Neutral Citation Number: [2019] EWHC 986 (Ch)

Claim No: E30NE082

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS IN NEWCASTLE
APPEALS (ChD)

The Law Courts,
The Quayside,
Newcastle-upon-Tyne, NE1 3LA.

Date: 23/04/2019

Before:

HIS HONOUR JUDGE KLEIN SITTING AS A JUDGE OF THE HIGH COURT

- -

Between:

MICHAEL JOSEPH FORSTER SHEFFIELD	**Appellant**
- and -	
(1) KIER GROUP PLC	
(2) MIDDLESBROUGH COUNCIL	
(3) THE TRUSTEES OF THE TEESSIDE PENSION FUND	**Respondents**

- -
- -

Charles Morgan (instructed by **Coles Solicitors Ltd.**) for the **Appellant**
Michael Uberoi (instructed by **Middlesbrough Council**) for the **Second Respondent**

Hearing date: 29 March 2019

- -

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

.....

HIS HONOUR JUDGE KLEIN

HH Judge Klein:

1. The Appellant ("Mr Sheffield") was HM Coroner for Teesside from 1 June 1972 until his retirement on 30 April 2014.[1] In that capacity, he joined the Local Government Pension Scheme ("the pension scheme") in about July 1978. The Third Respondents are said by Mr Sheffield to be the trustees of the Teesside Pension Fund, which, he says, is the relevant fund of the pension scheme for the purpose of this appeal.[2] The First Respondent ("Kier") administers the pension scheme, at least so far as is relevant, on the Second Respondent's ("Middlesbrough's") behalf. Middlesbrough is, I understand, notionally Mr Sheffield's employer for the purpose of the pension scheme.[3]

2. Between 20 May 1999 and 5 April 2006, the Local Government Pension Scheme Regulations 1997 ("the 1997 regulations") provided as follows:

> "25A Retirement after the normal retirement date
>
> (1) A member who with the consent of his employing authority remains in service after his 65th birthday is entitled to a pension and retirement grant when he retires from service.
>
> (2) The pension and retirement grant are payable immediately on retirement.
>
> 35 Requirements as to time of payment
>
> (1) Retirement benefits under this Chapter may not be paid to a person before he has retired from the employment in which he was a member.
>
> (2) But they must begin to be paid not later than the member's 75th birthday even if he has not retired (and see also regulation 36(3)).
>
> 94 Interest on late payment of certain benefits
>
> (1) Where all or part of a pension or lump sum payment due under these Regulations or the 1995 regulations is not paid within the relevant period after the due date, the appropriate administering authority must pay interest on the unpaid amount to the person to whom it is payable calculated from the due date as provided in regulation 82(2).
>
> (1A) The relevant period –
>
> (a) in the case of a pension is one year;

[1] The precise boundaries of Mr Sheffield's coronial jurisdiction changed over time, in part because of local government changes, but nothing turns on this.

[2] Following the circulation of the draft of this judgment, Mr Uberoi informed me that there is no trust-based pension fund or scheme in this case and that there are no trustees of any Teesside Pension Fund.

[3] Kier and the Third Respondents (if they exist) have taken no part in this appeal. Although the Pensions Ombudsman has been notified of this appeal, in the usual way he has also taken no part in it.

> …(c) otherwise is one month.
>
> (2) In the case of a pension the due date is the date on which it becomes payable.
>
> (2A) In the case of a retirement grant, the due date is the date on which it is payable…"

3. Mr Sheffield's 75th birthday was on 11 April 2005. However, no pension benefits were paid to him on his 75th birthday or, for reasons that do not matter, until July 2014 (or, possibly, July 2015, but nothing turns on this).

4. From 6 April 2006 until 31 March 2008, the 1997 regulations provided as follows:

> "25A Retirement after the normal retirement date
>
> (1) A member who remains in service after his 65th birthday is entitled to a pension and retirement grant when he retires from service.
>
> (2) The pension and retirement grant are payable immediately on retirement or, if earlier, on the day before the member's 75th birthday.
>
> (3) A member is not entitled to count any period of service on or after the day before his 75th birthday as a period of membership and is not an active member after that day.
>
> 35 Requirements as to time of payment
>
> (1) Retirement benefits under this Chapter may not be paid to a person before he has retired from the employment in which he was a member.
>
> …(2) In any event, retirement benefits under this Chapter must begin to be paid not later than the member's 75th birthday even if he has not retired…"

Regulation 94 of the 1997 regulations ("regulation 94") did not change during this latter period.

5. Immediately before 6 April 2006, Mr Sheffield had almost reached his 76th birthday, pension contributions had been made for almost a year after Mr Sheffield's 75th birthday and he had received payment for coronial work during that period.

6. In about July 2010, Kier wrote to Mr Sheffield's solicitors. It appears that Kier understood that, under the amended 1997 regulations, if Mr Sheffield had not retired from the pension scheme before 6 April 2006, he would be deemed to have retired from the pension scheme immediately before his 75th birthday (on 11 April 2005) whereas, prior to the amendments, Mr Sheffield was not deemed to have retired from the pension scheme until a later date (probably, although this is not clear, the date he actually retired as coroner). In the circumstances, Kier said:

> "It is therefore proposed that Mr Sheffield's effective date of retirement from the scheme is 4 April 2006. If you would confirm your agreement with this proposal, we will calculate Mr Sheffield's benefit entitlement based upon service and pensionable pay to that date."

7. Mr Sheffield maintains that the Respondents are bound by that proposal, so that he is to be treated as having retired from the pension scheme on 4 April 2006 ("the April 2006 retirement date"). On this appeal, Middlesbrough contends, as it happens, that it is not bound by that proposal.

8. As I have said, Mr Sheffield retired on 30 April 2014. On his retirement, he became entitled to a lump sum retirement grant ("a retirement grant") and an annual pension. There were a number of disputes between Mr Sheffield and Kier and Mr Sheffield pursued those disputes through Kier's internal dispute resolution procedure. Following the completion of that procedure, Kier calculates, Mr Sheffield was entitled to a retirement grant of £108,602.37, arrears of annual pension from 5 April 2006 to 31 July 2015 of £109,505.60 and an annual pension of £36,200.79 (as at the April 2006 retirement date). These calculations assume that pension contributions from Mr Sheffield's 75th birthday until the April 2006 retirement grant are to be taken into account, as is the payment Mr Sheffield received for coronial work during that period. It was accepted, as part of the internal dispute resolution procedure, that Mr Sheffield is entitled to interest on the retirement grant and on the arrears of annual pension for the 2006/7 year. However, it was not accepted that Mr Sheffield is entitled to interest on the arrears of annual pension for the 2007/8 year or for later years (together "the arrears of the later annual pensions").

9. Mr Sheffield was dissatisfied with the outcome of the internal dispute resolution procedure and, as he was entitled to do, he complained to the Pensions Ombudsman ("the ombudsman") on 13 June 2016 about a number of matters, including the decision by Kier not to pay interest on the arrears of the later annual pensions. Mr Sheffield contended that he is entitled to interest on those arrears under regulation 94.

