevant correspondence and payslips, he has incurred costs which he would not otherwise have incurred. The evidence supports the view that recoupment of the overpaid pension would significantly reduce his income and cause him significant financial strain in his remaining years of retirement.

187. As noted in paragraph 178 above, Neuberger LJ said that an additional reason why the court should lean against an estoppel in favour of one, or only some, of the members of a pension scheme, is that it involves favouring that small group over the other members. The issue was also referred to in *Grievson v Grievson*, in *Burgess* in relation to the Trustees' group estoppel defence, and in *Catchpole v Alitalia*. So I will also consider whether estoppel is inappropriate in this case because it involves "favouring" one or some members of the Scheme.

188. Mr E is a pensioner member of a defined benefit scheme. The employer, which is still extant, is required to fund any deficit under statutory funding requirements of the Pensions Act 2004 and stand behind the Scheme on an annuity buy-out basis under Section 75 of the PA 95. Consequently, the finding of an estoppel defence, preventing recovery of the overpayments, has no direct impact on the level of benefits provided to other members of the Scheme.

189. Consequently, I do not consider that allowing an estoppel in Mr E's case would involve favouring Mr E over other members of the Scheme in terms of the impact on Scheme funding.

190. It could be argued that allowing Mr E an estoppel defence to recovery would be favouring Mr E over pensioners who have agreed to repay the overpayment. However, the pensioners concerned had the same opportunity to object to the recoupment plan being proposed by the Trustees. Ultimately, the complaint could have been referred to TPO for an independent review if they considered that they had valid defence(s) to recovery or it was otherwise inequitable for the Trustees to recover the overpayment. Each complaint would then have been considered on the facts of each individual case (and thus some may have been successful, and others not).

191. I recognise that BIC UK will have to fund any additional shortfall as a result of any Determination I make in Mr E's case that upholds his complaint, and the fact that some of the overpayments may not be recovered. However, I also recognise that the amounts which are potentially recoverable do not amount to £90,394. Given Mr E's age, the amounts which can be recovered by recoupment will be much lower (and will depend on Mr E's life expectancy). Any attempt to recover further amounts from Mr E's estate following his death would also have been subject to change of position and estoppel defences, but are in any event moot following the Trustees' concession that they will not seek to recover any further repayment following Mr E's death.

192. I note that in *Burgess (CA)*, at paragraph [9], it states:

> "Payment of these members' benefits could potentially be affected by the increase in the Scheme's liabilities of approximately £5 million resulting from the judge's decision, although we were told that this is not likely to be a practical concern given the financial health of the BIC group."

193. Having regard to all the above, and applying analogous principles to those which have been applied by the courts, I am satisfied that it would be inequitable to allow the Trustees to recoup the overpayments for the period up to March 2013 from Mr E.

The position post February 2013 Announcement

194. In relation to the position from the date of the February 2013 Announcement onwards, Mr E would have continued to receive payslips each month and P60s each year from 2013 onwards. In the absence of any qualification, they amount to a series of clear representations of Mr E's pension entitlement on which it would continue to be reasonable for him to rely in making any spending decisions and conducting his tax affairs. Moreover, the payment of these amounts by themselves without qualification potentially amounted to a series of implied representations that Mr E was entitled to the instalments of pension that was paid to him.

195. However, the February 2013 Announcement advised that the Trustees and BIC UK had received opposing advice concerning the Pre 97 Increases. Consequently, there was an attempt to express some uncertainty as to whether pensioners were entitled to the level of pension in payment at that time. The February 2013 Announcement explained that further increases would be suspended until the matter had been resolved.

196. The February 2013 Announcement was, for all the reasons I have previously given, poorly drafted and did not clearly explain that overpayments were continuing to build up even after 2013 and may have to be repaid.

197. That said, I am not convinced that following the February 2013 Announcement Mr E received sufficiently clear representations from the Trustees that he was entitled to the money to give rise to an estoppel by representation defence, as any subsequent payslips and P60s and implied representations arising by virtue of the continued payment had to be read in the context of the February 2013 Announcement.

198. This does not contradict my conclusion in paragraph 136 above that Mr E was acting in good faith for the purposes of considering change of position. The February 2013 Announcement was not adequate, in my view, to give Mr E actual or Nelsonian knowledge that further overpayments were building up, and that he should question whether to continue spending the full pension he continued to receive following the issue of the February 2013 Announcement (see above). I appreciate that this is quite a fine distinction, but nonetheless I consider that there is a distinction between the two defences. Unlike in estoppel by representation, there is no necessity for a representation in a change of position defence.

199. Accordingly, notwithstanding my conclusion on change of position, if I were to apply analogous principles to those applied in relation to an estoppel by representation defence to assist my inequity enquiry, I would not say it was available to Mr E in relation to any payments made to him on or after 22 February 2013.

