

PPFO-8286

Ombudsman's Determination

Applicant	Mr N
Scheme	Lambert Fenchurch Staff Pension Scheme (LFS Scheme)
Respondent(s)	The Board of the Pension Protection Fund (the Board)

Summary of application

The Ombudsman has received a reference of a reviewable matter, following a decision by the Reconsideration Committee of the Pension Protection Fund (**PPF**) dated 27 February 2015. The referral concerns the decision, by the Board, not to treat Mr N's transferred-in pension as a money purchase benefit.

Summary of the Ombudsman's decision and reasons

The Board is not required to take any action. Mr N's transferred-in pension does not fall within the definition of a money purchase benefit either before or after the July 2014 amendment to section 181(1) Pension Schemes Act 1993. Nor is the Board required to treat his transferred-in pension separately for the purposes of applying the compensation cap.

Detailed Determination

Background

1. Mr N is a pensioner member of the LFS Scheme. The LFS Scheme was formed in August 1998, by the merger of the Fenchurch Group Pension Scheme and the Lowndes Lambert Group Staff Pension Scheme. Mr N originally joined the Fenchurch Group Pension Scheme. For simplicity, references to the LFS Scheme include the Fenchurch Group Pension Scheme.
2. Prior to joining the LFS Scheme, Mr N was a member of the Bowring Group Staff Pension and Assurance Fund (the **Bowring Scheme**). This was a final-salary type scheme. In August 1995, Mr N transferred his accrued benefits from the Bowring Scheme to the LFS Scheme.
3. Mr N was provided with a certificate of deferred benefits under the Bowring Scheme. The certificate stated (amongst other things) that Mr N could expect a minimum pension of £18,142.44 p.a. at his normal retirement age (in 2017). A maximum pension of £36,524.57 p.a. was also quoted. The certificate also quoted a transfer value of £68,690.59.
4. On 28 April 1995, Fenchurch plc (**Mr G**) wrote to Mr N informing him that the transfer value would purchase a pension of £15,973.75 p.a. in the LFS Scheme. Mr N was told that this pension would increase at a guaranteed rate of 5% between the date of transfer and his normal retirement age. He was told this would equate to a pension of £46,727.39 p.a. at his 65th birthday. This was then compared with the maximum pension quoted in his deferred benefits certificate (see above). Mr G also compared the pensions payable on early retirement (age 60) and said the LFS Scheme would offer a pension of £29,289 p.a. and the Bowring Scheme would offer a pension of £21,666 p.a. He advised Mr N to transfer to the LFS Scheme.
5. Mr N says he spoke to Mr G by telephone and was told that the transfer value would purchase an additional pension which would stand alone from the LFS Scheme. He says he was told the transfer value would not purchase extra years under the LFS Scheme because this was not possible. He says he was assured that his transferred-in pension would be ring-fenced from his LFS Scheme pension.
6. Following the merger of the Fenchurch Group Pension Scheme and the Lowndes Lambert Group Staff Pension Scheme, Mr N received a benefit statement which did not include his transferred-in pension.
7. Mr N wrote to the pension scheme administrators on 14 June 1999 with a copy of the 28 April 1995 correspondence. He said this was the basis upon which he had transferred his benefits from the Bowring Scheme. Mr N referred to a "guaranteed pension of £46,727.39 per annum at age 65" which had increased to £47,633.22 per annum because the transfer value had been higher. He said he had enquired about

extra years with the LFS Scheme and had been told this was not possible. He said he had been told the transfer value would buy a stand-alone pension.

8. A revised statement referred to an “Additional tv-in fixed pension” of £47,633.22 p.a. payable in 2017. A similar issue arose in subsequent years.
9. On 26 May 2005, the principal employer for the LFS Scheme, Heath Lambert Management Limited, was placed in administration. On 27 May 2005, the CEO of the Heath Lambert Group wrote to all staff notifying them of a decision to close the LFS Scheme (amongst others) and apply for transfer to the PPF. In a separate letter to LFS Scheme members, the CEO provided more details relating to the potential transfer to the PPF, including the level of benefit provided by the PPF (90% of accrued entitlement up to a maximum of £25,000 p.a.).
10. The LFS Scheme entered the PPF assessment period on 27 May 2005.
11. Mr N says he spoke to the PPF (**Mr B**) on 1 June 2005. He has provided copies of the notes he took at the time. His first note, dated 1 June 2005, records that he was told that the trustees of the LFS Scheme would have to discharge their liabilities for “Money Purchase Schemes, like mine,” before they could wind-up the scheme. The note states this would normally be done by purchasing an insurance policy. A second note, dated 6 June 2005, records Mr N was told, as long as his transfer value had been used to purchase a “set pension figure”, this would have to be “honoured first”. The note states Mr B had said this was normally done by buying a personal pension in Mr N’s name. Mr N says he had returned from holiday to the news about the LFS Scheme and was extremely worried; particularly about his transferred-in pension. He said he explained his position to Mr B in great detail.
12. Capital Cranfield Trustees Limited (**CCT**) was appointed as independent trustee to the LFS Scheme in July 2005. On 5 December 2005, following enquiries by Mr N, CCT wrote to him. Amongst other things, CCT referred to *Aon Trust Corporation Ltd v KPMG and others* [2005] EWCA Civ 1004. CCT said the Court of Appeal’s decision appeared to say that a fixed pension purchased with a transfer value should not be regarded as a money purchase benefit because it was not calculated only by reference to a payment or payments made by the member or by any other person in respect of the member. CCT said the PPF and the trustees had reviewed their policy in relation to benefits purchased by transfers in, which they had previously thought could be paid in full.
13. In February 2007, Mr N opted to take early retirement with effect from 1 November 2006, on the basis that he would continue to pursue payment of his transferred-in pension.
14. In October 2010, Mr N wrote to CCT following the judgment in *Houldsworth and another v Bridge Trustees Limited and another* [2010] EWCA Civ 179. In their response, CCT said the new ruling merely confirmed that pensions derived from a

money purchase account remained money purchase benefits. They expressed the view that this had no bearing on the treatment of Mr N's transferred-in pension.

