

Neutral Citation Number: [2016] EWHC 2519 (Ch)

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION

Appeal No: CH-2016-000032

Royal Courts of Justice
Rolls Building,
Fetter Lane,
London,
EC4A 1NL

MR EDWARD BARTLEY JONES QC (Sitting as a Deputy High Court Judge)
Friday 14 October 2016

BETWEEN:-

NORMAN CHARLES WEBBER

Appellant

and

DEPARTMENT FOR EDUCATION

Respondent

and

THE PENSIONS OMBUDSMAN

Party Intervening

Mr Norman Charles Webber appeared in person
Mr Saul Margo (instructed by Government Legal Department) for the Respondent
Miss Emily Campbell (instructed by Pensions Ombudsman Service) for the Party Intervening
Hearing date: 8 July 2016

APPROVED JUDGMENT

I direct that no official shorthand note should be taken of this Judgment and that copies of this version as handed down may be treated as authentic.



EDWARD BARTLEY JONES QC

Introduction/The Issues

1. This is an appeal by Norman Charles Webber (“Mr Webber”) against a Determination dated 2 February 2016 of the Pensions Ombudsman, Mr Anthony Arter (“the Pensions Ombudsman”). The appeal is brought under section 151(4) of the Pension Schemes Act 1993 (“the 1993 Act”) which allows for an appeal to the High Court but only on a point of law. Permission to bring this appeal (as is now required by CPR 52.21(a)) was granted by Snowden J. on 12 April 2016. Subsequently, by order of 20 May 2016 Snowden J. granted permission to the Pensions Ombudsman to appear and make representations at the hearing of this appeal and to file and serve a Skeleton Argument.

2. The primary issue raised by this appeal is of some general importance in the investigation and determination of complaints by the Pensions Ombudsman under Part X of the 1993 Act. Indeed, Snowden J. granted Mr Webber permission to bring this appeal not merely on the basis that it had a real prospect of success but also because the wider potential effect of the primary issue afforded a compelling reason why the appeal should be heard.

3. Briefly stated, the primary issue is as follows:-
 - (1) Mr Webber faces a claim for repayment of overpaid pension;
 - (2) he has made complaint under Part X of the 1993 Act to the Pensions Ombudsman;

(3) Mr Webber is entitled to, and wishes to, take a limitation defence in that complaint so as to defeat in part the claim against him;

(4) accordingly, for the purposes of a complaint under Part X of the 1993 Act, what date is to be taken as the date from which the limitation period is to be back calculated? Or, put another way, what has to be done, and by whom, to stop (as opposed to suspend or postpone) the running of the limitation period? Or, to put the same point in yet another way, what is the equivalent, in a complaint brought under Part X, to “action brought” for the purposes of the Limitation Act 1980 (“the 1980 Act”)?

4. Nugee J. has already indicated the firm provisional view that, for limitation purposes, the closest analogy to the issue of a claim form is the formal bringing of a complaint under Part X. Nugee J. said that on the bringing of such a complaint the question of the recovery of the overpayments was in issue between the parties before the Pensions Ombudsman. Granted his conclusions on the limitation issues Nugee J. remitted Mr Webber’s complaint to the Pensions Ombudsman for determination (1) of the date which ended the limitation period for the recovery of pension overpayments and (2) the quantum of any overpayments remaining payable by Mr Webber. The Pensions Ombudsman’s Determination of 2 February 2016 was as a result of that remission.

5. However, the Pensions Ombudsman reached a conclusion very different from the firm provisional view of Nugee J. The Pensions Ombudsman decided, as a matter of

law, that the limitation period stopped running when an unequivocal demand was first made of Mr Webber for repayment of his overpaid pension.