Applying analogous principles to estoppel by convention

200. Broadly, where the parties have acted on the common assumption that the given state of facts or law is true, and it would be unfair on one party for the other party to go back on the agreed assumption, then the complainant will be entitled to appropriate relief. The principles of estoppel by convention are broadly as follows[18] :

200.1. "It is not enough that the common assumption on which the estoppel is based is merely understood by the parties in the same way. It must be expressly shared between them. Something must be shown to have "crossed the line" sufficient to manifest an assent to the assumption, which may consist of either words or conduct from which the necessary sharing can be properly inferred";

200.2. The expression of the common assumption by the party alleged to be estopped must be such that he may properly be said to have assumed some element of responsibility for it, in the sense of conveying to the other party an understanding that he expected the other party to rely on it;

200.3. The person alleging the estoppel must in fact have relied on the common assumption, to a sufficient extent, rather than merely upon his own independent view of the matter;

200.4. reliance must have occurred in connection with some subsequent mutual dealing between the parties; and

200.5. some detriment must thereby have been suffered by the person alleging the estoppel, sufficient to make it unjust or unconscionable for the latter to assert the true legal (or factual) position."

201. Having given the matter further consideration, I now accept that applying analogous equitable principles to those which are generally applied in relation to an estoppel by convention would not provide a defence to a recoupment claim.

202. Indeed, I agree with BIC UK that Mr E had no independent view on whether the information provided by the Trustees about the amount of his pension and the content of the assumption (see paragraph 92.8 above) is based entirely on information received from the other party. It follows that there is no continuing common assumption on which to base an estoppel by convention defence.

203. Additionally, I agree with BIC UK there is no evidence of mutual dealings based on the Trustees' representation of Mr E's entitlement. The dealings were all one way, in the form of actions by and communications from the Trustees. Again, it follows that

[18] Briggs J in *Revenue and Customs Commissioners v Benchdollar* [2009] EWHC 1310 at [52] as subsequently modified by him in *Stena Line Ltd v Merchant Navy Ratings Pension Fund Trustees Ltd* [2010] EWHC 1805 (Ch) PLR 411 at [137] and by Hildyard J *in Blindley Health Investments Ltd v Bass* [2015] EWCA Civ 1023, [2017] Ch 389 at [92]. These principles were approved by the Supreme Court in *Tinkler v HMRC* [2021] UKSC 39, [2021] 3 WLR 697 at [53]

applying analogous principles to an estoppel by convention defence will not entitle Mr E to keep the overpayments.

Conclusion on whether it is appropriate to deny equitable recoupment under general equitable principles

204. If I consider whether equitable recoupment should be denied on general equitable principles, I could potentially reach different conclusions depending on the defence from which the underlying legal principles were derived from.

205. The key reason for the difference, as to whether the equitable recoupment should be available, between the principles derived from change of position and estoppel by representation, depends on whether the February 2013 Announcement was sufficiently clear for Mr E not to realise in the period after it was issued that he was building up further overpayments which he might have to repay (depending on the outcome of the court proceedings).

206. If the February 2013 Announcement had been clearer, there is no doubt in my mind that the recovery of the overpayments after the date of the February 2013 Announcement was issued should be denied. However, I consider that the February 2013 Announcement was very poorly drafted and I do not consider that Mr E and the other pensioners who received the announcement would have realised (and were definitely not warned) that they were building up further overpayments which they might also have to repay in addition to the overpayments that had built up before the February 2013 Announcement was issued. The February 2013 Announcement was unhelpful to members of the Scheme, and therefore ultimately unhelpful to the Trustees in seeking to recoup the overpayments from them.

207. In relation to estoppel by convention, I do not attach much weight to my conclusion that the principles underlying the defence could not apply in the circumstances of the case. This is because it is going to be very difficult in a pensions context, other than in very specific circumstances, for this defence to apply given the requirement for there to be mutual dealing based on representations of a member's entitlement.

208. Accordingly, I consider in all the circumstances it is equitable to deny recoupment both in respect of the period up to, and also following, the February 2013 Announcement, until 1 August 2019.

Laches

209. Broadly, laches is a defence to an equitable claim of recovery on the basis that the scheme has delayed asserting its right to reclaim the overpayments and, because of this delay, it is no longer entitled to recover them. It was accepted by the High Court in the *Burgess* case, and it was common ground between the parties, that where a limitation defence was not capable of applying, the doctrine of laches could potentially apply. It was noted that the classic statement of the doctrine is that of Lord Selbourne LC in *Lindsay Petroleum* (1874) LR 5 PC 221 at 239:

> "Now the doctrine of laches in the Courts of Equity is not an arbitrary or a technical doctrine. Where it would not be practically unjust to give a remedy, either because the party has by his conduct, done that which may fairly be regarded as equivalent to a waiver of it, or where by his conduct and neglect he has, through perhaps not waiving that remedy, yet put the other party in a situation in which it would not be reasonable to place him if the remedy was afterwards to be asserted, in either of these cases, lapse of time and delay are most material."