15. The LFS Scheme transferred to the PPF in April 2011.
16. In April 2011, Mr N wrote to the PPF raising the matter of his transferred-in pension. The PPF received Mr N's letter on 13 June 2011 and acknowledged it on 25 July 2011. They said they were investigating the circumstances of his case and would respond in full at the earliest opportunity.
17. On 27 July 2011, the Supreme Court issued its judgment in *Houldsworth and another v Bridge Trustees Limited and another* [2011] UKSC 42.
18. In August 2012, Mr N wrote to the PPF saying he believed his transferred-in pension of £47,633.22 was now payable.
19. The PPF issued a decision on 12 December 2013.
20. Mr N submitted a request for a review on 16 June 2014. The PPF acknowledged receipt on 19 June 2014 and said they anticipated being in a position to respond by 13 September 2014. A review decision was issued on 21 November 2014. The review decision addressed two issues:
 - Whether the benefits Mr N had transferred into the LFS Scheme were money purchase benefits which should be discharged separately to his PPF entitlement.
 - If it was decided they were not, whether the Board was bound by an estoppel by representation and/or convention meaning it must treat the transferred-in benefits as money purchase benefits.
21. The review committee decided that Mr N's transferred-in pension was not a money purchase benefit and that no estoppel arose which required it to be treated as such. The review committee gave the following reasons:
 - The term 'money purchase benefits' is defined in Section 181 of the Pension Schemes Act 1993. It has also been considered by the courts in *Aon Trust Corporation Ltd and Houldsworth*.
 - A new definition of the term 'money purchase benefits' was introduced by Section 29 of the Pensions Act 2011 on 24 July 2014 (the **New Definition**). This applies retrospectively from 1 January 1997¹.
 - Broadly speaking, under the New Definition, a benefit will be a money purchase benefit when it is calculated solely by reference to the assets

¹ Pensions Act 2011 (Commencement No. 5) Order 2014 (SI2014/1683)

available to provide the benefit; it must not be possible for a funding deficit to arise in respect of the benefit.

- Whether the transferred-in pension met the definition of a money purchase benefit prior to the coming into force of the New Definition was not relevant. In deciding whether Mr N's transferred-in pension was a money purchase benefit, they had to apply the law as it stood at the time of the review.
- It was clear that Mr N's transferred-in pension was not a money purchase benefit under the New Definition. The transferred-in pension was not calculated solely by reference to the assets available to provide it.
- The correct date for determining the nature of the transferred-in pension was not the date of the transfer (1995) but the date the LSF Scheme entered the PPF assessment period (27 May 2005). Even if the transferred-in pension was a money purchase benefit in 1995, it ceased to be so with effect from 1 January 1997 following the retrospective application of the New Definition.
- The categorisation of the transferred-in pension was not fixed and could be affected by subsequent changes in the law.
- Neither the 28 April 1995 memorandum from Mr G (the **1995 Memo**) nor Mr N's 14 June 1999 memorandum (the **1999 Memo**) referred to the transferred-in pension as being ring-fenced. They described the pension as being additional or stand-alone, which it was because it did not accrue under the LFS Scheme, but was payable under it.
- Any estoppel which would have been binding between Mr N and the LFS Scheme trustees could not override the Board's statutory duty to pay compensation in accordance with schedule 7 Pensions Act 2004 (**PA04**).
- Even if it had been possible to ring-fence the transferred-in pension in 1995, the position would have changed in April 2005 with the creation of the Board.
- The main consequences of the commencement of a PPF assessment period and the transfer of a scheme to the Board are:
 - (i) To override both the scheme's rules and any special arrangements;
 - (ii) To provide for the transfer of the assets of the scheme to the Board; and
 - (iii) To create an obligation on the Board to pay statutory compensation in accordance with the PA04.

22. Mr N submitted a request for a reconsideration on 18 December 2014. A reconsideration decision was issued on 27 February 2015.

Relevant legislation

23. See appendix.

The reconsideration decision

24. The Board's Reconsideration Committee (the **Committee**) issued a decision on 27 February 2015. In response to the matters raised by Mr N, the Committee found as follows:

The Board was wrong to have regard to the New Definition.

25. The Committee considered the correct time for determining the nature of the transferred-in pension to be the date on which the LSF Scheme entered the assessment period and in accordance with the law in force at that time. Accordingly, the New Definition applied.

The Board had ignored the transitional provisions relating to the coming into force of the New Definition.

26. The Committee noted that the retrospective coming into force of the New Definition was subject to the Pensions Act 2011 (Transitional, Consequential and Supplementary Provisions) Regulations 2014 (SI2014/1711) (the **Transitional Regulations**). They concluded that none of the regulations applied to Mr N's transferred-in pension. In particular, they noted Mr N's reference to the Explanatory Memorandum to the Transitional Regulations. The Committee noted that regulation 57 of the Transitional Regulations provided that, in certain circumstances, the Board may direct the trustees of a scheme to discharge pensions in payment derived from additional voluntary contributions as though they were money purchase benefits. However, they did not agree with Mr N's argument that, if this approach could be taken in respect of schemes with assessment dates on or after 24 July 2014, it could apply to the LSF Scheme. The Committee found the wording of regulation 57 to be clear; it only applied to schemes with assessment dates on or after 24 July 2014.

The New Definition only has force with effect from 1 January 1997 and could not apply to earlier matters.

27. The Committee considered the clear intention of Parliament was that the New Definition would apply to schemes with effect from 1 January 1997, subject to the Transitional Regulations. They found the Board must apply the law in force at the Assessment Date. They were of the view that Mr N's transferred-in pension is not a money purchase benefit because the New Definition applies with retrospective effect from a date which is before the Assessment Date.

The Board was wrong to conclude that no estoppel had arisen.

28. The Committee said to succeed on a defence of estoppel by representation, Mr N would have to establish an unambiguous representation upon which he had

reasonably relied to his detriment. They considered there was no unequivocal representation as to the legal nature of the transferred-in pension. They said reference to the pension being stand-alone or ring-fenced did not amount to a representation that the benefit was a money purchase benefit.

29. The Committee found, because the references to the pension being stand-alone or ring-fenced were not references to the legal nature of the benefit, it was not possible to show the shared agreement or understanding required for estoppel by convention.

The Board was wrong to conclude that no estoppel binds it.