6. Mr Webber also brings a second ground of appeal, namely the alleged failure of the Pensions Ombudsman in his Determination of 2 February 2016 to deal adequately, or at all, with Mr Webber's complaints of "Maladministration". There is no merit whatsoever in this second ground of appeal. But in order to indicate why I shall have to set out the facts below in somewhat greater detail than would have been necessary had I been dealing only with the limitation issue.
7. This is now the third appeal which Mr Webber has brought to the High Court under section 151(4) of the 1993 Act. His first appeal was heard by Asplin J. and was totally successful (see her judgment at [2012] EWHC 4225 (Ch)). His second appeal to Nugee J. achieved success only on the limitation issue ([2014] EWHC 4240 (Ch); [2015] ICR 544).
8. Mr Webber appeared before me as a litigant in person. He conducted his appeal with courtesy and moderation. But it is hardly surprising (and no criticism of him whatsoever) that he was able to afford me little assistance on the legal issues which arose. Fortunately I received the most considerable assistance from Mr Margo (appearing for the Department for Education) and Miss Campbell (appearing for the Pensions Ombudsman). Mr Margo sought to defend the Determination of the Pensions Ombudsman. Miss Campbell put before me, on behalf of the Pensions Ombudsman, a number of potential answers to the limitation issue, setting out the

arguments for and against each and also the practical consequences of the various answers. That said, the essential thrust of Miss Campbell's submissions was that the Pensions Ombudsman commended the legal approach which had been set out in his Determination. But both Mr Margo and Miss Campbell sought to ensure, to the very best of their abilities, that I was fully aware of the legal arguments which could be deployed on Mr Webber's behalf. Mr Webber need not feel, therefore, that he has been in any way prejudiced because he had to appear before me as a litigant in person. I am extremely grateful to each of Mr Margo and Miss Campbell for their careful and detailed submissions.

The Facts

9. Mr Webber was born on 10 February 1947. He was a teacher and a member of the Teachers' Pension Scheme ("the Scheme"). The Scheme is a statutory occupational pension scheme established under the Superannuation Act 1972. The manner of constitution of the Scheme, and its terms, are not material for the purposes of this appeal. They are set out in detail in paragraphs [5] to [8] of the judgment of Nugee J. What does matter is that the relevant statutory Regulations have always contained provisions which, in broad summary, provide that if a person has become entitled to a teacher's pension and then goes back to work as a teacher then his pension is liable to be reduced, if necessary to nil, so as to ensure that the salary from his new employment and his pension taken together do not exceed the salary he had in his last employment, adjusted for inflation.

10. When Mr Webber turned 50 in February 1997 he applied for, and was granted, early retirement from the Scheme with effect from 1 April 1997. Mr Webber then began to receive his pension under the Scheme.

11. Mr Webber resumed full-time employment as a teacher with effect from 1 September 2001. His employer was Durham County Council. Mr Webber did not seek to hide this fact from Teachers' Pensions who administered the Scheme on behalf of the Department for Education. On the contrary, he completed a Certificate of Re-employment which was received by Teachers' Pensions on 11 September 2001.

12. On 22 October 2001 Teachers' Pensions wrote to Mr Webber. In that letter Teachers' Pensions recorded that Mr Webber's annual pension would not be affected, based on earnings of £14,491 for the period 6 April 2001 to 5 April 2002. The letter recorded that Mr Webber's earnings limit for that tax year was £20,837. But, of course, Mr Webber had re-commenced employment only on 1 September 2001. So the earnings of £14,491 for the period 6 April 2001 to 5 April 2002 related to only part of that tax year. As Nugee J. recorded in paragraph [74] of his judgment, whoever in Teachers' Pensions calculated the figure of £14,491 must have known that this was not a full years' salary but only for 7 months. Nugee J. indicated that it did not take a moment to realise that this was equivalent to some £24,000 a year. Accordingly (paragraph [75]) it was inevitable that if Mr Webber continued in the same employment throughout the next tax year his salary would exceed his earnings

limit. Teachers' Pensions, accordingly, already had at the time of writing this letter of 22 October 2001 all the information they needed to see that this would happen.