10. The ombudsman made his determination ("the determination") on 28 September 2018. At the beginning of the determination, the ombudsman summarised Mr Sheffield's complaint as, that:

> "…Kier failed to calculate interest payable as result of the late payment of his…pension in accordance with the relevant regulations."

The ombudsman then summarised his determination and the reasons for it as follows:

> "The complaint should be upheld against Middlesbrough because it is responsible for ensuring that [Mr Sheffield] receives the benefits he is entitled to under the [pension scheme], including any interest due."

In the body of the determination, the ombudsman set out what he understood to be Mr Sheffield's case. The ombudsman said, in particular, that Mr Sheffield's complaint was:

> "…one of principle; whether, as a matter of principle, interest is payable at all in respect of the 2007/08 and later payments. There is no basis upon which any distinction can be drawn between the lump sum and 2006/07 payment, and the late payments. Both attract interest under regulation 94."

The ombudsman then set out his conclusions, including as follows:

> "…As at the date of [Mr Sheffield's] 75th birthday, regulation 35(2) required payment of his benefits even though he had not retired. Kier has not explained why it was agreed that an effective retirement date of 4 April 2006 would be used; other than to say it protected [Mr Sheffield] from punitive tax charges and enables a higher pensionable pay figure to be used. It has not explained under what authority regulation 35(2) was set aside and agreement to defer payment reached.[4] It has been suggested that the requirement to pay the pension from [Mr Sheffield's] 75th birthday was introduced by amending legislation in 2006. In fact, regulation 35(2) was included in the original 1997 statutory instrument and remained unchanged up to and beyond [Mr Sheffield's] 75th birthday…
>
> Kier has explained that [Mr Sheffield] failed to provide it with the necessary paperwork for it to pay his benefits until 2014. This may or may not have been the case but it does not change the fact that, under regulation 35(2), [Mr Sheffield's] benefits should have been paid from his 75th birthday. Kier and Middlesbrough have acknowledged that arrears of pension were due to [him] but have calculated these from the agreed effective retirement date; 4 April 2006.
>
> I find that [Mr Sheffield's] pension was payable from his 75th birthday. It should have been calculated by reference to his service and pensionable pay as at that date. Any arrears should also have been calculated from that date…
>
> …There is then the question of whether and to what extent interest should be paid on the arrears of pension…
>
> The "relevant period" [for the purpose of regulation 94] is one year. In [Mr Sheffield's] case, the due date was his 75th birthday, as per regulation 35(2), and each payment date thereafter.
>
> …Regulation 94 simply stated that the due date was the date on which the pension is payable. Once a pension has commenced,

[4] The determination records that (1) Kier proposed that the date of Mr Sheffield's retirement from the pension scheme should be the April 2006 retirement date, (2) Kier chased for a response to that proposal from Mr Sheffield's solicitors, (3) Mr Sheffield contended that the April 2006 retirement date "was set by agreement" and (4) Kier also contended that the April 2006 retirement date was agreed as the date of Mr Sheffield's retirement from the pension scheme.

> it is payable for the lifetime of the recipient and the "due date" is the date on which each instalment would otherwise be paid. Where a pension is paid in monthly instalments, the due date is the day of the month on which payment would otherwise have been made.
>
> …Kier's…interpretation [of regulation 94] leads to the rather odd situation whereby a member may receive interest only for the late payment of his first year of pension but nothing thereafter; regardless of any subsequent delay. There is no logical reason why the late payment of subsequent instalments of a member's pension should not qualify for the same recompense as the first.
>
> …I find that Kier has not calculated the interest due on [Mr Sheffield's] pension in accordance with regulation 94…I uphold his complaint."

The ombudsman therefore directed as follows:

> "Within 28 days of the date of my final decision, Kier should recalculate [Mr Sheffield's] pension as at the date of his 75th birthday, together with any appropriate adjustments to contributions overpaid. It shall then recalculate the interest due on any instalment of the pension paid more than one year after it fell due to be paid."

The ombudsman also considered an application, by Mr Sheffield, for costs. As to that application, the ombudsman said:

> "…Whilst I acknowledge that the subject matter of [the] case is technical in nature and not something he could necessarily be expected to have any detailed knowledge of, access to my office and the then Pensions Advisory Service was available to him free of any charge. I am not, therefore, directing either Kier or Middlesbrough to reimburse [Mr Sheffield's] legal fees."

11. Whilst the ombudsman's determination that Mr Sheffield was to be taken to have retired from the pension scheme immediately before his 75th birthday, rather than on the April 2006 retirement date, had the effect of extending the period during which interest has been payable on the retirement grant, on the arrears of annual pension for the 2006/7 year and, when taken together with his determination that interest is payable on the arrears of later annual pensions, on those sums as well, it also had the effect of reducing the amount of the retirement grant and of the annual pensions, and so the arrears of annual pensions. The effect of the determination is, Kier has calculated, that Mr Sheffield's retirement grant is reduced to £92,797.21, his annual pension, as at his 75th birthday, was reduced to £30,932.40 and the arrears of annual pension are also reduced accordingly. As at January 2019, the effect of the determination was, Kier has calculated, that Mr Sheffield's annual pension was reduced by about £7,300 (when compared to the position if Mr Sheffield is taken to

have retired from the pension scheme on the April 2006 retirement date) and he owes the pension scheme £40,443.48.

12. On 26 October 2018, Mr Sheffield filed an appellant's notice in relation to the determination, and His Honour Judge Kramer gave permission to appeal on 12 November 2018.

13. Broadly, Mr Sheffield contends in the appeal, first, that the ombudsman erred in law in:

    i) that he misdirected himself that he had jurisdiction to determine the due date, under regulation 94, of Mr Sheffield's first payment from the pension scheme, and, more generally, to determine when Mr Sheffield retired from the pension scheme ("the misdirection ground");

    ii) determining that the due date, under regulation 94, for that first payment was not the April 2006 retirement date, but Mr Sheffield's 75th birthday, or, to put it another way, in determining that Mr Sheffield retired from the pension scheme on a day other than the April 2006 retirement date;

    iii) dismissing Mr Sheffield's application for costs "by treating the access to his office and the Pensions Advisory Service as the sole or principal reason for [that] refusal";

    ("the first ground of appeal").

14. Broadly, Mr Sheffield also contends, secondly, that the determination is wrong, and unjust because of a serious procedural or other irregularity, because the ombudsman did not give reasons for rejecting Mr Sheffield's submission that the date of Mr Sheffield's retirement from the pension scheme was irrelevant to the complaint before him ("the second ground of appeal").[5] [6]

<u>The first ground for appeal – regulation 94 – misdirection as to jurisdiction</u>

15. Mr Morgan, who represented Mr Sheffield in the appeal, contended as follows.

16. The ombudsman's jurisdiction is derived from section 146 of the Pension Schemes Act 1993 ("the 1993 Act"), which provides:

> "(1) The Pensions Ombudsman may investigate and determine the following matters –

[5] The second ground of appeal is somewhat broader than this but, to a large extent, this ground overlaps with the first ground of appeal and, to the extent that, by this ground, Mr Sheffield contends, as he may do, that he did not have an opportunity to address the argument that the due date, for the purpose of regulation 94, was his 75th birthday and not the April 2006 retirement date, that is not borne out by the evidence or, indeed, the second ground of appeal itself.