30. The Committee considered that, if the alleged estoppel was held to be binding on the Board, it would be required to make payments other than PPF compensation, which was not within its power.
31. The Committee considered the case law Mr N's representatives had referred to related to different circumstances. In particular, they said there was no public policy reason why the Board should be held to be estopped from acting in accordance with its statutory duties and objectives. The Committee noted Mr N's argument that, if the transferred-in pension was a money purchase benefit, the estoppel would not be contrary to the PA04, but considered it to be circular. They said case law had shown that the circumstances in which estoppel could override statute were limited.
32. The Committee considered that giving effect to the alleged estoppel would be contrary to the PA04 because it would require the Board to discharge the transferred-in pension (which is a defined benefit) as though it were a money purchase benefit. They said the Board only had the power to discharge actual money purchase benefits separately to PPF compensation.
33. The Committee accepted that there were circumstances in which the Board paid PPF compensation which took an estoppel into account. They said this was where the estoppel had the effect of changing the scheme's rules, which they did not agree was the case here.

Grounds for referral

34. The key points from Mr N's grounds for referral are summarised below:

The Board was wrong to apply the New Definition

35. Subject to his submissions relating to the retrospective effect of the New Definition, Mr N is content to proceed on the basis that:
- the date at which the nature of his transferred-in pension should be determined is 27 May 2005; and
 - the correct time to make such a determination was no later than 13 December 2013.

36. It cannot be right that the Board should apply the law as it stood at the time of the review. This would make the outcome dependent upon the lengthy delays in dealing with Mr N's case. There is nothing in the PA04, the Pensions Act 2011 (**PA11**) or subordinate legislation which provides that the Board must only apply the law as it stands at the date of review or reconsideration. Had the Board dealt with Mr N's referral within a reasonable timeframe, it would have determined his case on the basis of the law as it stood before the New Definition came into force.

The effect of the Transitional Regulations

37. The retrospective effect of section 181(B) is subject to the Transitional Regulations. The explanatory memorandum to the Transitional Regulations indicates that the aim of the retrospective effect was to ensure consistency with the past. In particular, paragraph 7.30 of the explanatory memorandum states,

"Some members receive a pension from additional voluntary contributions made alongside contributions to a defined benefit pension. Where such a pension (resulting from money purchase benefits or from other affected benefits) comes into payment before 1 April 2015 it will be treated as money purchase if the scheme enters an assessment period at any time after the coming into force date. This recognises that scheme members may have chosen to convert their additional voluntary contributions to a scheme pension on the understanding that the pension would be discharged as money purchase benefits if the scheme entered the Pension Protection Fund."

38. Mr N disagrees with the Committee's conclusion that Regulation 57 of the Transitional Regulations (see appendix) only applies where the scheme has entered the assessment period on or after 24 July 2014. He makes the following points:

- The statutory aim of the Transitional Regulations is to avoid prejudice and the revisiting of past decisions, and to protect members' pensions. The retrospective application of the New Definition leads to harsh consequences.
- There is a specific need for regulation 57 to cover the prospective position for schemes which commence an assessment period after the appointed day.
- It is implicit that the position specified by regulation 57 for a scheme which enters an assessment period after the appointed day must apply with equal (if not more) weight where a scheme entered an assessment period prior to 24 July 2014.
- Part 13.10 of the Department for Work and Pensions (**DWP**) guidance document 'Money purchase benefits in pensions law: guidance on recent changes to legislation (November 2014) states,

"Regulations 51 and 53 to 57 validate the treatment, and discharge of liabilities in respect of affected benefits as money purchase benefits in

relation to periods before the appointed day, and after the appointed day where the specified conditions are met.”

- Here the position is extreme because the LFS Scheme entered the assessment period more than nine years earlier.
- Any other position would be paradoxical. Statutes and statutory instruments should be constructed purposively; that is, in a way which gives effect to, rather than frustrates, the objective of and policy behind it².
- As at 27 May 2005, the position of the Board and CCT was that the transferred-in pension would be paid in full. No-one at the time proceeded on the basis of the New Definition. The New Definition cannot be used to prejudice members as the Board seeks to do here.
- Alternatively, the Board’s reading of regulation 57 supports the argument that the New Definition should not be used to determine whether, as at 27 May 2005, the transferred-in pension was a money purchase benefit.

Retrospective effect only to 1 January 1997

39. It was the express will of Parliament to limit the retrospective effect of section 29(7)PA11. There would have been no point specifying 1 January 1997 if section 29 had been intended to have a blanket retrospective effect. Paragraph 4.5 of the explanatory memorandum to the Transitional Regulations states,

“Decisions taken by schemes between 1 January 1997 and the coming into force of section 29 will in most cases be validated. In almost all areas, the practical effect of section 29 upon schemes which took decisions incompatible with the clarified definition will only be prospective.”

40. At the time of the material events in 1995, section 29 has and had no effect. The wording of section 29(7) and the statutory aim of consistency would be undone if it could be said that the transfer value was a money purchase benefit on transfer in 1995 until 31 December 1996, but then ceased to be a money purchase benefit by reason of the New Definition.

The Board was wrong to reject the evidence of estoppel

41. There is clear and incontrovertible evidence of representation and/or a convention that the transferred-in pension was ring-fenced or stand-alone. Mr N refers to:

- His memorandum of 14 June 1999
- A memorandum dated 12 July 1999, from a pensions administrator for the LFS Scheme, which stated,

² *PNPF Trust Company Limited v Taylor* [2010] Pen LR 261

“I now enclose a revised Benefit Statement which you will see separates your current scheme benefits from those purchased by your transfer in.”

- His memorandum of 30 December 1999, which stated,

“... as per my correspondence earlier this year the statement should show my transferred in benefits ... separately. The transferred in benefits being in addition to those earned [sic] on the [LFS Scheme] avoid the two thirds limit and are also Guaranteed.”
- His letter of 22 August 2003 in which he said,

“I should point out that I have two separate pension pots one made up from the funds transferred in from my previous employment ... These pots were kept separate to avoid the two-thirds rule imposed by the Revenue.”
- The pensions administrator’s response dated 30 September 2003, which stated,

“... I apologise for the delay, which resulted from our taking the opportunity to confirm that our understanding of the situation is correct, by consulting the Trustees’ independent advisers.”
- His letter of 13 March 2006 in which he said,

“When I was originally advised to transfer my pension from the Bowring Scheme to Fenchurch I was advised by [Mr G] that this would be “ringfenced” from the Fenchurch benefits ...”