13. And what Teachers' Pensions should have seen would have happened is precisely what occurred. In every tax year from 2002/2003 onwards (up to and including 2010/11) Mr Webber was overpaid pension by the Scheme granted the level of salary he was earning from his employment. The primary fault for this lay with Teachers' Pensions (with the Department for Education also receiving annual returns from Durham County Council containing details of Mr Webber's salary).

14. But Mr Webber was not without fault himself. Nugee J. indicated (paragraph [56] of his judgment) that, granted the terms of the letter of 22 October 2001, he did not understand how Mr Webber could have failed to appreciate that if he (Mr Webber) continued teaching full-time in the following tax year on the same salary then he (Mr Webber) would be bound to earn more than the earnings limit (even allowing for the earnings limit being uprated in line with inflation). Further, at a bare minimum, Mr Webber ought to have completed a Certificate of Re-employment when he attained 55 years but he did not do so. Indeed it would appear that a Certificate of Re-employment ought to have to be completed by Mr Webber and returned to Teachers' Pensions on any change in his annual salary. Mr Webber never submitted any such Certificates of Re-employment to Teachers' Pensions.

15. On 19 April 2004 Mr Webber wrote to Teachers' Pensions informing them of his new address and that he had married on 7 December 2002.

16. On 19 January 2009 Teachers' Pensions wrote to Mr Webber saying that they had recently received information from Durham County Council about his employment with them and asking him to complete a Certificate of Re-employment.
17. On 19 February 2009 Mr Webber returned the completed Certificate of Re-employment. In a covering letter he said he was very anxious about the contents as he believed that everything was fine:-

"and that you knew all about my current employment from the outset".

18. Mr Webber then heard nothing until he received a letter from Teachers' Pensions dated 24 November 2009 ("the November Letter"). The November Letter is important because in his Determination of 2 February 2016 the Pensions Ombudsman found it to be the requisite "unequivocal demand" which stopped the limitation period running as against Teachers' Pensions.
19. The November Letter:-
 - (1) analysed each tax year from 2002/2003 onwards;
 - (2) identified how in each tax year Mr Webber had been overpaid his pension granted the salary he was earning. A date in each tax year was identified on which payment of Mr Webber's pension should have ceased. Thus, for example, in the tax year 2002/2003 pension should have ceased on 30 April

2002. By contrast, in the tax year 2003/2004 pension should have ceased on 3 May 2003 (and so on for each successive tax year);

- (3) identified a total net pension overpayment for all the specified tax years of £36,282.53;
- (4) contained the following paragraph:-

"In accordance with The Teachers' Pensions Regulations, we must ask you to arrange repayment of this amount. Payment of the above amount can be made by cheque, payable to "Teachers' Pensions" and crossed "Account Payee Only". Your cheque should be forwarded together with the enclosed remittance advice to this office."

20. On 1 December 2009 Mr Webber replied expressing his shock at receiving a demand for over £36,000 out of the blue and saying that he had done his best to follow the rules he had been told about. He indicated that he was now nearly 63 and had no prospect of finding a job earning the £60,000 or so a year needed for him to be able to repay the amount demanded by the November Letter.

21. On 29 June 2010 Mr Webber received a further letter from Teachers' Pensions indicating that in the tax year 2009/2010 (which had not been included within the November Letter) there had been a further net pension overpayment of £4,751.68 bringing the total net overpayment figure to £41,034.21. On 3 August 2010 Mr Webber paid Teachers' Pensions £3,775 which was Mr Webber's calculation of the amount of pension overpayment in the tax year 2009/2010. A subsequent letter

dated 21 October 2010 from Teachers' Pensions acknowledged receipt of this payment but simply claimed that it had been "offset" against the total overdue sum of £41,034.21 leaving the net balance of overpaid pension outstanding at £37,259.21.

22. I have not seen any indication that Teachers' Pensions has ever sought to apply this £3,775 against statute-barred debts. Certainly Mr Webber appears to be adamant that the £3,775 was paid specifically in respect of the tax year 2009/2010. If there be any dispute about this in the working out of any relevant final figures following my judgment then this would have to be remitted, yet again, to the Pensions Ombudsman (since my role under section 151(4) of the 1993 Act does not involve, and cannot involve, the finding of primary facts).