210. It was also noted that the doctrine was considered by the House of Lords in *Fisher v Brooker* [2009] UKHL 41, [2009] 1 WLR where Lord Neuberger said at [64]:

> "laches is an equitable doctrine, under which delay can bar a claim to equitable relief. Although I would not suggest that it is an immutable requirement, some sort of detrimental reliance is usually an essential ingredient of laches, in my opinion.

211. The Trustees argued in *Burgess* that the Court can and should determine that the recovery of overpayments by the Trustees would be barred by laches. However, BIC UK argued the contrary, that the Court cannot, or should not, determine the question on a group basis, but should leave it to be determined as between the Trustees and the individual members of the Scheme. The judge agreed with BIC UK on this point. The starting point is that, prima facie, it would be the Trustees' duty and not inequitable to seek to recover the overpayments and thereby increase the assets available for the benefit of all the members. On the other hand, it may be inequitable for the Trustees to do so in a particular case. A key factor, as indicated by Lord Neuberger, is whether there has been detrimental reliance by the individual in question in their particular circumstances.

212. Case law indicates that laches generally requires:

    212.1. knowledge of the relevant facts on the part of the claimant (see *Beale v Kyte* [1907] 1 Ch 564) where there is a waiver of the claimant's rights (but see below for further consideration of whether this is always the case under the more modern formulation of laches); and either

    212.2. acquiescence on the claimant's part; or

    212.3. prejudice or detriment on behalf of the defendant.

213. Historically, in deciding whether laches could be used as a defence, a court considered the length of the delay and the nature of the acts done during the interval (such as change of position or loss of evidence by the trustee) which might affect either party, and cause a balance of injustice in allowing or not allowing the remedy. More recent cases, for example *Frawley v Neill* (the Times April 5 1999) (**Frawley and Neil**), have established that the court should not enquire whether the circumstances match previous decisions but ask whether the claimant's actions make it inequitable to grant the relief the claimant is seeking.

214. In *Patel v Shah* [2005] EWCA Civ 157, the Court of Appeal also endorsed the more modern approach of Aldous LJ in *Frawley v Neill*, that it does not:

> "require an inquiry as to whether the circumstances can be fitted within the confines of a pre-conceived formula derived from old cases…[but instead requires] a broad approach directed to ascertaining whether it would in all the circumstances be unconscionable for the party to be permitted to assert his beneficial right. No doubt the circumstances which give rise to a particular result in decided cases are relevant to the question whether or not it would be conscionable or unconscionable for the relief to be asserted, but each case has to be decided on its facts applying the broad approach."

215. Also, in *PO Nedlloyd BV v Arab Metals Co* [2006] EWCA Civ 1717 applied in *Sheffield v Sheffield* [2013] EWHC 3927 (Ch) at [100], [106], [119] it was said:

> "The question for the court in each case is simply whether, having regard to the delay, its extent, the reasons for it and its consequences, it would be inequitable to grant the claimant the relief he seeks."

216. The early laches cases I have looked at do suggest that for a defence of laches to apply, usually the trustees must have actual knowledge of the error. Also, delay without knowledge of the right which is not being asserted is not sufficient in itself to give rise to a laches defence. Halsbury's Laws' consideration of the doctrine of laches notes that:

> "Where statute provides expressly that no period of limitation prescribed by the Limitation Act 1980 applies, one might also expect that the doctrine of laches would not be available, but the doctrine of acquiescence would be, though it has been held that both are available. The modern approach to laches or acquiescence, however, has largely assimilated the two. It does not require an exhaustive inquiry into whether the circumstances could fit within the principles established in previous cases. **A broader approach is adopted, namely whether it is unconscionable for the party concerned to be permitted to assert his beneficial rights. Mere delay is never a bar in itself to equitable relief; it must be coupled with circumstances which make it inequitable to enforce the claim**. [emphasis added in bold]."

217. Having considered all the above caselaw, I concluded in my Preliminary Decision (and my view remains) that generally a mere delay without knowledge cannot by itself give rise to a defence of laches. However, the Trustees did have knowledge that the increase was not documented at the time of the original announcements of the LPI increases and from 20 December 2011, the Trustees had knowledge that there was a possible issue with adequacy of the documentation of the increases. There are also other circumstances which I need to consider in determining whether it is equitable to allow a defence of laches. For example, whether the length of the delay and the nature of the acts done (or not done) during the interval might affect Mr

E and the Trustees, and cause a balance of injustice in allowing or not allowing the remedy.

218. I do not agree with BIC UK and the Trustees that time does not begin to run for laches purposes until the issue of whether there was an overpayment was conclusively determined by the Court of Appeal. In my view, having considered the further representations of BIC UK and the Trustees, that time began to run for laches when the Trustees first became aware of the potential issue regarding the increase rule, and therefore the possibility of benefits having been overpaid, irrespective of whether the mistake was not conclusively proved until later.[19]

219. Once the Trustees became aware of the potential issue, it is then necessary to consider what steps the Trustees took to establish the true position to determine whether recoupment is barred by laches, along with other relevant matters, such as the detriment suffered by Mr E as a result of the delay in establishing the true position. It is then necessary to take account of the reasons why the Trustees failed to establish the validity of the rule earlier than they did.

