PO-6773

Ombudsman's Determination

Applicant	Mrs Catherine Butterworth
Scheme	Local Government Pension Scheme (**LGPS**) (Greater Manchester Pension Fund (**GMPF**))
Respondent	Police and Crime Commissioner for Greater Manchester (**PCCGM**)

Complaint summary

Mrs Butterworth's complaints about PCCGM are as follows:

- PCCGM has failed to honour a commitment made in an offer letter dated 4 February 2008, by which its predecessor authority, Greater Manchester Police Authority (**GMPA**), agreed to allow her to "retire early with maximum augmentation" (**Complaint A**).

- PCCGM failed to comply with clause 4.2 of her compromise agreement with GMPA which granted her an entitlement to an unreduced pension payable from age 55 (**Complaint B**).

Summary of the Ombudsman's determination and reasons

The complaint is partly upheld against PCCGM. Any claim relating to the offer letter dated 4 February 2008 has been compromised. However, while clause 4.2 is void and unenforceable a contractual estoppel has arisen. The consequence of this is that PCCGM is estopped from avoiding liability arising out of the promise it conferred in clause 4.2. It follows that Mrs Butterworth is entitled to receive an unreduced pension from age 55 and that PCCGM must provide it.

Detailed Determination

Jurisdiction

1. As explained in Adam Summerfield's letter to Mrs Butterworth's representatives of 1 April 2015, I am unable to consider all of the complaints made in the schedule attached to Mrs Butterworth's application form. The complaints that will be considered in this Determination are, therefore, limited to the two set out in the previous 'Complaint Summary' section.

Relevant legislation

2. Regulation 30 of the Local Government Pension Scheme (Benefits, Membership and Contribution) Regulations 2007 (revoked) (the **2007 Regulations**), entitled 'Choice of early payment of pension', says as follows:

> "(1) If a member leaves a local government employment before he is entitled to the immediate payment of retirement benefits (apart from this regulation), once he has attained the age of 55 he may choose to receive payment of them immediately.
>
> (2) A choice made by a member aged less than 60 is ineffective without the consent of the member's-
> (a) employing authority;
> (b) former employing authority where the member has no current employing authority; or
> (c) appropriate administering authority where the member has no current employing authority and the member's former employing authority has ceased to be a Scheme employer.
>
> (3) If the member so chooses, he is entitled to a pension payable immediately calculated in accordance with regulation 29.
>
> (4) His pension must be reduced by the amounts shown as appropriate in guidance issued by the Government Actuary.
>
> (5) A member's employing authority, former employing authority or, where any such authority has ceased to be a Scheme employer, the appropriate administering authority, as the case may be, may determine on compassionate grounds that his retirement pension should not be reduced under paragraph (4).
>
> …"

(There is no definition of "compassionate grounds" in the 2007 Regulations.)

3. Section 91(1) of the Pensions Act 1995 (the **PA 1995**), entitled 'Inalienability of occupational pension', says:

> "(1)…where a person is entitled to a pension under an occupational pension scheme or has a right to a future pension under such a scheme –
>
> (a) the entitlement or right cannot be assigned, commuted or surrendered,

… and an agreement to effect any of those things is unenforceable…"

4. Section 124(2) of the PA 1995 says:

> "(a) the accrued rights of a member of an occupational pension scheme at any time are the rights which have accrued to or in respect of him at that time to future benefits under the scheme, and
>
> (b) at any time when the pensionable service of a member of an occupational pension scheme is continuing, his accrued rights are to be determined as if he had opted, immediately before that time, to terminate that service;"

Material facts

5. Mrs Butterworth entered into an employment contract with GMPA in 1996.

6. In a letter dated 4 February 2008, Mrs Butterworth was offered the role of HR and Development Director for GMPA for a period of six years up to and including 31 March 2014 (the **Offer Letter**) with effect from 1 April 2008. In the Offer Letter it said:

> "On conclusion of the fixed term agreement, the force will use its 'best endeavours' to allow you to retire early with maximum augmentation to your pensionable service in so far as the pension regulations in force at the time allow the force to do so."

7. However in early 2011 the employment relationship broke down to such an extent that Mrs Butterworth and GMPA negotiated an agreement to resolve the situation. This was the compromise agreement dated 18 May 2011 (the **Compromise Agreement**).

8. Clause 3.1 of the Compromise Agreement says as follows:

> "Except as set out in this agreement all entitlements to payments or benefits arising out of or in connection with the Employee's employment with the exception of accrued pension rights, if any, will cease from the Termination Date and the Employee acknowledges that he/she has no further claims in respect of them."