42. There was no challenge to Mr N’s assertion that there were two pensions.
43. The crucial point is that the clear concept is of a pension which was separate and distinct from the final salary benefits under the LFS Scheme.
44. The Board is not in a position to reject and has not rejected Mr N’s consistent recollection of his 1995 conversation with Mr G.
45. The transferred-in pension was ring-fenced or stand-alone because it was of a different nature; comprising money purchase benefits. Otherwise, there was no purpose in the separation, since it was not possible to buy added years. The Board has not suggested any other rationale for the separation.
46. The language of ring-fencing is apposite to and often used in relation to money purchase scheme; in that a member’s assets are ring-fenced from other members’ assets.
47. Accordingly, an estoppel arises and the Committee were wrong to conclude otherwise.

The binding nature of the estoppel on the Board

48. It is clear that an estoppel can override statute³. This general proposition does not appear to have been rejected by the Committee.
49. There is no statutory intention to exclude the operation of an estoppel in the present circumstances for the following reasons:
- The statutory purpose of the PPF is to pay compensation to the members of eligible defined benefit pension schemes when there is a qualifying insolvency event in relation to the employer and there are insufficient assets to cover PPF levels of compensation. This purpose is not subverted by the estoppel.
 - If the transferred-in benefits were money purchase benefits, they would be payable in full. Accordingly, the estoppel is not contrary to the provisions of Part 2 PA04⁴.
 - The Board has acknowledged that it would be bound by an estoppel if the trustees would have been and an estoppel can form part of the admissible rules. Such an approach is consistent with the purpose of the PPF and it would be inequitable to deny members a benefit to which, absent the PPF, they would be entitled. There is no reason to apply a different approach in this case.
 - In concluding that the Board would be required to pay something other than PPF compensation if it were bound by estoppel, the Committee employed a circular argument. The fact that the estopped party is prevented from relying on its strict legal rights/powers is true of any estoppel.
 - The estoppel applies notwithstanding the rules of the scheme or the PPF and becomes institutionalised⁵.

The stand-alone pension should be subject to the PPF compensation limits

50. If Mr N's transferred-in pension is not to be treated as a money purchase benefit, it should be separately assessed for PPF compensation. He is entitled to arrears of compensation from 2007, together with interest.

Representations from the Board

51. The Board's submission is summarised below, following the same pattern as the grounds for referral:

³ *Shah v Shah* [2002] QB 35; *Briggs & Ors v Gleeds (Head Office) & Ors* [2014] Pen LR 265

⁴ Cf. *Actionstrength Ltd v International Glass Engineering Spa* [2003] 2 AC 541

⁵ *Catchpole v Trustees of the Alitalia Airlines Pension Scheme & Anor* [2010] EWHC 1809 (Ch)

The Board was wrong to apply the New Definition

52. The Board notes that Mr N accepts that the correct date for determining the nature of the transferred-in pension is 27 May 2005. The Board does not accept that this means that the New Definition does not apply. Even if the transferred-in pension was a money purchase benefit under the original definition (which is not accepted), it ceases to be one with effect from 1 January 1997. It is wrong to treat the legal characteristic of the pension as being immutably fixed irrespective of subsequent changes in the law.
53. The Board rejects the allegation that this approach produces an arbitrary or unfair result.
54. At the time Mr N requested a determination of his compensation entitlement, the LFS Scheme had only just transferred to the PPF and the *Houldsworth* decision was pending. The *Houldsworth* decision was handed down three months after Mr N's application and was accompanied by a statement from the DWP. The DWP stated that the Government intended to introduce legislation to provide certainty which was likely to have retrospective effect. The Board could not have disregarded the forthcoming legislation to make a decision in Mr N's case which might have been contrary to obligations it would subsequently be required to give effect to.

The effect of the Transitional Regulations

55. The substantive rights of the parties to an action will usually fall to be determined by the law as it existed at the time when the action commenced unless subsequent legislation expressly states that it is to have retrospective effect. That occurred here.
56. Recourse to explanatory memoranda in order to construe legislation is only possible when the meaning of the legislation is not clear. The Transitional Regulations make clear and specific provision for cases where events which occurred before the regulations came into force require different treatment. None of the examples cited by Mr N apply in his case.
57. It is incorrect to say that, as at 27 May 2005, the position of the Board and CCT was that the transferred-in pension would be paid in full. CCT were not appointed until July 2005. The LFS Scheme was in the assessment period and responsibility for decisions regarding members' benefits remained with the trustees. The conversations Mr N had with the PPF took place within a fortnight of the relevant insolvency event and before a decision had been reached as to whether the LFS Scheme was eligible for entry into the PPF. It cannot be asserted that the Board's position in May 2005 was that the transferred-in pension was a money purchase benefit.
58. The Board does not accept that the transferred-in pension was a money purchase benefit under the original definition. Under the original definition, a case fell to be determined by considering whether, having regard to all the features of the scheme in question, the rate or amount of the benefit was calculated by reference to payments

by or in respect of the member. This was not the case for the LFS Scheme. In particular:

- There was no equivalent mechanism for calculating Mr N's pension to those which existed in the KPMG and Bridge cases;
- There is nothing in the LFS Scheme rules providing for a member's 'pot'; and
- The lump sum transfer payment received in respect of Mr N was converted on receipt into a future pension; the conversion did not occur when the benefit came into payment. Mr N's case can, therefore, be distinguished from the situation considered in the Bridge case.

59. In each of the cases considered by the Courts, a mechanism has existed by which it could be seen that the members' payments generated the amount of the benefit in question. Given the absence of such a mechanism in Mr N's case, it cannot be said that the transferred-in pension was calculated by reference to payments by or in respect of the member. It was not, therefore, a money purchase benefit under the original definition.

Retrospective effect only to 1 January 1997

60. The benefit which Mr N is claiming arises out of the merger of the Fenchurch Scheme with the Lowndes Lambert Group Staff Pension Scheme in August 1998. This is after the retrospective effective date of the New Definition.

The Board was wrong to reject the evidence of estoppel

61. The Board's position remains as previously stated:

- There was no unequivocal representation as to the legal nature of the transferred-in pension;
- Describing the transferred-in pension as ring-fenced or stand-alone does not amount to a representation as to whether the underlying benefit is a money purchase benefit or not;
- Any express sharing of a common understanding that the transferred-in pension would be ring-fenced or stand-alone does not constitute a common understanding as to the legal nature of the transferred-in pension;
- The first reference to the pension being ring-fenced was in December 2005; after the LFS Scheme had entered to PPF assessment period.

