

## Ombudsman's Determination

Applicant	Mr D
Scheme	The Bic UK Pension Scheme ( <b>the Scheme</b> )
Respondents	Atkin & Co ( <b>Atkin</b> ) Trustees of the Bic UK Pension Scheme ( <b>the Trustees</b> )

### Complaint summary

1. Mr D has complained that he has been overpaid pension benefits by the Trustees and that the Trustees are now seeking recovery of the overpayment.
2. Mr D would like the Trustees to write off the overpayment and reinstate his pension payments to the original amount paid.

### Summary of the Ombudsman's preliminary decision and reasons

3. The complaint is partly upheld against the Trustees, because the errors which led to the overpayment of Mr D's pension amount to maladministration and have caused him serious distress and inconvenience.

## Detailed Determination

### Material facts

4. Mr D began taking benefits from the Scheme in 1996.
5. Until 2004, the Scheme was administered by Mercer, following which Alexander Forbes took over.
6. In 2004, Mr D reached age 65 and a Guaranteed Minimum Pension (**GMP**) became payable. This should have resulted in the GMP portion of the pension (the **GMP Element**) being identified and a different, lower, rate of annual increase being applied to that portion going forward. However, the GMP Element continued to increase at the same, higher rate as had been applied to the pension before Mr D's 65<sup>th</sup> birthday.
7. In May 2011, Atkin took over the administration of the Scheme, inheriting basic electronic data and member records relating to each member's benefits. Atkin asserts that, on the basis of the records it received, as far as the Scheme was concerned, Mr D had no GMP entitlement.
8. Atkin says it did not have the file papers or copies of benefit calculations from the time Mr D retired, so it had assumed that the pension in payment was accurate and it continued to increase the pension in accordance with the records it had received.
9. In 2014, Dalriada (the Scheme's trustee at that time) requested Atkin undertake a full GMP reconciliation exercise. On completion of this, it was identified that Mr D was entitled to a GMP and, as a result, he had received higher increases to his pension than he ought to have received had the correct rate of increase applied to the GMP Element from 2004.
10. In November 2014, Atkin notified Dalriada, who wrote to Mr D to explain the error. Dalriada told Mr D that it intended to correct his benefits from September 2015 and recover the overpayment by making a deduction to his pension payments going forward for a period of 10 years.
11. On 3 August 2015, Atkin wrote to Mr D confirming that his pension would be reduced in September 2015 from £17,278.80 to £16,343.16 per annum. Atkin also confirmed that the overpayment of £6,653.49 would be recouped at the rate of £55.49 per month over 10 years starting from October 2015, by reducing Mr D's pension by that amount during that period.
12. On 10 January 2016, Mr D raised a complaint under the Scheme's Internal Dispute Resolution Procedure. The complaint was not upheld.
13. Mr D made a number of points in his complaint. He explained that he could not understand why the Trustees (who had since replaced Dalriada) were reducing his pension and requesting repayment when the overpayments had been made due to a mistake made by a previous administrator and not through any fault of his own. He suggested that the Trustees seek redress from the previous administrator.

14. The Trustees' response was that they were obliged to reduce Mr D's pension to the correct amount and to seek recovery of the overpaid pension as it was their duty to do so: ensure that benefits were paid correctly under the rules of the Scheme; and correct any errors. The Trustees said that, under Rule 17.2, Mr D was not entitled to receive increases on the part of his GMP that related to his pensionable service prior to 6 April 1988 (the **Pre-88 GMP**). Therefore, any pension increases attributable to Mr D's Pre-88 GMP that had been applied from 2004 would need to be recovered. The Trustees suggested that action against the previous administrator was unlikely to be successful due to the time that had passed since the errors occurred which had led to the overpayment.
15. The complaint was referred to my Office and reviewed by an Adjudicator.
16. On 1 September 2017, I issued a Determination on Mr D's complaint (the **Original Determination**), finding that the complaint should be partially upheld, on the basis that section 5 of the Limitation Act 1980 (the **Act**) applied and, as a result, the Trustees were restricted from recovering overpayments made more than six years before they had issued their formal response.
17. Around this time, the Trustees began recouping the overpayment from Mr D's pension at a rate of £55.44 per month. This would end in February 2023.
18. Following that Determination, Bic UK Limited, the Scheme's sponsoring employer, appealed the Original Determination. It argued that the Trustees were looking to recover the overpayment by way of equitable recoupment, to which section 5 of the Act did not apply, so its actions to recover the overpayment were not subject to section 5 of the Act.
19. The appeal was initially stayed, pending the outcome of a related case, *Burgess and ors v Bic UK Limited* [2018] EWHC 785 (Ch) (the **Bic Judgment**). In the Bic Judgment, the judge held that the recovery of overpayments by recoupment was not subject to the six-year limitation period under section 5 of the Limitation Act 1980.
20. On 1 August 2018, in an email between my Office and Bic UK Limited's legal adviser about the Original Determination, my representative stated:-