9. Clause 4.1 of the Compromise Agreement sets out the position regarding augmentation of Mrs Butterworth's pension. It says:

> "To the extent that it is and remains lawful for the Employer to do so, prior to the Termination Date the Employer will resolve to augment the Employee's membership of the Greater Manchester Pension Fund ("the Fund") within the Local Government Pension Scheme ("the Scheme") by an additional 3 years and 219 days. The Employer will within 6 months of the Termination Date make all necessary arrangements with and payments to the Fund in this regard and in accordance with Regulation 12 of the Local Government Pension Scheme (Benefits, Membership and Contributions) Regulations 2007 (or any other provision having similar effect which is in force at that time in relation to the Scheme)."

10. Clause 4.2 of the Compromise Agreement sets out the position in relation to Mrs Butterworth retiring at age 55. It says:

> "To the extent that it is and remains lawful for the Employer to do so and upon receipt of a written request from the Employee in accordance with the Local Government Pension Scheme (Benefits, Membership and Contribution) Regulations 2007 (or any other provision having similar effect which is in force at that time in relation to the Scheme) the Employer will allow the Employee to access her Greater Manchester Pension Fund pension without reduction or abatement when she reaches 55 years of age on 22 February 2014. In the event that the regulatory position has changed on or before 22 February 2014 with the result that the Employee cannot access her Greater Manchester Pension Fund on 22 February 2014 at age 55, the Employer will allow the Employee to access her Greater Manchester Pension Fund at the earliest possible date permitted by the legislative provisions in force at that time and after 22 February 2014."

11. Clause 7.2 of the Compromise Agreement says:

> "…PROVIDED ALWAYS THAT this clause 7 shall not apply to any claims in respect of the Employee's accrued pension entitlement at the Termination Date…and any claim to enforce the terms of this agreement. For the avoidance of doubt the Claimant's accrued pension entitlement for the purpose of this exclusion is limited to that which she has accrued to the Termination Date. The Claimant's total pension entitlement shall be that which she has accrued to the Termination Date and that which is granted to her by the Employer by virtue of Clause 4 herein. The parties agree that the pension entitlement granted to the Claimant by Clause 4 herein shall not constitute accrued pension entitlement and that this exclusion shall not apply to the pension entitlement provided by Clause 4 herein."

12. Clause 15.1 of the Compromise Agreement says:

> "This Agreement sets out the entire agreement between the parties and supersedes all prior discussions between the parties and their advisors and all statements, representations (other than fraudulent or negligent misrepresentations), terms and conditions, warranties, guarantees, proposals, communications and understandings wherever given and whether orally or in writing. The proposals in it are made without admission of liability."

13. On 18 December 2013, PCCGM (having by then taken over the functions of GMPA) wrote to Mrs Butterworth to confirm that it intended to take further legal advice on the terms of the Compromise Agreement and, in particular, clause 4.2.

14. On 24 February 2014, Mrs Butterworth applied in writing to PCCGM for an unreduced early retirement pension to commence from age 55 (in accordance with clause 4.2 of the Compromise Agreement). The application included circumstances for consideration as compassionate grounds.

15. In its letter of 29 May 2014 PCCGM confirmed that it had refused the application.

Summary of Mrs Butterworth's position

Complaint A

16. The promise in the Offer Letter was a "contractual term" and an "accrued pension right". It was an accrued pension right because it crystallised upon her fixed-term employment concluding, it related to the pension benefits that she had accrued up to that date (Mrs Butterworth had been in pensionable service on receiving the Offer Letter and had been since 1996) and there was an unambiguous contractual entitlement to receive additional pension benefits.

17. The use of the term "best endeavours" (in the Offer Letter) has a specified meaning in law and means that GMPA (or its successor, PCCGM) will do everything in its power, including the expenditure of its own money, to allow Mrs Butterworth to retire early with the maximum augmentation. This is not restricted to procuring that GMPF pay that pension; this is a commitment by an employer to ensure that an employee will be paid a specific level of "deferred pay", whether that payment comes from a pre-funded agreement (such as an occupational pension scheme), or from the funds of the employer, or (in the case of a bridging pension arrangement) from a mixture of both.

Complaint B

18. Mrs Butterworth negotiated a settlement in good faith and from a position that the commitments GMPA gave were, in fact, commitments it could properly give.

19. GMPA was under a duty to act in good faith when entering into the Agreement; if it had been aware that clause 4.2 of the Compromise Agreement was effectively rendered inoperable by legislation, then that was maladministration.

