PO-17403

Ombudsman's Determination

Applicant	Professor G
Ombudsman	The expressions Ombudsman or Pensions Ombudsman shall, where the context so requires, include references to the Deputy Pensions Ombudsman
Scheme	NHS Pension Scheme (**the Scheme**)
Respondents	East London NHS Foundation Trust (**the Trust**)
	NHS Business Service Authority (**NHS BSA**)

Complaint summary

1. Professor G's complaint is that NHS BSA has refused to honour its promise to re-admit him into the Scheme from 2001. Professor G claims that he should be entitled to benefits for his service from 2001, irrespective of whether NHS BSA's promise to allow him to be readmitted to membership of the Scheme on an exceptional basis was made in error because it had no power to promise to provide benefits other than in accordance with the NHS Pension Regulations 1995 (SI 1995/300) (**the Regulations**).

2. NHS BSA also acted negligently in telling the Trust and Professor G that he could be readmitted to membership of the Scheme from 2001 despite the fact that NHS BSA had no legal power to permit this.

3. Further, he claims that if he was not entitled to admittance in 2001, the Trust, upon his employment, misrepresented his contractual rights and acted negligently.

Summary of the Deputy Pensions Ombudsman's Determination and reasons

4. Professor G has sustained injustice as a consequence of maladministration (involving infringements of various legal rights) by NHS BSA.

5. NHS BSA:

   5.1. told Professor G on 20 May 2002 and also the Trust, that Professor G could exceptionally remain and continue to pay contributions to the Scheme even though he had attained age 60 and continuing membership of the Scheme was

not permitted under the Regulations. This was negligent and amounted to a negligent statement/misrepresentation;

5.2. was in breach of its statutory duty to administer the Scheme in accordance with the Regulations, and also in breach of a concurrent ongoing duty of care in negligence to provide the correct benefits under the Scheme, by administering the Scheme on the basis that Professor G was entitled to be a member for the period from 20th May 2001 to 10th October 2014, when he was not in fact eligible; and

5.3. was in breach of its duty of care in negligence to administer the Scheme in accordance with the rules by accepting contributions up to 2006 and issuing further documentation to Professor G indicating that he was an active member of the Scheme during the period from 01 February 2001 until 10th October 2014 (in particular the 10 September 2004 estimate issued to Professor G's financial adviser and the June 2010 statement in relation to Professor G's right to join the 2008 Scheme).

6. I also find separately that there have been various breaches of law by NHS BSA in relation to the administration of Professor G's pension as detailed in paragraphs 5.1 to 5.3 above.

7. The complaint against the Trust is not upheld:

7.1. The Trust is not in breach of contract (nor is there a contractual estoppel arising) by the Trust failing to give effect to the terms of Professor G's contract which purportedly said Professor G was able to join the Scheme when he was re-employed in 2001. The contract, if one exists, is legally unenforceable as it is vitiated on grounds of common mistake that Professor G could, under the Regulations, re-join the Scheme; and

7.2. no findings against the Trust have been made in negligence concerning the statement made in 2001, as such a claim is time barred and in any event no loss arose, and the Trust is not liable in negligence regarding information provided to Professor G about his ability to join the Scheme in 2002, as it was reasonable for the Trust to rely on the confirmation from NHS BSA that this was possible.

8. I also find that NHS BSA is liable to pay Professor G the amounts set out in the Directions (paragraphs 272-277 below).

Detailed Determination

Material facts

9. Professor G was a deferred member of the 1995 Section of the Scheme following the cessation of his NHS employment and Scheme membership in September 1985. During the period from September 1985 to 19 February 2001 Professor G was employed in honorary and unpaid capacities except for a brief paid period as a part-time general practitioner in 1985.

10. On 23 April 2000, Professor G reached age 60 and he became a pensioner member. He became entitled to access his deferred pension benefits under Rule L1(Preserved pension), and his preserved pension under the 1995 Section of the Scheme should have come into payment from age 60. There was no power to defer payment of the pension beyond age 60. Under the Regulations, he was not entitled to re-join the Scheme. This was pursuant to Regulation B3(2) of the Regulations, which stated that:

> "Persons whose pensions under the scheme are payable may not contribute to or accrue further pensionable service under the scheme."[1]

11. There are some specified circumstances where this is permitted, but these were not applicable in Professor G's case.

12. On 19 February 2001, the Trust offered Professor G a permanent appointment. His contract of employment dated 19 February 2001, stated at Clause 4:

> "**Superannuation**
>
> Your appointment does allow you to become a member of the National Health Service Superannuation Scheme although membership is voluntary. Payments will automatically be deducted at source from your salary. If you wish to opt out of the scheme, the payroll service, NSA should be contacted so that appropriate arrangements can be made.
>
> The broad principles of the scheme are explained in the booklet enclosed. Should you opt to become a member of the National Health Service Superannuation Scheme, your employment will be contracted out of the State Pension Scheme (SERPS)."

13. At this time, the employer contribution rate was 5%. From 1 April 2001, the employer contribution increased to 7%. The Scheme however provided defined benefits, so the level of contribution was not relevant to the benefit payable.

14. In April 2002, Professor G's financial adviser made enquiries with what was then known as the NHS Pensions Agency, now NHS BSA, about his pension entitlement.

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[1] Professor G would also not have been able to join the 2008 Scheme from 1st April 2008 under the NHS Pension Regulations 2008, as to do so he would have needed to have been an active member of the 1995 Section of the Scheme on or after 1 April 2008.

15. On 20 May 2002, NHS BSA responded to Professor G's financial adviser. NHS BSA explained that Professor G had been enrolled into the Scheme in error and because his preserved pension had been payable since age 60, he was not entitled to re-enrol in the Scheme. NHS BSA then stated:

> "However, due to the particular circumstances of Dr G's case, it is possible to give him the following options:
>
> - To take his preserved benefits from age 60 and have a refund of his pension contributions with Bedfordshire & Luton Community NHS Trust (already paid).
>
> - To continue to pay contributions to this Scheme, on an exceptional basis, for as long as this employment with Bedfordshire & Luton Community NHS Trust continues."

16. On 15 July 2002, NHS BSA also wrote to Professor G, in similar terms to the letter of 20 May 2002 sent to his financial adviser. NHS BSA stated that Professor G was not eligible to join the Scheme because at age 60, he had less than 9 years' service in the Scheme. To be eligible to purchase any additional service he would have had to have more than 9 years in the scheme at age 60[2]. NHS BSA then stated:

> "It is not possible for the Pensions Agency to give you financial advice, we can only inform you of the options available to you. These are as follows:
>
> 1. To take your preserved benefits from age 60, and have a refund of his pension contributions with Bedfordshire & Luton Community NHS Trust (already paid) This means that with the appropriate cost of living increases you would have received total benefits of
>
>   Pension £2271.04 a year
>
>   Lump sum £6813.12
>
>   Widow's pension £1135.52
>
> 2. To continue to pay contributions to this Scheme, on an exceptional basis, for as long as this employment with Bedfordshire & Luton Community NHS Trust continues. This means the totals of your current benefits at 31.05.2002, including the cost of living on your practitioner benefits are:
>
>   Pension £9491.99 a year
>
>   Lump Sum £28475.97
>
>   Widow's pension £4746 a year,

[2] We are unable to find any legal basis for the statement. It was correct however that Professor G could not re-join the Scheme for the reasons set out in paragraph 15 above.

Will you please let me know how you wish to proceed in this matter. A pre-paid envelope is enclosed for your reply".

17. Professor G opted to continue paying contributions and remain enrolled in the Scheme.

18. Around this time the Trust had peremptorily refunded his contributions up to that point, but on deciding to remain enrolled in the Scheme, a payment plan was set up whereby Professor G repaid the contributions. The arrears were repaid by March 2003.

19. On 10 September 2004, NHS BSA provided Professor G's financial adviser with an estimate of his pension benefits at age 70. This was forwarded to Professor G. This statement confirmed that the current value of benefits would provide a lump sum of £36,958, plus a pension of £12,319 with a 50% widow's pension. The estimate stated that for every year after that date the lump sum would increase by approximately £3,244 per annum and the pension by £1,081 pa. The NHS BSA statement, while intended to be an estimate, showed that Professor G was an active member and accruing benefits in the Scheme.

20. As of 28 February 2006, Professor G's employee contributions stopped. This appears to have been a mistake following a change in the Trust's payroll provider. There is no evidence it was due to the Trust realising that Professor G should not have been readmitted to membership of the Scheme. Professor G has said he did not notice that the contributions had stopped being deducted from his pay. Professor G was not notified by the Trust or NHS BSA that contributions had been stopped at the time. If Professor G had been treated as an early leaver an early leaver statement should have been issued giving details of his preserved benefits in the Scheme.

21. On 24 May 2007, NHS BSA provided Professor G's financial adviser with an updated benefit statement showing the value of his benefits at that time. The benefit statement also confirmed that Professor G had accrued benefits for the period from 01 February 2001 to 31 March 2006 and the value of his benefits was calculated on this basis.

22. In June 2010, NHS BSA wrote to Professor G with a further statement of benefits. The reason for this statement was to enable Professor G to make a decision whether to remain in the 1995 Section or join the 2008 Section. The statement gives Professor G details of his estimated benefits on 24 June 2010 if he opted to remain in the 1995 Section or join the 2008 Section. The statement stated that the total membership figure for the 1995 Section was 17 years two hundred days, and showed an annual pension of £21,596 and a lump sum of £64,788.

23. On 1 April 2014, the employer contribution rate increased to 14%.

24. On 10 October 2014, NHS BSA wrote to Professor G to explain that he had been ineligible to be a member and that his contributions between February 2001 and February 2006, should not have been accepted, so the contributions would be refunded. The offer to continue as a member should not have been made as there was no provision for this within the Regulations.

25. Professor G subsequently complained to both NHS BSA and the Trust.

26. On 12 February 2015, the Trust wrote to Professor G commenting on the circumstances. It explained that it did not have full records for the period in question, but pension contributions had been made until March 2006 at which point, they ceased. This event occurred at the time of a change in payroll system, and it was possible that the transfer had resulted in the pension deduction instruction being dropped at that time.

27. On 16 February 2015, NHS BSA responded to the complaint at stage 1 of the Internal Dispute Resolution Procedure (**IDRP**). It concluded that as the offer made for Professor G to remain enrolled in the Scheme was invalid and could not be honoured, it would need to refund the contributions made. In respect of distress and inconvenience suffered, it offered £250.

28. On 1 April 2015, the employer contribution increased to 14.3%.

29. Professor G appealed this decision arguing that the offer to remain in the Scheme was binding. Even if it had been made in error, it was a contract, and was legally binding on NHS BSA. He had relied upon this pension to fund his retirement and he had made no alternative arrangements. In doing so, he had acted in good faith.

30. Professor G stated that he had recently discovered that his pension contributions had ceased in 2006, although his payslips continued to refer to "pensionable pay". He states: "had I read the sections of the payslip more carefully, I should have noticed that the pension contributions were zero from that time."

31. On 15 September 2015, NHS BSA issued its IDRP stage 2 decision. It upheld the complaint and offered Professor G £1,000 for the loss of expectation suffered. However, it said it could not honour the pension claimed by Professor G. He was not entitled under the Scheme to pension benefits for his post 2001 employment and the Regulations allowed for no payment of benefits where there is no entitlement. It offered Professor G a refund of contributions plus interest. Professor G did not accept NHS BSA's decision, and he referred his complaint to the Pensions Ombudsman (TPO). He remains employed by the Trust and has not yet taken any benefits from the Scheme.

Summary of Professor G's position

32. He entered into a contract with the Trust which provided an unequivocal statement that he was entitled to membership of the Scheme. When it was established that his employment would not be treated as pensionable, that contract was breached.

33. The Trust's representation that he was entitled to membership of the Scheme also amounted to negligent misstatement. The Trust should therefore pay Professor G damages for breach of contract and negligent misstatement equivalent to the benefits he would have received had his employment been pensionable.

34. The complaint against NHS BSA should succeed on the basis of estoppel by representation and/or promissory estoppel. The promise and statements, confirming

his benefits, were clear and unequivocal that he was a member and therefore entitled to benefits.

35. On the basis of those statements, Professor G contributed to the Scheme and made no alternative arrangements. It was reasonable for Professor G to have relied upon the statements, especially as the offer had been made following additional consideration by NHS BSA, and when it was entirely aware that Professor G was ineligible.

36. As a result of NHS BSA's error Professor G will suffer clear detriment as he was given no opportunity to make alternative arrangements and cannot now make up the lost opportunity.

37. The circumstances show that it would be unconscionable to allow NHS BSA to renege from the contract and its representation.

38. Although NHS BSA cannot, due to its rules, pay Professor G a pension from the Scheme, it should compensate him in full so that it fulfils its unequivocal promise outside any binding rules, or alternatively, the rules should be changed. If necessary, NHS BSA shall pay Professor G a sum of money sufficient for him to purchase, from an alternative provider, equivalent benefits to those he would have obtained under the Scheme.

39. The claim should also succeed because of the negligent misstatement made by NHS BSA. NHS BSA owed Professor G a duty of care when communicating with him about his entitlement. This was breached by the false statements NHS BSA made on 20 May 2002 and 15 July 2002. Those statements were relied upon by Professor G and in turn he has suffered a financial loss. Had he been given the correct information he would have redirected his contributions into a Self-Invested Personal Pension Plan (**SIPP**), and as of 2008, when he would have been entitled to join the 2008 Section of the Scheme, he would have done so.

40. Professor G's complaint is not just a complaint about pure maladministration, rather his complaint discloses a breach of his legal rights and is founded upon breach of contract; estoppel by representation and/or promissory estoppel; and negligent misstatement. [3]

41. If NHS BSA and the Trust had not misinformed him of his eligibility to re-join the Scheme, he would have negotiated a salary increase of at least 14.3% to compensate for the loss of employer's contributions and would have immediately started contributing to a SIPP or taken out alternative life insurance. He seeks compensation

[3] In effect Professor G is making a complaint that he has sustained both non-financial injustice (distress and inconvenience) and also that he has sustained financial injustice as a consequence of maladministration by NHS BSA involving various infringements of legal rights (which would fall within my jurisdiction under section 146(1)(a) PSA 93) and also has referred various disputes of law to me which I have jurisdiction to investigate under section 146(1)(c) PSA 93. It is well established that there is overlap between the Ombudsman's powers to investigate and determine complaints of maladministration under section 146(1)(a) PSA 93 and the Ombudsman's jurisdiction to investigate disputes of law. Also, maladministration will often involve a breach of law or infringement of a legal right although the expressions maladministration and breach of law are neither synonymous nor co-terminous (see for example Westminster City Council v Haywood [1996] 2 All ER 467 and Hillsdown Holdings v Pensions Ombudsman [1997] 1 All ER 842 at [73]).

of £452,615.00, which he submits is the amount required to establish a fund equivalent to his NHS pension. NHS BSA's settlement offer does not adequately compensate him for his loss, and he is also entitled to an award for the distress and inconvenience which he has suffered.

42. He has not yet taken pension benefits from the Scheme, because he remains in NHS employment, with a not insignificant salary. At present he does not require any additional income and, as he understands it, to take benefits now is likely to have adverse tax consequences given the level of his income.