The binding nature of the estoppel on the Board

62. The Board accepts that, in appropriate circumstances, an estoppel can override statutory provisions. The operation of this principle is carefully confined by the Courts; as demonstrated in the *Gleeds* case.

63. The Board does not accept that an estoppel could bind it in this case because:

- The PPF pays compensation within limits. Mr N is relying on the estoppel defence in order to circumvent the effect of the compensation cap which would otherwise limit the benefits the PPF can pay. To allow the estoppel to take effect would subvert the statutory purpose;
- The *Actionstrength* case can only be distinguished if the transferred-in pension was a money purchase benefit under the original definition, which the Board does not accept;
- To give effect to the estoppel would be to confer on Mr N a benefit to which he is not entitled. His case is, therefore, materially different to other cases in which the Board might recognise an estoppel.

The stand-alone pension should be subject to the PPF compensation limits

64. This ground cannot be upheld having regard to the provisions contained in Schedule 7, paragraph 26 PA04.

65. It is not accepted that Mr N has a second benefit from the LFS Scheme. His entitlement is to the totality of the fixed pension and the pension calculated by reference to his pensionable salary and pensionable service with the LFS Scheme; there is no “other benefit”. Accordingly, paragraph 26(2)(a) Schedule 7 applies and his compensation is capped.

66. Even if Mr N were to establish that he had an “other benefit” within the LSF Scheme, that benefit would be attributable to his pensionable service in the LSF Scheme because it is inextricably linked to the pension he accrued in consequence of his pensionable service with the LSF Scheme. He was only able to avail himself of the fixed pension within the LSF Scheme because of his transfer into that scheme. In such circumstances paragraph 26(2)(b) applies.

Supplementary statement by the Applicant

67. Mr N submitted a supplementary statement. This largely reiterated the points made in his Grounds for Referral (see above). In addition, Mr N states:

- The decision not to honour his transferred-in pension means that he has lost 23 years of pension contributions made by himself and his employers. The transferred-in pension was projected to provide a self-standing pension of around £48,000. Overall, he stood to receive total pension benefits of around £85,000. As a result of the Board’s decision, he is subject to the PPF compensation cap (currently £17,000). In addition, the LFS Scheme was contracted-out and he will not receive a full pension at age 65. Without the pension he had expected to receive, he and his wife will be forced to sell their

house, downsize and move to another area to acquire a more affordable property.

- The ability to consider explanatory memoranda is not as limited as the Board contends. This is particularly so in the case of a statutory instrument. He cites *PNPF v Taylor* (see above). It is common ground that paragraph 7.30 of the Explanatory Memorandum is a summary of regulation 57 of the Transitional Regulations. It makes it clear that the aim of the Transitional Regulations was to avoid prejudice to the member and revisiting of past decisions.
- The first indication he had that his transferred-in pension might not be paid in full was in a letter from CCT dated 5 December 2005 (see above). This letter stated they had previously felt that transferred-in benefits could be paid in full.
- The explanation as to how the transferred-in pension was calculated was provided in the 1995 Memo. This explanation provided the mechanism by which it could be seen how the members' payments generated the amount of the benefit in question. Whether the lump sum payment was converted on receipt into a future pension or only on payment cannot determine the nature of the benefit. If anything, conversion on receipt is a greater indication that it was a money purchase benefit.
- Reference to the merger between the Fenchurch Scheme and the Lowndes Lambert Group Staff Pension Scheme ignores the fact that the transferred-in pension arises out of a transfer from the Bowring Scheme in 1995.
- It is not correct to say the *Actionstrength* case can only be distinguished if the transferred-in pension was a money purchase benefit under the original definition. If the transferred-in pension was a money purchase benefit under the original definition, the estoppel would only be needed to correct the retrospective application of the New Definition. If the transferred-in pension was not a money purchase benefit under the original definition, an estoppel could still apply (on the basis previously set out). Either way, there is nothing unenforceable in his contention that the transferred-in pension should be treated as a money purchase benefit. It is not as if he was contending, for example, that he was entitled to take his pension before age 55, which would be impermissible.
- The creation of the Board should have no effect on his pension entitlement.
- He considers his transferred-in pension to have been ring-fenced. He points to the use of the terms "stand alone" and "ring-fenced" in correspondence.
- There is no point the transferred-in pension being ring-fenced unless it is a money purchase pension. Therefore, any reference to the pension being stand-alone or ring-fenced amounts to a representation or understanding that the pension was a money purchase pension.

- He is of the view that his transferred-in pension meets the amended definition of a money purchase benefit under the Pensions Act 2004.
- The use of actuarial factors and/or a set percentage increase does not mean that a pension cannot be a money purchase pension. He cites *Bridge Trustees v Yates* [2008] EWHC 964 (Ch).
- CCT acknowledged, in 2005, that the pension was a money purchase pension. Given that it was subsequently confirmed that *Aon v KPMG* did not apply in his case, CCT's original position should apply.
- The New Definition is retrospective to 1 January 1997. Pensions which pre-date this are not caught by the New Definition.
- His conversations with the PPF, on 1 and 6 June 2005, show a clear understanding on their behalf that his transferred-in pension was a money purchase pension.
- All estoppels have the effect of changing or deviating from the relevant scheme rules. There is no difference between paying compensation in excess of the limit and paying more than the strict entitlement under the pension scheme rules. There is no difference between paying in excess of the limit and enforcing a deed which does not comply with the formalities required under the Law of Property (Miscellaneous Provisions) Act 1989.
- He does not agree that paragraph 26(b), Schedule 7, the PA04 applies. Consequently, his transferred-in pension is a separate pension which should be assessed separately for the purposes of the compensation cap. His transferred-in pension was a stand-alone pension because it was different in terms of accrual. The value of his transferred-in pension was not a function of his pensionable service in the LFS Scheme; it was a product of the transfer value revalued at a fixed 5% per year, which was attributable to his service in the Bowring Scheme. He agrees that sub-paragraphs (a) and (c) do not apply.
- The answer lies in the meaning of the word "attributable". He does not accept that, in the interpretation of scheme rules and/or pensions legislation, words should be given their ordinary everyday meaning. The word attributable is used frequently in pensions legislation; it appears 85 times in the PA04 and 49 times in Schedule 7. At no time is it used as a synonym for "caused by". For example, paragraph 12 (which deals with the revaluation of active members' accrued benefits) applies a different revaluation percentage depending upon whether the accrued amount is attributable to pensionable service falling before or after the commencement date for the Pensions Act 2008. Applying the suggested interpretation would mean that the member would not acquire the right to revaluation in respect of service prior to the commencement date without service after that date. This would make a mockery of the careful structure of paragraph 12 and the different revaluation percentages.