Summary of PCCGM's position

Complaint A

20. To succeed on Complaint A, Mrs Butterworth must establish that the promise contained in the Offer Letter should be construed in such a way that GMPA made a binding contract (in February 2008) the effect of which is that PCCGM was obliged (in 2011 when Mrs Butterworth's employment terminated) to allow her to retire early on an unreduced pension from age 55. However, there is no factual or legal basis for such an argument. The wording of the Offer Letter is unambiguous and thus, in accordance with the principles summarised by the Supreme Court in Rainy Sky SA v Kookmin Bank [2011] UKSC 50, to construe the Offer Letter as containing a promise by the GMPA to allow Mrs Butterworth to retire early with the maximum pension which could be paid, or, to construe the offer letter as granting Mrs Butterworth an unreduced pension from age 55, goes beyond the natural and unambiguous meaning of the words used.

21. In any event, any claim Mrs Butterworth might have based on that promise was settled by the Compromise Agreement. It is clear that the effect of clause 3.1 of the Compromise Agreement was to settle any claim that Mrs Butterworth might have for breach of the terms of the Offer Letter. Although accrued pension rights were expressly excluded from the ambit of clause 3.1 of the Compromise Agreement, a promise by GMPA, made before Mrs Butterworth commenced pensionable service and by reference to best endeavours which GMPA agreed to take on Mrs Butterworth's employment terminating, cannot reasonably be construed as constituting pension rights (and certainly not accrued pension rights).

Complaint B

22. As a matter of contractual interpretation, clause 4.2 of the Compromise Agreement did not confer on Mrs Butterworth an immediate entitlement to receive (on attaining age 55) an unreduced pension payable from that age. Rather, clause 4.2 required GMPA (or its successor, PCCGM) to consider exercising its discretion to grant an unreduced pension to Mrs Butterworth on her (subsequently) attaining 55.

23. In accordance with its contractual obligation, PCCGM did (indeed) consider exercising its discretion to grant an unreduced pension to Mrs Butterworth on her attaining age 55. However, it declined to exercise discretion in her favour.

24. If, contrary to the above, by clause 4.2 of the Compromise Agreement GMPA did (purport to) agree that it would, in the future, exercise its discretion in favour of Mrs Butterworth should she (later) apply for an unreduced pension on attaining age 55, the act of GMPA in so agreeing was ultra vires, as a consequence of which clause 4.2 is not enforceable.

25. Mrs Butterworth's allegation that the circumstances culminating in the conclusion of the Compromise Agreement constituted maladministration is not supported by the facts and is, in any event, misconceived. Mrs Butterworth took advice on the Compromise Agreement and so any failure on the part of the GMPA to point out the potential effect of any caveats, provisos or areas of potential uncertainty in the wording of the Compromise Agreement in a negotiation exercise where both parties are legally represented does not amount to maladministration, bad faith or misrepresentation.

26. A contractual estoppel has not arisen in the circumstances of this case. A public body, having only the powers conferred on it by statute, cannot enlarge those powers by way of an estoppel; hence it is a general principle that estoppel is a doctrine that has no role to play in public law. Further, it is an established principle that a party cannot achieve by estoppel what it could not achieve by express agreement to the same effect. In any event, the doctrine of contractual estoppel is irrelevant in this case. The doctrine is concerned with the situation in which the parties have agreed that a particular state of affairs shall be treated as existing, whether it actually exists or not. That is not the nature of the Compromise Agreement, which is simply a

promise to grant a payment - either that promise is lawful and enforceable, or it is not. If it is not, no estoppel can change that position. In addition (and, it follows that) the judgment of Andrew Smith J in Credit Suisse International v Stichting Vestia Groep [2014] EWHC 3103 (Comm) is not relevant in this case.

Conclusions

Complaint A

Background

27. PCCGM has advanced arguments as to why the promise in the Offer Letter did not have contractual effect. It has also argued that the promise in the Offer Letter was not an accrued pension right and, therefore, any subsequent claim in relation to it is precluded by the operation of clause 3.1 of the Compromise Agreement.

28. Mrs Butterworth is, essentially, asserting that the promise in the Offer Letter was a contractual term and an accrued pension right. As such, Mrs Butterworth submits that the promise imposes an obligation on PCCGM to provide her with an augmentation (at the time the Offer Letter was issued, pursuant to regulation 52 of the Local Government Pension Scheme Regulations 1997).

Does the promise amount to an accrued pension right?

29. By way of reminder, PCCGM's view is that GMPA's promise to grant added years of pensionable service to Mrs Butterworth's pension was settled by the Compromise Agreement. It was settled by the Compromise Agreement as the promise was not an accrued pension right and so any claim in respect of it was settled by operation of clause 3.1. The promise was not even a pension right, as it was made before Mrs Butterworth commenced pensionable service, and it was made by reference to best endeavours which GMPA agreed to take on Mrs Butterworth's employment terminating (therefore it was certainly not an *accrued* pension right (my emphasis)).