23. In July 2010 Mr Webber applied for further retirement benefits in respect of his additional service from 1 September 2001 to 31 August 2010. It seems that Mr Webber ceased working, permanently, as a teacher at the end of July 2010. In October 2010 Teachers' Pensions wrote to Mr Webber with details of his further benefits, saying amongst other things that the net amount outstanding (£37,259.12) had been set off against a lump sum of £10,672.45 due to him in respect of his additional retirement benefits. In August 2011 the Department for Education wrote to Mr Webber to the effect that it was common practice for a scheme member to use a retirement lump sum to offset an amount owed by him but that this would only be done where the member did not object. If Mr Webber preferred to receive

the lump sum he could do so. This would, however, mean that his debt would rise again to £37,259.21 “which will be pursued robustly”.

24. Mr Webber invoked the Internal Disputes Resolution Procedure (“IDR”) of the Scheme. An initial letter was written on his behalf by The Pensions Advisory Service to Teachers’ Pensions on 30 July 2010. A letter from The Pensions Advisory Service of 22 November 2010 invoked Stage 2 of the Scheme’s IDR. By letter of 8 December 2010 the Department for Education confirmed that an overpayment of pension had occurred and that this had to be repaid to the Scheme. This letter referred to Mr Webber’s right to refer matters to the Pensions Ombudsman.

25. By Application Form dated 2 April 2011 (stamped as received on 18 April 2011) Mr Webber made complaint to the Pensions Ombudsman.

26. By letter dated 9 June 2011 from a Ms O’Neill, an Investigator with the Pensions Ombudsman, Mr Webber was informed that Ms O’Neill was reviewing his application. This was described as a standard part of the process before Mr Webber’s complaint could be investigated. The letter indicated that during this stage Ms O’Neill would be considering the nature of Mr Webber’s complaint and whether the Pensions Ombudsman could investigate it. Mr Webber was asked a number of questions about the nature of his complaint to which he responded promptly by letter of 15 June 2011.

27. By letter of 21 June 2011 Ms O’Neill informed Mr Webber that his complaint was within the Pensions Ombudsman’s jurisdiction and could be investigated further. Mr

Webber was informed that his “papers” were waiting to be allocated to another Investigator to assess the merits in further detail.

28. By letter of 18 August 2011 Mr Webber was informed by the Pensions Ombudsman’s office that his case had yet to be allocated to an appropriate Investigator. A letter of 12 October 2011 from the Pensions Ombudsman’s Office to Mr Webber informed him that his case had still not been allocated to an appropriate Investigator.

29. By a letter which could be dated either 26 November 2011 or 28 November 2011 sent to Teachers’ Pensions (stamped as received by Teachers’ Pensions on 29 November 2011) and written by a Ms Jane Stephens, a Senior Investigator at the Pensions Ombudsman’s office, Teachers’ Pensions were informed, for the first time, that the Pensions Ombudsman had received a complaint from Mr Webber. Mr Webber’s complaint was briefly summarised and the letter continued:-

“We require you to tell us whether you oppose the allegations and, if so, to provide your reasons and any additional supporting evidence.”

Teachers’ Pensions were required to respond within 21 days. This was clearly the notification to Teachers’ Pensions from the Pensions Ombudsman as required by Rule 5(2) of The Personal and Occupational Pension Schemes (Pensions Ombudsman) (Procedure) Rules 1995 (“the 1995 Rules”).