220. I agree with BIC UK and the Trustees' additional submissions that the evidence we have is that on 21 March 2007 Hewitsons (the Trustees then legal advisers) did advise in response to an email dated 13 March 2007 that the previous administrators had correctly paid Pre 97 Increases, relying on Rule 9(1) and the March 1992 Announcement (see paragraph 74 of Mr Justice Arnold's judgment in *Burgess*).

221. I also accept that the original trust deeds and rules which failed to document the increases correctly were drafted with the aid of the Trustees' advisers and, despite the failures to adequately document the original increase announcement, it was not until 2011 following the appointment of Atkin & Co as advisors, administrators and actuaries in the place of Alexander Forbes that BIC UK challenged the validity of the Pre-97 Increases at a meeting of the Trustees on 20 December 2011 (see paragraph 75 of the Burgess decision).

222. Further investigations were then carried out into the validity of the original increase rule changes as referred to in the March 1992 Announcement, and access to BIC UK's minutes relating to the increase were sought (see paragraph 75 of Mr Justice Arnold's judgement in *Burgess* at first instance).

223. The investigations appear to have resulted in the issue of the February 2013 Announcement on 22 February 2013 (slightly over one year later). Then in August 2015 (over two years later and almost four years after the issue was identified in 2011) a note was issued to pensioners, which stated that:

> "This note is being issued on behalf of the Trustees to provide you with an update. A letter was issued by Dalriada in February 2013 explaining that due

[19] See *Allcard v Skinner* (1887) 36 ChD at 145 at 188 per Lindley and 192 per Bowen LJ.

to legal uncertainty as to whether members are entitled to pension increases it has been decided to suspend those increases.

…

We do now have a meeting booked for 3rd September 2015 to be attended by the Trustees and BIC UK Limited, and the legal advisers. The aim is to reach some degree of understanding and if it is deemed necessary apply to court to resolve any matters which cannot be agreed. This process may take some time, possibly another 12 months.

We will issue another note as soon as we have something positive to report."

224. Events were not moving quickly. It was not until March 2017 (over five years after the issue was initially identified on 20 December 2011) that members were told that High Court proceedings had commenced to obtain a ruling of the court to resolve the matter. The first instance decision was then handed down in March 2018.

225. It was over six years from the identification of the issue on 20 December 2011 until the Court ruled on the issue at first instance in *Burgess* on 17 April 2018. This is a considerable period of time to resolve this issue during which the members were effectively left in limbo, and the Trustees would have been aware that further potential overpayments may have been building up, which may have to be repaid by pensioners (if the court found in favour of BIC (UK)). The problem with this type of situation is that trustees often assume that the matter will be resolved satisfactorily for members, but this is not always the case and in this type of situation time is of the essence. It is just not acceptable for matters to have progressed at that speed.

226. I do not see why the matter could not have been resolved much earlier if the Trustees had pursued the matter with the level of diligence I would have expected the Trustees to apply given the importance of the issue to the membership and the implications for the members if the Court found that the increases had not been validly granted.

227. During that period, Mr E (and other affected pensioners) continued to build up further overpayments in relation to the increases which had been integrated into his pension before the date the February 2013 Announcement was issued. Mr E has undoubtedly sustained detriment as a result. If the position had been adequately explained to Mr E, he could have set the additional overpayments aside until the issue was resolved.

228. In terms of general equity, I also again need to consider the impact on the funding of the Scheme in not allowing the recovery of the overpayments; if the overpayments were recovered this would improve the funding position for the benefit of all the members.

229. I also need to consider whether it is equitable to allow a defence in this case as it may involve favouring some members over others. For the reasons given previously, I do not consider that finding in Mr E's favour is inequitable.

230. In the circumstances, applying the more modern formulation of laches, and having regard to all the above issues, in my view it is unconscionable for the Trustees to be permitted to assert their right to recovery of the overpayments that built up in the period from the date of issue of the February 2013 Announcement (which failed to adequately explain that further overpayments were building up which might have to be paid back) in respect of the period up to 31 July 2019.

231. I find that the circumstances of this case falls within the second limb of the original *Lindsay* decision. Specifically, through conduct or neglect the Trustees have, "*though perhaps not waiving that remedy, yet put the other party in a situation in which it would not be reasonable to place him if the remedy was afterwards to be asserted*".

232. Any overpayments that built up from 1 August 2019, are recoverable for similar reasons to those I have already discussed above.

233. I therefore achieve the same result by applying a laches defence as under my analysis of whether recoupment should be allowed under general equitable principles.