30. To the contrary, Mrs Butterworth has argued that the contractual term in the Offer Letter was an accrued pension right because it crystallised upon her fixed-term employment concluding, it related to the pension benefits that she had accrued up to that date (Mrs Butterworth had been in pensionable service on receiving the Offer Letter and had been since 1996) and there was an unambiguous contractual entitlement to receive additional pension benefits.

31. Section 91(1) of the PA 1995 says that an agreement to assign, commute or surrender an entitlement or right to a pension or a future pension under an occupational pension scheme will be unenforceable. Section 124(2) of the PA 1995, says that the accrued rights of a member under an occupational pension scheme are "the rights which have accrued to or in respect of him at that time to future benefits under the scheme". In addition to these definitions, the question as to what constitutes an accrued right has been considered by the Courts.

32. In Danks and others v Qinetiq Holdings Ltd and another [2012] EWHC 570 (Ch), Mr Justice Vos distinguished the Court of Appeal's decision in Aon Trust Corporation Ltd v KPMG (a firm) and others [2005] EWCA Civ 1004, in which it was held that an "entitlement" referred to a "pension already in payment" whereas "accrued rights" referred to "a member's current right to a future pension". Mr Justice Vos said:

> "The right to an increase in the pension in payment or the deferred pension…at a particular or specific rate is not an entitlement or an accrued right until the calculation has been done, as it was in Aon under rule 7 when the pension was taken…"

33. Whilst the present case does not concern pension increases but a promise to provide a single augmentation of benefits at a future date, applying the principle established in Danks in the present circumstances suggests that the promise in the Offer Letter cannot be construed to confer an accrued right because the calculation of the augmentation was not done at the time the Compromise Agreement was entered into on 18 May 2011.

34. In any event, the promise was subject to GMPA using its best endeavours. As such, the promise in the Offer Letter was contingent on GMPA using its best endeavours to provide an augmentation, so it could not be an accrued right.

35. It follows that the promise in the Offer Letter did not constitute an accrued pension right. Given my finding that there is no accrued pension right, it is my view that Mrs Butterworth's claim concerning the promise in the Offer Letter amounts to a disputed right or entitlement which is capable of being compromised by agreement without falling foul of section 91 of the PA 1995 (as per International Management Group (UK) Ltd v German & another [2010] EWCA Civ 1349, and the more recent decision in IBM United Holdings Ltd & Another v Dalgleish & others [2015] EWHC 389 (Ch)). As a consequence, any claim in relation to the promise is precluded by the operation of clause 3.1 of the Compromise Agreement.

Contractual effect

36. Mrs Butterworth has also described the promise in the Offer Letter as a contractual term and, as such, has said that the promise constituted an unambiguous contractual entitlement.

37. The entire agreement clause, at clause 15.1 of the Compromise Agreement, does not specifically say that the Compromise Agreement supersedes any contracts entered into between Mrs Butterworth and GMPA. However, it does say that it supersedes "statements, representations….terms and conditions", etc. It follows that any claim in respect of the promise in the Offer Letter, irrespective of whether it can be construed to have contractual effect, is precluded by operation of clause 3.1 of the Compromise Agreement.

Estoppel by representation

38. Further, the promise in the Offer Letter does not give rise to an estoppel by representation. To succeed with a defence of estoppel by representation, a person needs to establish an unambiguous representation on which he or she relied in good faith to their detriment. These requirements were elaborated in the case of Steria v Hutchison [2006] 64 PBLR. In that case Neuberger LJ said as follows:

> "When it comes to estoppel by representation or promissory estoppel, it seems to me very unlikely that a claimant would be able to satisfy the test of unconscionability unless he could also satisfy the three classic requirements. They are (a) a clear representation or promise made by the defendant upon which it is reasonably foreseeable that the claimant will act, (b) an act on the part of the claimant which was reasonably taken in reliance upon the representation or promise, and (c) after the act has been taken, the claimant being able to show that he will suffer detriment if the defendant is not held to the representation or promise. Even this formulation is relatively broad brush, and it should be emphasised that there are many qualifications or refinements which can be made to it."

39. There can be no estoppel by representation as the promise in the Offer Letter was not a "clear representation"; it was a promise to use best endeavours to augment a pension on the expiry of a contractual period.