[6] Under section 151(4) of the Pensions Schemes Act 1993, an appeal to the High Court only lies on a point of law; which means, broadly, that the appellant must contend, and can only succeed if he establishes, that the ombudsman misdirected himself in law, misunderstood the law, misapplied the law, reached a factual conclusion for which there was no evidence or reached a decision which is perverse (see, for example, *British Telecommunications plc v. Sheridan* [1990] IRLR 27 and also *Wakelin*, to which I refer below, per Mummery LJ, at [40]).

> (a) a complaint made to him by or on behalf of an actual or potential beneficiary of an occupational or personal pension scheme who alleges that he has sustained injustice in consequence of maladministration in connection with any act or omission of a person responsible for the management of the scheme,…
>
> (c) **any dispute of fact or law in relation to an occupational or personal pension scheme between** –
>
> (i) **a person responsible for the management of the scheme, and**
>
> (ii) **an actual or potential beneficiary**,…
>
> (1A) **The Pensions Ombudsman shall not investigate or determine any dispute or question falling within subsection (1)(c)…unless it is referred to him** –
>
> (a)…**by or on behalf of the actual or potential beneficiary who is a party to the dispute**,…
>
> (2) Complaints and references made to the Pensions Ombudsman must be made to him in writing…
>
> (7) The persons who, for the purposes of this Part are "actual or potential beneficiaries" in relation to a scheme are –
>
> (a) a member of the scheme,…
>
> (8) In this Part –
>
> "member", in relation to a pension scheme, includes a person –
>
> (a) who is or has been in pensionable service under the scheme…" (emphasis added).

17. The relevant dispute which Mr Sheffield referred to the ombudsman was whether interest is payable, under regulation 94, on the arrears of later annual pensions. Mr Sheffield did not refer to the ombudsman any dispute about (1) the due date, for the purpose of that regulation, for the first payment to him from the pension scheme or (2) when he retired from the pension scheme, in respect of which, as it happens, there was no dispute. It follows, therefore, (Mr Morgan contended) that the ombudsman did not have jurisdiction to determine these two matters and was wrong to do so.

18. Mr Uberoi, who represented Middlesbrough in this appeal, argued as follows.

19. First, as a matter of fact, Mr Sheffield referred to the ombudsman the questions of (1) the due date, for the purpose of regulation 94, for the first payment to him from the pension scheme and, more generally, (ii) when he retired from the pension scheme.

20. Secondly, in any event, although the ombudsman's jurisdiction is derived, or principally derived, from section 146 of the 1993 Act, the ombudsman has an inquisitorial function which allowed him to investigate and determine those questions even if, formally, they had not been referred to him by Mr Sheffield.

21. In support of this argument, Mr Uberoi referred to *Hillsdown Holdings plc v. Pensions Ombudsman* [1996] 1 All ER 862, where Knox J said, at [105]:

> "…Since the Pensions Ombudsman's jurisdiction is largely inquisitorial it would in my view be proper to include among points of law, which can properly be investigated on appeal from his Determination, points of law which could have been dealt with by him on the material before him but were not…"

Mr Uberoi also referred to *Police and Crime Commissioner for Greater Manchester v. Butterworth* [2017] 001 PBLR (020), where Mr Jonathan Crow QC, sitting as a Deputy Judge of the Chancery Division, said, at [44]:

> "The Commissioner's first argument also relies on the fact that Mrs Butterworth did not make any complaint based on legitimate expectation. In response, the ombudsman points out that his proceedings are largely inquisitorial (relying on *Hillsdown Holdings*…) and on that basis he submits that the question whether Mrs Butterworth relied on legitimate expectation "is immaterial"…In my judgment, it is entirely correct to say that the ombudsman's proceedings are largely inquisitorial, and as a result in reaching a determination in any given case he may properly investigate matters which do not fall strictly within the terms of the complaint that has been made to him. But, accepting that as the correct starting point, it would be wrong to argue that it is now immaterial for the court to take into account the fact that Mrs Butterworth did not seek to rely on legitimate expectation. The question for this court is not: what issues can an ombudsman properly investigate under section 146 of the 1993 Act before making a determination? Rather, the question is: in a case where the ombudsman has already made a determination under section 151 of the 1993 Act, should the court exercise its discretionary power under the CPR to remit any new issues to him for consideration in circumstances where the complainant did not seek to rely on those issues, and they have not so far been investigated?..."

22. Mr Uberoi also argued, thirdly, that, because any agreement or arrangement to treat Mr Sheffield as having retired from the pension scheme on the April 2006 retirement date was ultra vires, the ombudsman had to determine as he did and make a direction in the terms of the direction in the determination, because otherwise he would be condoning an ultra vires act and the ombudsman is not permitted to do that.

23. In support of this argument, Mr Uberoi referred to four authorities; namely, the first instance decision in *Westminster City Council v. Haywood* [1998] Ch 377, *NHS*

Pensions Agency v. Beechinor [1997] PLR 95, *Wirral BC v. Evans* [2001] OPLR 73 and *Secretary of State for Scotland v. Turner* [2003] SC 525.

24. In *Haywood*, Robert Walker J, at first instance,[7] explained, at page 387, that one of the questions before him was:

> "Can the "steps" open to the Pensions Ombudsman include a direction to trustees to pay to a complainant benefits greater than those to which he is entitled under the scheme, because the trustees have made a mistake in informing him of entitlement to his benefits?"

However, in the circumstances, it appears that the Judge did not need to answer the question.

25. In *Beechinor*, Lightman J explained, at [1], that before him was:

> "…an appeal against a decision of the Pensions Ombudsman (the Decision) dated 21 November 1995 directing the appellants, who are the current administrators of the National Health Service Pension Scheme (the New Scheme), to increase the pension payable to the complainant Miss Beechinor. The Ombudsman found that the appellants' predecessors as administrators (whom I shall refer to as the Administrators) negligently failed to give a full explanation of the advantages and disadvantages of joining the New Scheme when she was considering joining, and that, if this full explanation had been given, this would almost certainly have influenced her decision to join."

At [8], the Judge recorded that:

> "By common consent, the Decision is flawed in a number of serious respects. In particular the direction that the appellants increase the complainant's pension by so much as ensured that there was no shortfall between what she is currently entitled to and what she would have been entitled to if she had not joined the New Scheme, cannot stand on two separate grounds: (1) first it would be ultra vires for the appellants to pay this increased pension, for they are bound by the terms of the New Scheme as set out in the National Health Service (Superannuation) Regulations 1961 (now the 1995 National Health Pension Scheme Regulations) and have no discretion to make payments other than in accordance with their terms; (2) second, if and so far as the ombudsman can give damages for tort, a single sum only could be awarded representing the damages suffered at the date of commission of the tort, i.e. the date that the complainant joined the New Scheme. Accordingly on any basis the Decision cannot stand and must be set aside."