234. The amount of the overpayments recoverable, in respect of the overpayments made since 1 August 2019, is £6,554.

The Trustees' submissions in response to the Preliminary Decision

235. In relation to the Trustees' observation that if an unqualified payslip may amount to a representation, it would mean that estoppel by representation may arise in many more circumstances than it is commonly thought. In my view this observation is correct. However, whether it does or not will depend on the circumstances of the case and having regard to other information supplied to the members about the validity of the payments. In the context of an occupational pension scheme where trustees have an obligation to pay the correct amount of pension, mere payment of a pension instalment, where there is no other qualification, may also amount to an implied representation for the purposes of an estoppel by representation defence to a repayment claim that the member is entitled to the overpayment. BIC UK conceded in its submissions to TPO that a representation, that a recipient is entitled to a payment, may arise where the payer has a duty to calculate the payments accurately.

236. I have concluded, however, looking at the documents together there was not a sufficiently clear series of express or implied representations to give rise to an estoppel by representation after the date of the February 2013 Announcement.

237. Similarly, in relation to the issue about whether a comparison of the payslips can amount to a representation, I agree with the Trustees that it is not possible to work out which of the elements of pay had increased. However, this does not mean that by comparing payslips there is no representation that a member is entitled to a pension increase given that the pension had increased in amount. The mere payment of a pension instalment may, in appropriate circumstances, amount to an implied

representation that the member is entitled to the payment as increased from time to time.

238. In relation to the Trustees' submissions on the laches defence, I agree with the Trustees that I do need to have regard to the fact that the Trustees were advised by Hewitsons that increases were validly granted when determining the period over which the laches defence could apply. However, I do not agree with the Trustees that a laches defence cannot apply until it was conclusively determined by the Court of Appeal that the pension increases had not been validly granted. I can consider whether laches defence is appropriate in the circumstances of the case having regard to the actions of the Trustees once they became aware that there was doubt about the validity of the increases (see paragraphs 217-218 above).

The period of recovery of the overpayments

239. Ms E has argued that the Recoupment Plan proposed by the Trustees would cause Mr E hardship. The Trustees are proposing to recover the overpayments over the same period over which it arose and were proceeding on the basis that all of the overpayments were recoverable. I have since determined that only £6,554 is recoverable, representing overpayments made since 1 August 2019, as it would be inequitable to recover the balance of the overpayments.

240. The Trustees have already reduced Mr E's pension from July 2020 from £1,552 per month (gross) to £1,055 per month (gross) to reflect his correct entitlement under the Scheme. The Trustees were proposing to recover the overpayments at a rate of £307 per month. This represents approximately 30% of Mr E's corrected pension and more than his household net surplus income. The figure of £307 per month appears to have been arrived at by looking at the total overpayment of £90,934 over a period of 24 years and 8 months (£3,686 a year or £307 per month) and has been arrived at on the assumption that all of the overpayments are recoverable (though I am now determining that the bulk of them are not recoverable). The recovery rate is consistent with the rule of thumb I generally apply that the period of recovery should be at least as long as the period over which the overpayments built up. This is, however, not a hard and fast rule and I do also look at affordability. A longer recovery period may be appropriate in circumstances where the recovery plan being proposed would cause hardship. There is currently no consideration of the issue of affordability in the Trustees' proposed Recoupment Plan.

241. A breakdown of Mr E's monthly household income and expenditure is set out in Appendix D.

242. I note that Mr E's surplus monthly income over expenditure amounts to £170. This means that if the overpayments are recovered at a rate of £307 a month Mr and Mrs E will have to make material cuts to their expenditure if they continue to pay Ms E the mortgage payments. I have no evidence that Mr and Mrs E have any significant assets other than the Property so it could result in reducing the amount of money Mr and Mrs E have for food and other essentials.

243. BIC UK and the Trustees have submitted that Mr E's alleged inability to make payments under the Recoupment Plan is because of his decision to acquire the Property. There is some force in this submission.

244. In relation to Mr E's move back to the UK in June 2016, Ms E has explained that the reason why Mr E needed to move back to the UK was due to concerns about the announcements from the Trustees, as well as concerns about his declining health. I agree that given Mr E's health and age, it is reasonable that he would want to return to the UK.

245. I agree that if Mr and Mrs E had not bought the Property in July 2021 (which Ms E has explained, and I accept, was more suitable to their needs) Mr E would have sufficient household income to repay £307 a month under the proposed Recoupment Plan.

246. That said, I do not want to put undue financial burden on Mr and Mrs E (given their age and the fact they are both in ill-health). I am also very conscious of how little income Mr and Mrs E have for food and other essentials. It is arguable that Mr and Mrs E should not have bought the new more expensive Property in 2021 with the aid of a mortgage, given that by then they would have been aware that the overpayments may need to be repaid. However, there were serious concerns about Mr E's health at the time and the new house has been bought and it will not be easy to access capital from the Property. Also, I understand that Mrs E is being assessed for some form of dementia. In the circumstances, I remain of the view (having regard to the competing equities) that a recoupment plan at the rate of £200 a month would be equitable.

247. What is equitable in the circumstances in terms of a recoupment plan may change over time. If at a future date Mr E can demonstrate, to the satisfaction of the Trustees, that the rate of recovery is no longer affordable the Trustees should, at Mr E's request, revisit whether the above rate of recovery remains equitable.