<u>Complaint B</u>

40. Under regulation 30 of the 2007 Regulations, former employees could choose to take a reduced pension from age 55. If the member intended to take benefits before reaching age 60, this required the consent of the employer (regulation 30(2)). The pension could be paid unreduced between the age of 55 and 60 only if the member's employing authority determined "on compassionate grounds" that it should not be reduced (regulation 30(5)). There was, therefore, no scope within regulation 30 for an unreduced pension to be taken at age 55 unless the compassionate grounds were present. Regulation 30 of the 2007 Regulations was in force both at the time the Compromise Agreement was entered into on 18 May 2011, and also when Mrs Butterworth reached age 55 on 22 February 2014.

41. Clause 4.2 of the Compromise Agreement says that, subject to two caveats (which I consider below), "…the Employer will allow the Employee to access her GMPF pension without reduction or abatement when she reaches age 55 on 22 February 2014". The intended meaning of this statement is unequivocal; GMPA promised to exercise discretion to allow Mrs Butterworth to access her pension unreduced at age 55, subject to two caveats. Under regulation 30(5) of the 2007 Regulations an unreduced pension could only be paid if the compassionate grounds were present. It follows that, in making a promise to provide an unreduced pension, GMPA effectively (although not expressly) made a promise to find that, on 22 February 2014, the compassionate grounds would be present.

42. As I have referred to above, GMPA's promise to exercise discretion is effectively subject to two caveats. The first is that GMPA would exercise discretion to provide an unreduced pension at age 55 so long as Mrs Butterworth makes a written request to it for the benefit to be paid. The second is that GMPA would exercise discretion to provide an unreduced pension at age 55 "to the extent that it is and remains lawful for them to do so…".

43. With respect to the first caveat, Mrs Butterworth applied in writing for her benefits to be paid unreduced with effect from her 55th birthday on 22 February 2014 (but was refused access to unreduced benefits on the basis that the compassionate grounds were not present). With respect to the second caveat, PCCGM submits that the words "to the extent that it is and remains lawful for them to do so…" reinforces the argument that GMPA had not legally committed to paying Mrs Butterworth an unreduced pension at age 55, because it lay beyond its powers to do so. I will consider the extent of GMPA's powers later. However, I find that the words "to the extent that it is and remains lawful for them to do so…" are not, on the balance of probabilities, referring to the legality of the exercise of discretion under regulation 30 of the 2007 Regulations, as it existed at that time, or any future provision that might supersede it. Instead, the words "to the extent that it is and remains lawful for them to do so…" refer, on the balance of probabilities, to wider legal or policy changes by Government (or changes in European law) that would prevent the lawful payment of benefits at age 55. In the absence of such changes in the period between 18 May 2011 and 22 February 2014, I find that the words "to the extent that it is and remains lawful for them to do so…" does not have an effect on GMPA's promise to provide unreduced benefits to Mrs Butterworth at age 55.

44. I therefore find that clause 4.2 should be interpreted as a promise by GMPA to exercise its discretion to allow Mrs Butterworth to access her pension unreduced at age 55 when she reached that age on 22 February 2014. I also find that the words "to the extent that it is and remains lawful for them to do so…" should not be interpreted as referring to the lawfulness of the exercise of discretion under regulation 30 of the 2007 Regulations, but rather to wider legal or policy changes, and as such the words would not prevent the promise being fulfilled in the circumstances.

45. However, PCCGM's view is that the promise made by GMPA fettered its discretion under regulation 30 and that, as a matter of contractual construction, it would be wrong to conclude that by clause 4.2 of the Compromise Agreement GMPA had legally committed to do something that lay beyond its powers to do. Given the fetter on PCCGM's discretion, PCCGM has also argued that clause 4.2 is unenforceable. It has submitted that clause 4.2 is unenforceable because, in its own words, "it is well established that a term of a contract which purports to fetter a public authority's discretion under a statutory scheme will be void and unenforceable if the contractual term is incompatible with the authority's powers".

46. PCCGM give two examples of cases that support this principle. The latter is the case of Kilby v Basildon DC [2007] HLR 39. In that case the tenant appealed against a decision that the respondent local authority could not lawfully bind itself by contract to subject its statutory power, to vary its tenancy agreements by notice, to the approval of tenants' representatives. The High Court found that the relevant clause, which said that the local authority could only change the terms of the agreement if a majority of the tenants' representatives agreed to it, was incompatible with the local authority's statutory right and power to vary the tenancies unilaterally. The local authority did not have the power to amend the statute by those means (in other words, to give up its power of unilateral variation). Rix LJ found that the relevant clause was “a fetter on the Council’s statutory power”.