[7] The Court of Appeal allowed an appeal from the Judge's decision.

26. In *Evans*, Evans-Lombe J said, at [30]:

> "It is common ground that the direction given by the ombudsman to the administrators to "increase Mr Evans reckonable service" in the scheme so as to reflect the loss Mr Evans sustained as result of the ill-judged transfer of his BT pension entitlements, cannot stand because it requires the administrators to do something which it is beyond their powers to effect. See *NHS Pensions Agency v. Beechinor*…"

27. In *Turner*, the Inner House of the Court of Session said, at [36]:

> "…In our opinion, it is quite clear that the provisions of section 151(3) of the 1993 Act do not confer a power on the ombudsman to direct the taking of any action which would itself be unlawful. It is evident to us that the provisions of section 151, and particularly sub-section (4), contemplate that directions of the Pensions Ombudsman must be of such character as to be in accordance with law."

28. My conclusions on these competing arguments are as follows.

29. The office of the ombudsman is a statutory creation and so the ombudsman's jurisdiction to determine disputes is statutory. On a plain reading of section 146 of the 1993 Act, the ombudsman only had jurisdiction to determine a dispute between Mr Sheffield and the Respondents if that dispute was referred to him by or on behalf of Mr Sheffield. This conclusion is supported by two authorities to which Mr Morgan referred me; namely, *Hamar v. French* [1998] Pens LR 321 and *Wakelin v. Read* [2000] Pens LR 319.

30. In *Hamar*, Millett LJ, with whom Simon Brown and Saville LJJ agreed, said, at [73]:

> "Investigations by the Pensions Ombudsman are informal. There are no pleadings. The issues are defined by the complaint and the response to it. The jurisdiction of the Pensions Ombudsman is limited to the investigation of the complaint actually made to him. I do not doubt that he can invite the complainant to add to his complaint, and may suggest new matters of defence to the other party, and so extend the scope of the enquiry. But he is not bound to do so, and he cannot be criticised if he does not. At the end of his investigation, his duty is to determine the matters then actually in dispute between the parties. If he applies the law correctly to the facts found or not in dispute, he makes no error of law."

31. In *Wakelin*, Mummery LJ adopted, without qualification, at [12], what Millett LJ had said in *Hamar*.

32. There may be some further support for this conclusion from a decision to which Mr Uberoi referred me; *Edge v. Pensions Ombudsman* [1998] Ch 512, where Sir Richard Scott VC said, at first instance, at page 519:

> "I return to the issue of jurisdiction. Jurisdiction in relation to courts or tribunals can have two alternative meanings. In its strict sense a reference to the jurisdiction of a court or tribunal is a reference to the type of case that the court or tribunal is capable of entertaining. A reference to the jurisdiction of a court or tribunal is, however, often a reference to the circumstances in which it is proper for a tribunal to entertain a case or to make a particular order. In the strict sense there is, in my opinion, no limit, **save such limits as are imposed by regulations made under section 146 of the Act**, to the type of complaints of injustice sustained by maladministration or as to the type of disputes of fact or law which arise in relation to a scheme that the Pensions Ombudsman may entertain under section 146(1) and (2). "Any complaint" presumably means what it says. So does "any dispute of fact or law"" (emphasis added).

33. *Hillsdown* does not assist Mr Uberoi in his argument that the ombudsman has an inquisitorial function which allowed him to investigate and determine questions even if, formally, they had not been referred to him by Mr Sheffield. In *Hillsdown*, at [14]-[15], Knox J set out the two important questions about the ombudsman's jurisdiction which he needed to resolve. Neither of those questions was whether, because the procedure before the ombudsman is inquisitorial, the ombudsman can determine a question which has not been referred to him. In any event, as the passage on which Mr Uberoi relies itself makes clear, Knox J was considering, in that part of his judgment, whether a party could raise a point on appeal which had not, but which could have, been raised before the ombudsman. Indeed, that passage begs but does not answer the question (because Knox J did not need to): what points could have been raised before the ombudsman?[8] It is effectively the answer to that question which I am now considering.

34. Nor does *Butterworth* assist Mr Uberoi.

35. In *Butterworth*, the Deputy Judge was not apparently referred to, and did not consider, *Hamar*. Most importantly, perhaps, the issue before the Deputy Judge was not whether the ombudsman has jurisdiction to determine a question which has not been referred to him (as the Deputy Judge himself acknowledged in the passage relied on by Mr Uberoi). Rather the issue was whether a question which had been referred to the ombudsman could be remitted to him to consider an argument which could have been, but was not, made to him. That is tolerably clear from the passage Mr Uberoi relied on. Indeed, that is confirmed by what the Deputy Judge added, at [44], after the passage relied on by Mr Uberoi:

> "…In my judgment, it is important to recognise that this is not a case where the ombudsman has failed fully to deal with the complaints made to him. On the contrary he has carefully considered the complaints that were made; he has rejected

[8] In fact, as the earlier part of the same paragraph of Knox J's judgment makes clear, his view, that a point of law which could have been, but was not, raised before the ombudsman can be raised on an appeal, was only a provisional view.

> some of them; he has added to them (contractual estoppel not having formed part of the complaint); and he has made his final determination…"

In this passage, when the Deputy Judge talked of the ombudsman adding to the complaint before him, he meant that the ombudsman added to the arguments which were before him on the complaint (or question) referred to him. I am clear that the passage relied on by Mr Uberoi should be read in this context.

36. As it happens, as I read what the Deputy Judge said at [45] (a paragraph of the judgment to which I was not referred by the parties), the Deputy Judge was actually of the view that the only dispute the ombudsman can determine is one which is referred to him, so that the Deputy Judge's instinctive view was consistent with the plan language of section 146 of the 1993 Act and with what Millett LJ said in *Hamar*.

37. I also reject Mr Uberoi's argument that the ombudsman was compelled to make the direction he made because otherwise he would be illegitimately condoning an ultra vires act.

38. On the assumption that the question which was referred to the ombudsman did not extend to (1) the due date, under regulation 94, for the first payment to Mr Sheffield from the pension scheme and/or (2) when Mr Sheffield retired from the pension scheme, the dispute which the ombudsman had to resolve was whether interest is payable on the arrears of later annual pensions; that is, to be clear, on arrears of annual pensions for the relevant years (from 2007/8) whatever the amount of those annual pensions. If this is the dispute (as Mr Sheffield contends) which was referred to the ombudsman, in making his determination the ombudsman did not need to consider the due date for the first payment to Mr Sheffield from the pension scheme or when Mr Sheffield retired from the pension scheme. He did not need to consider, let alone determine, the amount of the annual pensions. Rather, as Mr Sheffield suggested to the ombudsman, in such circumstances the question before the ombudsman was one of principle. It follows, therefore, that a direction by the ombudsman, that Kier had to recalculate "the interest due on any instalment of [Mr Sheffield's] pension paid more than one year after it fell due to be paid", leaving Kier to properly calculate the correct principal amount of each instalment, would not amount to the ombudsman condoning an ultra vires act.