The impact of the CMG Decision on the question of whether the Ombudsman is a competent court for the purposes of Section 91(6) of the PA 95

248. It was accepted in *Burgess*, the later *CMG Pension Trustees v CGI IT UK* [2022] 083 PBLR (056) (**CMG**) case at first instance and also at *CMG (CA)* that equitable recoupment was a form of set-off for the purposes of section 91(6) of the PA 95. Where the amount of overpayment is disputed, the trustees cannot commence recovery of the overpayment under an occupational pension scheme without an order of a "competent court". *CMG* at first instance also confirmed that a "dispute" for the purposes of section 91(6) extends to both a dispute about whether the overpayment is recoverable and the amount of each deduction going forward.

249. The *CMG (CA)* judgment confirmed that the Ombudsman is not a competent court for the purposes of section 91 of the PA 95. Trustees of a trust-based occupational pension scheme will be acting in breach of law and could be found liable for maladministration if they fail to comply with these decisions.

250. It follows that before the Trustees can commence recoupment of any overpayments (where I find it is equitable to recoup the overpayments) the Trustees will need to obtain an order of a "competent court" authorising them to commence recovery. The Trustees will also need to provide Mr E with a certificate showing the amount of set-off and the effect on his benefits.

251. Lady Asplin confirmed in paragraph [29] of her judgment in *CMG (CA)* that the detailed procedure, and the way in which an application for enforcement of the PO's Determination and directions is made, is set out in CPR Rule 70 and the Practice Direction. Where CPR Rule 70 applies, a copy of a decision to be enforced must be filed with the application and the matter will be dealt with by a court officer without a hearing (See CPR Rule 70.5(7)). This is a paper-based application.

252. Lady Asplin also confirmed again at paragraphs [55] and [58] of her judgment in *CMG (CA)* that the enforcement in the County Court is an administrative matter and there is no requirement to commence an action in the County Court or for the County Court to consider the merits of the matter. Moreover, Lady Asplin indicated at paragraphs [45] and [55] of her judgment that she envisaged that the County Court would enforce the Determination and directions by making an order specifying the amount of the overpayment and the amounts to be recouped over a specified period at a specified rate.

253. TPO has produced a factsheet setting out the procedure for obtaining approval of a competent court following the decision in *CMG (CA)*. TPO has confirmed in the factsheet that in future the PO will specify the amount and rate of recovery of any overpayments that are recoverable in his Determinations.

254. I have set out the amount of the overpayment that is recoverable in Mr E's case, and the rate of recovery which I consider appropriate, in my directions below so that the County Court can authorise commencement of the overpayments at this rate. To obtain the approval of a competent court, TPO will issue a certified copy of this Determination to the Trustees.

Distress and inconvenience award

255. I have power to make reasonable awards for non-financial injustice (distress and inconvenience) arising as a consequence of maladministration. The fact that the overpayments have arisen is due to maladministration by the then Trustees. They failed to document the increase rule and/or to apply the increase rule correctly (given that the increases had not been hardcoded into the rules as intended).

256. The subsequent failure to adequately explain the situation to Mr E in the February 2013 Announcement also amounts to maladministration. Furthermore, the time the Trustees took to resolve the uncertainty about the increase rule was excessive in my view and amounts to maladministration. The consequence of these failures is that Mr E has sustained serious distress over a prolonged period.

257. I concluded in the Preliminary Decision that an award of £1,000 would be appropriate for the serious distress and inconvenience Mr E has sustained. This is consistent with the level of distress and inconvenience award that has been offered by the Trustees. I remain of the view that £1,000 is appropriate in the circumstances.

Directions

258. Subject to section 91(6) of the PA 95 and as provided for below, the Trustees may recoup £6,554 (**the Recoverable Amount**) of the total overpayments of £90,934. However, the Trustees may not recoup the remainder of the overpayments amounting to £84,380.

259. I further direct that, subject to section 91(6) of the PA 95, the Recoverable Amount may be recouped from Mr E's future pension payments at a rate of £200 per calendar month.

260. If Mr E opts to make additional payment(s) towards reducing the balance of the Recoverable Amount, or agrees that any payment which would otherwise be made for distress and inconvenience should be applied for this purpose, the amount which may be recouped from his pension shall be reduced by the amount of these payments.

261. If at a future date Mr E can demonstrate, to the satisfaction of the Trustees, that his financial circumstances have deteriorated and the recovery of the overpayments at £200 a calendar month is unaffordable, the Trustees should consider whether it is still equitable to recoup the overpayments at that rate.

262. Unless Mr E agrees that the distress and inconvenience award of £1,000 should be applied towards reducing the Recoverable Amount, the Trustees shall, within 28 days of the date of this Determination, pay Mr E £1,000, in respect of the serious non-financial injustice Mr E has sustained as a consequence of maladministration on the part of the Trustees.