43. He did not realise that contributions had stopped in 2006 because his payslips continued to refer to pensionable salary. He understood this meant his salary continued to be pensionable. Additionally, his monthly income was inconsistent and changed dependent on the hours worked, along with other deductions. In these circumstances he cannot have been expected to notice the lack of contributions. Professor G was not issued with any notification at the time by NHS BSA telling him that had been treated as an early leaver or should never have been re-admitted to membership of the Scheme.

44. If NHS BSA requires any information in order to follow the Ombudsman's directions, he will provide it directly.

45. Professor G accepts that he may be liable for missed employee contributions. It may be feasible for any redress payable to be set off against outstanding contributions.

46. Regardless of the Trust's liability to pay employer contributions, this has no bearing on NHS BSA's liability to provide him with a pension. There should be no requirement for the Trust to make those contributions in order for him to receive the due pension.

Negligent misstatement

47. As the Scheme administrator, and in all the circumstances, NHS BSA owed Professor G a duty of care to provide information about his pension entitlement, and it was reasonable for him to rely on the information provided given NHS BSA's skill and knowledge as the administrator. This would include only allowing eligible individuals to contribute and benefit from the Scheme.

48. Additionally, NHS BSA was under a statutory duty to provide members with information about their benefits, and all such statements issued to Professor G on this basis were obviously intended to enable him to make decisions about retirement and the terms of his employment.

49. By allowing Professor G to re-join the Scheme despite being over 60 and agreeing with him that it would provide a pension, NHS BSA breached its duty of care to provide the correct entitlement. It is irrelevant in a case of negligent misstatement that NHS BSA did not have the power to provide the promised benefit.

50. The case is equivalent to an overpayment case where similarly, the Scheme would not have the power to have made the overpayment, but nevertheless, the individual may have detrimentally relied upon statements relating to the overpayment.

51. NHS BSA has argued in its supplementary submissions following the issue of the Second Preliminary Decision that a breach of statutory duty does not give rise to a liability to pay damages, however that is not an issue that the Ombudsman needs to consider in the case of negligent misstatement. In the case of a statutory duty the Ombudsman can assess the standard of care in the circumstances and informed by the statutory duty.

52. Contrary to the arguments advanced by NHS BSA in its supplementary submissions following the issue of the Second Preliminary Decision, there is nothing difficult or unusual about the negligent misstatement in this case. NHS BSA was under an established duty of care to provide correct information and it is fair, just and reasonable to impose it here. The duty to assess someone's eligibility to join the Scheme, and whether there was any discretion, is a fundamental rule and there can be no sensible suggestion that it did not have a duty to understand this.

53. The existence of this duty is demonstrated in the High Court decision of Corsham v Police and Crime Commissioner for Essex [2019] EWHC 1776 (Ch) (**Corsham**). In that case the members were re-engaged by the police force immediately following retirement resulting in a 40% tax charge, and they had not been informed of this. The decision in that case was that there was a duty of care and that they should have been informed of the tax liability.

54. The case relied upon the House of Lords decision in Customs and Excise Commissioners v Barclays Bank plc [2007] 1 AC 181, to explain the law of negligent misstatement. Specifically, the decision outlined three approaches a court might take when assessing possible liability for negligent misstatement causing financial loss:

    54.1. Whether the defendant assumed (or is to be treated as having assumed) responsibility for the statement;

    54.2. Whether the facts satisfied a threefold test of reasonable foreseeability, of proximity and the imposition of liability being fair, just and reasonable; and,

    54.3. Whether a finding of liability involved an incremental development of the law from earlier cases establishing liability for negligence.

55. In the context of Professor G's complaint:-

    55.1. NHS BSA, as the Scheme administrator, plainly assumed responsibility for the statement that Professor G could join the Scheme in 2002.

    55.2. It was reasonably foreseeable that Professor G would plan his retirement based on information he was given by the Scheme administrator, the relationship is sufficiently proximate to give rise to that duty, and it is fair, just and reasonable

to impose liability. The NHS BSA has not given any reason as to why it is not fair, just and reasonable for the duty to be imposed.

55.3. There is no incremental development of the law alongside the High Court's decision in Corsham.

56. The Ombudsman's findings of fact on these points in the earlier Second Preliminary Decision are permissible and so the decision on negligent misstatement should stand.

57. NHS BSA has argued that the statutory bar on Professor G's enrolment into the Scheme is the crucial consideration, and that the suggestion of a duty of care is an attempt to circumvent the statutory bar. The correct view is that in the case of a breach of duty of care which results in loss and damage, then that act, or omission is negligent.

58. Corsham is relevant as there was a statutory bar in the form of a tax penalty if they returned to police employment, and the scheme had no power over HMRC's regulations. But this did not prevent a duty being imposed that the scheme provides correct information about the tax position to allow the officers to take this into account.

59. Negligent misstatement, crucially, is typically applied when something that does not exist is negligently represented as existing, as is the case here.

60. There is no question, that the representation made by NHS BSA to Professor G was not a representation. NHS BSA has sought to argue it was not a representation, but an "offer or promise", but the representation in this case is clear, that Professor G could join the Scheme. This was a false statement made negligently.

61. Professor G confirms that he relied upon the statement to his detriment. Even if NHS BSA now says that it also relied upon it, this negligence is just further proof of its own negligence given that it ought reasonably to have known the rules of the Scheme that it administers.

62. NHS BSA refers to mistake; however, mistake is a means of voiding a contract, and yet the Ombudsman has said that there was no contractual relationship between it and Professor G. It is unlikely that this can apply in any way or at all. Alternatively, if NHS BSA contends that a mistake cannot found an action for negligent misstatement, then that is wrong in law.

63. The Corsham decision assessed loss by addressing three questions taken from Hagan v ICI Chemicals & Polymers Ltd [2002] Pens LR 1 and Thomas v Albutt [2015] PNLR 29, in the affirmative:

63.1. Was the statement relied upon by the claimant(s)?

63.2. Was it reasonable to rely on the statement?

63.3. Would they have acted differently if they had been told the correct position?

64. Professor G confirms that each of the questions should be answered in the affirmative.

65. In respect of alleged contributory negligence on the part of Professor G, after 2006 he continued to receive statements as if he were an active member of the Scheme and in the course of the IDRP, NHS BSA accepted that Professor G was without fault and it should not now be entitled to resile from that position.

Estoppel

66. Professor G does not agree with NHS BSA's supplementary submissions in respect of estoppel following the Second Preliminary Decision (these submissions are summarised at paragraphs 133-140 below). Estoppel by representation, as would apply in this context, is distinct from the doctrine of equitable estoppel, and estoppel by convention does not apply in this case.

67. The decision in Catchpole v Trustees of the Alitalia Airlines Pension Scheme [2010] ICR 1405, is a permissible approach to this case. Broadly in Catchpole the member was given inaccurate information that his partner needed to be married to him to receive benefits under a trust based occupational pension scheme following his death. This was not correct. The court held that the partner had a right to the benefits on the basis of estoppel by representation as the requirements for such an estoppel as set out in Steria v Hutchinson [2006] 64 PBLR at [91]-[94], were satisfied.

68. Estoppel by convention prevents one party from asserting that the shared mistaken assumption is not true. In this case, that would be in Professor G's favour as it is NHS BSA which seeks to resile from the mistake to his detriment. The circumstances in which an estoppel by convention can arise are summarised in Briggs J in HMC v Benchdollar [2009] EWHC 1310, 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].

69. In this context, NHS BSA's statement on 20 May 2002, was clearly a representation for the purposes of estoppel or negligent misstatement.

70. This representation was relied upon by Professor G to his detriment, which is sufficient to establish an estoppel. NHS BSA's mistake as to its powers is not a relevant consideration in negligence or legitimate expectation but could be relevant to estoppel by convention. However, this does not apply in this case, see paragraph 66 above.

71. Although it appears that the Ombudsman does not have the power to direct an *ultra vires* payment on the basis of estoppel, Professor G contends that Catchpole is relevant.

72. Finally, in Tinkler v HMRC [2022] AC 866, in a purposive interpretation of the relevant Act, the Supreme Court found that there was nothing in the Act to prevent HMRC from being able to rely on an estoppel by convention, despite there being a statutory bar as to the validity of service. Therefore, consideration of the statutory provision requires

scrutiny of the underlying purpose of the statute itself. It is incorrect to assert that a statutory bar under one cause of action is relevant to others.

Legitimate Expectation

73. Legitimate expectation can be described as analogous in public law to the private law doctrine of estoppel. The case law makes clear that an unlawful promise made by a public authority can give rise to a legitimate expectation, even in the circumstances where the promise is unenforceable, that the individual's reliance on the promise should be taken into account and other means of compensation, including monetary should be considered (R (Bibi) v Newham London Borough Council [2001] EWCA Civ 607 at [56]; see also Rowland v Environment Agency [2003] EWCA Civ 1885 (Rowland).

74. In Rowland, it was decided that a legitimate expectation that a waterway was private had arisen despite it being contrary to statute, and there was no discretion for the public body to allow otherwise.

75. The Court of Appeal in Rowland found that an *ultra vires* promise could give rise to a legitimate expectation, and in keeping with Pine Valley Developments v Ireland (1992) 14 EHRR 319, that legitimate expectation could be a possession for the purposes of Article 1 of the First Protocol (**A1/P1**) of the European Convention on Human Rights (**ECHR**) and a claim for damages under s8 Human Rights Act 1998 could be submitted, but a legitimate expectation could also arise under common law.

76. Where a clear, unambiguous assurance is given and it was reasonable for it to be relied upon, the second test is whether the public authority has frustrated the legitimate expectation and whether that was so unfair as to amount to an abuse of power. As in the case of R(Majed) v London Borough of Camden [1009] EWCA Civ 1029, such an abuse of power does not have to involve bad faith; incompetence or negligence is sufficient, as in this case.

77. Relevant to the issue of an abuse of power include the importance of the benefit to the individual; whether the reliance was detrimental; the context of the promise; and the extent of any countervailing public interest. Professor G highlights that NHS BSA has provided no countervailing public interest.

78. NHS BSA's suggestion in its supplementary submissions following the Preliminary Decision that the Ombudsman is trying to "magic up possessions for the purposes of A1/P1 when the operation of the statutory bar prevents property rights arising at all", is contrary to the relevant case law.

79. The Ombudsman can direct financial compensation attributable to the injustice of the promise being, according to NHS BSA, subject to a statutory bar. It is notable that the promise was made in spite of the statutory bar.

80. The central question is what Professor G would have done had he known the correct position, but this is only relevant to the negligent misstatement claim. The measure of damages for a legitimate expectation claim is distinct.

81. PO-18140, as cited by NHS BSA, is significantly different from Professor G's case, being about a pension put into payment without the member's knowledge and where it could not be delayed, and the tax liability that arose from this.

82. Professor G considers that if a promise has been made and confirmed on more than one occasion, the party should be held to fulfil that promise or compensate in full for the failure to do so. This would be fair and just. He trusts the Ombudsman to make a Determination that is fair and just.

Summary of the Trust's position

83. As the responsibility to pay Professor G a pension, if any, does not fall to the Trust, it is unclear what redress, if any, can be ordered against it.

84. It is accepted that the words "Your appointment does allow you to become a member of the National Health Service Superannuation Scheme although membership is voluntary" in the contract of employment amounted to a contractual term. It is also accepted that Professor G's contract did not expressly state that his entitlement to membership of the Scheme depended on certain eligibility criteria. However, the question of eligibility was subject to an implied term. Professor G's contract stated that "The broad principles of the Scheme are explained in the booklet enclosed." The term "broad principles" provided a clear indication that the booklet did not include the full terms and conditions of the Scheme and it was incumbent on Professor G to investigate those terms and conditions. It was an implied term of the contract that Scheme membership was subject to full (and separate) terms and conditions extraneous to the contract.

85. The interpretation of Clause 4 of the contract of employment is disputed. The contract, as stated, "allowed" Professor G to join the Scheme on accepting employment, but it did not make membership and benefits from the Scheme a contractual term. The employment was merely the gateway to accessing the Scheme. The plain meaning of Clause 4 is that Professor G's employment provided him access to the Scheme; membership and/or any benefit of the Scheme was not a contractual term.

86. There was no express or implied term within the contract that Professor G's employment would be pensionable. That is a point for NHS BSA to determine, and not within the gift of the Trust to give. There can be and was no intention to create legal relations on this issue.

87. Even if Professor G was able to demonstrate a breach of contract, the Trust had performed its requirements under the contract by paying the employer contributions to the Scheme. Therefore, the Trust is not liable for the financial redress Professor G seeks.

88. Professor G's complaint relates to an alleged breach of contract in 2001. Any breach of contract would have crystallised in February 2001 when the contract with the Trust was formed. This is because Professor G's complaint is that it was a contractual term that he would gain legitimate membership of the Scheme. The breach occurred at the time the contract was formed as Professor G never gained or was capable of gaining legitimate membership of the Scheme. Professor G did not present his breach of contract claim within six years commencing in February 2001, therefore the complaint is statute barred under section 5 of the Limitation Act 1980 (**the Limitation Act**).

89. The complaints concerning negligent misstatement and estoppel by representation are directed at NHS BSA and the Trust does not comment on those matters:

> "…the only implied term that could reasonably be considered to apply in the circumstances is for the Trust to be obliged to make relevant contributions properly payable to the NHS Pension Scheme, as this is the only scheme referred to in the relevant offer letter."

90. As Professor G was not entitled to join the Scheme, there is no legal basis to imply that the Trust was required to make contributions for his period of erroneous membership or to contribute to putting him into the correct position but for NHS BSA's error. As NHS BSA's error cannot have been contemplated by the parties to the contract, such a responsibility for the Trust to meet the costs in this scenario cannot have been implied. Had it been considered at the time, the parties would have agreed that the Trust would not be responsible, a position so obvious it goes without saying.

91. The only possible implied contractual obligation was for the Trust to make properly payable employer contributions to the Scheme. Any implied wording must be viewed in the context of the express wording, and a reasonable interpretation is that the contract provided a gateway to the Scheme specifically, not to make employer contributions to any other pension arrangement.

92. If the complaint is upheld against NHS BSA and it is required to make payment of the full benefits to Professor G, then the failure to pay employer contributions is a loss suffered by NHS BSA, not Professor G. The Ombudsman should not make such a direction as NHS BSA is not a complainant. Any claim for employer contributions should be made by NHS BSA against the Trust.

93. Additionally, any such claim is based on NHS BSA's error. Had the error not occurred the Trust would not have been responsible for any contributions, and it should not take on additional liability arising from NHS BSA's mistake.

94. If the Trust is directed to make employer contributions this should be conditional on Professor G making the necessary employee contributions. Any access to the Scheme would be conditional on both the employer and employee making contributions and the Trust should not be required to make contributions if Professor G does not.

95. Any direction to pay contributions should be limited at the point Professor G reached age 75, the upper age threshold for the Scheme.

96. If it is upheld that the Trust was in breach of contract by not making employer contributions between February/March 2006 and April 2015, the claim should be limited to 6 years as there would be a fresh breach of contract at each point the Trust failed to make the necessary contributions. The Ombudsman cannot make a direction that would not be made by the Courts and so Professor G can only claim missed contributions up to six years ago. Any missed contributions prior to that are out of time for the purposes of limitation and a direction for those missed contributions would be erroneous and outside of the Ombudsman's powers.

Summary of NHS BSA's position

97. It accepts that an error was made when Professor G was readmitted to the Scheme in 2001. Under Regulation B3 (2), having attained age sixty and therefore with benefits being payable, Professor G had no entitlement to make contributions or accrue further pensionable service in the Scheme, and NHS BSA had no authority to offer him further membership.