- A legislative instrument is to be read as a whole and an enactment within it is not to be treated as standing alone but is interpreted in its context as part of the instrument⁶. He cites *R v Bradley* [2005] EWCA Crim 20 and *Collins v National Theatre* [2004] EWCA Civ 144.
- Even if a broader meaning for the word attributable were adopted, this does not mean that his transferred-in pension was caused by pensionable service in the LSF Scheme. He would have been entitled to and received the pension even if he had never transferred it or had transferred it but never had any pensionable service in the LSF Scheme. It cannot be said that but for his pensionable service in the LSF Scheme he would not have been entitled to his transferred-in pension.

Conclusions

68. This is a reviewable matter by virtue of Schedule 9, paragraph 16 Pensions Act 2004.
69. Mr N seeks to establish that his transferred-in pension is a money purchase benefit. If this were the case, this benefit would not be included in the calculation of his PPF compensation.
70. It is accepted by the parties that the appropriate date for determining the nature of Mr N's transferred-in pension is 27 May 2005 (the date on which the LSF Scheme entered the PPF assessment period). I would agree. It is clear that Pensions Act 2004 Schedule 7, expects PPF compensation to be calculated by reference to the status of the member's benefits as at the date immediately prior to the commencement of the assessment period. It follows that the Board was required to take a view as to the nature of Mr N's transferred-in pension as at that date.
71. The definition of money purchase benefits is found in Section 181(1) Pension Schemes Act 1993. It is clear that Mr N's transferred-in pension is not a money purchase benefit under the New Definition. It cannot be said to be "calculated solely by reference to assets which (because of the nature of the calculation) must necessarily suffice for the purposes of its provision". Mr N argues the Board was wrong to apply the New Definition. Before determining this point, it would be helpful to consider whether Mr N's transferred-in pension would have been considered to be a money purchase benefit under Section 181(1) prior to its amendment. If it would not have been considered to be a money purchase benefit previously, arguably it matters not whether the Board was correct or not in applying the New Definition, although, in my view, the Board were correct in applying it.
72. Prior to amendment, Section 181(1) defined a money purchase benefit as one where the rate or amount of benefit was "calculated by reference to a payment or payments made by the member or by any other person in respect of the member" and which

⁶ Bennin on Statutory Construction 6th Ed.

was not an average salary benefit. This definition was considered by the courts in the *Aon Trust Corporation Ltd* and *Houldsworth* cases. In *Aon Trust Corporation Ltd*, the court decided that the use of actuarial factors (in calculating the amount of pension) and the trustees' powers to adjust contributions/benefits in the case of a scheme funding surplus or deficit broke the required direct relationship between contributions and benefits. In *Houldsworth*, the court decided that "calculated by reference to" contributions did not mean "calculated *only* by reference to" contributions because that would ignore investment return. The court also determined that the application of actuarial factors at some stage in calculating the benefits did not preclude them from being money purchase benefits because it was inescapable. The court found that the *Aon Trust Corporation Ltd* case had been "rightly decided" because the use of actuarial factors and the trustees' wide powers produced "too wide a discontinuity" between the contributions (and any investment return on them) and the eventual benefits.

73. The key to deciding whether Mr N's transferred-in pension is money purchase in nature lies in seeing whether and to what extent there is a direct relationship between contributions paid by and/or in respect of Mr N (and any investment return thereon) and his pension. I do not find that there is a direct relationship. The transferred-in pension was calculated by the application of actuarial factors to the transfer value received from the Bowring Scheme (rule 3.2 of the LSF Scheme rules). Since the Bowring Scheme was a final-salary scheme, the transfer value, itself, would have been a cash equivalent value of the benefits Mr N had accrued in that scheme. Neither the transfer value nor the resultant pension bore any relationship to contributions made by and/or in respect of Mr N. In my view, this produced a discontinuity between the contributions (and any investment return) and the eventual pension of a similar magnitude to that found in the *Aon Trust Corporation Ltd* case. Mr N's transferred-in pension would not have been considered a money purchase benefit under the pre-2014 definition.
74. Section 29 PA11, came into force on 24 July 2014.⁷ It specifically provided that the amendment to the definition of money purchase benefits should "be regarded as having come into force on 1 January 1997". Section 30 PA11, provided for the making of regulations for transitional provisions in relation to the coming into force of Section 29. These are the Transitional Regulations (see appendix). If it was intended that the retrospective effect of Section 29 should not apply in the circumstances of Mr N's case, the necessary provision would be found here.
75. Mr N cites regulation 57. I do not find that regulation 57 applies in Mr N's case. It relates specifically to pensions purchased by members' additional voluntary contributions; Mr N's case relates to benefits deriving from a transfer value. It is also the case that one of the conditions to be met is that the scheme's assessment date is on or after 24 July 2014.

⁷ The Pensions Act 2011 (Commencement No.5) Order 2014 (SI2014/1683)