Dominic Harris

Pensions Ombudsman

19 April 2024

Appendix A

Pension figures detailed on Mr E's monthly payslips

Month	Pension (gross)
6 April 2012	£1,478.42
6 April 2013	£1,552.15
6 April 2014	£1,552.15
6 April 2015	£1,552.15
6 April 2016	£1,552.15
6 April 2017	£1,552.15
6 April 2018	£1,552.17
6 April 2019	£1,552.15
6 April 2020	£1,552.15
6 July 2020	£1,055.65
6 April 2021	£1,058.61
6 July 2021	£1,923.09*
6 April 2022	£1,077.77

* Includes arrears amounting to £853.38

Appendix B

A breakdown of the overpayments

Start Date	End Date	Pension Due	Pension Paid	Amount of Overpayment
01/12/1995	30/11/1996	£11,559.84	£11,559.84	£0.00
01/12/1996	30/11/1997	£11,559.84	£11,967.27	£407.43
01/12/1997	30/11/1998	£11,559.84	£12,182.00	£622.16
01/12/1998	30/11/1999	£11,559.84	£12,576.73	£1,016.89
01/12/1999	30/11/2000	£11,559.84	£12,937.37	£1,377.53
01/12/2000	30/11/2001	£11,559.84	£13,036.78	£1,476.94
01/12/2001	30/11/2002	£11,559.84	£13,424.66	£1,864.82
01/12/2002	30/11/2003	£11,559.84	£13,607.32	£2,047.48
01/12/2003	30/11/2004	£11,559.84	£13,796.44	£2,236.60
01/12/2004	30/11/2005	£11,618.43	£14,175.84	£2,557.41
01/12/2005	30/11/2006	£11,683.90	£14,609.44	£2,925.54
01/12/2006	30/11/2007	£11,743.65	£14,996.59	£3,252.94
01/12/2007	30/11/2008	£11,812.67	£15,538.59	£3,725.72
01/12/2008	30/11/2009	£11,884.18	£16,150.29	£4,266.11
01/12/2009	30/11/2010	£11,957.62	£16,954.55	£4,996.93
01/12/2010	30/11/2011	£11,957.62	£16,954.55	£4,996.93
01/12/2011	30/11/2012	£12,033.26	£17,739.99	£5,706.73
01/12/2012	30/11/2013	£12,111.17	£18,625.79	£6,514.62
01/12/2013	30/11/2014	£4,060.67	£6,207.60	£2,146.93
01/04/2014	31/03/2015	£12,264.39	£18,625.79	£6,361.40
01/04/2015	31/03/2016	£12,329.44	£18,625.79	£6,296.35
01/04/2016	31/03/2017	£12,352.58	£18,625.79	£6,273.21
01/04/2017	30/04/2018	£12,410.91	£18,625.79	£6,214.88
01/04/2018	30/04/2019	£12,500.15	£18,625.79	£6,125.64
01/04/2019	30/04/2020	£12,592.07	£18,625.79	£6,033.72
01/04/2020	30/06/2020	£3,166.96	£4,656.45	£1,489.49
Total				**£90,934**

Appendix C

Summary of Mr E's bank statements

2016	Month	Balance	Credits	Debits	Closing Balance
	July	£1,062.93	£2,818.63	£2,906.13	£997.43
	August	£570.93	£2,849.44	£3,048.73	£798.14
	Sept	£785.69	£3,876.38	£2,996.27	£1,678.25
	October	£1,678.25	£2,859.63	£3,425.66	£1,112.22
	November	£732.54	£3,184.13	£2,696.06	£1,600.29
	December	£1,543.29	£2,838.63	£3,653.73	£785.19

2017	Month	Balance	Credits	Debits	Balance
	January	£785.19	£2,818.63	£2,380.74	£1,223.08
	February	£1,223.08	£2,835.63	£2,898.05	£1,160.66
	March	£1,160.66	£2,818.63	£2,612.92	£1,366.37
	April	£1,366.37	£17,817.0	£6,828.50	£12,554.96
	May	£12,554.96	£16,903.7	£8,314.04	£21,144.71
	June	£21,144.71	£3,303.14	£9,230.98	£15,216.87
	July	£15,216.87	£3,496.28	£11,094.6	£7,618.46
	August	£7,599.46	£2,663.25	£2,890.29	£7,391.42
	September	£7,857.82	£3,692.78	£4,146.42	£6,937.68
	October	£6,937.68	£2,634.11	£2,381.10	£7,190.69
	November	£7,153.84	£2,843.86	£2,731.40	£7,303.15
	December	£7,288.13	£2,642.34	£1,604.60	£8,340.89