39. In the light of these conclusions, the ombudsman did not have jurisdiction to determine (1) the due date, under regulation 94, for the first payment to Mr Sheffield from the pension scheme and/or (2) when Mr Sheffield retired from the pension scheme, unless these questions were referred to him by Mr Sheffield. I therefore have to consider the remaining issue between the parties on this part of the first ground of appeal; namely, whether either or both of these questions was referred to the ombudsman by Mr Sheffield. To resolve this remaining issue, I need to consider, in some detail, the documents Mr Sheffield submitted to the ombudsman and the context in which they were submitted.

40. Mr Sheffield's original 13 June 2016 complaint to the ombudsman is a narrative document running to some twenty eight pages, with appendices. In Section 1 of the complaint, Mr Sheffield introduced the matters he was referring to the ombudsman as including (1) "miscalculation [of] interest calculated on the unpaid pension benefits"

and (2) "if maladministration is found, with injustice, the exercise by the…ombudsman of the power to award…costs". In Section 2 of the complaint, Mr Sheffield identified an injustice which he said he had suffered; namely, "that the pension paid to [him] fails to calculate interest properly payable in accordance with the [1997] Regulations…" He continued that he was the subject of maladministration in that the following two relevant omissions had been made; that is (1) the omission "to correctly calculate and pay interest in a consistent way in respect of both the lump sum and annual pension benefits" and (2) the omission "to address repeatedly and unreasonably the issues raised in relation to interest by" him. In Section 5.4 of the complaint, Mr Sheffield addressed "the Issue of Interest". The complaint which Mr Sheffield developed at length in that section was that he was entitled to interest under regulation 94 on the arrears of later annual pensions and that there was no rational basis for paying interest only on his retirement grant and the annual pension for 2006/7. In developing his complaint in this section, Mr Sheffield accepted that interest on his annual pension for 2006/7 had "clearly" been correctly calculated and that regulation 94 had been properly applied to that annual pension. The thrust of Mr Sheffield's complaint in this section can perhaps be best gleaned from the final two sentences in it:

> "The facts are that [Kier] have not paid interest on **both** the lump sum and his pension. They have only calculated interest on the lump sum and the first year of his pension entitlement" (original emphasis).

In Section 5.5 of the complaint, Mr Sheffield argued for an interest entitlement on a different basis. In the course of doing so, he said:

> "As noted from the earlier section it is the complainant's contention that interest on part of his pension entitlement has not been correctly calculated nor indeed been paid. Although correctly calculated and paid in relation to the "lump sum entitlement" that part of the pension which has also become payable (the annual pension) has only been the subject of interest for one year only. There is in consequence disparate treatment of interest between the different elements of the complaint's pension."

In Section 7 of the complaint, Mr Sheffield said it was his case:

> "…that the pension benefits are not in fact correctly calculated to date on the basis that (a) they do not include the addition of the enhanced years [and] (b) the interest calculation to date omits a significant number of years' payments of annual pension to which no interest has been credited in accordance with the Regulations."

In Section 9 of the complaint, Mr Sheffield summarised the remedies he sought, including in relation to interest, as follows:

> "We invite the…ombudsman to find that interest has been incorrectly calculated on the unpaid pension (annual pension)

> and in consequence a direction should be made for…Kier to recalculate interest correctly on each of the individual annual pension payments after the first year in keeping with both the 1995 Act or in the alternative the 1996 Regulations referred to above."

41. Mr Sheffield's complaint was accompanied by a long witness statement from him. In the witness statement, he said as follows:

> "…My complaints are summarised in the following way:
>
> …(d) The calculated interest on the pension due in 2006 but not paid until 2014 and 2015 is through maladministration incorrect as it has not been paid on subsequent years after the first year as it should have been and not in keeping with the Regulations.
>
> …The pension benefits became payable immediately upon retirement or (if earlier) the day before the member's 75th birthday. As the trigger date being the day before my 75th birthday on the 11 April 2005 had already passed when the legislation was brought in I would have been subject to disadvantage retrospective legislation. It was accepted and agreed by [Kier] as administrators of the Teesside Pension Scheme that the "key date" for the commencement of my pension benefits due from the pension scheme was 6 April 2006. My pension is calculated to 6 April 2006 being the date the disadvantageous retrospective regulations/legislation came into force. This has been accepted by myself as well as [Kier]/Middlesbrough Council.[9]
>
> …My contention is that the calculation of interest in relation to the lump sum payment has been correctly calculated…[The retirement grant] became due on 6 April 2006…
>
> However interest has not been correctly calculated in relation to my annual pension. I refer to page 23 in the attached bundle where it appears that interest is correctly calculated on the first year only of my annual pension entitlement. Erroneously on the part of [Kier] no interest is however calculated or paid for the annual pension payment in subsequent years when I was entitled to be paid but in fact did not receive payment. In effect, until July 2014, incorrectly interest on only one year's annual pension has been calculated and paid.
>
> My contention is that interest must be calculated at the appropriate rates and in the appropriate format (compounded with 3 monthly rests) on each of the successive years from when the pension became payable in each year between 2007

[9] It is clear to me, both from the paragraph itself, and in context, that Mr Sheffield was referring here to the payment of pension benefits under the amended 1997 regulations.

> 2014. This would be in keeping with the calculation of interest on the lump sum and the first year's annual pension.
>
> …Under sub-paragraph 94(2) the due date is the date upon which the pension becomes payable which in my case was 6 April 2006 which is accepted by [Kier]."

42. The ombudsman made his first preliminary decision on 25 October 2017. He rejected Mr Sheffield's entitlement to any interest on the arrears of later annual pensions on the following basis:

> "Regulation 94 provided for the payment of interest when all or part of the pension was not paid within the relevant period after the due date. The relevant period was one year and the due date, under regulation 94(2), was the date on which the pension "becomes payable".
>
> Under regulation 93(1), the first period for which [Mr Sheffield's] pension was payable began with "the day after the date with which his employment ends". [Mr Sheffield's] employment ended on 30 April 2014. His pension, therefore, became payable from 1 May 2014.
>
> In order that he did not incur tax on his lump sum, it was apparently agreed that [Mr Sheffield] would be treated as having retired on 4 April 2006. However, his employment did not end on 4 April 2006…[Mr Sheffield's] pension was paid within a month of its due date. I do not find that interest was payable in respect of [Mr Sheffield] pension under regulation 94."