76. Nor do I find that any of the other provisions in the Transitional Regulations apply in Mr N's case. In general, the transitional protection provided by the Transitional Regulations allows decisions regarding the treatment of benefits made by trustees to stand (provided certain conditions are met). In other words, if the trustees of a scheme have in the past treated certain benefits as money purchase benefits, those benefits can continue to be treated as money purchase benefits. For example, in the winding up of the scheme. However, as I have explained above, I do not find that the trustees of the LSF Scheme did treat Mr N's transferred-in pension as a money purchase benefit. The fact that a pension is referred to as stand-alone and/or ring-fenced does not make it a money purchase benefit. Mr N suggests that there is no point in the transferred-in pension being ring-fenced unless it is a money purchase benefit. This does not follow. There are other reasons for certain benefits to be ring-fenced; for example, they may be treated differently for revaluation purposes or on winding up.
77. This brings me to the question of estoppel. For there to be estoppel by representation, there must have been a clear and unambiguous representation on which the claimant has relied. Mr N is relying on his recollection of a telephone conversation with Mr G in 1995, correspondence between himself and the LSF Scheme administrators in 1999 and 2003, and his letter of 13 March 2006. The first thing to note is that nowhere in any of the correspondence or notes relied on by Mr N is his transferred-in pension described as a money purchase benefit. In 1995, Mr N recorded that he had been advised that the transfer value would purchase a stand-alone pension which would be ring-fenced. In 1999, the pension is described as stand-alone and fixed and was shown separately on his benefits statement. In 2003, Mr N asserted that he had two separate pensions and, in 2006, he said he had been advised that the pension would be ring-fenced. I do not find, within the correspondence or the notes from conversations, a clear and unambiguous representation that Mr N's transferred-in pension was/is a money purchase benefit. The references to the pension being separate from his LSF Scheme benefits or ring-fenced in some way do not amount to a representation that it was money purchase in nature.
78. There are other forms of estoppel. For estoppel by convention to apply, the parties must have,
- “acted in their transaction upon the agreed assumption that a given state of facts is to be accepted between them as true”⁸
- If this is the case, each party will be estopped from questioning the truth of the assumed statement of facts. Mr N would have to be able to show that both he and the trustees of the LSF Scheme, and later the PPF, acted on the assumption that his transferred-in pension was a money purchase benefit.

⁸ *Prudential Staff Pensions Ltd v The Prudential Assurance Company Ltd* [2011] EWHC 960 (Ch)

79. The evidence does not support such a conclusion. Mr N asserts that, as at 27 May 2005, the position of the Board and CCT was that the transferred-in pension would be paid in full. As the Board rightly points out, CCT had not then been appointed. Mr N's first contact with the PPF appears to be his conversation with Mr B on 1 June 2005. He recorded being told that the trustees of the LSF Scheme would have to discharge their liabilities for "Money Purchase Schemes, like mine," before they could wind-up the scheme. A second note, dated 6 June 2005, records Mr N was told, as long as his transfer value had been used to purchase a "set pension figure", this would have to be "honoured first". I am sure that Mr N has given his recollection of the conversation in good faith and I am happy to accept that he spoke to Mr B at length. However, with the passage of time, an individual's recollection of a conversation must be treated with some caution. It is helpful that Mr N took notes at the time but, of course, these only record his view of the conversation.
80. I do not find that this amounts to the PPF acting upon an agreed assumption as to the nature of Mr N's transferred-in pension. The information provided by Mr B is general in nature; that is, it might well be the response given to anyone who says they have a money purchase benefit. There is no evidence that he had any specific information about the transferred-in pension on which to base his comments other than Mr N's own assertions.
81. Having found that no estoppel arises in Mr N's case, arguably, I do not need to consider whether it would bind the Board. I note that the Board accepts that there are circumstances in which estoppel can establish a right which may be in excess of or contrary to statutory provision. I agree but it does not help Mr N.
82. Finally, there is the question of whether Mr N's transferred-in pension should be assessed separately for the purposes of the PPF compensation cap. The Board have referred me to the PA04, Schedule 7 paragraph 26 of (see appendix).
83. The Board take the view that Mr N has only one benefit from the LSF Scheme; the pension calculated by reference to his pensionable salary and pensionable service under that scheme plus the transferred-in pension. It argues paragraph 26(2)(a) applies in such circumstances. As an alternative, the Board argue that Mr N could only avail himself of the transferred-in benefits because of his pensionable service in the LSF Scheme. Again it argues paragraph 26(2)(b) applies in such circumstances.
84. It is accepted that Mr N is "entitled to relevant compensation in respect of a benefit ("benefit A") under the scheme". It is not immediately clear whether benefit A should include both the pension calculated by reference to his pensionable salary and pensionable service under the LSF Scheme, and the transferred-in pension. I do not believe this can be the case simply because both benefits are now paid under the same scheme. Benefit A is expressed in the singular; whereas the definition of benefit B expressly includes more than one benefit. Mr N's transferred-in pension is a separate benefit to the pension he accrued by virtue of his pensionable service under the LSF Scheme.

85. The next step is to determine whether (and which of) paragraph 26, sub-paragraphs (a), (b), and (c), apply. Sub-paragraph (c) applies where Benefit A is a pension credit and is therefore not relevant in Mr N's case. Sub-paragraph (a) only applies if neither sub-paragraph (b) or (c) apply. It is therefore necessary to determine whether sub-paragraph (b) applies in Mr N's case.
86. Clearly Mr N has a benefit A which is attributable to his pensionable service. The question is whether he has also become "entitled to relevant compensation in respect of one or more other benefits that are attributable to his pensionable service under the scheme or a connected occupational pension scheme ("benefit or benefits B")". The transferred-in pension arises from a transfer payment to the LSF Scheme from the Bowring Scheme. The original benefits which the transfer value represented were attributable to Mr N's pensionable service in that scheme which is not "a connected occupational pension scheme" to the LSF Scheme. The amount of the transferred-in pension has not been calculated by reference to Mr N's pensionable service in the LSF Scheme. It cannot be said to be "attributable" to his pensionable service in the LSF Scheme in the conventional (to the 'pensions world') sense.
87. The Board makes the point that Mr N could not have acquired the transferred-in pension without pensionable service in the LSF Scheme. Mr N argues that he would have been entitled to the transferred-in pension even if he had not transferred it or had transferred it but not had any pensionable service in the LSF Scheme. If Mr N had not transferred his pension, he would have retained entitlement to a pension under the Bowring Scheme; he would not be entitled to the transferred-in pension. In order to transfer his pension, Mr N had to be a member of the LSF Scheme (or the Fenchurch Group Pension Scheme as it was then) and, thereby, accruing pensionable service in that scheme.
88. The courts have developed a number of 'rules' to assist in the interpretation and construction of statute. The starting point for the courts in interpreting a statute is the so-called literal rule; that is, Parliament's intentions are found by giving words their ordinary and natural meaning in context. The House of Lords has held, that in applying the literal rule, words should be given their common or ordinary meaning unless they have a particular technical meaning. If the use of the literal rule produces an absurd result, or one that is repugnant to or inconsistent with the rest of the statute, it may be ignored and the golden rule applied. The golden rule simply allows the grammatical and ordinary sense of a word to be modified to avoid any absurdity and inconsistency created by the application of the literal rule. The literal rule is also increasingly being modified by the courts' adoption of a more purposive approach; that is, interpreting legislation in the light of its purpose.
89. Following the literal rule, the word "attributable" (according to the online Oxford dictionary) means caused by or able to be ascribed to. I note Mr N's assertion that the word attributable is used on numerous occasions throughout the PA04 and Schedule 7. I am happy to take his word for the exact numbers. However, "attributable" is not specifically defined in the PA04. In contrast, section 318 contains a series of