2018	Month	Balance	Credits	Debits	Balance
	January	£8,340.89	£2,622.38	£1,958.83	£9,004.44
	February	£8,989.42	£2,621.84	£2,028.21	£9,598.07
	March	£9,583.05	£2,621.29	£6,122.29	£6,097.07
	April	£6,097.07	£2,636.56	£3,324.64	£5,408.99
	May	£5,393.97	£2,662.73	£2,355.97	£5,715.75
	June	£5,698.65	£2,663.53	£2,922.43	£5,456.85
	July	£5,456.85	£2,698.03	£5,206.90	£2,947.98
	August	£2,930.88	£3,752.42	£2,595.17	£4,105.23
	September	£4,105.23	£2,680.78	£1,561.14	£5,224.87
	October	£5,207.77	£2,831.84	£2,091.42	£5,965.29
	November	£5,948.19	£1,980.29	£5,948.19	£6,877.08
	December	£6,877.08	£1,985.04	£6,877.08	£7,582.33

Summary of Mr E's bank statements

2019	Month	Balance	Credits	Debits	Closing Balance
	January	£7,582.33	£2,669.88	£1,674.95	£8,577.26
	February	£8,560.16	£2,670.08	£1,375.75	£9,871.59
	March	£9,854.49	£2,669.47	£5,472.07	£7,068.99
	April	£7,018.99	£2,675.14	£2,047.27	£7,696.86
	May	£7,679.76	£2,727.83	£1,886.18	£8,583.51
	June	£8,538.51	£2,668.50	£2,519.96	£8,687.05
	July	£8,668.67	£3,214.95	£4,200.06	£7,701.94
	August	£7,683.56	£3,788.29	£1,878.82	£9,611.41
	September	£9,611.41	£2,675.27	£2,329.73	£9,956.95
	October	£9,938.57	£2,675.12	£1,820.55	£10,811.52
	November	£10,793.14	£3,202.75	£1,879.40	£12,134.87
	December	£12,134.87	£2,932.42	£1,977.85	£13,089.44

2020	Month	Balance	Credits	Debits	Balance
	January	£13,089.44	£2,674.29	£2,009.80	£13,753.93
	February	£13,753.93	£2,690.45	£1,699.41	£14,744.97
	March	£14,744.97	£2,673.80	£1,710.33	£15,708.44

Appendix D

Mr E's household income and expenditure

Income	
Mr E's state pension	£664.52
Mrs E's state pension	£524.64
Mrs E's private pension	£288.02
Mr E's private pension	£921.31
Total	**£2,398.49**

Expenditure	
Mortgage	£747.75
Hearing aids	£83.33
Home Phone	£35.3
Sky TV	£48
Sky Protect	£16
Water	£50
Pet insurance	£22.80
Mobile phone	£15.60
Mobile insurance	£4
Electricity	£93
Council tax	£195
TV Licence	£13.25
Car Insurance	£70
Home Insurance	£9.41
Car service, Mot, road tax	£30
Food	£450
Petrol	£80
Cleaner	£104
Gardener	£40
Haircuts	£40
Treatments chiropodist etc	£80
Total	**£2,227.40**

Appendix E

CAS-55100-G3W9

The full text of the February 2013 Announcement, which was issued on headed paper by Dalriada the then independent trustee.

21 February 2013

Private and Confidential

Dear [.]

The BIC UK Pension Scheme

Following the transfer of administration services to Atkins & Co a discrepancy with the Scheme's governing documentation and administration practice was uncovered to how pensions increase in payment.

For the purposes of pension increases your pension is broken into up to 2 components prior to State Pension Age:

1. Pension earned before 6th April 1997 ("Pre 97");
2. Pension earned from 6 April 1997 ("Post 97").

and up to 4 components after State Pension Age:

1. Guaranteed Minimum Pension earned before 6th April 1988 ("Pre 88 GMP");
2. Guaranteed Minimum Pension earned between 6th April 1988 and 5 April 1997 ("Post 88 GMP");
3. Pension earned before 6 April 1997 in excess of GMP ("Pre 97 Excess")
4. Pension earned from 6 April 1997 ("Post 97")

Since 1992, the administrative practice has been to increase Pre 97 and Pre 1997 Excess by 5% per annum or the increase in the Retail Prices Index ("RPI") if less. However, the Trustees and Employer have received opposing advice as to whether the payment of these increases was in accordance with the Scheme Rules and therefore uncertainty has arisen as to whether members are entitled to be paid these increases.

The Trustees are investigating this matter and are taking appropriate legal advice. The Company, BIC UK Ltd, is also taking legal advice independently and we are working together to come to a conclusion.

As the Trustees can only pay benefits in line with the Scheme Rules, it will be necessary to suspend increases to Pre 97 and Pre 97 Excess pensions until the matter is resolved. The suspension is effective from 6 March 2013 and will only affect future increases. The Company has agreed that there should be no deductions, at this time, for increases already applied that may not have been paid in line with Scheme rules.

Should it be concluded that members are entitled to suspended increases they will be re-instated and fully backdated.

We would like to make it clear that your retirement pension will continue to be paid in the usual way. The suspension of payments only relates to future increases to Pre97 and Pre97 Excess pensions at this time.

Please contact me should you have any questions.

Yours sincerely

[…]

On behalf of Dalriada Trustees Limited”