43. In response to the ombudsman's first preliminary decision, Mr Sheffield made further submissions on 7 December 2017, in which he said the following:

> "The complaint of Mr Sheffield…is one of principle. It is contained in Section 5.4 of Mr Sheffield's submissions dated 13 June 2016, the essence of which is that:
>
> (1) whilst [Kier] did (correctly) calculate interest at the rate stipulated in regulation 94…on both:
>
> (a) the lump sum which became payable in 2006 but was not paid until 2014…; and
>
> (b) the annual payment payable in respect of the period 5 April 2006 to 4 April 2007;
>
> (2) [Kier] (incorrectly, and without any reasons) declined to pay any interest in respect of the annual payments falling due in respect of the period 5 April 2007 to 4 April 2008 and later years…

> Mr Sheffield is content with the arithmetic methodology by which the amount of interest upon the lump sum and the 2006/07 payment was calculated and would accept the same methodology if applied to the 2007/08 onwards payments. Thus the issue is quite simply whether as a matter of principle interest is payable at all in respect of the 2007/08 and later payments. Mr Sheffield's case put equally simply is that there is no basis at all upon which any distinction can be drawn between:
>
> (1) on the one hand, the entitlement to interest in respect of the lump sum in the 2006/07 payment; and
>
> (2) on the other hand, the entitlement to interest in respect of the 2007/08 and later payments
>
> and that both attract interest under regulation 94…
>
> …[I]t is submitted that the overall effect of the [1997 regulations], so far as relevant to present purposes, is that a person was entitled to remain in employment so long as the employer was willing to continue to employ them. However, whilst "normally" no entitlement to either pension or retirement grant would arise until the actual end of employment, there was a "long-stop" on the day before the employee's 75th birthday, at which date at the latest the pension retirement grant became payable and an employee had to cease to be a member of the scheme.
>
> …Mr Sheffield accepts that beyond his 76th birthday he could not further contribute to the [pension scheme] but could have taken his pension benefits but did not do so…
>
> Mr Sheffield attained his 75th birthday on 11 April 2005. He continued to work. He ceased to be an active member of the scheme from 6 April 2006…
>
> …The literal effect of [the amendments to the 1997 regulations] was retrospectively to render Mr Sheffield's pension payable at 10 April 2005. [Kier then proposed, as Mr Sheffield's retirement date from the pension scheme, the April 2006 retirement date.]
>
> …[Having referred to in regulation 35(2) of the 1997 regulations, Mr Sheffield continued that, under that regulation] payment of a pension [is required] to begin on an employee's 75th birthday even if that person is still in employment…"

44. Mr Sheffield then explained why he contended that "the agreement by [Kier] that…payments of interest would be made" was binding. He contended that (1) there is a contract, (2) an estoppel has arisen and (3) the circumstances have raised "in Mr

Sheffield…a legitimate expectation in public law that interest would be paid on both the lump sum and annual payments in the manner provided for in regulation 94".

45. Having received Mr Sheffield's further submissions, the ombudsman wrote to Kier, on 1 February 2018, as follows:

> "…I enclose a copy of the response received from Mr Sheffield's representatives. You will see that one of the issues they have raised is the requirement for the payment of the benefits not later than Mr Sheffield's 75th birthday, under regulation 35(2). I should be grateful if you could explain why Mr Sheffield's benefits were not paid at this time.
>
> … If it is the case that the benefits should have been paid at age 75, regardless of the fact that Mr Sheffield continued in employment, it seems likely that interest is due in respect of each subsequent pension payment. The method you have adopted would appear only to apply interest in respect of the first pension payment. If the ombudsman were to find that Mr Sheffield's pension should have been paid not later than the 75th birthday, it seems likely that the interest you will need to be recalculated…"

46. Kier responded to the ombudsman's letter, on 15 February 2018, saying:

> "It was agreed that an effective retirement date of 4 April 2006 would be used as this did not place Mr Sheffield in a position whereby punitive tax charges would be applied, and using an earlier date of his 75th birthday would have resulted in a lower pensionable pay figure having to be used to calculate his benefits…"

47. Mr Sheffield submitted his own response to Kier's response on 2 May 2018. Mr Sheffield responded:

> "It is boldly stated in Kier's letter that [the April 2006 retirement date] was an **agreed** effective date of retirement. This was never agreed. There is no evidence to support the existence of any agreement. However, what was clear is that there was an effective date set by statutory regulation which meant that Mr Sheffield could no longer contribute to the scheme after 6 April 2006…" (original emphasis).[10]

48. The ombudsman then made his second preliminary decision, which is substantively in the same in terms as the determination.

[10] Mr Morgan said at the hearing that, by this response, Mr Sheffield meant that he did not disagree with the April 2006 retirement date as the date of his retirement from the pension scheme. Mr Morgan said that, in this case, a date for Mr Sheffield's retirement from the pension scheme was put to him and, thereafter, everybody proceeded on the basis of that date.

49. On 10 August 2018, Mr Sheffield responded to the second preliminary decision. In his response, Mr Sheffield said:

> "We respectfully invite the ombudsman to fully uphold the complaints including specifically…acceptance that the current pension calculation date of 6 April 2006…is correct (please refer to Annexe A) and does not require recalculation…
>
> … We would wish to emphasise that there was **never** agreement that the date of **retirement** was 6 April 2006. This is patently wrong as [Mr Sheffield] continued in office until 2014. It was agreed that benefits could be payable from 6 April 2006 as the "due date" and was when [Mr Sheffield's] stopped contributions to and retired from the scheme.
>
> This agreement was evidenced by the adoption of this due date thereafter in all of Kier's calculations. The continued disagreement is over the issue of principle as to the calculation of interest in 2007 on parts of [Mr Sheffield's] pension (i.e. the annual pension payments).
>
> …Whilst it is agreed in principle the dates are not agreed as the "due dates" for the application of the Regulations on Interest. It is strongly asserted the trigger date is 5 April 2006 for the reasons…set out.
>
> We urge the…ombudsman to reconsider why it is necessary to recalculate the pension at all. There is no issue that is before the [ombudsman] relating to the recalculated pension following the successful [internal dispute resolution procedure] decision requiring the inclusion of long inquest payments. It is solely an interest issue; i.e. the unpaid interest on parts of [the] pension since 2007 that need to be calculated in accordance with the regulations.
>
> …Given the above there is no disagreement between the pension provider and the complainant as to the elements of the complainant's pension **other than** the issue of interest on the parts of his pension constituting annual pension payments from 2007 to 2014.
>
> Annexe A
>
> …[The] pension provider and [Mr Sheffield] agreed that the date for the payment of benefits would be 5 April 2006 and to do otherwise would effectively:
>
> (a) breach the agreement made between the pension provider and the pension receiver which followed sound legal principles;

> (b) raise penalties upon [Mr Sheffield] retrospectively which are unfair and unjust in unusual circumstances of this case" (original emphasis).

50. The ombudsman then made the determination.

51. The written material provided to the ombudsman by Mr Sheffield requires careful consideration. The material is extensive and, perhaps because it is technical in nature, is not always in the plainest of English; although it is right to acknowledge that its intended recipient, the ombudsman, can reasonably be expected to have a good understanding of the operation of pension schemes.

52. Although some introductory remarks in Mr Sheffield's original 13 June 2016 complaint suggest that he was referring to the ombudsman a broad question about the interest payments he contended he is entitled to, a fair reading of that complaint shows that Mr Sheffield was only referring to the ombudsman, so far as is relevant, the question of principle of whether interest is payable at all on the arrears of later annual pensions, whatever the amount of those arrears. Indeed, in the complaint, Mr Sheffield accepted that regulation 94 had been properly applied to his retirement grant and to his annual pension for 2006/7 and that the amount of interest payable on the arrears of the retirement grant and that annual pension had been correctly calculated. In other words, Mr Sheffield was contending, although not expressly, that his retirement date from the pension scheme was the April 2006 retirement date.