98. The Trust should not have submitted Professor G's joiner details, which was contrary to a long-standing position that re-employed pensioners cannot re-join the Scheme. The Trust ought to have been aware of that fact.

99. At the time Professor G was re-employed, there was no requirement for any alternative pension to be offered to him.

100. The misunderstanding should have been corrected in May 2002, and Professor G did have a reasonable expectation of accruing further service until March 2006.

101. Whilst it would not be a satisfactory outcome to Professor G for NHS BSA to purchase an annuity replicating the Scheme benefits on his behalf, NHS BSA has a duty to the public purse and this outcome may result in Professor G receiving more than he is legally entitled to. This may also result in NHS BSA paying out more than it has a duty to as Professor G's employer's contributions have been returned.

102. Further, such a direction by the Ombudsman would provide Professor G with a full remedy which NHS BSA is not under a duty to provide. In cases of pure maladministration, such as Professor G's case, the Ombudsman cannot direct a full remedy as there has been no breach of Professor G's legal rights. The refusal to grant Professor G further membership is in line with his entitlement.

103. Professor G has no right to further service within the Scheme so it would not be appropriate for NHS BSA to pay him, or arrange for him to be paid, a pension equivalent to what he would have received.

104. Had Professor G been told the correct position, and the maladministration not occurred, it is unclear how he would have invested his contributions differently.

105. Professor G had no reason to rely on the Scheme's death benefit, and it is unclear whether he has established any separate life cover since 2014. Additionally, Professor

G has refused to accept his refund of contributions since October 2014, and therefore missed investment opportunities since then.

106. The offer made to Professor G to remedy its error is appropriate in the circumstances. NHS BSA would:

106.1. Return Professor G's contributions, with interest;

106.2. Pay £1,000 for the distress and inconvenience caused; and

106.3. Backdate his pension entitlement to age 60, taking account of any increases, lump sum entitlement and paying interest.

107. Had Professor G been able to continue membership beyond 2001, he would not be entitled to the back payment of benefits, and these would only be paid on retirement or when he reached age 75, whichever was earlier.

108. At the point Professor G's payslips changed in 2006 and contributions stopped, NHS BSA considers that he should have become aware of the absence of contributions. Given his variable pay, this suggests he ought to have checked the payslips more carefully and it would be natural for an individual to check to ensure their salary is correct. The contributions were several hundred pounds each month, this was therefore a significant change to Professor G's monthly pay.

109. The offer of further membership in 2002 was described at the time as exceptional. Once contributions ceased it is reasonable to consider that the exceptional arrangement would cease. The Ombudsman should carefully consider the period post 2006.

110. NHS BSA accepts that it made a mistake, and it is not denying that error, but it must be corrected from 10 October 2014 onward, when it was identified.

111. If the Ombudsman concludes that Professor G should receive benefits equivalent to those he would have received from the Scheme, then it would be appropriate for the employer to pay the correct level of employer contributions.

112. The NHS has nationally agreed pay scales, but employers do agree higher pay rates as a recruitment and retention premium, in line with the needs of the service and scarcity of particular skills. In the event that Professor G was unable to join the Scheme and instead negotiated a high salary, the rate of premium would be a matter for agreement between Professor G and the Trust.

113. The employer contribution rate varied significantly over the years in question: 5% until 1 April 2001; 7% until 1 April 2014; 14% until 1 April 2015; and 14.3% onward.

114. From 1 April 2001, the Trust was required to provide an alternative pension arrangement where the employee was not entitled to join the Scheme. The employer might choose not to contribute, but that position might have changed at the point auto enrolment came into force.

115. It is the responsibility of the employer to calculate the contributions payable, as it has access to employment records, not NHS BSA.

116. NHS BSA disagrees with the legal analysis that it is liable to compensate Professor G for breach of a duty of care owed to him or that it has breached his right to property.

117. It submits that the Ombudsman is wrong in law to conclude that there was a duty of care at common law owed by NHS BSA.

118. It submits that the Ombudsman is wrong in concluding that Professor G had a "possession" arising from a legitimate expectation, breach of which gave rise to a cause of action in private law.

119. The correct analysis is that the dealings between NHS BSA and Professor G were based on a mistaken approach to the scheme and a mistaken offer by NHS BSA to Professor G to continue "exceptionally" contributing to the scheme after he turned sixty. It accepts that this was maladministration.

120. As a matter of law, this mistake and the contributions made by Professor G, which were based on it, between 2001 and 2006, give rise to an estoppel by convention because they both proceeded on the mistake. But for the statutory bar, NHS BSA would be estopped from denying the validity of the contributions and that they gave rise to a pension entitlement. However, the statutory bar defeats any estoppel. To circumvent the statutory bar by creating a duty of care in the law of negligence defeats the policy of the law in the field of equitable estoppel, which is the only remedy available to Professor G on the facts of the case.

121. It finds that neither the doctrine of legitimate expectation nor Professor G's rights under the Human Rights Act 1998, can improve his position in law where no private law cause of action arises. The rights guaranteed by the Human Rights Act 1998, do not give rise to additional duties of care in the law of negligence.

122. The approach in the decision to breach of statutory duty and liability for negligent omissions is misconceived.

<u>The Duty of Care Issues</u>

123. NHS BSA refers to paragraphs 5.1 to 5.3 of the Second Preliminary Decision and respectfully submits that each of these bases for a legal liability owed by NHS BSA is misconceived.

124. In respect of the breach of statutory duty, there is nothing in any of the Regulations' terms which gives rise to a statutory duty on NHS BSA, a breach of which would give rise to liability to pay damages. A statutory duty breach of which sounds in damages only arises if the express terms of legislation, or their necessary implication, give rise to such a right (Gorringe v. Calderdale MBC [2004] 1 WLR 1057) (**Gorringe**).

125. The House of Lords decision in Gorringe also made clear that it would be very unusual for "a common law duty to be founded simply upon the failure to provide some benefit

which a public authority has power to provide", i.e. there needs to be some overriding reason or policy why the law would impose a common law duty of care on a public body when Parliament has chosen not to impose a statutory duty, breach of which sounds in damages.

126. The existence of a common law duty of care in any case depends on a number of considerations such as a relationship of proximity between the parties and foreseeability of loss (Donoghue v. Stevenson [1932] AC 562). However, it must also be "fair, just and reasonable" to impose a duty of care on a person or body in any situation (Caparo Industries v. Dickman [1990] 2 AC 605), i.e. there will be reasons of legal or public policy why a duty of care should not arise in a particular situation, notwithstanding that the tests of proximity and foreseeability are satisfied.

127. It submits that this statement of the law has recently been approved by the UK Supreme Court in the context of public authority liability in Poole BC v. GN [2019] UKSC 25. In summary, public authorities do not owe a common law duty of care simply because they have statutory powers or duties. They may come under such a duty where they assume responsibility to a person but even then, only as far as the imposition of the duty is consistent with the relevant legislation and, implicitly, only where it is fair, just and reasonable for such a duty to arise.

128. In Manchester Building Society v. Grant Thornton UK LLP [2022] AC 783, the UK Supreme Court explained that as regards the tort of negligence, liability of a person or body involves six questions:

    128.1. the first of which is 'the actionability question'; and

    128.2. the second of which is the 'scope of duty question'.

129. There must be a duty of care before the question of its scope is reached. In turn, there will be cases where it is not fair, just and reasonable to impose a duty of care and one such situation must be where legal policy is against such a duty. The absence of an express or implied statutory duty is a weighty consideration pointing against a common law duty of care.

130. The existence and operation of the statutory bar in the Regulations is a decisive consideration against it being fair, just or reasonable to impose a common law duty of care on NHS BSA.

131. The Ombudsman is wrong to conclude that the circumstances arising from the dealings between Professor G and NHS BSA give rise to an actionable claim in negligence in the first place. This is because, in all the circumstances and in the absence of any express statutory duty under the Regulations, breach of which sounds in damages and the existence of the statutory bar, it is not fair, just and reasonable for any duty of care to arise.

132. The approach of the Ombudsman in the First and Second Preliminary Decisions, imputing liability to NHS BSA for an alleged omission, is not vouched by the authorities

and is a wholly unwarranted extension of the law to impose legal duties and liability on NHS BSA which the law of negligence does not support.

Estoppel

133. The Ombudsman discusses estoppel as a possible basis for a right arising in Professor G's favour in the Second Preliminary Decision but then rejects it because of the statutory bar. While this is the correct analysis, it is erroneous and contradictory to then circumvent the statutory bar by deciding that the basis of NHS BSA's liability rests on the law of negligence. Both of these decisions cannot be correct and the correct analysis of the circumstances of Professor G's case is under the equitable doctrine of estoppel by convention.

134. NHS BSA does not accept that the statement made on 20 May 2002, that "due to the particular circumstances of [Professor G's] case, it is possible to give him the following options…to continue to pay contributions to the Scheme, on an exceptional basis, for as long" as he continues to be employed by the Trust, amounts to a *representation* in the sense covered by the line of cases beginning with Hedley Byrne & Co Ltd v. Heller & Pts Ltd [1964] AC 465.

135. It submits that the statement made by NHS BSA on 20 May 2002, is not a statement on which Professor G *alone* relied. Rather, it was a mistaken statement about the powers of NHS BSA under the Scheme upon which both NHS BSA and Professor G relied, and which thereafter gave rise to a (mistaken) course of dealing between them, namely, contributions to the Scheme between 2001 and 2006.

136. The facts of Professor G's case are that NHS BSA made a mistake about its powers under the Regulations, in effect ignoring the statutory bar on new members joining over the age of 60. Relying on that mistake, both NHS BSA and Professor G, who reasonably relied on what he was mistakenly told, entered into a mistaken arrangement under which Professor G paid contributions to the Scheme for 5 years and NHS BSA treated him as being a member of the Scheme for a period when it should not have done (because it had no statutory power to do so).

137. These facts are not apt to be analysed in terms of the law of negligence, for the reasons already explained. Rather, the facts are correctly analysed as giving rise to an equitable estoppel because both NHS BSA and Professor G proceeded on the basis of a mistaken common assumption that he could be enrolled into the Scheme and contributions were paid and received between 2001 and 2006 on this erroneous basis.

138. In Tinkler v. HMRC [2022] AC 886, an estoppel by convention arises where there was a common assumption of fact or law by both the party raising the estoppel (Professor G) and the party estopped (NHS BSA) and the two parties dealt with each other subsequently based on the common assumption, following which a detriment is suffered by the party raising the estoppel. In this case, all other things being equal, NHS BSA would not be able to deny its statement or promise (on which both it and Professor G had relied) and in equity would be bound to honour it. It is well established

that an estoppel cannot arise where there is a statutory bar to its operation and so an estoppel cannot apply because it would undermine a statute.

139. It follows that equity does not assist Professor G in this case because of the statutory bar. In the circumstances where both NHS BSA and Professor G proceeded on a mistaken assumption about the Regulations and in ignorance of the statutory bar, no estoppel arises in Professor G's favour.

140. In summary, the statutory bar means that the doctrine of estoppel does not assist Professor G. Furthermore, given the fact of a mutual mistake by NHS BSA and Professor G upon which both proceeded, the law of negligence cannot assist Professor G because there was no 'representation' made by NHS BSA to Professor G and, in any event, it would not be fair, just and reasonable for a duty of care in negligence to arise.

Breach of Legitimate Expectation and Protocol 1, Article 1, of the European Convention on Human Rights

141. NHS BSA strongly disagrees with the Ombudsman's analysis in his Second Preliminary Decision as far as it is based on a liability for breach of Professor G's ECHR rights, as guaranteed by the Human Rights Act 1998, arising from a breach of a legitimate expectation possessed by Professor G that he was enrolled in the Scheme after 2001.

142. Firstly, the doctrine of legitimate expectation is a public law principle. In English law, a breach of public law principles does not give rise to independent causes of action for damages so there must be a private law cause of action.

143. For these reasons, Professor G does not have a remedy in estoppel nor a cause of action in negligence. The doctrine of legitimate expectation cannot give rise to a remedy in damages in the absence of a private law cause of action.

144. Secondly, the purpose of the Human Rights Act is not to create new causes of action in private law, save to the extent that the Act itself gives rise to a cause of action for breach of the ECHR rights. The Act does not require the domestic law of negligence, or the law on estoppel, to be adapted so as to accommodate new causes of action which domestic law does not already provide.

145. Thirdly, the cases relied on by the Ombudsman for the purposes of vouching breach of Professor G's A1/P1 right to property are far removed from the present case, for example Police & Crime Commissioner for Greater Manchester v. Butterworth [2017] 1 PBLR 20).

146. The conclusion that because Professor G was once a member of the Scheme, he therefore had a legitimate expectation based on the mistake of NHS BSA that he could again be enrolled in the Scheme in 2001, and that this gives rise to a possession for the purposes of A1/P1, even when no contributions were actually being made to the

scheme, is far-fetched[4]. It is no more than a subjective view of the law which is not supported by the case law cited.

147. In summary, there is no basis in the doctrine of legitimate expectation, nor in the law on A1/P1 of the ECHR, to support a free-standing private law claim for significant damages on the facts of Professor G's case.

Loss

148. NHS BSA submits that the only compensation to which Professor G is entitled is the return of his contributions to the Scheme made between 2001 and 2006, with interest, in addition to a sum to compensate him for maladministration.

149. It submits that an appropriate sum is £2,000, in line with the Ombudsman's published awards scale.

150. The approach proposed by the Ombudsman to loss arising from the decisions on breach of duty of care and breach of Professor G's A1/P1 rights is wrong in law. It leads to an exorbitant liability arising for NHS BSA and is not one which is supported by tort damages.

151. The correct approach to damages for negligence is to compensate for foreseeable loss. The starting point must be to put Professor G into the position he would have been in but for the mistaken statement on which he relied. The central question is what Professor G would have done regarding his pension arrangements if the Trust in 2001, or NHS BSA in May 2002, had correctly stated the legal position under the Regulations.

152. NHS BSA argues that it is likely that Professor G would have become a member of a stakeholder arrangement and invested contributions in a default investment fund.

153. In short, the measure of loss is not, as the decision wrongly asserts, what his return would have been if the mistaken advice had been correct; that is, if he could have contributed to the Scheme but for the statutory bar.

154. Secondly, the decision proceeds on a measure of loss under which Professor G is to be repaid both his contributions to the Scheme made between 2001 and 2006 and compensation for lost investment, on the basis that the contributions had been made and that he continued to be a member of the Scheme until 2014. This approach to loss amounts first to double recovery and is wrong in law as a basis for calculating tort damages. In addition, it leads to an inflated award of compensation to Professor G based on putative contributions which he never made and never could have made.

155. Thirdly, the decision on loss fails to take account of the reasons why Professor G has never claimed his pension benefits under the Scheme and the extent to which the tax implications of doing so have influenced him. The decision notes that Professor G did not claim pension benefits as payment would have been taxed at higher rates.

[4] The Ombudsman would note in relation to that statement that contributions were made to the Scheme until 2006 and the Scheme continued to be administered on the basis that Professor G was an active member as evidenced by various announcements issued to Professor G in the period up to 2014.

However, members of pension schemes cannot improve their position by choosing (or not choosing) payable dates for pension benefits so as to avoid paying tax. The Ombudsman has relied on this point in earlier decisions: see for example, PO-18140. If the Ombudsman continues to proceed on a negligence liability and measure of loss on that basis, it is erroneous to allow Professor G a favourable position in terms of his loss by accumulation of pension benefits continuing because of his decision to avoid payment of pension benefits for tax reasons.