"On the basis that the parties will be referring back to TPO for re-determination in light of the BIC decision we would suggest, in confidence, receiving a preview copy of any consent order (presuming that is the route this goes down) to ensure that it doesn't cause any problem for us in re-investigating and re-determining the matter."
21. The primary reason for suggesting our involvement was to avoid a situation, which has occurred in an unrelated appeal case, where the parties agreed (and the court approved) a consent order which failed to quash the existing Determination, leaving the validity of any re-determination of that matter in question.

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22. On 5 October 2018, following the Bic Judgment, the stay on the appeal against the Original Determination was lifted and a Consent Order was handed down, directing that:

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1. The stay on the appeal shall be lifted.
2. The Pensions Ombudsman's Determination No. PO-1918 dated 1 September 2017 shall be set aside.
3. The matter shall be referred back to the Pensions Ombudsman who shall reconsider Mr D's complaint against Atkin & Co. and MJB Independent Trustee in light of the judgment of Arnold J. in *Burgess and ors v Bic UK Limited* [2018] EWHC 785 (Ch).”

### **Summary of Mr D's position**

23. Mr D has not presented any change of position or estoppel argument to defend against the recovery of the overpayment. Additionally, he has not provided any counter arguments to the position set out in the Bic Judgment.
24. Mr D has said that he attributes a deterioration in his health to the stress caused by the overpayment and the subsequent proceedings to recover it. He has provided a summary of expenses that are associated with his deteriorated health, which is included at Appendix 1.

### **Summary of the Trustees' position**

25. Under the Consent Order, the Original Determination is to be reconsidered in light of the Bic Judgment and, particularly, in light of the finding that the Act does not apply in the context of the equitable remedy of recoupment when recovering an overpayment. Therefore, the reconsideration should be restricted to the issue of the limitation defence. Other defences, such as change of position and estoppel, should not be considered. If they were relevant they should have been considered in the Original Determination.
26. No finding of maladministration, or award for distress and inconvenience, was made in the Original Determination. In the absence of any further findings of fact, the Trustees would disagree with such a finding being made in the reconsideration.
27. Bic UK Limited, as the Scheme's sponsoring employer and the appealing party to the Original Determination added:
  - The Scheme is a balance of cost scheme and therefore, although it is not a respondent to the complaint, it has a real financial interest in the outcome which may affect the approach taken to other cases.
  - The Consent Order was approved by the High Court, with the consent of all the parties, including Mr D and a representative of the Ombudsman.

- The Consent Order requires the Ombudsman to “reconsider Mr D’s complaint against Atkin & Co. and MJB Independent Trustee in light of the Judgment of Arnold J. in *Burgess and ors v Bic UK Limited* [2018] EWHC 785 (Ch)”, of which the relevant part is whether the Limitation Act 1980, is an applicable defence to the equitable remedy of recoupment.
- The Consent Order does not allow the Ombudsman to reopen the case to the extent that new issues not previously considered (including, without limitation, change of position or estoppel), would be addressed in the new Determination. If they were relevant, they should have been considered under the Original Determination.
- There was no finding of maladministration in the original decision, and no new facts have come to light to support such a conclusion. To introduce them now would not be consistent with the terms of the Consent order. The Judgment in the recent case of *Sheffield v Kier Group Plc* [2019] EWHC 986 (Ch) (**the Kier Judgment**) is relevant in this regard.
- The Ombudsman should limit the reconsideration of the complaint to the issues referred to in the Consent Order, specifically the implications of the Bic Judgment.