30. By letter dated 19 December 2011, sent by Teachers' Pensions to Ms Stephens at the Pensions Ombudsman's Office, Teachers' Pensions made clear, with detailed supporting reasoning, that they opposed the allegations contained in Mr Webber's complaint. This letter concluded "*The overpayment of pension still stands and [Teachers' Pensions] is obliged to seek its recovery*". This was clearly the Reply of Teachers' Pensions as required by Rule 6 of the 1995 Rules.
31. By a Determination dated 26 June 2012, Ms Jane Irvine, the Deputy Pensions Ombudsman, determined that Mr Webber's complaint should not be upheld because "*Mr Webber ought reasonably to have been aware that he was required to complete a Certificate of Re-employment in each tax year if he had received an increase in his salary*".
32. I should, however, record that Ms Irvine did find in Mr Webber's favour in respect of one specific instance of maladministration. Paragraphs 62 to 64 of Ms Irvine's Determination were in the following terms:-

"62. Mr Webber contends that he was not advised that [Teachers' Pensions] were going to offset the lump sum payment nor was he given the opportunity to dispute that action. Section 91(1)(b) of the Pensions Act 1995 provides that, where a person is entitled to a pension under an occupational pension scheme, "the entitlement or right cannot be charged or a lien exercised in respect of it." Section 91(5)(d) and (e) would allow the exercise of a charge, lien or right of set off in certain circumstances, but sub-section (6)

prevents such action where there is a dispute as to the amount, unless the obligation in question has become “enforceable as an order of a competent court or in consequence of an award of an arbitrator”.

63. *Although [Teachers’ Pensions] advised Mr Webber, in their letter of 15 October 2010, that the lump sum had been off-set against the overpayment by this point [Teachers’ Pensions] were already aware that Mr Webber disputed that he should have to repay the overpayment. It was therefore wrong of [Teachers’ Pensions] to have offset the lump sum in this way without first obtaining Mr Webber’s agreement. [Teachers’ Pensions’] actions contravene Section 91 of the Pensions Act 1995 and constitute maladministration.*

64. *However, Mr Webber did not suffer financial injustice as a result of [Teachers’ Pensions’] maladministration as the payment of the lump sum would simply have increased the amount of the overpayment. I note also that [the Department for Education] later offered to pay Mr Webber the lump sum payment, which he did not accept, as presumably he did not wish to increase the amount he was said to owe”.*

33. Mr Webber appealed to the High Court under section 151(4) against this Determination. As I have indicated, Asplin J. allowed the appeal on 22 November 2012 and remitted the complaint to the Pensions Ombudsman for reconsideration. Asplin J.’s reasons for so doing can be found in her judgment and are not material to the issues before me.

34. Following the remittance by Asplin J., Ms Irvine, the Deputy Pensions Ombudsman, issued her second Determination on 24 January 2014. Again she refused to uphold Mr Webber's complaint with the consequence that Mr Webber was liable to repay the whole of the overpaid pension claimed. Mr Webber appealed again under section 151(4) with his appeal on this occasion being heard by Nugee J.
35. Nugee J. engaged in a detailed analysis of the Deputy Pensions Ombudsman's reasoning as to why a change of position defence was not available to Mr Webber. He identified (at paragraph [49]) the Deputy Pensions Ombudsman's carefully nuanced findings which were to the effect that, although Mr Webber may not have known that he was definitely being overpaid, Mr Webber must have been aware that there was a possibility that this could happen and that Mr Webber had turned a blind eye in the hope that *if* there was an overpayment it would go unnoticed. This led Nugee J. to conclude (paragraph [62]) that, on the Deputy Pension Ombudsman's factual findings, her conclusion that a defence of change of position was unavailable to Mr Webber could not be faulted. If a person appreciates that a payment he is receiving may be an overpayment (or in other words that the payer may be mistaken) and can make a simple enquiry of the payer to check whether this is so but chooses not to do so, then Nugee J. did not see anything wrong in the conclusion that the defence was not open to that person. That person knows that there is risk that he may not be entitled to the money, but is willing to take that risk.
36. However, in her second Determination the Deputy Pensions Ombudsman had also considered the limitation defence raised by Mr Webber. She rejected that defence

by relying on section 32(1)(c) of the 1980 Act. This provides that where in the case of any action for which a period of limitation is prescribed by the 1980 Act and the action is for relief from the consequences of a mistake then:-

“the period of limitation shall not begin to run until the plaintiff has discovered... the mistake... or could with reasonable diligence have discovered it.”