156. Fourthly, the decision fails to attribute any fault to Professor G arising from his failure properly to check his salary statements and to notice that contributions to the Scheme ceased in 2006. Given Professor G's education, the facts that he had previously been a member of the Scheme, that he returned to it at the age of 60 and was motivated to some extent by making contributions to a pension scheme, it is not reasonable that Professor G never noticed, at any point after 2006 that his contributions had ceased. This amounts to contributory negligence and must be the basis for a reduction in the liability of NHS BSA under the Ombudsman's approach to compensation.

157. Finally, assuming for the purposes of this alternative submission that breach of Professor G's A1/P1 right is the Ombudsman's preferred approach to the measure of damages, it is well-established that a breach of ECHR rights under the HRA does not give rise to damages assessed on tort principles. The correct approach to HRA damages is adopted by the Strasbourg court, which makes awards of damages for breach of ECHR rights according to principles of ensuring 'just satisfaction'. In summary, this approach is more akin to compensation for maladministration by the Ombudsman under the published award scales for maladministration rather than large compensatory awards which are made by the courts in negligence cases.

158. In summary, even on the erroneous approach to the law taken in the decision, the approach to loss is wrong in law and leads to an overly generous approach to calculating Professor G's loss which he would not be able to obtain in court.

Conclusions

Table of headings

A Contract and Contractual Estoppel

A.1 The Trust – contract arguments

159. In relation to the issue of contract, the contract of employment stated originally (and incorrectly) in 2001 that Professor G's appointment allowed him to become a member of the Scheme. It was later established in 2002 that Professor G's circumstances were such that he should not have been offered membership of the Scheme. However, NHS BSA advised Professor G (and presumably also the Trust) in 2002, when the mistake was discovered, that exceptionally Professor G could have the option of either having his pension commence at age 60 or remaining in the Scheme. So, the Trust must have agreed that Professor G could be permitted to re-join the Scheme as it then deducted employee contributions and paid employer contributions until 6th April 2006 (when the contributions appear to have been stopped by the payroll function in error). There is no evidence that the contributions were stopped as a result of any realisation by the Trust that Professor G should not have been allowed to re-join the Scheme.

160. It is my view that under general contract law, any contract between The Trust and Professor G (to the extent it exists), will be vitiated by common mistake. Both parties proceeded on a common mistaken assumption (as a result of inaccurate information provided by NHS BSA) that it was possible under the Regulations for Professor G to re-join the Scheme. There is no evidence that Professor G and the Trust realised that, if Professor G was allowed to re-join the Scheme, NHS BSA would be acting outside of the Regulations (even assuming it has the authority to do so, which it did not). Professor G cannot therefore have an enforceable claim for breach of contract as the contract was vitiated by mistake.

161. Furthermore, the precise wording in Clause 12 of Professor G's contract of employment purports that Professor G's appointment allows him to become a member of the Scheme but that the principles of the Scheme are explained in the booklet. So, the contract may have provided access to the Scheme by virtue of this appointment but his entitlement to membership is subject to the eligibility criteria under the Scheme, and as Professor's G was not looking to become a member but rather to re-join the Scheme, this was not possible.

A.2 The Trust – contractual estoppel

162. I have also considered whether a contractual estoppel might arise in this case. The basis of the doctrine of contractual estoppel is explained in Police and Crime Commissioner for Greater Manchester v Butterworth [2017] 001 PBLR (020), and also in Springwell Navigation Corp v JP Morgan Chase Bank 2010 EWCA Civ 1221, and Prime Sight Ltd v Lavarello [2013] UKPC 22. Contractual estoppel is founded essentially on the principle that the contracting parties (subject to the constraints of public policy, statute law, etc) are entirely free to make whatever bargain they choose (Springwell at [143] and Prime Sight at [47]). If, on the true construction of their contract they have made, a binding commitment to arrange their affairs on the assumed basis that a certain state of affairs exists, they will be held to that bargain irrespective of

whether that state of affairs truly exists in fact (Peekey Intermark Ltd v Australia and New Zealand Banking Group Ltd [2006] EWCA Civ 386 at [56], and Credit Suisse International v Stichting Vestia Groep [2014] EWHC 3103 (Comm) at [302]).

163. It is arguable that the parties have arranged their affairs on the assumption that it was possible for Professor G to remain in the Scheme under the Regulations. For a contractual estoppel to have arisen, however, in my view the Trust would have had to have known that it was not lawfully possible for Professor G to have re-joined the Scheme, that NHS BSA was looking to act outside of its powers, but still proceeded on the basis it was possible; that is that the Trust was looking to enter into a contract outside of the Regulations. The cases also indicate contractual estoppel is, like contract, subject to the law of mistake. In Prime Sight it was said:

> **"[47]** Parties are ordinarily free to contract on whatever terms they choose, and the court's role is to enforce them. There are exceptions and qualifications, but these too are part of the general law of contract. In *Greer v Kettle* [1937] 4 All ER 396, [1938] AC 156, Lord Maugham referred to fraud, illegality, **mistake** and misrepresentation. Similarly, just as a court may refuse in some circumstances to enforce a contract on grounds of public policy (a topic closely related to illegality), the same will apply to a contractual convention. So in *Welch v Nagy* [1949] 2 All ER 868, the Court of Appeal held that just as parties to an agreement to rent unfurnished premises [1950] 1 KB 455, were not competent to contract out of provisions of the Rent Restriction Acts which protected tenants under such agreements, so a tenant could not be estopped from proving that a tenancy was an unfurnished tenancy by entering into an agreement which described it as a furnished tenancy. The effect of such an estoppel would have been to confer on the courts a jurisdiction which Parliament had said that they should not have, namely an untrammelled power to make orders for possession of unfurnished premises. In short, **contractual estoppels are subject to the same limits as other contractual provisions,** but there is nothing inherently contrary to public policy in parties agreeing to contract on the basis that certain facts are to be treated as established for the purposes of their transaction, **although they know the facts to be otherwise**." [my emphasis in bold]

164. The Trust's statement in 2001, that Professor G's appointment allowed him to become a member of the Scheme, or its actions from 2002 in paying contributions into the Scheme on Professor's G behalf, does not give rise to a contractual estoppel as there was no lawful contract nor any contractual understanding that benefits would be provided outside the scope of the Scheme's Regulations. I do not consider on the evidence that I have reviewed that the Trust was proceeding on the basis of a given set of facts, which it knew to be false, were being treated as correct. Both the Trust and Professor G believed it was lawfully possible for him to re-join the Scheme as this is what NHS BSA had told them. Like the contract itself, any contractual estoppel must be unenforceable if vitiated on grounds of mistake.

165. In any event, as found in Butterworth, the High Court ruled that an estoppel is inapplicable as a matter of principle, because a party cannot achieve by estoppel what

he could not achieve by express agreement: see Daejan Properties v Mahoney (1996) 28 HLR 498. Any promise to grant Professor G an exceptional pension is contrary to the Regulations and so the doctrine of estoppel cannot be used to find that the Trust (or NHS BSA) had lawfully committed itself to do the same.

166. My conclusion on contract and contractual estoppel does not mean however that the Trust has no potential liability in negligence (subject to any limitation defence) in relation to the original inaccurate statement in the February 2001, and its actions in 2002. However, for the reasons explained below (paragraphs 220-229), I do not make any finding against the Trust in this respect.

A.3 NHS BSA – contract arguments

167. In its letters of 20 May 2002 and 15 July 2002, NHS BSA (see paragraphs 15-16 above) purported to give Professor G an option to continue to pay contributions into the Scheme, on an exceptional basis, for as long as his employment with the Trust continued.

168. Professor G chose this option. I have not seen the document confirming his response, but given the subsequent conduct of the parties, including the arrangement of additional pension contributions to be made by Professor G, and the repayment of employer's contributions back to NHS BSA by the Trust, I have no reason to doubt that Professor G communicated his wish to take advantage of this option.

169. I have considered whether there is a contract between Professor G and NHS BSA, but my conclusion is that there is not, as there is no employment relationship between Professor G and NHS BSA, but more critically, NHS BSA does not have power to provide benefits under the Scheme other than in accordance with the Regulations. The statement by NHS BSA, that Professor G could exceptionally opt to re-join and remain in the Scheme while employed by the Trust was not, in my view, intended to create a contract but only to communicate erroneously to Professor G that he could exceptionally re-join in the Scheme under the Regulations.

170. The analysis of the position is similar to an issue considered in the HR Trustees v German (IMG Pension Plan) [2009] 076 PBLR (Ch), where Arnold J said at paragraph 163, in relation to the question of whether a contract could override the terms of a trust-based occupational pension scheme:

> "The final preliminary point is that, in the circumstances of the present case, I consider that the Employers must establish not merely that there was an intention to create legal relations, but specifically an intention to create contractual relations. The reason I say this is that the parties may have intended to create legal relations to be regulated by the applicable trust documents. What the Employers must establish is an intent to create contractual relations, so that the contract is binding even if its terms differ from those of the applicable trust documents."

171. If I am wrong, and NHS BSA entered into a contractual obligation to permit Professor G to exceptionally re-join the Scheme and there is valid consideration provided for this option, any contract would be vitiated on grounds of common mistake that NHS BSA had power to provide the promised benefit. I have no evidence to demonstrate that Professor G or NHS BSA believed that NHS BSA was looking to provide a benefit outside of the Regulations or that it would be acting *ultra vires* by providing the benefit. The evidence supports the conclusion that Professor G erroneously believed that membership could be granted on an exceptional basis. Many schemes do have rules which may permit members to be admitted on special terms, although there is no such provision in the Scheme.

172. Moreover, if NHS BSA did enter into a contractual obligation to permit Professor G to exceptionally re-join the Scheme, knowing this was not permitted under Regulations, then the contract would on the face of it be unenforceable, as NHS BSA did not have the capacity to grant benefits other than under the Regulations. However, this does not mean that Professor G cannot be compensated for NHS BSA's actions or that NHS BSA should escape liability for making an *ultra vires* pension promise. I shall address this separately.

173. For similar reasons to those discussed in relation to the Trust (paragraph 162-166 above), I do not consider that a contractual estoppel could arise in relation to NHS BSA. I have no evidence to believe that when NHS BSA advised Professor G that it was possible for him to re-join the Scheme, NHS BSA knew that it did not have power to permit this. Moreover, the relevant case law indicates that contractual estoppel cannot arise in cases of mistake.

174. Although not in force at the time, I note section 26 of the Public Services Pensions Act 2013 (PSPA 2013), enables, in certain circumstances, managers and employers to make contributions outside a statutory scheme. This demonstrates Parliament does empower public sector authorities to pay special benefits.

B Negligence

B.1 NHS BSA – negligence

B.1.1 NHS BSA's position

175. NHS BSA has admitted:

175.1. that the second option given on 20 May 2002 to Professor G, via his adviser, and then directly to Professor G on 15th July 2002, to continue to pay contributions to the Scheme (paragraphs 15 and 16 above), on an exceptional basis, for as long as the employment with the Trust continues, was incorrect as Professor G was required to take his preserved benefits from 60 and NHS BSA had no power to re-admit Professor G to membership on that basis; and

175.2. that Professor G has sustained injustice as a consequence of maladministration as a result.

176. However, NHS BSA submits that this is pure maladministration and not maladministration involving an infringement of a legal right (in negligence or otherwise) and the Ombudsman can only direct a non-financial injustice award in the absence of an actionable breach of law. For the reasons set out below my view is that there are actionable breaches of law in negligence and legitimate expectation.

B.1.2 Does NHS BSA owe Professor G a duty of care in relation to inaccurate information provided concerning his benefits and in relation to any failures in relation to the administration of the Scheme?

177. In my Second Preliminary Decision I indicated that I was satisfied that the statement(s), made by NHS BSA were made negligently. NHS BSA was in a sufficiently proximate relationship for a duty of care to arise. NHS BSA knew that Professor G would rely on the statement when making a decision about his pension planning and NHS BSA was in breach of the duty of care as the statement was not correct. In the light of NHS BSA's and Professor G's supplementary submissions on this issue I will revisit the issue from first principles.

178. The fact that a public body (such as NHS BSA) is engaged, in exercising a statutory power on behalf of the Secretary of State, to provide benefits under the Scheme is not in itself an answer to an allegation of negligence. At the same time the careless performance of a statutory duty or power does not of itself create any liability in negligence. Liability in negligence could only arise where such liability would arise under private law (see below) and then only if the imposition of such a duty is not inconsistent with the exercise of the statutory duty (see paragraph 179 below). However, the fact that NHS BSA had no power to provide the promised benefit does not mean that NHS BSA cannot have liability for any loss caused as a result of negligent misstatement. I do not accept NHS BSA's argument that the fact that on existing authorities a court (or the Ombudsman) cannot direct that a public authority should provide an *ultra vires* benefit on the basis of an estoppel means that a public authority can have no liability in negligence for a negligent statement that Professor G can join the Scheme (when NHS BSA had no power to permit Professor G to do so), when such a statement causes Professor G financial loss on established legal principles. These are separate causes of action.

179. I agree with NHS BSA counsel's submissions that there is nothing in the Regulations governing the Scheme which gives rise to a statutory duty on NHS BSA to pay damages for breach of those Regulations. There is no statutory right to damages. Also, as observed by Lord Scott in Gorringe at [71], that if "*a statutory duty does not give rise to a private right to sue for breach, the duty cannot create a duty of care that would not have been owed at common law if the statute were not there*." I do not however agree with the interpretation put on Gorringe by NHS BSA in its submissions, that it follows that "*there needs to be some overriding reason or policy why the law would impose a common law duty of care on a public body where Parliament has chosen not to impose a statutory duty breach of which sounds in damages*". A duty of care has often been imposed by the courts in circumstances where such a duty of care may arise under

private law in similar circumstances, in particular where the duty is imposed for the benefit of a specific group of people. Lord Scott recognised in Gorringe at [73] that:

> "There are, of course, many situations in which a public authority with public duties has a relationship with a member of the public that justifies imposing on the public authority a private law duty of care towards that person."

180. The point I take from Gorringe CC is that there needs to be something beyond the existence of the statutory duty from which a common law duty can arise. It was confirmed by Lord Reed in Robinson v Chief Constable of West Yorkshire Police [2018] UKSC 4 at [32]-[36]), that public bodies are generally subject to the same liabilities in tort as private individuals. Accordingly, if the duty would be tortious if committed by a private individual or body it will generally be tortious if committed by a public authority. The Robinson case had to consider whether police officers owed a duty to take reasonable care to safeguard an elderly pedestrian when they arrested a suspect standing beside her who was liable to escape. The court held it was reasonably foreseeable that the suspect might seek to escape and there was a breach of the duty of care. It was noted that a duty of care could not arise if it were excluded by statute or the common law if it were not compatible with the performance of the officer's functions. However, no such incompatibility arose on the facts of that case.

181. NHS BSA then go onto observe that the existence of a common law duty of care in any case depends on a number of considerations such as relationship of proximity between the parties and foreseeability of loss (Donaghue v Stevenson [1932] 2 AC 605). However, it must also be just, fair and reasonable" to impose a duty of care on a person or body in any situation (Caparo Industries v Dickman [1990] 2 AC 605). I also accept that there may (not "will" as submitted by NHS BSA) be reasons of public policy why a duty of care should not arise in a particular situation, notwithstanding that the tests of proximity and foreseeability are satisfied.