specifically defined words and phrases. If it had been intended that “attributable” should be assigned a particular technical meaning, I would expect to find it set out in section 318. I find, therefore, that the word should be given its ordinary meaning within the context in which it is found. I do not agree that the meaning should be imported from other parts of the PA04. Applying the literal rule does not, in my view, produce an absurd or inconsistent result nor does it appear to be at odds with the purpose of paragraph 26.

90. In that sense, I find that Mr N’s transferred-in pension does fall within the definition of benefit B; inasmuch as his entitlement to the pension may be ascribed to his having pensionable service in the LSF Scheme. Consequently, it must be aggregated with his benefit A for the purposes of applying the compensation cap. Paragraph 26(2)(b) applies.
91. I am required, under regulation 6 Pension Protection Fund (Reference of Reviewable Matters to the PPF Ombudsman) Regulations (SI2005/2024) (as amended), to determine what action, if any, the Board is required to take. I find that there is no action which the Board is required to take in Mr N’s case.

Anthony Arter

Pension Protection Fund Ombudsman

25 November 2016

Appendix

Relevant legislation

The Pension Schemes Act 1993

92. In August 1995, Section 181(1) defined “money purchase benefits” as follows,

“in relation to a member of a personal or occupational pension scheme ... means benefits the rate or amount of which is calculated by reference to a payment or payments made by the member or by any other person in respect of the member and which are not average salary benefits”

93. Following the retrospective amendments, Section 181(1) defined “money purchase benefits” as follows,

“in relation to a member of a personal or occupational pension scheme ... means benefits the rate or amount of which is calculated by reference to a payment or payments made by the member or by any other person in respect of the member and which fall within section 181B”

94. Section 181B stated,

- “(1) This section applies for the purposes of the definition of "money purchase benefits" in section 181(1).
- (2) A benefit other than a pension in payment falls within this section if its rate or amount is calculated solely by reference to assets which (because of the nature of the calculation) must necessarily suffice for the purposes of its provision to or in respect of the member.

...”

The Pensions Act 2011 (Transitional, Consequential and Supplementary Provisions) Regulations 2014 (SI2014/1711)

95. Regulation 57 provides,

“Discharge of pensions in payment derived from additional voluntary contributions treated as money purchase benefits: periods after the appointed day

- (1) Where the conditions specified in paragraph (2) are met in relation to a member's pension in payment under an occupational pension scheme, the Board may give the trustees or managers of an eligible scheme a direction regarding the exercise of the trustees or managers' power to determine that the member's pension or part of a pension should be discharged as if it were money purchase benefits ...
- (2) The conditions specified in this paragraph are that -

- (a) the assessment date⁹ or further assessment date in relation to an eligible scheme is on or after the appointed day¹⁰;
 - (b) the pension or part of a pension is derived from additional voluntary contributions;
 - (c) the pension or part of a pension is derived from any of the benefits specified in sub-paragraphs (a) to (c) of regulation 44(3) or from money purchase benefits;
 - (d) the pension or part of a pension comes into payment on or before 1st April 2015;
 - (e) pensions in payment which satisfied the conditions specified in sub-paragraphs (b) and (c) were, before the appointed day, treated by the trustees or managers of the scheme as money purchase benefits; and
 - (f) the Board is satisfied that it is reasonable in the circumstances to treat the pension or part of a pension as money purchase benefits.
- (3) Where the Board directs the trustees or managers of an eligible scheme, in accordance with paragraph (1), that a pension or part of a pension should be discharged as if it were money purchase benefits, the relevant Pension Protection Fund provisions apply as if the pension or part of a pension discharged were a money purchase benefit.”

Schedule 7 of the Pensions Act 2004

96. Paragraph 26 states,

- “(1) Where –
- (a) a person becomes entitled to relevant compensation in respect of a benefit ("benefit A") under the scheme, and
 - (b) sub-paragraph (2)(a), (b) or (c) applies,
- the amount of the compensation must be restricted in accordance with sub-paragraph (3).
- (2) For the purposes of sub-paragraph (1) -
- (a) this paragraph applies if -

⁹ The date on which the assessment period begins.

¹⁰ The day appointed for the coming into force of section 29 of the Act (definition of money purchase benefits) - 24 July 2014.

- (i) the annual value of benefit A exceeds the compensation cap, and
 - (ii) neither of paragraphs (b) and (c) applies, and
- (b) this paragraph applies if -
 - (zi) benefit A is attributable to the person's pensionable service,
 - (i) at the same time as the person becomes entitled to relevant compensation in respect of benefit A he also becomes entitled to relevant compensation in respect of one or more other benefits that are attributable to his pensionable service under the scheme or a connected occupational pension scheme ("benefit or benefits B"), and
 - (ii) the aggregate of the annual values of benefit A and benefit or benefits B exceeds the compensation cap, and
- (c) this paragraph applies if -
 - (i) benefit A is attributable to a pension credit from a transferor ..."

97. For the purposes of paragraph 26, except in prescribed circumstances, a scheme is connected with another occupational pension scheme if the same person is or was an employer in relation to both schemes.

LFS Scheme Trust Deed and Rules 23 April 2003

98. Rule 3.2 provides,

"3.2 Transfers

If any Member or any former Member either (i) was previously a member of a Transfer Scheme, and a transfer payment is made by the Transfer Scheme to the Trustees, or (ii) if his rights under any previous Transfer Scheme have been bought out, then the Trustees may receive from the trustees of the Transfer Scheme, or from the Insurance Company concerned, such amount as may be payable under the rules of the Transfer Scheme, or an assignment of or the surrender value of the policy concerned, and credit the Member with such additional benefits as the Trustees, acting on Actuarial Advice, and with the consent of the Principal Employer, shall consider appropriate, ..."