## Conclusions

### *The application of section 5 of the Act:*

28. In the Original Determination I found that section 5 of the Act applied, and that the Trustees were restricted from recovering the full overpayment. Having considered the Bic Judgment, I note Arnold J’s finding that equitable recoupment is not a claim in restitution for unjust enrichment but is instead an equitable self-help remedy.
29. The relevant section of the Bic Judgment is set out in Appendix 2 below. In summary, equitable self-help remedies are excluded from the limitation periods set out in the Act, by virtue of section 36 of the Act. Under that section therefore, the six year limitation period which it seemed at that time prevented the Trustees from recovering overpayments made more than six years before the Trustee’s response to this Office, and which I had sought to apply in the Original Determination, does not apply.
30. Mr D has not put forward any counter argument to that conclusion, and so I accept the Trustees’ position, in light of the Bic Judgment, that section 5 of the Act does not apply to their attempt to recover the overpayment through recoupment.

### *The extent to which I can reconsider Mr D’s complaint:*

31. Under the Consent Order, the Original Determination was set aside completely and the complaint as a whole was remitted to me to reconsider it in light of the Bic Judgment. In this context, I consider that I am entitled to reconsider the applicability of the Act, following the Bic Judgment, *and* the wider issues of the complaint. The Court considered issues such as laches and estoppel and held that these must be considered on an individual basis as between the Trustees and the member and not

on a group basis, therefore, if such matters form, or become part of the complaint made by the applicant, I can evaluate these as part of my reconsideration of the matter in the light of the Bic Judgment.

32. In saying that I also refer to the email from this Office to a lawyer representing Bic UK Limited, which I have quoted in paragraph 20 above. From the email it is clear that the intention of the Consent Order, from our perspective, was to allow us to re-investigate and re-determine the complaint rather than continue with the legal proceedings.
33. I have considered the judgment handed down in respect of the Kier Judgment, which was highlighted by Bic UK Limited's legal advisers. I am not persuaded that that judgment restricts me from considering the wider issue of whether Mr D had any defence against the recoupment of the overpayment, other than under the Act, in this Determination.
34. In the Kier Judgment, I was required to investigate and determine a dispute, in relation to the interest payable on certain pension benefits in payment. The Kier Judgment found that my jurisdiction regarding the complaint did not extend to investigating and determining matters concerning the validity and correctness of those benefits themselves, as those matters had not been raised by the parties. Although those matters were related, they were separate from the matter that I had been asked to investigate and determine in that particular case.
35. In investigating disputes concerning the recovery of overpayments by equitable recoupment, it is necessary to consider any defence to that recovery that might apply and any other factor that could potentially prevent the proposed recovery from being fair, just, and equitable. Consideration of any potential defence and/or the fairness, justness, and equitability of the recovery, as well as the question of whether there has been maladministration on the part of any party that made, caused, or allowed the overpayment, forms part of the investigation of the overpayment complaint itself. As I have explained in paragraphs 30 and 31 above, it is clear from the wording of the Consent Order that Mr D's complaint has been remitted to me in its entirety.
36. On those bases, I do not consider that the Kier Judgment is relevant to my investigation and determination of Mr D's complaint and I will consider: whether any defence to the recoupment of the overpaid benefits applies; whether the rate and duration of the recoupment is fair, just and equitable; and whether there has been maladministration on the part of the Trustees in their handling of this matter.

*Defences against recovery of the overpaid benefits:*

37. In reaching the Original Determination, having considered whether any defence on Mr D's part against the Trustees' recovery of his overpaid benefits, other than under the Act might apply, I did not find that there were sufficient grounds for any such defence

to apply<sup>1</sup>. No other potential defences were raised and Mr D has made no further submissions in that respect. Therefore, I do not consider that any valid defence against the Trustees' recoupment of Mr D's overpaid benefits applies.

*Whether the terms of the recovery are fair, just and equitable:*

38. Considering the fairness, justness and equitability of the proposed rate of recoupment requires consideration of the particular facts and circumstances, on a case by case basis. In my Original Determination, I did not find that the Trustees' proposed rate of recoupment was unfair, unjust or inequitable. While I understand that Mr D's health has deteriorated since I issued my Original Determination, I have been informed by Mr D's wife that his financial situation has not changed substantially. Therefore, I do not consider that I should direct the Trustees to lower the monthly amount that has been deducted from Mr D's benefits in the future. However, given that the length of time over which the recoverable overpayments were made has been increased by the finding that section 5 of the Act does not apply. I would suggest that the Trustee seeks to recover the overpaid amount by lengthening the period of time over which the deductions are made from Mr D's benefits, rather than by increasing the monthly amount of the deductions.