182. NHS BSA submits that this statement of law has recently been approved by the UK Supreme Court in the context of public authority liability in Poole BC v GN [2019] UKSC. In summary, public authorities do not owe a duty of care simply because they have statutory powers or duties. They may come under such a duty to a person but even then, only as far as the imposition of such a duty is consistent with the relevant legislation, and, implicitly, only where it is fair, just and reasonable for such a duty to arise.

183. Rather than rely on a summary of what Poole BC v GN said, provided by NHS BSA's counsel, it is helpful to set out the relevant passages of the judgment at paragraphs 63-67 more fully. Paragraph 63 describes what Robinson decided. In paragraph 64 it is noted that:

> "64 Robinson did not lay down any new principle of law, but three matters were clarified. First, the decision explained, as Michael had previously done, that Caparo did not impose a universal tripartite test for the existence of a duty of care, but recommended an incremental approach

> to novel situations, based on the use of established categories of liability as guides by analogy, to the existence and scope of a duty of care in cases which fall outside them. The question whether the imposition of a duty of care would be fair, just and reasonable forms part of the assessment of whether such an incremental step ought to be taken. It follows that, in the ordinary run of cases, courts should apply established principles of law, rather than basing their decisions on their assessments of the requirements of public policy. Secondly the decision re-affirmed the significance of the distinction between harming the claimant and failing to protect the claimant from harm (including harm caused by third parties), which was emphasised in Mitchell and Michael. Thirdly the decision confirmed, following Michael and numerous older authorities, that public authorities are generally subject to the same principles of the law of negligence as private individuals and bodies, except to the extent that legislation requires a departure from those principles. That is the basic premise of the consequent framework for determining the existence or non-existence of a duty of care on the part of a public authority."

184. Paragraph 65 of the judgment then goes onto say:

> "65. It follows that (1) that public authorities may owe a duty of care in circumstances where the principles applicable to private individuals would impose such a duty, unless such a duty would be inconsistent with, and is therefore excluded by, the legislation from which their powers or duties are derived, (2) that public authorities do not owe a duty of care at common law merely because they have statutory powers or duties, even if, by exercising their statutory functions, they could prevent a person from suffering harm and (3) that public authorities can come under a common law duty to protect from harm in circumstances where the principles applicable to private individuals or bodies would impose such a duty, as for example where the authority has created the source of danger or has assumed a responsibility to protect the claimant from harm, unless the imposition of such a duty would be inconsistent with the relevant legislation."

185. I accept that Poole BC v GN, provides a helpful summary of the current state of the law. However, it needs to be borne in mind that the case considered whether a duty of care arose in negligence as a consequence of the local authority's general obligations under the Children's Act 1989, to protect children from anti-social behaviour. This is not quite the same situation as in the current case where NHS has a statutory obligation to administer the Scheme and provide benefits in accordance with the Scheme Regulations. Professor G's case does not concern the intra vires exercise of a discretion where generally no duty of care will be imposed and the remedy where there is an invalid exercise of discretion would be to direct the reconsideration of the decision. Professor G's case concerns a situation where inaccurate information was provided by

NHS BSA, as part of its general obligations to administer the Scheme in accordance with its governing Regulations. This is an example of operational duties of a public authority rather than a case relating to an exercise of policy decisions. In Anns v Merton [1978] AC 728, Lord Wilberforce distinguished policy aspects of a local authority's functions from its operational ones and said that a duty of care was more likely to arise in respect of the latter. The general status of the Anns v Merton decision has diminished due to subsequent developments in the law of tort. The usefulness of the decision was doubted by the Privy Counsel; and various views have been expressed as to its cogency in the House of Lords. However, leading academic commentators on the law of tort consider the nature of the decision may still have some relevance and provide a context as to whether a duty of care may arise in the circumstances of a case.

186. There is a helpful discussion about the continued relevance of the distinction and the closely related issue of whether the question before the court was suitable for judicial resolution in Charlesworth & Percy on Negligence (Fifteenth Edition) 2022 – Section 2-354. It was noted in Charlesworth that in Rowling v Takaro Properties Ltd [1988] AC 473, Lord Keith formulated a closely related test, asking whether or not the question before the court was suitable for judicial resolution, and in more recent cases this was seen as an appropriate focus for inquiry. Also, in Barrett v Enfield LBS [2001] 2 AC 550, Lord Slynn and Lord Hutton both thought that the ultimate question is whether the particular issue is judiciable or whether the court should accept it had no part to play. The learned editors of Charlesworth concluded that whether an authority had acted within their discretion and the policy/operational distinction, were guides to the question of justiciability, and that the policy/operational distinction can provide a guide towards identifying cases where a duty may be thought inappropriate (or the converse). In my view the issue in this case, about whether NHS BSA is liable for a negligent statement that Professor G was eligible to re-join the Scheme, was clearly at the operational end of the spectrum and the issue in dispute is judiciable.

187. NHS BSA's counsel has also noted that in Manchester Building Society v Grant Thornton UKSC 2019/0040, (which concerned the scope of a professional advisers' duty of care in negligence) the Supreme Court explained that as regards the tort of negligence, liability of a person or body involves six questions. NHS BSA then refers to the first two; the "actionability question" and the "scope of the duty" question:

188. Again, it may be helpful if I set out in full the passage on the six questions that need to be considered, when looking at the scope of a duty of care which may be assumed by the defendant, which were as follows:

(1) Is the harm (loss, injury and damage) which is the subject matter of the claim actionable in negligence? (the actionability question);

(2) What are the risks of harm to the claimant against which the law imposes on the defendant a duty to take care? (the scope of duty question);

(3) Did the defendant breach his or her duty by his or her act or omission? (the breach question);

(4) Is the loss for which the claimant seeks damages the consequence of the defendant's act or omission? (the factual causation question);

(5) Is there a sufficient nexus between a particular element of the harm for which the claimant seeks damages and the subject matter of the defendant's duty of care as analysed at stage 2 above? (the duty nexus question);

(6) Is a particular element of the harm for which the claimant seeks damages irrecoverable because it is too remote, or because there is a different effective cause (including novus actus interveniens) in relation to it or because the claimant has mitigated his or her loss or has failed to avoid loss which he or she could reasonably have been expected to avoid? (the legal responsibility question).

189. Professor G has submitted, in response to NHS BSA's submissions that no duty of care is owed, that I do not need to consider the public policy argument advanced by NHS BSA (the argument that the rules provide that Professor G cannot re-join the Scheme is a bar to a duty of care arising), as there is nothing difficult or unusual about negligent misstatement in Professor G's case, and it is fair and reasonable to impose such a duty of care in these circumstances. Professor G notes that the existence of the duty is already recognised in the case of Corsham. In Corsham at [161] it was held that the relationship between the police authority, as administrator of the scheme, and the applicants, was a proximate one and involved foreseeability of harm and that it would be just and reasonable for the law to impose liability on the Avon and Somerset police authority for its negligent misstatements. It was concluded at [162] of the Judgment that the Avon and Somerset police authority were in breach of the duty of care owed to the Avon and Somerset applicants by stating incorrectly that the lump sums would be tax free when they were not. The case is not precisely on all fours with Professor G's case as it does not relate to an inaccurate statement about entitlement to a benefit which the scheme administrator had no power to provide. I agree, however, that the case provides authority and does recognise that a manager of a public sector scheme is in a sufficiently proximate relationship, so it is reasonable to assume a duty of care in relation to the provision of inaccurate information about pension benefits or eligibility for membership in a statutory public sector scheme.

190. Professor G relies on Corsham to establish that the Courts have previously recognised that a public authority can owe a duty of care in relation to the administration of pension scheme benefits under a statutory pension scheme. There are also many other authorities (which have not been cited by either party) that recognise (expressly or impliedly) that while the Ombudsman has no power to direct a manager of a public sector scheme to pay an *ultra vires* benefit by virtue of an estoppel, damages may be payable for negligent misstatement in circumstances where loss can be demonstrated under normal negligence principles. It needs to be borne in mind when considering these cases that the courts have held that when making an award for financial injustice as a consequence of maladministration (under section 146(1)(a) of PSA 93), or for breach of law under 146(1)(c) PSA 93, the Ombudsman must make the award in accordance with established legal principles and cannot generally make an award for

financial loss where a court would not make an award in the same circumstances. Therefore, although in many of the cases where the Ombudsman made findings of maladministration, the courts, on appeal, considered the underlying basis in law under which the Ombudsman (like a court) had power to award damages. The cases when a similar issue was considered in the context of the Ombudsman's jurisdiction, and which assist in demonstrating that it is well established by the courts that a duty of care can arise in relation to negligent misstatements made by a public authority, include the following:

190.1. ***Westminster CC v Haywood [1996] 2 All ER.*** This is one of the earliest cases where the issue was considered in relation to an Ombudsman complaint or dispute. In this case an *ultra vires* benefit promise was made by a public authority. The court held that the Ombudsman could not direct the payment of an *ultra vires* benefit. In relation to any claim advanced for financial loss compensation for negligent misstatement would be to put the complainant in the position they would have been in if the information had been correct. On the facts there was no financial loss so the Ombudsman could not direct an award for financial loss as a consequence of maladministration;

190.2. ***NHS Pensions Agency v Pensions Ombudsman [1999] 59 PBLR (1).*** In this case the member asked for estimates of pension entitlements prior to retirement from the NHS. He was given an estimate on the basis of 40 years' service, although his service was actually 140 days short of that. The Pensions Ombudsman found there had been maladministration and directed that full pension should be paid. The NHS pension scheme appealed to the High Court. It was held by Carnwarth J at paragraph 4 of his judgment that, on the authority of Westminster v Haywood, in a case where the Ombudsman is awarding some sum by way of compensation for mistaken advice of this kind, the measure of damages should be approached on a tortious basis, that is on the basis of the position the applicant would have been if the advice had not been given, rather than on the basis of what it would have been if the advice had turned to be correct. On the facts no loss could be demonstrated. However, the case recognises that compensation might be payable on the basis of negligent misstatement in appropriate circumstances;

190.3. ***East Sussex County Council v Jacobs [2004] OPLR 247 at [16]-[17].*** In this case an inaccurate retirement quote was given. The Court held that the Ombudsman had no power to direct the payment of enhanced benefits (as they would be *ultra vires*). However, in relation to a claim for negligent misstatement the measure of loss would be to put the complainant in the position she would have been in if the information were correct. Blackburne J indicated that if the case had not settled he would have quashed the original decision and remitted the matter back to the Ombudsman to consider the loss of salary and pension suffered by the complainant through her early retirement in reliance on the negligent misstatement of her benefits and to consider the sum if any which should be paid for distress and inconvenience. In other words, it was accepted

that a duty of care in negligence could arise notwithstanding that the promised benefits were outside the powers of the authority to grant, and the Ombudsman could not direct that they should be paid;

190.4. ***NHS Pensions Agency v Beechinor NHS Pensions Agency - [1997] OPLR 99.*** In this case NHS Pensions Agency provided inaccurate information that the member could join the Scheme when there was no power to enable the member to do so. Lightman J found that the Ombudsman has been wrong to make a finding of maladministration in that NHS Pensions Agency had no active duty to advise or warn under general private law negligence principles; and if (contrary to Lightman J's view) NHS Pensions Agency otherwise might have had such a duty imposed on them, such duty was expressly disclaimed by the letter dated 22 May 1978. In relation to the argument that such a duty of care had been assumed by writing the letter Lightman J recognised that NHS Pensions Agency, by writing that letter, assumed the responsibility to take reasonable care that the information therein contained was correct (in other words it is possible to assume a duty of care). However, on the facts, unlike Professor G's case, the information was correct and in no way misleading so there was no breach of the duty of care.

190.5. ***Andrew v Royal Devon and Exeter NHS Foundation Trust [2022] EWHC 2992.*** In this case the member retired on the basis of an inaccurate ill-health retirement quote given by the Trust (as his employer) which overstated the benefits payable under the NHS Scheme. Mr Justice Zacaroli remitted the matter back to the Ombudsman to reconsider whether the applicant has sustained any loss in reliance on normal negligence principles. In other words, it was accepted that such a duty of care could arise, however, the Ombudsman needed to look at whether the loss flowed from the negligent misstatement.

191. There are also many other cases where it has been held that a manager of a public sector occupational pension scheme can owe a duty of care in negligence for failure to exercise reasonable skill and care in performing its functions. These provide further support for a view that a concurrent duty of care can arise in negligence in relation to a breach of the statutory functions of a public authority in relation to the administration of a public service pension scheme. The cases include the following:

191.1. ***NHS Business Services v Leeks [2014] 056 PBLR (017),*** where it was confirmed on appeal from an Ombudsman Determination that failure by NHS Business Services to put in place adequate systems to identify overpayments amounted to maladministration (breach of duty of care);

191.2. ***Secretary of State v Marshall [2008] 48 PBLR at 24 and 25,*** where it was confirmed on appeal that failure by an employing authority to send a booklet contrary to the instructions of NHS Scheme manager amounted to maladministration (breach of duty of care); and

191.3. ***Baugniet v Capital Employee Benefits (Teachers' Pension Scheme)*** **[2017] 059 PBLR,** breach of duty of care in calculating transfer payments. In this case the Court remitted the complaint (which the Ombudsman had not determined in the complainant's favour) to consider whether Teachers Pensions had caused any loss under normal negligence principles for failing to deal with the transfer in a timely fashion;

192. I therefore agree with Professor G's counsel's submissions that it is already well established by previous court decisions that the manager of a public sector scheme can owe a duty of care in negligence in relation to the provision of inaccurate benefit information, or the making of an *ultra vires* pension promise, where such a duty would be owed under established negligence principles. This is the case even though the Ombudsman cannot direct the public authority to provide the *ultra vires* benefit. There is no incremental development of the law to impose such a duty.

193. If I had not reached that conclusion and had to consider the issue to determine Professor G's case it would not in my view be inconsistent with the Regulations to impose such a duty. Like the trustees of a trust based occupational pension scheme who would owe such an equitable duty of care in analogous circumstances, or an administrator of a private sector occupational pension scheme who would owe a duty in negligence in similar circumstances, to ensure that information provided about scheme benefits is in accordance with the rules, the manager of a public sector statutory occupational pension scheme's primary obligation is to administer and pay the scheme benefits in accordance with the regulations governing the scheme. The manager of a public sector statutory scheme should not be providing inaccurate statements of members' entitlement to benefits or making *ultra vires* pension promises. If, in reliance on such a promise or an inaccurate statement of entitlement a member sustains loss in accordance with established negligence principles, it is entirely fair and reasonable that liability should be imposed on the manager in these circumstances. It is also entirely consistent with an obligation to provide benefits in accordance with the scheme regulations to impose a requirement to pay compensation to members who lose out as a result of the breach of such a duty of care if they have relied on the statement and sustained loss as a result. Managers/Administrators should not be making inaccurate *ultra vires* statements to members and should have appropriate systems in place to ensure that this does not happen.

194. As noted by Professor G in his latest submissions, Corsham contains a very helpful examination of when liability for negligent misstatement will arise, including referring to the House of Lords decision in Customs and Excise Commissioners v Barclays Bank plc [2007] 1 AC 181. Specifically, the decision outlined three matters a court might consider when assessing possible liability for negligent misstatement causing financial loss:

194.1. whether the defendant assumed (or is treated as having assumed) responsibility for the statement;

194.2. whether the facts satisfied a threefold test of reasonable foreseeability, or proximity and the imposition of liability being fair, just and reasonable; and

194.3. whether a finding of liability involved an incremental development of the law from earlier cases establishing liability for negligence.