The Deputy Pensions Ombudsman held that Teachers' Pensions could not with reasonable diligence have discovered the mistake of overpayment of pension to Mr Webber any earlier than it did and, hence, no part of the overpaid pension was statute barred.

37. Nugee J. (paragraphs [65 to 78]) rejected this conclusion. In his judgment the only reasonable conclusion was that Teachers' Pensions could with reasonable diligence have discovered the fact of overpayment during the tax year 2002/2003. It therefore followed from this conclusion (paragraph [79]) that the limitation period started running against Teachers' Pensions as soon as Teachers' Pensions started making overpayments (which Nugee J. described as being sometime in the 2002/2003 tax year). Accordingly, Mr Webber had a limitation defence for the recovery of any overpayments made more than 6 years before the relevant date when the limitation period was to be regarded as having stopped (the cut-off date). To this limited, but important, extent Nugee J. allowed Mr Webber's appeal.

38. As I have indicated in paragraph 19 above on Teachers' Pensions' own case, as set out in the November Letter, it started making pension overpayments to Mr Webber on 1 May 2002.

39. But when is the cut-off date (the date on which the limitation period is to be regarded as having stopped)? Nugee J. said this at paragraphs [80] and [81]:-

"80. I have had no submissions on when the cut-off date is. In court proceedings the cut-off date is when the claim form is issued. The proceedings before the Ombudsmen do not start with a claim form and do not technically stop the limitation period, but in practice the Ombudsman will decide cases that turn on legal rights (as opposed to pure maladministration) by analogy to how a court would have decided the same dispute: see the explanation by the [Deputy Pensions Ombudsman] at [41]:

"As I am obliged to decide cases in accordance with legal principles (except in cases of "pure maladministration and consequential injustice" which is not the case here) it would not be right for me, by not upholding Mr Webber's complaint to, effectively, grant a remedy to [Teachers' Pensions] (by implying it was entitled to full recovery in the full amount) if it would not have been entitled to such a remedy had the matter been before the court."

It was not suggested to me by either party that this approach was wrong.

81. *Since I have not heard any argument on the point, I will not formally decide what the cut-off date is but I will say, in the hope that this may assist the parties, that I am presently firmly of the view that the closest analogy to the issue of a claim form is the formal bringing of the complaint by Mr Webber to the Ombudsman because at that point the question of the recovery of overpayments was in issue between the parties before the Ombudsman. I do not I think have any information as to what that date was but it is presumably easy to identify. I also have no information which enables me, even if the cut-off date were identified, to ascertain what overpayments were made in the 6 years before that date, but again I would hope that that would not be a difficult or controversial exercise. I will formally give the parties the opportunity to have both the question of cut-off date and the quantum of overpayments that were made in the 6 years prior to that date referred back to the [Deputy Pensions Ombudsman] in case they are unable to identify or agree those matters, but I hope that they will be able to agree what should be straightforward matters and that it will be unnecessary to actually trouble [the Deputy Pensions Ombudsman] again.”*

40. As it seems to me, rolled up together in the first sentence of paragraph [81] of Nugee J.’s judgment are two separate propositions. The first is that the closest analogy to the issue of a claim form is some step in the complaint procedure (because the complaint procedure equates, by analogy, with proceedings commenced by a claim form): “Proposition 1”. The second is that for the purposes of Proposition 1 it is the

bringing of the complaint by Mr Webber which is the relevant step: "Proposition 2". It will be seen below that I have no difficulties whatsoever with Proposition 1. It is Proposition 2 which is more difficult because, of course, the complaint is brought not by Teachers' Pensions but by Mr Webber.

41. The formal order made as a result of the hearing before Nugee J. provided:-

"(3) The following questions be remitted to the Deputy Pensions Ombudsman for determination (if not agreed) as soon as reasonably practicable:

- (i) the date which determines the limitation period for the recovery of overpayments by [Teachers' Pensions]*
- (ii) the quantum of any overpayments remaining payable by Mr Webber to the Respondent."*

I draw attention to the limited and narrow terms of remittance.