47. Applying the approach adopted in Kilby in the present circumstances leads me to the conclusion that clause 4.2 was incompatible with GMPA’s statutory power, conferred in regulation 30(5) of the 2007 Regulations, to pay an unreduced pension if the compassionate grounds are met. Clause 4.2 was a fetter on GMPA’s statutory power to award an unreduced pension on compassionate grounds by virtue of the fact that the regulation does not envisage that an employer can agree to find compassionate grounds ahead of receipt of an application. It follows that clause 4.2 effectively purports to amend regulation 30(5) of the 2007 Regulations. It was clearly beyond GMPA’s power to do this. The effect of this is that clause 4.2 is void and unenforceable.

48. In any event, and in addition, it is an established public law doctrine that the exercise of discretion by a public authority must not exceed express or implied limits in the relevant statute (see, by way of example, R v Westminster City Council [1986] AC 688). In Mrs Butterworth’s case there can be little doubt that Parliament did not intend that regulation 30(5) of the 2007 Regulations provides that the discretion to find compassionate grounds could be exercised ahead of receipt of an application to do so (i.e. it could not be exercised in advance to the recipient’s advantage where no evidence of compassionate grounds had been provided). The effect of GMPA exceeding the limits of the discretion conferred on it by regulation 30(5) of the 2007 Regulations is that clause 4.2 is void and unenforceable.

49. But, while clause 4.2 is void and unenforceable, it does not automatically follow that there is no obligation on PCCGM to provide the benefit clause 4.2 purports to confer. As set out previously, my view is that GMPA, in entering into clause 4.2, intended to confer on Mrs Butterworth the option to take her pension unreduced at age 55, should she apply to do so and should the law in force at the time permit her to take her benefits at that age. In Peekay Intermark Ltd v Australia and New Zealand Banking Group Ltd [2006] EWCA 386, the Court of Appeal held that where contracting parties agreed that certain facts formed the basis of their contract, they were estopped from subsequently asserting that the true facts differed. In the subsequent case of Credit Suisse International v Stichting Vestia Groep [2014] EWHC 3103 (Comm), Andrew Smith J ruled that although the disputed transactions

were ultra vires and therefore invalid, Credit Suisse were nevertheless able to enforce the provisions of the relevant master agreement as if the ultra vires transactions were valid. In doing so Andrew Smith J relied upon the doctrine of contractual estoppel, quoting Moore-Bick LJ's statement of the principle in the Peekay case as follows:

> "There is no reason in principle why parties to a contract should not agree that a certain state of affairs should form the basis for the transaction, whether it be the case or not… Where parties express an agreement of that kind in a contractual agreement neither can subsequently deny the existence of the facts and matters upon which they have agreed…The contract itself gives rise to an estoppel."

50. In the present case GMPA entered into a contractual agreement to provide a benefit that it was beyond its powers to provide. The agreement to provide the benefit was conferred in clause 4.2 of the Compromise Agreement, which is a contractual agreement. It follows that I am satisfied that, in accordance with Moore-Bick LJ's statement, PCCGM is not entitled to simply deny the existence of the agreement reached which is recorded in clause 4.2. I have found previously that clause 4.2 did confer on Mrs Butterworth a right to receive unreduced benefits at age 55 provided that she applied for them and the law in force at the time did not prevent payment of such benefits at that age. Clause 4.2 was not a mere representation, but a contractual term that conferred a valuable right on Mrs Butterworth.

51. The particular relevance of the Credit Suisse case to Mrs Butterworth's circumstances is that Andrew Smith J effectively extended the doctrine of contractual estoppel to statements as to a future state of affairs. Specifically, Andrew Smith J said that he could "…see no reason of authority, principle or policy that the doctrine should be confined… or that the law should adopt a different approach where the parties have made an agreement about a state of affairs in the future". In the present case the future 'state of affairs' was that Mrs Butterworth would reach age 55, she would apply to receive the benefit and that the law had not changed in the intervening period to prevent payment of pension at that age. Given that the extension of the doctrine in Credit Suisse remains good law, I am therefore of the view that a contractual estoppel has arisen in Mrs Butterworth's case.

52. The effect of the estoppel is that GMPA (and thus PCCGM) cannot go back on the promise to provide the benefit, thus it cannot avoid liability to provide the benefit promised in clause 4.2.