195. The more recent Supreme Court decision in Robinson v Chief Constable of West Yorkshire Police [2018] UKSC 4, (as clarified in Poole Borough Council v GN [2019] UKSC 25 (Poole v GN) at [64]), confirmed that the law favours an incremental approach to analysing allegedly negligent conduct in most factual situations, that is one which builds upon and proceeds from past decisions. To the extent that a decision is required in a novel or borderline case, where the duty is not covered by authority or the courts (and the Pensions Ombudsman), the traditional three-fold Caparo test may be relevant. Only in cases where the question of whether a duty of care arises has not previously been decided, will the courts consider the closest analogies in the existing law, with a view to maintaining the coherence of the law and avoidance of inappropriate distinctions (See Robinson at [35] for a consideration of when the Caparo test may still be relevant).

196. I agree with Professor G that:

196.1. there is no incremental development of the law in finding that NHS BSA owed a duty of care in the current circumstances given the previous decisions where such a duty has been found including Corsham and the other cases referred to above;

196.2. NHS BSA, as scheme administrator, plainly assumed responsibility for the statement that Professor G could join the Scheme in 2002 (such a finding of assumption of responsibility is entirely consistent with the line of authorities dating back to Hedley Byrne); and

196.3. it was reasonably foreseeable that Professor G would plan his retirement based on information he was given by the scheme administrator, the relationship was sufficiently proximate to give rise to that duty, and it is fair just and reasonable for the duty to be imposed.

197. I am also of the view that the six-fold test set out in the Manchester Building Society v Grant Thornton [2019] UKSC 0040, is satisfied in Professor G's case, that a duty of care does arise and the loss sustained is within the scope of the duty of care. NHS BSA, as administrator of the Scheme, is responsible for providing correct information as to members' entitlement to benefits and ensuring that the correct benefits are paid in accordance with the Scheme rules.

B.1.13 *NHS BSA's additional arguments that the offer to allow Mr G to re-join the Scheme was not a representation?*

198. NHS BSA has submitted, following my Second Preliminary Decision, that the letters issued to Professor G and his financial adviser, giving him the option of re-joining the Scheme, were not a representation but an offer or promise.

199. However, I agree with Professor G that, contrary to NHS BSA's latest submissions, there is no question that the letters issued to Professor G and his financial adviser amount to unequivocal representations, that Professor G could exceptionally re-join the Scheme. I agree that this was a false statement negligently made and it was reasonable for Professor G to rely on such a statement.

B.1.1.4 Calculation of loss Professor G sustained under principles of negligent misstatement?

200. In the Second Preliminary Decision I analysed what loss Professor G had sustained under principles of negligent misstatement and also whether damages for negligent misstatement were sufficient to provide "just satisfaction" in relation to Professor G's Article 1 Human Rights Act claim.

201. NHS BSA submits, in its supplementary submissions made in response to the Second Preliminary Decision, that the only compensation to which Professor G is entitled is the return of his contributions to the Scheme made between 2001 and 2006, with interest, together with a sum to compensate him for maladministration[5]. NHS BSA submits this should be a sum of £2000 in line with the Ombudsman's published awards scale.

202. NHS BSA further submits that the approach proposed by the Ombudsman, to calculate loss on breach of duty of care and breach of Professor G's Article 1 rights, is wrong in law on the grounds that it leads to an exorbitant liability arising for NHS BSA and is not one which is supported by tort damages. The correct approach to damages for negligence is to compensate for foreseeable loss. The starting point is to put Professor G into the position he would have been in but for the mistaken statement on which he relied. The central question is what Professor G would have done regarding his pension arrangements if the Trust in 2001, or NHS BSA in May 2002, had correctly stated the legal position under the Regulations. NHS BSA submits (and accepts) that it is likely that Professor G would have become a member of a stakeholder arrangement and invested his contributions in a default investment fund.

203. These supplementary submissions by NHS BSA demonstrate a misunderstanding of the loss analysis in the Second Preliminary Decision. It is important to examine two legal issues which need to be considered separately:

    203.1. First, what is the correct measure of loss for negligent misstatement; and

[5] By which NHS BSA must mean compensate him only for non-financial injustice (distress and inconvenience) sustained as a consequence of maladministration and not financial injustice sustained as a consequence of maladministration.

203.2. Second, if I were only to direct a payment equivalent to damages for negligent misstatement whether such a payment is sufficient on the facts of the case to achieve “just satisfaction” in relation to any Article 1 of the First Protocol claim.

204. In relation to the first issue, the calculation of loss for negligent misstatement, I agree that the correct measure of loss is to put Professor G in the position he would have been in if he had been told correctly that he could not re-join the scheme. This is confirmed in all the previous decisions I have listed, from Westminster City Council v Haywood onwards and many other decisions of the Courts.

205. It is necessary to consider what Professor G would have done if he had been told in May 2002 that he could not re-join the Scheme, and that his deferred pension would need to be brought into payment retrospectively with effect from 23 April 2000, when he had attained age 60 (as there is no power to defer). Professor G was clearly concerned about making adequate provision for his retirement, as he has instructed his own IFA to assist him on a number of occasions, had obtained quotes about his estimated pension benefits, and has confirmed that he made no other pension provision, as he was relying on the Scheme benefits.

206. It is reasonable in my view to conclude, on the balance of probabilities, given the fact he had only built up 9 years accrual in the Scheme before he left the NHS from his earlier employment, that if Professor G had been told he could not re-join the Scheme he would have made alternative pension arrangements.

207. Professor G has submitted that if he had been told he could not re-join the Scheme he would have negotiated an increase in his salary and asked his employer to pay an employer contribution of 14.3% per annum to an alternative pension arrangement. This figure seems to have been arrived at from the fact that employer contributions have been 14.3% of salary from 1 April 2015 and I assume that Professor G considers this reflects the value of the benefits foregone. The rate of employer contributions at the time Professor G was wrongly admitted to membership of the Scheme again was 5% and increased to 7% from 1 April 2001. However, even a contribution rate of 14.3% of salary to the Scheme, plus employee contributions, would not fund a similar level of benefits to the Scheme under a private sector arrangement. A defined benefit is extremely valuable and very expensive to fund.

208. I am satisfied that if Professor G had taken financial advice, which I believe, on the balance of probabilities, he would have done, his adviser would have explained how expensive it is to fund a pension. He would have been told that a higher rate of contributions to fund his benefits than 7% plus employee contributions would have been appropriate for someone of his age.

209. It does not follow, however, that Professor G would have successfully persuaded the Trust to increase his salary to the amount which would have funded an equivalent level of pension benefit to that provided by the Scheme. NHS BSA has noted in its submissions that, ‘the NHS has nationally agreed pay-scales, but employers do agree higher pay rates as a recruitment and retention premium, in line with the needs of the

service and scarcity of particular skills'. NHS BSA has noted previously that the rate of the premium would be a matter for agreement between Professor G and the Trust. Given that the Trust would benefit from the fact that from 1 April 2001 as Professor G could not re-join the Scheme there would be a 7% employer contribution saving, in my view it is reasonable to assume that Professor G would, on a balance of probabilities, have been able to negotiate a salary uplift or contribution to a stakeholder scheme on his behalf (which were introduced from 2000 as noted by NHS BSA) of 7%. This would have been cost neutral to the Trust. The employer contributions would then have been invested and obtained tax free growth until they were drawn down from his pension.

210. The amount of tax-free growth on any employer and employee contributions to a defined contribution pension would depend on how these contributions were invested. It has been confirmed in the Tenconi case[6] that it is not necessary for a complainant to identify specific investments he would have made nor to prove how they were affected. Any loss is a matter of quantification, and not a matter of recoverability. In such a claim, I should inquire what a complainant would have done with funds if they had been received at the time when they ought to have been received had there not been maladministration. I am satisfied that Professor G would have taken financial advice and invested them in accordance with the financial advice and his attitude to risk. Also, given that he did not need to draw on any pension for many years, this would have enabled him to take a greater level of investment risk than for other individuals of similar age who did not continue working.

211. Any estimate of loss is going to involve making an assessment of the rate of return which would have been received on the contributions once they were invested. I consider, given Professor G has taken financial advice, he would have taken advice on how the money would be invested. In my pension loss calculation I have used a real investment fund which Professor G might have invested in as a proxy for the investment which Professor G would have obtained. I invited in the Second Preliminary Decision both parties to make any further submissions on the potential rate of return but neither did. I will therefore proceed, when calculating the loss sustained by Professor G, on the assumption that he invested the contributions into the notional fund I identified previously: that is the Scottish Widows Progressive Growth Portfolio 1 Class A Accumulation (ISIN: GB0031903288[7]). I have been advised that this fund would provide a suitable proxy measure for the total return Professor G was likely to have received during the period 19 February 2001 to 10 October 2014. I also invited submissions from both NHS BSA and Professor G on whether the particular fund would provide an appropriate proxy for calculating the loss. Neither party has suggested an alternative measure of loss.

212. In relation to any negligent misstatement, it is also necessary to consider whether there was any break in the chain of causation; that is, was Professor G's loss directly attributable to the negligent misstatement, and was his reliance reasonable? In particular, should Professor G have realised on or after 2006, that his contributions to

[6] Tenconi v James Hay Partnership [2019] 094 PBLR (008).

[7] Daily unit prices can be found at - https://www.charles-stanley-direct.co.uk/ViewFund?Sedol=3190328

the Scheme had ceased and the employee contributions were no longer shown in his payslips, and having so realised contacted the Trust and NHS BSA? I am minded that even if Professor G could or should have known of the cessation of his contributions, it does not necessarily follow that he would have thought this meant he was not eligible to acquire benefits under the Scheme. But in any event, I find, on the balance of probability, that it was not unreasonable that he was unaware his contributions had ceased.

213. NHS BSA has argued that Professor G should have noticed and queried that his employee contributions ceased from 2006 onwards. Professor G has argued that he did not notice that the deductions were no longer being made on his payslips, and that because his payslips referred to pensionable salary, regardless of whether the deductions were being shown, he assumed this meant his salary continued to be pensionable. He also argues that his monthly income was not consistent and changed dependent on the hours worked, along with other deductions, so he cannot be expected to have noticed that his employee contributions were no longer being deducted.

214. I find this reasoning credible and convincing, having reviewed a representative proportion of the relevant payslips. The format of Professor G's payslips changed from 2006. Pension information was set out at the bottom of the new style payslips, as opposed to the old-style payslips where pension information was placed prominently at the top of the payslip. In addition, Professor G's pay was not consistent each month and I do not consider that there was any notable change or clear increase in his net pay attributable to pension contributions that would have alerted Professor G to the fact that contributions had ceased. The new style payslips did, on close scrutiny, confirm that Professor G's pension contributions were nil, however without any formal confirmation that contributions had ceased (which would generally have necessitated the issue of a leaving service statement from the Scheme), I do not consider, on the balance of probability, that Professor G had sufficient notice from his payslips given the circumstances where the relevant payslips were unclear, and his pay was fluctuating.

215. Professor G was also issued with documents on two occasions subsequent to the 5th April 2006, indicating that he was still an active member of the Scheme and accruing benefits.

216. A statement for 2006, sent on 21 May 2007, indicated benefits were "as at" date of 31 March 2006 for "membership up to last update". The statement showed that from 1/02/2001 to 31 March 2006 Professor G had accrued 5 years and 59 days pensionable service.

217. No statements were sent for 2008 and 2009.

218. As noted (see paragraph 22 above), Professor G was sent a statement in June 2010, treating him as an active member; it detailed his estimated benefits on 24 June 2010, if he: (i) opted to remain in the 1995 Section; or (ii) joined the 2008 Section under the

Choice exercise[8]. The statement demonstrates that Professor G was still being treated as an active member of the 1995 Section. If he were not an active member, he would not have been able to join the 2008 Section under the 2008 Regulations. Although the statement states that "the benefit comparisons were calculated on 23 June 2010, using the latest pay and membership details notified by your employer up to 31 March 2006," this information is contained in small print in the first of 9 bullet points in small text on page 4, and in any event the statement goes on to say, on page 5, that the amount of membership Professor G had in the 1995 Section up to 31 March 2008, that will transfer to the 2008 Section, is 15 years 115 days, which assumes therefore that there is post 31 March 2006 accrual. The statement indicated that accrual was continuing, and Professor G had to make a choice about whether to opt to remain in the 1995 Section or join the 2008 Section on a different accrual basis. I am satisfied that this statement also amounted to a further negligent misstatement of Professor G's position.

219. NHS BSA has submitted, in its latest supplementary submissions, that any compensation for loss (which it denies should be payable) should be reduced to reflect the contributory negligence of Professor G by not noticing that the Trust's contributions had stopped in 2006 and raising it with the Trust and NHS BSA. It has been submitted on behalf of Professor G, that he continued to receive statements as if he were an active member of the Scheme and in the course of IDRP, NHS BSA accepted Professor G was without fault and that NHS BSA should not be entitled to resile from that position. Having regard to the arguments put by NHS BSA, and my finding concerning contributory negligence (paragraphs 211 – 218 above) I do not consider that there should be a reduction in an award for negligent misstatement.

B.2 Trust - negligence

220. The Trust has submitted that NHS BSA is entirely responsible for Professor G's wrongful admission to the Scheme. I have not considered whether the statement by the Trust, see paragraph 12 above, amounts to negligent misstatement because any complaint about that is time barred for the reasons explained in paragraph 226 below.

221. NHS BSA has submitted that the Trust should not have sent NHS BSA Professor G's joiner details, and the submission of these details was contrary to a long-standing position that re-employed pensioners cannot re-join the Scheme. That may indeed be the case, but as NHS BSA was ultimately responsible for applying its eligibility criteria and for only admitting eligible applicants into the Scheme, any administration failings in this respect fall to it. I do not believe that the mere submission of joiner details by the Trust is sufficient to absolve NHS BSA of its responsibility and, in any event, the offer to join in May 2002, on an exceptional basis, was made after the Trust had submitted the joiner details and the mistake had come to light.

[8] My understanding is that under the NHS Pension Regulations 2008/653, Regulation 2K.1 and 2K.2, the option to join the 2008 Scheme, applied to active members of the 1995 Scheme on or after 1 October 2009, and on the day their option to join the 2008 Scheme was received by the Secretary of State. The relevant regulations were inserted by the National Health Service Pension Scheme, Injury Benefits and Additional Voluntary Contributions (Amendment) Regulations 2009 SI 2009/2446, with effect from 1 October 2009.

222. The Trust must also have been made aware by NHS BSA, in 2002, that a mistake had been made and that as an exceptional measure NHS BSA was willing to allow Professor G to remain a member of the Scheme as an alternative to having a return of his contributions and his pension commencing from age 60. I have considered whether it was reasonable to have expected the Trust to check with NHS BSA, the legal basis on which this option was being made available given that the Scheme is a statutory scheme governed by regulations and the Trust would have been aware that NHS BSA cannot act *ultra vires*.

223. I consider that it was not unreasonable for the Trust to rely on the information provided by NHS BSA. NHS BSA, as manager of the Scheme, is responsible for the error in 2002, in saying that it was possible for Professor G to be readmitted to membership of the Scheme on an exceptional basis.