*Maladministration: record-keeping responsibilities:*

39. As I have explained in paragraphs 31-36 above, I do not consider that I am restricted from considering whether any maladministration has occurred on the Trustees' part, regardless of whether I considered that question before reaching my Original Determination. In any case, I would point out that I did address that point in the Original Determination; at paragraph 22. I stated that:-

“The Trustees have cited various failings with previous administrators which led to the overpayment, including incomplete records and calculations. However, that is a matter for the Trustees and, on balance, I am satisfied that had the Trustees been more diligent then the overpayments would not have occurred. It follows that I am not persuaded that with reasonable diligence the Trustees could not have discovered these until 2014.”

40. While this was not explicitly labelled as a finding of maladministration against the Trustees, it is clear that the Trustees had themselves identified failings on the part of former administrators which constitutes maladministration. The Trustees are ultimately responsible for the actions of administrators, former and current and, in this context, I find that they are responsible for the maladministration that occurred when the records relating to Mr D's GMP were not adequately kept.

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<sup>1</sup> The Adjudicator who initially investigated Mr D's complaint referred to having considered whether any defence applied and explained that no such defence did apply, in paragraphs 25 to 31 of her Opinion. In my Original Determination, I acknowledged this in paragraph 17 of my Original Determination and did not disagree with it.

41. The result of this error is that Mr D has incurred a significant debt to the Scheme which, upon him learning of the debt, will no doubt have caused him serious distress and inconvenience.
42. As a consequence of the shortcomings in relation to the Trustees' record-keeping requirements, the Trustees did not discover the errors that led to the overpayments being made in respect of Mr D's benefits until sometime later than they would otherwise have done.
43. In paragraph 22 of my Original Determination, I explained that the Trustees could not rely upon section 32 of the Act in order to disapply the six year limitation period under section 5 of the Act and allow them to recover the overpayments in their entirety. I found that the Trustees had possessed all of the information that they needed to enable them to realise that they would be making overpayments to Mr D from 2004, when he reached age 65, if they continued to allow his pension benefits to increase at the same rate as they had been before then. Given that that finding meant that Mr D benefitted from the effect of section 5 of the Act, I considered that it would not have been appropriate to have also awarded him a monetary payment in respect of the Trustees' maladministration, as that would have caused him, effectively, to have received 'double compensation'.
44. However, in light of the Bic Judgment, section 5 of the Act no longer applies. So my directing the Trustees to pay a monetary amount to Mr D in recognition of the distress and inconvenience that he has suffered as a consequence of the Trustees' maladministration in failing to prevent the overpayments from occurring and/or to discover earlier that Mr D was being overpaid would no longer cause Mr D to be over-compensated. Instead, this direction would recognise that in law he must repay the money despite the errors not being his, but he has nevertheless suffered considerable and avoidable distress and inconvenience from those actions leading up to this point.

*Maladministration: Section 91(6) of the Pensions Act 1995 (Section 91(6)):*

45. I further note that the Trustees began recouping the overpayment following the Original Determination. However, following the quashing of the Original Determination and remittal of this case back to me to re-determine it, the dispute between the Trustees and Mr D concerning the recoupment of his overpayment has been re-opened.
46. Under Section 91(6), where a set-off is exercisable by virtue of subsection (5)(f) of the Pensions Act 1995 (as is the case here) and there is a dispute as to the amount of that set-off, it "must not be exercised unless the obligation in question has become enforceable under an order of a competent court" (Section 91(6) is set out, in full, in Appendix 3 to this Preliminary Decision). In this case, Mr D considers that the amount of the recoupment should be £nil and the Trustees consider that the amount of the recoupment should be as detailed in paragraph 11 above, so there is a dispute on the amount of the recoupment.