53. PCCGM has submitted that estoppel has not arisen in the particular circumstances of this case as estoppel is a doctrine that has no role to play in public law. PCCGM has referred to the judgment in R v East Sussex CC ex parte Reprotech (Pebsham) Ltd [2003] 1 WLR 348 to support this position. In Reprotech Lord Hoffman said that he thought that it was "unhelpful to introduce private law concepts of estoppel into planning law", adding Lord Scarman's comment in Newbury District Council v Secretary of State for the Environment [1981] AC 578 that estoppel binds individuals on the ground that it would be unconscionable for them to deny what they have represented or agreed, but that these concepts of private law should not be extended

into “the public law of planning control, which binds everyone”. The position in the present case is distinguishable on its facts from Reprotech. The Compromise Agreement is a private agreement that binds only the parties to it (and, in this case, GMPA’s successor). It is an agreement recording the outcome of negotiations between an employer and employee to facilitate the termination of that employee’s employment relationship with the employer. So I am not considering a matter of “public law” here. It follows that, on the particular facts of Mrs Butterworth’s case, I consider that the Compromise Agreement is subject to the private law concept of estoppel.

54. In addition, I do not see that the decision in Belfields Ltd v Sefton Metropolitan Borough Council [2008] EWHC 1975 (Ch), also cited by PCCGM, prevents me from reaching this conclusion. In paragraph 30 of the decision in that case HHJ Pelling QC said:

> “Where the local authority is acting as a private land owner, it is subject to the same legal principles as everyone else. Where it is acting pursuant to statutory powers in its capacity as a planning authority then its activities are governed by principles of public not private law.”

In the former scenario, estoppel would be available against the local authority, whereas in the latter the person seeking redress against the local authority must do so by reference “to submissions framed in legitimate expectation”. In the circumstances of the present case I consider that in entering into the Compromise Agreement GMPA was acting in its capacity as Mrs Butterworth’s employer. Although clause 4.2 was intended to confer rights under the pension scheme, the Compromise Agreement did not solely relate to pension rights. So when it entered into the Compromise Agreement GMPA did not enter into it as an ‘employing authority’ in the LGPS, but rather as Mrs Butterworth’s employer. It follows that I consider that, by analogy, the decision in Belfields Ltd v Sefton Metropolitan Borough Council supports my decision that estoppel is relevant in this case.

55. I consider there are two further reasons why estoppel is relevant.

56. Article 157 (formerly Article 141) of the Treaty on the Functioning of the European Unionenshrines the principle of equal pay for men and women. In the case of Barber v Guardian Royal Exchange Assurance Group [1991] 1 QB 344, the question for the European Court of Justice was whether an occupational pension scheme fell within the scope of Article 157. The Court agreed with Mr Barber’s proposition, finding that pension benefits were subject to Article 157. It follows that in the present circumstances it is clear that Mrs Butterworth’s rights in the LGPS - and the promise to enhance those rights - can be equated with her pay, as her rights in the LGPS were effectively subject to the same protection under Article 157 as her pay. It is beyond doubt that an employee’s pay is a matter that is entirely personal to that individual and therefore it could not be said that they would be governed by principles of public law. Given the finding in Barber, my view is that Mrs Butterworth’s pension rights should also not be considered a matter of public law.

57. Further, Article 1 of the First Protocol to the European Convention on Human Rights (the **Convention**) provides that:

> "Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law."

In Apostolakis v Greece (39574/07) the European Court of Human Rights (**ECtHR**) found that the applicant had acquired a right to a retirement pension that constituted a 'possession' within the meaning of Article 1 of the First Protocol to the Convention. The ECtHR found that the subsequent withdrawal of the applicant's pension amounted, on the facts of the case, to an infringement of his right of property (that was neither an expropriation nor a control of the use of property). Applying the ECtHR's view in the present case leads me to the conclusion that Mrs Butterworth's pension rights can be considered her 'possession' for the purposes of Article 1 of the First Protocol to the Convention and a right of property. It follows that those pension rights should not be considered a matter of public law.

58. PCCGM has also submitted that an estoppel cannot have arisen as it is an established principle that "a party cannot achieve by estoppel what it could not achieve by express agreement to the same effect" (per Sir Thomas Bingham MR (as he then was) in Daejan Properties v Mahoney (1996) 28 HLR 498). As I have set out previously, I consider that clause 4.2 is void and unenforceable. However, that is not to say that GMPA could not have agreed, in some other way, to pay Mrs Butterworth an unreduced pension at age 55. For example, GMPA could have made a promise in the Compromise Agreement to provide Mrs Butterworth with a sum of money equivalent to the unreduced pension she would have been paid had compassionate grounds been established at age 55 up to the time she could take her pension unreduced. While I appreciate that this would not necessarily replicate Mrs Butterworth's entitlement in the scheme (for example, to contingent benefits), it was nevertheless possible for GMPA to have expressly agreed in the Compromise Agreement to provide an equivalent amount. It follows that I do not accept that the principle in Daejan Properties v Mahoney highlighted by PCCGM has the effect of rendering the estoppel invalid.