224. Accordingly, I do not consider that it is appropriate to find the Trust jointly and severally liable for the negligent misstatement made by NHS BSA, that Professor G could re-join the Scheme despite the fact that there was no power to readmit him under the Regulations.

C Limitation and Negligence Claims

225. It is necessary for me to consider limitation in relation to the negligence claims against the Trust and NHS BSA, given that the facts giving rise to this complaint date back to 2001.

C.1 Trust - Limitation and Negligence Claims

226. Dealing first with the complaint against the Trust, the Trust's alleged original negligent misstatement occurred in February 2001. Professor G was required to submit his negligence claim to Court within 6 years from February 2001 (section 2 of the Limitation Act), or (if later) within 3 years from the date of knowledge (section 14A of the Limitation Act), subject to a 15-year long-stop period from February 2001 (section 14B of the Limitation Act). There is no suggestion that section 32 of the Limitation Act applies to extend the limitation period on the facts of this case.

227. Professor G submitted his complaint to TPO in May 2017, which falls outside the long-stop period. Any claim Professor G may have against the Trust for negligent misstatement in 2001 is time barred for the matter to be heard by the Courts and, because the Courts are unlikely to provide a remedy, neither can I. This is in accordance with the decision in Arjo Wiggins Limited v Henry Thomas Ralph [2009] EWHC 3198 (Ch), where the Court held that the powers available to the Ombudsman when investigating a complaint that is time-barred are the same as those which are available to the Court under the Limitation Act.

228. Also, I note that in any event, no loss flowed from the inaccurate information provided in 2001, as in 2002 Professor G was told by NHS BSA that the information provided in 2001 was incorrect but he could opt in on an exceptional basis to remain a member of the Scheme while he was employed by the Trust.

229. In relation to the inaccurate information given to Professor G by NHS BSA in 2002, that exceptionally he could continue to pay contributions to the Scheme, as noted at paragraphs 222-224 above, my view is that NHS BSA is liable for the error and the Trust is not jointly and severally liable for it as the Trust was also relying on the incorrect information from NHS BSA, and it was reasonable for it to rely on this incorrect information.

C.2 NHS BSA – limitation and negligence claims

230. The negligent misstatement made on 15 July 2002, is within the 15 year long-stop period, as the complaint was submitted to TPO in May 2017, just inside the 15-year period. I do not consider that Professor G had or could have had relevant knowledge (s14A Limitation Act 1980) sufficient to bring a claim until 10 October 2014. Relevant knowledge signifies such facts about the damage as would lead a reasonable person who had suffered damage to consider it sufficiently serious to justify his instituting proceedings for damages against a defendant who did not dispute liability and was able to satisfy judgment, together with the fact that the damage was attributable in whole or in part to the act or omission which is alleged to constitute negligence.

231. There were also further communications issued to Professor G which implied that he was still an active member. It was only on 10 October 2014, that he was told he should not have been re-admitted. If NHS BSA had been proceeding on the basis that Professor G had ceased to be a member when the employer contributions ceased NHS BSA should have issued a benefit statement at the time.

D Estoppel and Legitimate Expectation

D.1 NHS BSA - Estoppel by representation/promissory estoppel and estoppel by convention

232. The requirements for an estoppel by representation or promissory estoppel are not satisfied in this case against NHS BSA. Putting to one side the difficult and unresolved question of whether estoppel can have any application in public law, there are a number of cases which have confirmed that estoppel cannot provide a lawful foundation for unlawful payments and that TPO has no power to direct a public authority administering its pension scheme to make a payment other than in accordance with the regulations governing the Scheme.[9]

233. In Police and Crime Commissioner for Greater Manchester v Butterworth [2017] 001 PBLR (020) (**Butterworth**), at paragraphs [35] and [36], Jonathan Crow QC (sitting as a Deputy Judge of the High Court) accepted an estoppel argument would fail in relation to a claim to give the applicant an entitlement to a promised benefit which was outside the authority's powers to grant, as the Pensions Ombudsman could not direct that the payment should be made. This conclusion was based on the general doctrine that a

[9] Westminster CC v Haywood 1996] 2 All ER 467 at paragraph 57 and 66; NHS Beechinor [1997] PLR 95 at paragraph [9]; Secretary of State v Turner [2003] 30 PBLR, and East Sussex CC v Jacobs [2004] 24 PBLR at [16] and [17], & Police and Crime Commissioner for Greater Manchester v Butterworth [2017] at [35] and 36].

public authority cannot act outside its powers and the further proposition derived from East Sussex CC v Jacobs [2004] OPLR 243 at [16] to [17], and Secretary of State for Scotland v Turner [2003] SC 523, that the Pensions Ombudsman has no power to order public authorities to make pension payments that they have no power to make. Although these comments are *obiter,* I do not consider that, on the basis of the authorities referred to, I am able to direct that NHS BSA should pay Professor G an *ultra vires* pension on grounds of estoppel.

234. NHS BSA has submitted, in response to the Second Preliminary Decision, that on the facts it is not appropriate to analyse Professor G's case in terms of estoppel by representation but under estoppel by convention, and principles of negligent misstatement are not relevant at all. While I can see how estoppel by convention might arise in a private sector context in similar circumstances, and I consider that an estoppel can arise in relation to a public authority in appropriate circumstances (for example in defence to a claim for overpayment of benefits), I am satisfied that the Ombudsman has no power to direct a public authority administering its pension scheme to make a Scheme payment other than in accordance with the regulations governing the Scheme. This does not, contrary to the submissions of NHS BSA however, preclude a Court (or for that matter the Ombudsman) from directing an award for compensation in relation to a negligent misstatement, or making an additional award in analogous circumstances to where a court could make an award under section 8 of the Human Rights Act, where such an award is necessary to achieve just satisfaction for the applicant.

D.2 NHS BSA - Legitimate expectation

235. At Second Preliminary Decision stage I concluded that a legitimate expectation could arise in relation to the unequivocal promise made by NHS BSA that Professor G could re-join the Scheme and sought to quantify the loss sustained as a result. Both parties have made further representations on this issue which I will consider below.

236. I noted in my Second Preliminary Decision that in the Police and Crime Commissioner for Greater Manchester v Butterworth case, Jonathan Crow QC (Sitting as a Deputy Judge of the High Court) rejected an argument made by the Commissioner (based on Rainbow Insurance Co Ltd v Financial Services Commission [2015] UKPC 15 at [52], and United Policyholders Group v Attorney General of Trinidad & Tobago [2016] 1 WLR 3383 at [38]), that a legitimate expectation could not be founded on a promise ostensibly made by a public authority to do an unlawful act. Counsel for the Pensions Ombudsman submitted in that case, on a line of authorities following from the European Court of Human Rights (Pine Valley Developments Ltd v Ireland (1991) 14 EHRR 319 and Stretch v UK (2003) 38 EHRR 196, cited in Rowland v Environment Agency [2003] EWCA Civ 1885), that a person's possessions within Article 1 of the First Protocol could include an expectation as to the future enjoyment of existing property rights, even if that expectation was generated by an *ultra vires* act on the part of the public authority. Mance LJ said in the Rowland case that where it would be unfair to disappoint such an expectation, the unfairness could be mitigated by compensation, or by smoothing the position as far possible consistently with [the authority's] other duties. Mance LJ also

said as a result of Pine Valley and Stretch cases, "*Whatever the previous position…. [the lack of the Agency's power] can no longer be an automatic answer under English Law to a case of legitimate expectation*".

237. In Butterworth, the Commissioner sought to rely on Breyer Group Plc v Department for Energy & Climate Change [2015] 2 All ER 44 at [98] to [107], and submitted that European Court of Human Rights (ECHR) case law was predicated on there being some existing property rights to which the expectation could attach; alternatively by submitting that even if the argument on Article 1 of the First Protocol was in principle being capable of being run, it would at best justify an award of damages under the Human Rights Act 1998, and would not provide support for the directions made in the Butterworth case.

238. Jonathan Crow QC (sitting as a Deputy High Court Judge), in principle, accepted the first argument but considered in that case there were sufficient property rights by reference to Ms Butterworth's lawful pension entitlements and lawful contractual entitlements under the compromise agreement. Jonathan Crow QC also rejected the Commissioner's second argument and concluded that if the Pensions Ombudsman reaches the view that maladministration (by which he must have meant maladministration involving an infringement of a legal right not pure maladministration) has occurred by reference to an unjustified interference with the Article 1 of the First Protocol rights, he can make a Determination and issue directions on that basis. In the circumstances, if it had been necessary to decide the point (which he did not consider to be the case) Jonathan Crow QC stated in his judgment that he would have rejected the argument that a complaint based on legitimate expectation was inevitably doomed to failure and that it would be pointless to remit the matter back to the Ombudsman for further consideration. However, for other reasons he chose not to do so in the Butterworth case.

239. I concluded in the Second Preliminary Decision that, although on the authorities an estoppel argument cannot succeed against a public authority to give a future entitlement to an *ultra vires* benefit, a legitimate expectation argument may succeed in appropriate circumstances to give a right to damages where it is necessary to achieve just satisfaction, although in practice these circumstances will be rare. I consider, in particular, in Professor G's case, that his existing pension entitlement under the Scheme are sufficient property rights to which a legitimate expectation claim, attributable to the inaccurate statement regarding his eligibility to re-join the Scheme and to start accruing additional benefits, could attach, to found a claim on the basis of unjustified interference with his Article 1 First Protocol rights (see paragraphs 241-263 below).

240. Supplementary submissions were made on behalf of NHS BSA and Professor G following the issue of the Second Preliminary Decision. NHS BSA has submitted that the current position is very different from the Butterworth case and argues that there is no basis in the doctrine of legitimate expectation, nor in the law on Article 1 of the First Protocol, to support a free-standing private law claim for significant damages in Professor G's case. Professor G rejects these submissions for the reasons

summarised in paragraphs 73-82 above. In particular that there is case law which makes it clear that an unlawful promise made by a public authority can give rise to a legitimate expectation, even in the circumstances where the promise is unenforceable, and that the individual's reliance on the promise should be taken into account and other means of compensation, including monetary should be considered. The case of R v (Bibi) v Newham London Borough Council [2001] EWCA Civ 607 at [56], are cited, and various other cases, in support of the proposition. I remain of the view, having considered the submissions of both parties, that on the basis of the authorities cited on behalf of Professor G and in Butterworth, and having considered the supplementary submissions advanced by NHS BSA, it is arguable that a court (and accordingly an ombudsman with power to direct financial compensation) can direct the payment of financial compensation if it is satisfied that the award is necessary to afford just satisfaction to the person in whose favour it is made. I agree with Professor G that it is arguable that any such award is separate, and where just satisfaction requires it (but not otherwise), it is open to me to direct it, in addition to any other compensation I direct is payable, if such other compensation is not in itself sufficient to provide just satisfaction to Professor G.

D.3 Human Rights Act 1998

241. Under section 6 of the Human Right Act 1998 (HRA 98), it is generally unlawful for a public authority to act in a way which is incompatible with the rights and fundamental freedoms set out in the European Convention on Human Rights and Articles 1 to 3 of the first protocol and Article 1 to the 13th Protocol (the **Convention Rights**). In the case of subordinate legislation (like the Regulations) a public authority (like NHS BSA) will be acting unlawfully if it acts in a manner which is incompatible with the Human Rights Act, unless there is primary legislation in place, the effect of which is to prevent removal of the incompatibility (RR v Secretary of State for Works and Pensions [2019] UKSC 52).

242. Any person who claims that a public authority has acted (or proposed to act) in a way which is incompatible with a Convention Right can:

(a) Bring proceedings against a public authority under the HRA in an appropriate court or tribunal (the Pensions Ombudsman is not an appropriate court or tribunal for this purpose) (Section 7(1)(a) Human Rights Act); or

(b) Rely on Convention Rights in any legal proceedings (which will include ombudsman proceedings) (Section 7(1)(b) Human Rights Act), but only if he or she is (or would be) a victim of the unlawful act. So, if a dispute or complaint is referred to the Pensions Ombudsman under the Pension Schemes Act 1993 (PSA 1993), the applicant can rely on Convention Rights even though the Pensions Ombudsman has no power, unlike the High Court, to make a declaration of incompatibility with a Convention Right.

D.4 Applying the principles to Professor G's case

243. If the above principles relating to legitimate expectation are applied to Professor G's case, as I noted at Second Preliminary Decision stage, a legitimate expectation can only arise where a public body makes a clear and unambiguous statement which is devoid of any relevant qualification (R v IRV Ex p MFK Underwriting Agencies Ltd [1990] IWLR 1545 at 1570 (Bingham LJ), and many other cases). I agree with Professor G that in applying the test of whether a clear, unambiguous assurance is given and it was reasonable for it to be relied upon, the second test is whether the public authority has frustrated the legitimate expectation and whether that was so unfair as to amount to an abuse of power. Also, as noted by Professor G. the case of R(Majed) v London Borough of Camden [1009] EWCA Civ 1029, provides authority that such an abuse of power does not have to involve bad faith; incompetence or negligence is sufficient, as in this case.

244. NHS BSA has previously accepted (before later withdrawing the admission) that Professor G had a legitimate expectation that he would receive the promised benefit, albeit only for the period from 2001 to 2006. However, in its latest submissions it seems to have withdrawn this concession and is now submitting that legitimate expectation has no application to the current case, and that there is no unequivocal statement of entitlement.

245. I remain satisfied that NHS BSA is a public body and has made a clear and unambiguous statement which was devoid of any relevant qualification to Professor G that he could re-join and accrue benefits in the Scheme on an exceptional basis. NHS BSA identified in 2002 that it had admitted Professor G into the Scheme in error, and at that point it had the opportunity to correct its error, thereby minimising harm to Professor G. On two occasions in 2002 (first in May 2002 and second in July 2002), NHS BSA confirmed, in clear terms, that it would grant Professor G Scheme membership on an exceptional basis. NHS BSA also later issued statements to Professor G which were only compatible with him being treated as an active member.

246. Those statements by NHS BSA clearly mean that Professor G could expect to accrue benefits for his period of service with the Trust. Nothing contained therein, gave any indication that NHS BSA had no power under the Regulations to make such statements. Indeed, the statements indicated that given the circumstances of Professor G's case, exceptionally, he was being permitted to re-join the Scheme. I also consider that allowing NHS BSA to frustrate the legitimate expectation could potentially amount to an "abuse of power". I recognise that holding NHS BSA to account has a cost to NHS BSA (and ultimately the taxpayer), but NHS BSA has an obligation to pay the correct benefits under the Scheme, it should not make *ultra vires* promises and should have systems in place to ensure that this does not occur.

247. NHS BSA represented to Professor G that it had the authority to make this promise and I see no reason, on the evidence provided, why Professor G ought to have realised that NHS BSA lacked authority, or any reason why he ought to have investigated NHS BSA's apparent authority. Professor G reasonably relied on the statements, to his detriment as he made no alternative pension arrangements, and so lost the ability to build up further pension outside of the Scheme.

248. NHS BSA previously accepted (before withdrawing the admission) that Professor G had a legitimate expectation that he would receive the promised benefit for the period, but only for the period from 2001 to 2006. This is because it submits that Professor G's legitimate expectation must have ceased when Professor G's contributions ceased from 2006 onwards.

249. I do not agree. The reason Professor G and the Trust's contributions ceased appear to be as a result of an error of the payroll provider used by the Trust; and not due to the discovery that Professor G's membership of the Scheme was not permitted under the Regulations. If the error had been discovered there is no reason to believe that contributions would not have recommenced.