47. It seems, from Arnold J's obiter comments on Section 91(6) in the Bic Judgment (at paragraphs 164 to 166), that Bic UK Limited and the Trustees have both accepted that Section 91(6) applies to situations such as this one:

"It is common ground that the equitable right of recoupment is a form of set-off for the purposes of these provisions. The issue is to the effect of section 91(6), which prevents exercise of the right in the event of a dispute except under the order of 'a competent court', an expression which is not defined. Does this include a determination by the Pensions Ombudsman?

...

It is also common ground that, if trustees identify an overpayment and notify it to the member with proposals for the exercise of the right of recoupment out of future payments of pension, the member can refer to the Ombudsman a dispute about either the amount or the terms on which the trustees propose to exercise their right of recoupment. The outcome of such a referral could be a decision by the Ombudsman that the trustees are entitled to exercise their right of recoupment in the way they have proposed up to an amount which the Ombudsman is satisfied has been overpaid. If the Ombudsman made such a determination and the member was unwilling to accept the consequent exercise of the right of recoupment, the trustees could apply to the County Court to enforce the determination 'as if it were a judgment or order of that court'."

48. Accordingly, section 91(6) applies, so the Trustee acted in breach of Section 91(6) by continuing to recoup the overpayments from Mr D's benefits following the re-opening of this case. I find that that breach of Section 91(6) amounts to an act of maladministration on the Trustees' part.

*The Ombudsman's position as a "competent court" in relation to Section 91(6):*

49. In the Bic Judgment it was suggested (obiter dictum) by Mr Justice Arnold that a Determination by me did not satisfy the requirements of Section 91(6) because the Pensions Ombudsman is not a competent court. I am satisfied that the Ombudsman is a competent court. This office has published its reasons behind that view on The Pensions Ombudsman's website. That view still stands and those reasons are set out in Appendix 4.
50. I uphold Mr D's complaint against the Trustees in respect of their maladministration in failing to prevent the overpayment or detect it sooner and their continued recoupment of the overpayment following the remittal of Mr D's case to me.
51. I do not uphold Mr D's complaint that the Trustees should be prevented from recovering the overpayment in its entirety.

**Directions**

52. Within 28 days of the date of this Determination, the Trustees shall:

- (i) notify Mr D of the proposed terms under which they intend to recover the total amount of the overpayment made to Mr D, taking into account the amount already recouped and Mr D's increase in necessary outgoings following the deterioration of his health. Usually, any overpayment is repaid within the same period of time in which the overpayment occurred; and
- (ii) pay Mr D £1,000 for the serious distress and inconvenience that their maladministration has caused him.

**Anthony Arter**

Pensions Ombudsman  
28 October 2020

## Appendix

### Appendix 1

#### Summary of Mr D's additional costs – provided by Mrs D on 5 August 2019

“You requested a brief note concerning the expenses we have incurred since [Mr D] suffered a stroke in October 2017. The stroke left him severely incapacitated and it was necessary for several modifications to be made to our bungalow and our lifestyle in order for him to be cared for at home.

It was necessary to refurbish our bathroom to accommodate a wet-room. The total cost of this was £11,792.11. This included new units, central heating pump, electrics, tiles and labour and refurbishments

We had to have a ramp to the front door installed - cost £165.00.

It was necessary to purchase a wheelchair - cost £295.00.

We have had to employ a carer to assist with [Mr D]'s shower and dressing every morning - cost £13.00 per day. (I am [Mr D]'s main carer for the remainder of the day and night for which I receive no allowance.)

We have the services of a physiotherapist every two weeks - cost £52.00 per session.

There were several jobs around the house that [Mr D] used to carry out for which we now employ outsiders for their expertise:-

Any DIY jobs which are needed have to be paid for.

We have a gardener to cut the grass every two weeks - £25.00: per visit. Any additional gardening work is charged extra.

There are obviously incidental medical requisites (not provided by the NHS) which we pay for.”