59. If I am wrong in establishing that a contractual estoppel has arisen (for example, for the reasons submitted by PCCGM), then Mrs Butterworth may have a public law defence based on legitimate expectation. However, given my finding that a contractual estoppel has arisen in Mrs Butterworth's case, I have not gone on to explore this and so I make no finding on this question.

60. I also find that GMPA's promise to confer a benefit on Mrs Butterworth that it was not within its powers to provide was maladministration. It was maladministration because, as I have set out previously, in making the promise - which was of significant financial value to Mrs Butterworth - GMPA acted in a manner that was outside its powers, with the effect that clause 4.2 was void and unenforceable. PCCGM has made several

arguments as to why GMPA's entering into clause 4.2 did not constitute maladministration. Firstly, it has submitted that, in accordance with the decision in Westminster City Council v Haywood (No 1) [1998] Ch 377, acting unlawfully is not automatically maladministration. I do not disagree with this statement. PCCGM has also argued, however, that as the Compromise Agreement was negotiated between GMPA and Mrs Butterworth and during that negotiation Mrs Butterworth received legal advice, any potential uncertainty in the wording of the Compromise Agreement could not amount to maladministration on GMPA's part. I disagree with this view. The failure of GMPA to be aware that it was beyond its powers to enter into clause 4.2 was undoubtedly maladministration. It is maladministration irrespective of the fact that the agreement was negotiated; GMPA should have known what agreements it was (and was not) able to enter into. As such, if GMPA had negotiated on the basis that it could confer the benefit in clause 4.2 (which, while I haven't seen evidence of the negotiations, I consider it must have done given that it included the clause), then Mrs Butterworth and her advisor should have been entitled to rely on that.

61. With respect to remedying GMPA's maladministration, an award should be made to Mrs Butterworth to compensate her for the distress and inconvenience GMPA's maladministration has caused her to suffer. It is clear from Mrs Butterworth's submissions that GMPA's maladministration has caused her to suffer significant distress and inconvenience, in particular at the time of her application for an unreduced pension when she turned age 55 in 2014.

62. Given my findings, I partly uphold Mrs Butterworth's complaint.

63. With respect to providing a remedy, I have been asked by Mrs Butterworth whether any remedy would extend to contingent benefits (for example, the payment of a spouse's pension on her death). In my view this is a matter of construction of clause 4.2; essentially, does the promise in clause 4.2 extend to contingent benefits? Clause 4.2 makes it clear that it gives Mrs Butterworth access to *her* pension (my emphasis). However, Mrs Butterworth's pension from GMPF doesn't just comprise rights for her to receive benefits on retirement, the regulations also include provisions relating to the payment of contingent benefits. As such, my view is that clause 4.2 must be construed so as to confer rights in respect of contingent benefits, also.

Directions

64. Within 28 days of this Determination PCCGM must arrange to pay Mrs Butterworth her full unreduced pension with retrospective effect from 22 February 2014. The period in respect of which the benefit must be paid is 22 February 2014 to the date Mrs Butterworth is paid unreduced benefits from GMPF. However, PCCGM's liability will not extend beyond Mrs Butterworth's normal pension age in the LGPS. Accordingly, if Mrs Butterworth defers taking her pension to after normal pension age this will not have the effect of extending PCCGM's liability to Mrs Butterworth beyond her normal pension age. Furthermore, if Mrs Butterworth elects to take her pension before normal pension age then PCCGM's liability will cease at the point that pension

becomes payable. Any benefit paid to Mrs Butterworth in the period referred to above must be paid by PCCGM from its own funds, essentially as a bridging pension.

65. In the event that any contingent benefit becomes payable in the period between 22 February 2014 and the date PCCGM's liability to pay the bridging pension is extinguished (in accordance with the regulations governing the LGPS), PCCGM must pay it from its own funds until such point that the relevant benefit becomes payable from the GMPF (should this be relevant). If a benefit becomes payable in this period that requires, under the regulations governing the LGPS, a discretion to be exercised, PCCGM must make the necessary arrangements to exercise that discretion itself.

66. PCCGM must pay any tax charge arising out of the late payment on behalf of Mrs Butterworth. This must be paid within 28 days of the date any late payment charge is ascertained.

67. Within 28 days of this Determination PCCGM must pay to Mrs Butterworth simple interest on the gross arrears of benefits (payable in respect of the period from 22 February 2014 to the date they come into payment) - interest being calculated at the base rate for the time being quoted by the reference banks from 22 February 2014.

68. Within 28 days of this Determination PCCGM must pay to Mrs Butterworth £2,000 by way of compensation for the significant distress and inconvenience GMPA's maladministration has caused her to suffer.

Anthony Arter

Pensions Ombudsman
21 April 2016