250. Even if Professor G could have reasonably discovered that contributions ceased (which for the reasons I explained above, see paragraphs 213-218, I do not), it does not follow that the legitimate expectation he had that he would be paid a pension, also ceases. NHS BSA continued to issue communications which are consistent with Professor G's continued membership of the Scheme.

251. Also, I do not consider that because Professor G will have been issued with a booklet, which will have stated that the benefits payable will be determined in accordance with the Regulations, this is sufficient in Professor G's case, to negate a legitimate expectation that he was entitled to re-join the Scheme, as he was told that "exceptionally" he would be able to re-join the Scheme although he had been admitted in error.

D.5 Human Rights Act 1998 breach remedies

252. Broadly, although my direction-making powers under section 151 of the PSA 1993, are very wide, it has been established that in relation to any award for an infringement of a legal right, I should not make an award which is different from an award that a court could make in the same circumstances in relation to the same infringement of a legal right.

253. In the Pine Valley case it was noted that a legitimate expectation (that is, an expectation as to the future enjoyment of existing property rights) may constitute a "possession" under Article 1 of the First Protocol to the Convention and may be protected, "notwithstanding the fact it was beyond the powers of the public body which fostered the expectation to realise the expectation". In such circumstances however it was confirmed in the case that the expectation did not automatically entitle the person to a "realisation" of the *ultra vires* expectation, but may entitle him to other discretionary relief, such as compensation "which is within the powers of a public body to afford". There are similar statements in R (Bibi) v Newham London Borough Council [2001] EWCA Civ, and Rowland v Environment Agency [2003] EWCA Civ 1885, which have been cited by NHS BSA and which I have referred to in paragraphs 236 and 240 above.

254. Section 8 of the Human Rights Act provides that:

"8(1) In relation to any act (or proposed act) of a public authority which the court finds is (or would be) unlawful, it may grant such relief or remedy, or make such order, within its powers as it considers just and appropriate;

(2) But damages may be awarded only by a court which has power to award damages, or to order payment of compensation in civil proceedings.

(3) No award of damages is to be made unless, taking into account of all the circumstances of the case including -

(a) any other relief or remedy granted or order made in relation to the act in question (by this or any other court), and

(b) the consequence of any decision (or that of any other court) in respect of that act,

the court is satisfied that the award is necessary to afford just satisfaction to the person in whose favour it is made.

(4) In determining -

(a) whether to award damages;

(b) the amount of an award, the court must take into account the principles applied by the European Court of Human Rights in relation to the award of compensation under Article 41 of the Convention."

255. Accordingly, if I am to take a similar approach to a court in exercising my direction-making powers under section 151 PSA 1993, (and come to the same result as a court would in the same circumstances, as I am required to do under existing case law), I need to consider what relief or remedy is just and appropriate in the circumstances if a court were to consider the same issue. I also need to be cognisant of the fact that a damages award for breach of the Human Rights Act should not be made, unless taking into account the circumstances of the case including:

(a) any other relief or remedy granted or order made in relation to the act in question (by this or any other court) (which would include any award I make for non-financial injustice and any award for negligent misstatement); and

(b) the consequence of any decision (or that of any other court) in respect of that act,

the court (or the Ombudsman) is satisfied that the award is necessary to afford just satisfaction to the person in whose favour it is made.

256. The difficulty with taking into account the principles applied by the ECHR is, however, as noted by Lord Carnwath in R (on the application of Sturnham) v United Kingdom 2002 35 EHRR 177 at [43], that:

> "The great majority... of awards [under Article 41] are made on an "equitable basis reflecting the particular facts…. Most of the decisions are not intended to have any precedential effect, and it is a mistake in my view to treat them as if they were".

257. Domestic courts have generally followed the European Court of Human Rights (**EctHR**) in the light of HRA 98 section 8(4), in taking a broad "equitable approach to determining the necessity of the award". The EctHR has said that the decision involves an inquiry into "what is just, fair and reasonable in all the circumstances of the case." (Al-Jedda v United Kingdom (2011) 55 EHRR 23 at [114])). NHS BSA is correct, and it is also my understanding, that in many cases these awards are quite small, (that is, akin to an award that I might make in more serious cases of non-financial injustice) where the awards address distress caused by breach of human rights. However, in cases involving deprivation of property rights resulting in legal loss the courts often award very significant sums. In Mott v Environment Agency [2019] EWHC 1892 (Admin), for example, I understand that damages for proven pecuniary loss of £187,278 (plus interest) were awarded. In R (on the application of Infinis Plc) v Gas and Electricity Markets Act [2013 EWCA Civ 70] EWHC 1873, the Court of Appeal upheld the lower Courts decision to award damages in the sum of £94,393. In the Breyer Group Plc v Department of Energy and Climate Change [2014] EWHC 2257 (QB), it is my understanding that the case settled for the sum of approximately £60 million.[10]

258. NHS BSA has argued, in its supplementary submissions following the Second Preliminary Decision, that an award designed to compensate Professor G for breach of duty of care and breach of Professor G's Article 1 of First Protocol rights, is wrong in law, amounts to an exorbitant liability arising for NHS BSA and is not one which is supported by tort damages. NHS BSA however, has not cited any authorities in support of this statement. As noted previously NHS BSA is conflating two separate legal issues:

    258.1. First, the appropriate financial award to compensate for loss as a result of negligent misstatement; and

    258.2. Second, whether any additional award is necessary having regard to any award for negligent misstatement to achieve just satisfaction for Professor G having regard to Article 8 principles.

259. I understand that in the EctHR cases one of few broad principles that the EctHR applies is the principle of law known as "restitutio in integrum". This is the principle that damages should put the individual in the same position he would have been in if the wrong had not been committed, that is, the same approach to the approach the UK courts would take when measuring loss for negligent misstatement. I must therefore consider whether, having regard to EctHR principles if it would be appropriate to pay Professor G an additional amount over and above any award for negligent misstatement in order to achieve just satisfaction.

[10] McGregor on Damages – Twenty-First Edition Chapter 50-117-122

260. There is also a developing subsidiary line of English authority (Alseran v MoD [2017] EWHC 3289 at [939] to [946]) (**Alseran**), in which Legatt J recognised that more regard should be had to English principles for assessing loss and articulated the following four stage approach to assessing damages in HRA 98 claims which gives primacy to domestic principles and scales but not excluding consideration of EctHR practice which serves as a final cross-check:

(a) Identify the relevant injuries;

(b) Assess the sum that would be awarded for those injuries in accordance with English damages principles;

(c) Consider whether to depart from or adjust the sum having regard to wider considerations of what is just and equitable in all the circumstances; and

(d) Ask whether there is any reason to think that the sum arrived at by the preceding three steps is significantly more or less generous than the amount that the ECHR would be expected to award.

261. Applying the Alseran approach, the sum at stage 2, awarded for damage caused as a result of the negligent misstatement that Professor G could re-join the Scheme, would be the sum necessary to put Professor G in the position he would have been if the negligent misstatement had not been made.

262. It may be arguable that Professor G's case is particularly egregious (when compared with other overpayment cases) given that it was established that he was incorrectly enrolled and yet NHS BSA went onto tell him that in the exceptional circumstances of the case he was entitled to rejoin the Scheme. So it might be arguable that it would be appropriate to depart from the negligent misstatement measure of loss (and it would be open to the EctHR to do the same) and pay an additional amount having regard to wider principles of what is just and equitable in the circumstances.

263. However, my view is that: (i) payment of arrears of Professor G's preserved pension from age 60 onwards with interest; and (ii) damages for negligent misrepresentation, is sufficient to afford just satisfaction to Professor G for the breach in the circumstances and no additional award under section 8 of the Human Rights Act, is appropriate in the circumstances of the case. In reaching my decision, I have also had regard to the cost to the public purse.

E The complaint against NHS BSA – Right to Join the 2008 Section

264. I do not uphold Professor G's complaint that had NHS BSA's error not occurred, he would have been entitled to join the 2008 Section of the Scheme when it was established, and that he has lost potential benefits from that potential membership. Professor G was a "pensioner member" of the 1995 Section before 1 April 2008, so he was not eligible to join the 2008 Section and there is no evidence of any basis upon which he might have been entitled to membership of that Section (Under Regulation

2B.1 of the NHS Regulations 2008 (as originally drafted), Professor G would not have met eligibility Condition B).

F. Redress

F.1 Loss Calculation

265. In order to calculate the financial loss sustained by Professor G, NHS BSA should instruct the Scheme's Actuary to calculate the following amounts: -

265.1. the Personal Pension Loss;

265.2. the Pension and Lump Sum Arrears;

265.3. the Overpaid Employee Contribution;

such amounts to be calculated in the manner set out below as at the date of my Determination.

266. For the purposes of paragraph 265 above:

266.1. The "Personal Pension Loss" is a sum (adjusted for tax as set out below) equal to the accumulated value at the Determination Date of the personal pension Professor G would have built up assuming monthly contributions were made to a personal pension set up for Professor G's benefit over the period 19 February 2001 to 10 October 2014 on the 15th day of each calendar month at the rate of 7% of Professor G's pensionable pay (as defined in the National Health Service Pension Regulations 1995 (SI 1995/300)); and invested in the Scottish Widows Progressive Growth Portfolio 1 Class A Accumulation (ISIN: GB0031903288[11]). This sum shall be adjusted for tax by applying a reduction at an assumed rate of 30% (reflecting an assumed rate of tax at 40% on 75% of the amount and 0% on the remaining 25%).

266.2. The "Pension and Lump Sum Arrears" is a sum equal to the lump sum retirement benefit and unpaid instalments of pension (less any PAYE which the Scheme is required to deduct) which Professor G is owed from age 60, in respect of this period of pensionable service up to September 1985, on the assumption that his pension and lump sum retirement benefit under the Scheme came into payment at age 60 (less any tax NHS BSA is required to deduct under PAYE), plus Interest from the end of the month following the due date of payment of the lump sum retirement benefit or applicable instalment of pension to the Determination Date.

266.3. The "Overpaid Employee Contribution" is, to the extent that these employee contributions have not already been repaid to Professor G, a sum equal to the employee contributions made by Professor G from age 60 plus Interest from the

[11] Daily unit prices can be found at - https://www.charles-stanley-direct.co.uk/ViewFund?Sedol=3190328

end of the month of the due date of payment on each of the original employee contributions to the Determination Date.

266.4. "Interest" is simple interest at Bank of England Base rate on the applicable sum.

F.2 Tax

267. It is well established that when a court (or for that matter the Ombudsman) makes a damages (or its equivalent) award, it should generally seek to apply Gourley or reverse Gourley principles to put an individual in the same net tax position they would have been if the breach of law to which the damages award relates, had not been made. Throughout most of the period in question to which any direction to pay damages relates, Professor G, has, it is my understanding, been subject to higher rate tax at the rate of 40% . Various adjustments may be necessary to ensure that Professor G will not be put into a better position (net of tax) then he would otherwise have been had the pension been paid. It is assumed however, that the Personal Pension Loss payment will not itself be taxed as it is effectively a damages payment. If this proves not to be the case, it will be necessary to gross up the Personal Pension Loss figure for any tax which Professor G may be liable.

268. In relation to the Pension and Lump Sum Arrears, it is my understanding that NHS BSA will be required to deduct PAYE from the pension payments but not the lump sum retirement benefit. It is also my understanding that it may not be possible to reopen Professor G's last twenty or so tax returns so the payment may need to be taxed in the year of payment. Accordingly, if all or part of the arrears of pension paid to Professor G by NHS BSA, pursuant to my direction in respect of the period of his pensionable service up to September 1985, become liable to income tax at the additional rate (currently 45%), rather than the rate at which Professor G would have been charged if such sums had been paid at the correct time, NHS BSA shall pay Professor G an additional amount to put him in the net tax position he would have been in had these amounts been paid at the correct times. My understanding is that any arrears of pension and lump sum payments should not be unauthorised for Finance Act 2004, purposes. However, if this proves not to be the case it would also be appropriate that any unauthorised payment charge is met by NHS BSA.

F.3 Non-financial Injustice

269. Finally, in addition to awarding Professor G recompense for his financial loss, he shall receive an award in respect of the non-financial injustice he has incurred as a result of NHS BSA's failings. I have no doubt that on becoming aware that his membership was disputed by NHS BSA Professor G will have suffered exceptional distress and loss of expectation. He had reasonably believed that he had accrued further pension benefits within the Scheme, and on learning that was incorrect, his retirement position would have been uncertain from that point onwards. Professor G's mental welfare will no doubt have been affected. There have been numerous, repeated errors, inconsistent actions, characterising poor administration in dealing with Professor G's benefits over a prolonged period. For example, on joining employment, by letters (paragraph 15 and

16), returning contributions (paragraph 18), statements issued (paragraph 19, 21 and 22) and ceasing contributions (paragraph 20).

270. An award in recognition of the exceptional distress and inconvenience caused, in this particularly egregious case, is appropriate. In the circumstances I do not consider that the amount offered by NHS BSA, £2,000 is sufficient. An award of £4,000 is, in my view, appropriate.

271. I would also recommend that NHS BSA considers whether its staff should receive training on the concept of *ultra vires,* and that NHS BSA staff should put in place appropriate systems to make sure NHS BSA staff do not make *ultra vires* pension promises or allow members to re-join the Scheme in circumstances where this is not permitted under the Scheme Regulations.

G. Directions

272. Within 30 days of the date of this Determination NHS BSA shall provide Professor G with calculations of his Personal Pension Loss, Pension and Lump Sum Arrears and the Overpaid Employee Contribution and commence payment of his pension under the Scheme from the Determination Date, calculated by reference to his pensionable service in the Scheme up to September 1985 and on the assumption that such pension came into payment at age 60 and has been increased in accordance with the Scheme rules since age 60 to the Determination Date.

273. I direct that within a further 14 days of the date of completion of the calculation under paragraphs 265 - 266 above, NHS BSA shall pay to Professor G

273.1. an amount equal to his Personal Pension Loss;

273.2. an amount equal to his Pension and Lump Sum Arrears,

273.3. an amount equal to the Overpaid Employee Contribution; plus

273.4. simple interest at Bank of England Base rate on all these sums from the date of this Determination until two days before the date of payment.

274. In addition, if all or any part of the arrears of pension paid in accordance with the directions at paragraph 272 and 273.2 above, are subject to income tax at additional rate (currently 45%) (instead of 40%) NHS BSA shall pay Professor G an additional amount sufficient put him in the position he would have been in if he had only been subject to tax at 40% on all or any of these amounts or parts of such amounts.

275. If the arrears of the lump sum retirement benefit and/or the amount equal to the Personal Pension Loss payable pursuant to my direction under paragraph 273 above are taxed other than at 0%, NHS BSA shall pay Professor G an amount equal to any tax charged on these amounts sufficient to put him in the same net tax position he would have been if no tax had been deducted.

276. If all or any of the Personal Pension Loss or Pension and Lump Sum Arrears or Overpaid Employee Contribution, paid pursuant to my direction under paragraph 273

and 274 above, are treated as unauthorised payments for Finance Act 2004, purposes NHS BSA shall also pay Professor G an amount equal to any unauthorised payment charge for which he is liable.

277. Additionally, NHS BSA shall: within 28 days of the date of this Determination pay Professor G £4,000 for the exceptional distress and inconvenience which he has suffered.

Anthony Arter CBE

Deputy Pensions Ombudsman
23 January 2024