53. Although Mr Sheffield's witness statement did explain that, under the amended 1997 regulations, pension benefits are payable from a member's 75th birthday, he made specific reference to the April 2006 retirement date, to his contention that regulation 94 had been properly applied to his retirement grant, which became due (he contended) in April 2006 and not on his 75th birthday, to his contention that regulation 94 had been properly applied to his annual pension for 2006/7 and to his contention that, in his case, the due date for the purpose of regulation 94 was April 2006, and he repeated that his complaint was that interest has not been paid at all on the arrears of later annual pensions.

54. In his 7 December 2017 further submissions, Mr Sheffield said expressly that his complaint was one of principle; namely, whether interest is payable at all on the arrears of later annual pensions (whatever their sum), in circumstances where regulation 94 had been properly applied (he contended) to his retirement grant and to his annual pension for 2006/7.

55. In his 10 August 2018 submissions, Mr Sheffield made clear that it was his contention that the ombudsman ought not to determine the "due date" for the purpose of regulation 94. Although it is correct that, in those submissions, Mr Sheffield did say: "It is solely an interest issue; i.e. the unpaid interest on parts of [the] pension since 2007 that need to be calculated in accordance with the regulations", that remark was itself made in a paragraph in which Mr Sheffield also said:

> "We urge the…ombudsman to reconsider why it is necessary to recalculate the pension at all. There is no issue that is before the [ombudsman] relating to the recalculated pension following the

> successful [internal dispute resolution procedure] decision requiring the inclusion of long inquest payments…"

I do not read Mr Sheffield's 10 August 2018 submissions as widening the scope of the reference to the ombudsman.

56. It is possible to follow how the ombudsman turned his mind to the due date, under the 1997 regulations, for payment of Mr Sheffield's pension. In responding to the ombudsman's first preliminary decision, Mr Sheffield discussed, at some length, in his 7 December 2017 further submissions, how, under the 1997 regulations, that date is to be determined; namely by reference to the longstop date of an employee's 75th birthday and not by reference to any later date when that employee retires from employment (as the ombudsman had suggested in his first preliminary decision). Nevertheless, even in those further submissions, Mr Sheffield made tolerably clear that he was not referring to the ombudsman the question of the due date for the first payment to him from the pension scheme or, more generally, the date when he retired from the pension scheme. Indeed, the ombudsman acknowledged as much when, in the determination, he summarised Mr Sheffield's complaint as being one of principle about whether interest is payable at all on the arrears of later annual pensions.

57. I have concluded, therefore, that the ombudsman misdirected himself that he had jurisdiction to determine the due date for the payment of Mr Sheffield's pension, and so he erred in law, and Mr Sheffield's appeal must be allowed on the misdirection ground.

58. It follows that I do not need to consider the difficult questions of (1) whether the unamended 1997 regulations did not deem Mr Sheffield's retirement from the pension scheme to be immediately before his 75th birthday, (2) whether the parties are bound, generally or on this appeal,[11] to proceed on the basis that Mr Sheffield retired from the pension scheme on the April 2006 retirement date, (3) whether the ombudsman erred in concluding otherwise and (4) whether the determination should be set aside or varied because of any such error.

59. Indeed, in the light of the conclusions I have already reached, in the particular circumstances of this case it is unhelpful for me to consider those difficult questions now, because, as Mr Morgan fairly acknowledged during the course of the hearing, there remains the practical risk that the Respondents will, for example, by way of a Part 7 claim, seek to recover the £40,443.48 "overpayment" made to Mr Sheffield, arguing, as Middlesbrough has sought to do in this appeal, that it is ultra vires for them, and they are not bound, to proceed on the basis that Mr Sheffield retired from the pension scheme on the April 2006 retirement date rather than immediately before his 75th birthday. Mr Morgan explained that, in the face of such a claim, Mr Sheffield might argue that:

    i) as he contends in this appeal, there was a binding agreement between Kier and him as to the date he is deemed to have retired from the pension scheme;

[11] In the case of this appeal, because it was accepted by Kier before the ombudsman that Mr Sheffield retired from the pension scheme on the April 2006 retirement date (as to which, see per Millett LJ in *Hamar* at [71]-[72]).

ii) the Respondents are estopped from arguing that the date he retired from the pension scheme was not the April 2006 retirement date;

iii) he has a legitimate expectation (and so a public law defence) that his entitlements would be calculated by reference to the April 2006 retirement date;[12] [13]

iv) he has an accrued limitation defence;

v) he has a change of position defence.

The first ground of appeal – costs

60. Mr Morgan contended that it is settled that the ombudsman can make a direction about costs. He referred me to *Nicol & Andrew Ltd. v. Brinkley* [1996] OPLR 361, where Sir John Vinelott said, at pages 365-366:

> "One further question has been raised in relation to both sets of complaints. The Ombudsman directed in both cases that on being presented by any of the complainants with an account of any legal expenses reasonably incurred by them in connection with these complaints, the trustees were to pay the amount of those expenses to the complainants involved "from their own personal resources in equal shares".
>
> Two objections have been raised on behalf of the appellants. Mr Clifford's first submission was that the Ombudsman had no jurisdiction to order that the complainants' legal expenses should be paid by anybody. The basis of that submission, as I understand it, is that the legislature intended to provide a quick and inexpensive way of resolving disputes arising in the administration of pension funds, and that an award of legal expenses would frustrate that object.
>
> A complainant, it is said, can obtain any advice he needs free of charge from the related OPAS [pensions advisory service] scheme. I can see no substance in that submission. The Ombudsman has power, on determining a complaint or dispute, to direct the trustees or managers of the scheme to take or refrain from taking such steps as he may specify in his written statement and determination. The power to give directions clearly imports power to direct in an appropriate case that compensation should be paid, including compensation for inconvenience and distress (see the decision of Robert Walker J

[12] I understand that, on Mr Sheffield's case, it is the ombudsman's rejection of these 3 matters which, by the second ground of appeal, Mr Sheffield contends was insufficiently reasoned.

[13] Mr Uberoi explained, at the hearing, in response, that, as I have briefly indicated already, Middlesbrough might take issue with these three matters (including the legitimate expectation argument) on the grounds that (1) no such agreement or representation was made and (2) in any event, they cannot succeed because such an agreement or representation was ultra vires.

> in *Westminster City Council v. Haywood and another* [1996] OPLR 95). That power must include power to award compensation for expenses reasonably incurred in taking advice and preparing a complaint."

61. Mr Morgan also pointed out that the ombudsman's website provides as follows:

> "We do not as a matter of course make awards for costs charged by professional advisers to the person complaining. That is [because] it should be possible to bring a complaint to us without professional help.
>
> However, in some circumstances we may direct the people at fault to pay the other person's costs.
>
> This depends on a number of factors such as the complexity of the case and whether or not:
>
> - it was reasonable for the costs to be incurred
> - the amount of costs claimed is reasonable
> - costs were incurred as a direct result of whatever went wrong."