## Appendix 2

### Extract from the Bic Judgment

#### “Limitation

- 169** The Claimants contend that recovery by exercise of the equitable right of recoupment is subject to a six year limitation period under section 5 of the Limitation Act 1980, but BIC UK disputes this.
- 170** Counsel for the Claimants relied upon three decisions in support of the Claimants' contention. The first two were successive decisions on appeal from the Pensions Ombudsman in the same case, *Webber v Department of Education (No 2)* [2014] EWHC 4240 (Ch), [2015] PLR 69 and *Webber v Department of Education (No 3)* [2016] EWHC 2519 (Ch), [2016] PLR 1. In the first of these decisions, *Nugee J held at [79]* that a claim for overpayment was subject to a six-year limitation period prior to a cut-off date. As is more clearly explained *in the second decision at [36]–[37]*, however, at that stage the issue between the parties was as to the applicability of section 32 of the Limitation Act. In the second decision, Edward Bartley Jones QC sitting as a deputy High Court Judge determined what the correct cut-off date was. As can be seen from *his judgment at [49]*, however, it was common ground before him that section 5 of the Limitation Act applied to the claim for overpayment.
- 171** More relevantly, in *D v BIC UK Pension Scheme* (PO-1918, 1 September 2017), a determination of the Pension Ombudsman concerning the Scheme, the Ombudsman rejected the Trustees' argument that the Limitation Act did not apply to the right of equitable recoupment. His reasoning was that equitable recoupment was a form of restitutionary claim for unjust enrichment, and it was settled that section 5 of the Limitation Act applied to such claims (see *Aspect Contracts (Asbestos) Ltd v Higgins Construction plc* [1015] UKSC 38, [2015] 1 WLR 2961 at [25] (Lord Mance)).
- 172** Counsel for BIC UK submitted that this reasoning was erroneous, because equitable recoupment was not a restitutionary claim for unjust enrichment, it was an equitable self-help remedy which did not involve any claim for payment back of the monies paid in the past but an adjustment of accounts in the future. Furthermore, the application of section 5 of the Act to 'any claim for specific enforcement of a contract or an injunction or for any other equitable relief' was excluded by section 36 of the Act. In support of these submissions, counsel relied upon the statement in Lewin at §42-010 that 'the right of recoupment, being a matter of adjustment of accounts by the trustee, is not subject to the Limitation Act 1980', citing *Re Robinson* [1911] Ch 502. I accept these submissions.”

## Appendix 3

### Relevant extracts of section 91 Pensions Act 1995:

“(5) In the case of a person (“the person in question”) who is entitled to a pension under an occupational pension scheme, or has a right to a future pension under such a scheme, subsection (1)<sup>2</sup> does not apply to any of the following, or any agreement to effect any of the following-

...

(f) subject to subsection (6), a charge or lien on, or set-off against, the person in question’s entitlement, or right, for the purpose of discharging some monetary obligation due from the person in question to the scheme arising out of a payment made in error in respect of the pension.

(6) Where a charge, lien or set-off is exercisable by virtue of subsection (5)(d), (e) or (f) –

(a) its amount must not exceed the amount of the monetary obligation in question or (if less) the value (determined in the prescribed manner) of the person in question’s entitlement or accrued right, and

(b) the person in question must be given a certificate showing the amount of the charge, lien or set-off and its effect on his benefits under the scheme,

and where there is a dispute as to its amount, the charge, lien or set-off must not be exercised unless the obligation in question has become enforceable under an order of a competent court or in consequence of an award of an arbitrator or, in Scotland, an arbiter to be appointed (failing agreement between the parties) by the sheriff.”

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<sup>2</sup> subsection (1) states that no set-off can be exercised against a person’s entitlement under an occupational pension scheme

## Appendix 4

**Extract from TPO's factsheet, 'Recoupment in overpayment cases: the Pensions Ombudsman is a 'competent court'', setting out TPO's view in response to Mr Justice Arnold's comments in *Burgess v BIC UK Ltd* [2018] EWHC 785 that the Pensions Ombudsman is not a 'competent court' for the purpose of section 91(6) of the Pensions Act 1995**

### Background

Where the trustees of an occupational pension scheme have mistakenly overpaid benefits, they may be entitled to recover the overpayment by off-setting against future benefit payments, using the equitable 'self-help' remedy of recoupment.

But, where there is a dispute regarding the amount to be repaid, the set-off cannot be exercised, under section 91(6) of the Pensions Act 1995 (PA 1995), unless the obligation to repay has become enforceable under an order of a 'competent court' or in consequence of an award of an arbitrator.