62. Mr Morgan argued that, by the determination, the ombudsman found that it was not reasonable for Mr Sheffield to pursue his complaint to the ombudsman without legal advice but that such advice was always available from the ombudsman and the Pensions Advisory Service. Mr Morgan argued that, effectively, the ombudsman held that, whilst he has a jurisdiction to make a costs direction, he will never exercise it in a complainant's favour.

63. Mr Uberoi suggested that the ombudsman does not have jurisdiction to make a costs direction.

64. Although I did not hear detailed argument on the jurisdiction of the ombudsman to make a costs direction, as it happens my present view is that Sir John Vinelott was right that the ombudsman can make a costs direction. Section 151(2) of the 1993 Act provides:

> "Where the Pensions Ombudsman makes a determination under this Part or under any corresponding legislation having effect in Northern Ireland, he may direct any person responsible for the management of the scheme to which the complaint or reference relates to take, or refrain from taking, such steps as he may specify in [his determination]."

This provision is broadly drafted[14] and well able to accommodate what is, in effect, a costs jurisdiction. In fact, I do not need to finally determine this matter. Because I did not hear detailed argument (in particular about the ambit of section 151(2) of the 1993

[14] Indeed, Robert Walker J said as much in *Haywood*, at page 385.

Act), it is proper for me to (and I will) follow *Nicol*, as a matter of judicial comity; particularly because it appears that, in that case, the question of the ombudsman's jurisdiction in relation to costs was fully argued.

65. In his witness statement to which I have already referred, Mr Sheffield submitted that the ombudsman ought to exercise his power to award costs because, he contended, (1) the dispute is complex, (2) the sums in issue are significant and (3) Kier had not co-operated with him and his lawyers. In his 10 August 2018 response, to which I have also already referred, Mr Sheffield added a further factor which he contended should be taken into account on the issue of costs; namely, his age and health.

66. Mr Sheffield does not complain about the adequacy of the ombudsman's reasons for his determination on costs. Nevertheless, it is helpful to consider, on this ground of appeal, the ombudsman's obligation to give reasons.

67. It is not disputed that the determination had to be reasoned (see section 151(1) of the 1993 Act).

68. In *Wakelin*, of an ombudsman's determination, Mummery LJ said, at [40]:

> "…the written statement of the determination must be read broadly and fairly. The findings of fact and the reasons for the determination should not be subjected to minute, meticulous or over elaborate critical analysis in an attempt to find a point of law on which the disappointed party to the reference can appeal."

69. Indeed, similar sentiments have been expressed in relation to judgments. As the White Book 2019 notes, at note 52.21.5:

> "Reasons for judgment will always be capable of having been better expressed. A judge's reasons should be read on the assumption that the judge knew (unless they have demonstrated to the contrary) how they should perform their functions and which matters they should take into account (*In re C (A Child) (Adoption: Placement order)* (Practice Note) [2013] EWCA Civ 431; [2013] 1 WLR 3720, CA, at para.39 per Sir James Munby P; *Piglowska v. Piglowski* [1999] 1 WLR 1360, HL, at p.1372 per Lord Hoffmann). An appellate court should resist the temptation to subvert the principle that they should not substitute their own discretion for that of the judge by a narrow textual analysis which enables them to claim that they misdirected themselves..."

70. It is reasonable to proceed on the basis that the ombudsman knew that, in determining whether to make a costs direction, factors he is entitled to take into account include the availability of free advice and easy access to the ombudsman's service, but that he also has to take into account the particular circumstances of the case before him.

71. Against this background, I do not read the ombudsman's determination on costs in the way contended by Mr Sheffield. Rather, on my reading of the determination, the

ombudsman acknowledged that factors to particularly weigh in the balance in this case were the complexity of the case and that it was reasonable for Mr Sheffield to have assistance, particularly because of his personal circumstances, but the ombudsman concluded, nevertheless, that those factors, which might justify a costs direction, were outweighed by the availability of free advice and easy access to the ombudsman's service, which militated against a costs direction.

72. The ombudsman can only have erred in law in his determination on costs if that determination, as I have interpreted it, is perverse.

73. In his determination on costs, the ombudsman identified factors to which he concluded weight should be attributed and he weighed those factors. It may be that, had I been the ombudsman, I would have attached different weight to different factors and that I would have reached a different conclusion but, as is not disputed, it does not follow that the ombudsman's determination on costs was therefore perverse and, on the facts of this case, I cannot say that the ombudsman's determination was perverse.

74. In the circumstances, this ground of appeal fails.

The second ground of appeal

75. I have already commented on the limited basis on which a party can appeal against a decision of the ombudsman. Because I heard submissions on the substance of the second ground of appeal and because of the conclusions I have reached in relation to it, I deal with the second ground of appeal substantively in this judgment.

76. I have already set out how an appeal court should approach a challenge to the adequacy of the reasons, given by the ombudsman, for a decision.

77. As I have indicated, as Mr Morgan developed this ground of appeal, Mr Sheffield complains that the ombudsman did not give reasons for rejecting Mr Sheffield's submission that:

    i) there is a binding agreement between Kier and him as to the date he is deemed to have retired from the pension scheme;

    ii) the Respondents are estopped from arguing that the date he retired from the pension scheme was not the April 2006 retirement date;

    iii) he has a legitimate expectation (and so a public law defence) that his entitlements would be calculated by reference to the April 2006 retirement date.

78. The difficulty with this complaint is that Mr Sheffield did not make the second or third submission to the ombudsman. Rather, he made those submissions in support of his case that he is entitled, in principle, to interest on the arrears of the later annual pensions. The ombudsman can hardly be criticised for not giving reasons in relation to a matter which was not raised with him.

79. Mr Sheffield did submit to the ombudsman that there is a binding agreement as to the date he is deemed to have retired from the pension scheme. That submission was dealt with in sufficient detail in the determination, where the ombudsman (1) acknowledged

the submission and (2) effectively concluded that any agreement between Mr Sheffield and Kier on that matter does not permit or compel (and is not a legitimate basis for) a departure from what the ombudsman concluded is the clear statutory effect of regulation 35 of the 1997 regulations; namely, that the "due date" for the first payment, to Mr Sheffield, from the pension scheme was Mr Sheffield's 75th birthday.[15]

80. In these circumstances, the second ground of appeal fails.

Disposal

81. It follows from all I have said that Mr Sheffield's appeal must be allowed in part, on the ground that the ombudsman misdirected himself that he had jurisdiction to determine (1) the due date, under regulation 94, for the first payment to Mr Sheffield from the pension scheme and (2) when Mr Sheffield retired from the pension scheme, and so erred in law. Otherwise, Mr Sheffield's appeal does not succeed. I will hear further from counsel about how effect is to be given to my decision.

[15] In the circumstances, the ombudsman did not have to consider, therefore, the weight to be attached to Mr Sheffield's apparent contention, in his 2 May 2018 response, that the April 2006 retirement date was not an agreed date.