In the case of *Burgess v BIC UK Ltd* [2018] EWHC 785, Mr Justice Arnold suggested:

- i) a Determination made by the Pensions Ombudsman was not an order of a 'competent court', because the Pensions Ombudsman is not a court; however
- ii) an order of the county court enforcing any Determination of the Pensions Ombudsman, or any direction made by the Pensions Ombudsman in a Determination, pursuant to section 151(5) of the Pension Schemes Act 1993 ("PSA 1993") would be an order of a 'competent court'.

If this were so, the consequence would be that a direction by the Pensions Ombudsman permitting trustees to recover overpaid benefits by offsetting them against future benefit payments would be of no practical use to the trustees, unless they obtained an order from the county court in effect to 'recognise' that direction.

### Our position

We regard Mr Justice Arnold's comments as obiter. That is, he was not required to decide whether the Pensions Ombudsman is a 'competent court' for the purposes of section 91(6) of the PA 1995 in view of his conclusion on the facts of the case before him. He merely gave a provisional view on the matter, which did not form part of his judgment on the issues before him. April 2019.

The court did not have the benefit of hearing full legal arguments on the issue, including from the Pensions Ombudsman himself, who was not a party in the appeal.

The following is a non-exhaustive list of reasons why the Pensions Ombudsman considers he is a 'competent court':

### **A Pensions Ombudsman Determination brings a dispute to an end**

- The Pensions Ombudsman has jurisdiction to investigate complaints or disputes about overpayments under section 146 and determine them in accordance with section 151 of the PSA 1993.
- The Determination by the Pensions Ombudsman of the amount of the overpayment that can be recovered concludes the dispute, including also for the purposes of section 91(6) of the PA 1995.
- This is because under section 151(3) of the PSA 1993, the Determination by the Pensions Ombudsman of a complaint or dispute and any direction given by him is final and binding, subject only to an appeal on a point of law to the High Court.

### **The Pensions Ombudsman is judicial, and Determinations are orders or judgments.**

- There is established judicial authority, *Peach Grey & Co. v Sommers* [1995] I.C.R. 549, that tribunals with the characteristics of a court of law are properly to be regarded as courts. The Pensions Ombudsman is such a tribunal.
- The Pensions Ombudsman is a tribunal under the auspices of the Tribunals and Inquiries Act 1992 in respect of its functions under or by virtue of section 146(1)(c) and (d) of the PSA 1993 (disputes of fact or law). It is also of note that section 91(6) of the PA 1995 applies not just to an order of a competent court, but also to an award of an arbitrator, or, in Scotland, a sheriff-appointed arbiter.
- Under Rule 52.1(3)(c) of the Civil Procedure Rules, a 'lower court' is defined as 'the court, tribunal or other person or body from whose decision an appeal is brought'. Hence, the Pensions Ombudsman is a lower court for the purposes of the Civil Procedure Rules.
- The Pensions Ombudsman must decide disputes in accordance with established legal principles and, apart from in relation to his pure maladministration jurisdiction, cannot direct remedial steps to be taken that are not steps that a court of law could properly have directed to be taken.
- The Pensions Ombudsman may refer questions of law to the High Court or, in Scotland, the Court of Session: section 150(7) of the PSA 1993. April 2019 3
- Under section 150(4) of the PSA 1993, the Pensions Ombudsman may certify an offence of contempt of court to the county or sheriff court if any person obstructs the Ombudsman in the performance of his functions or is guilty of any act or omission in relation to his investigation.
- The Pensions Ombudsman's final and binding Determinations or directions cannot be overturned except by appeal on a point of law to the High Court or, in Scotland, the Court of Session: section 151(4) of the PSA 1993.

**Pensions Ombudsman Determinations are enforceable**

- The county court recognises the Determination for enforcement but cannot re-determine or duplicate a Determination or direction because the substance of the matter has already been heard by the Pensions Ombudsman under s.151(1) & (2) and is final s.151(3) PSA 1993.
- The Pensions Ombudsman's Determinations or directions are enforceable in the county court, section 151(5) of the PSA 1993, as if they were a judgment or order of that court. In Scotland, similarly, but termed as an extract registered decree arbitral bearing warrant for execution issued by the sheriff court. The statutory requirement under s91(6) PA 1995 is not that enforcement proceedings are brought. In practice, it seems unlikely that enforcement measures would be necessary or relevant, as recoupment is a self-help remedy for trustees.