The Third Determination

42. Somewhat surprisingly, granted what Nugee J. had to say, Teachers' Pensions was not prepared to accept that the bringing of the complaint by Mr Webber was the relevant cut-off date for limitation purposes. So matters had to be considered by the Pensions Ombudsman for a third time. This resulted in the Determination of 2 February 2016 which is the subject matter of the appeal before me.

43. In written submissions to the Pensions Ombudsman Teachers' Pensions argued that the relevant date for limitation purposes should be taken to be the date of the November Letter. On this basis Teachers' Pensions calculated that there was £18,427.42 still outstanding from Mr Webber (after offsetting his lump sum payment of £10,672.45 and the payment which he had made of £3,775). Conversely, Teachers' Pensions calculated that if the relevant date were the date of receipt of Mr Webber's complaint to the Pensions Ombudsman (18 April 2011) then, after allowing for the same credits (of £10,672.45 and £3,775), the amount of overpaid pension outstanding from Mr Webber was £11,185.74.
44. Teachers' Pensions did not explain why they had utilised the date of sending of the November Letter when they had used the date of receipt by the Pensions Ombudsman of Mr Webber's complaint.
45. Conversely Mr Webber argued that the appropriate cut-off date was 26 November 2011 which he described as the date on which the Pensions Ombudsman's Office notified him of acceptance of his complaint. I believe that this is a reference to the letter I refer to above which could be dated either 26 or 28 November 2011 (but which does not appear to have been sent to Mr Webber unless he was sent a copy. If he was then I have not seen that copy). Now, of course, Mr Webber had been notified by the letter of 21 June 2011 that his complaint would be investigated further. It is, perhaps, fair to say that such letter was qualified in that it contained the sentence "*Please be aware that the decision to investigate further, and the basis of complaint, may be subject to review as the investigation progresses*". The letter of

26/28 November 2011 was written following allocation of Mr Webber's complaint to an Investigator to assess the same on the merits. It could, therefore, I suppose be argued that acceptance of Mr Webber's complaint was always provisional (being capable of being revoked during the course of the investigation on the merits) until the letter of 26/28 November 2011 was written (as a letter under Rule 5(2) of the 1995 Rules) requiring Teachers' Pensions to indicate whether they opposed the allegations in the complaint.

46. In any event, based on the date of 26 November 2011 Mr Webber calculated that only £7,935.15 remained owing from him to Teachers' Pensions. It is clear that Mr Webber put in issue the figures provided by Teachers' Pensions on the basis of the November Letter being the cut-off date. But I cannot trace him as having given any alternative specific figure. It does not appear that Teachers' Pensions provided any rival figure if 26 November 2011 were the correct date. Nor does Mr Webber appear to have given any figure if 18 April 2011 were the cut-off date. But it is clear from his challenges to Teachers' Pensions figure of £18,487.42 (for 24 November 2009) that he would not have accepted £11,185.74 as being validly calculated for 18 April 2011 as the cut-off date. In his Determination the Pensions Ombudsman accepted Teachers' Pensions' submissions and held that the cut-off date for limitation purposes was the date of the November Letter (24 November 2009). This meant, as he indicated, that Teachers' Pensions were able to recover overpayments which were made up to 6 years prior to that date. The Pensions Ombudsman fixed the quantum of those overpayments at £18,008.05. The breakdown of that figure is to be found in paragraphs 83 and 84 of his Determination. I merely point out that this

figure is slightly less than the one which Teachers' Pensions had put forward. This adds some credence to Mr Webber's claims that Teachers' Pensions' figures need to be treated with some caution.

47. The Pensions Ombudsman's reasons for taking the date of the November Letter as being the cut-off date for limitation purposes were as follows:-

(1) the Pensions Ombudsman started (paragraph 62) by referring to sections 29 to 31 of the 1980 Act as extending the limitation period in cases where a defendant makes some acknowledgement or payment in respect of the claimant's right of action. That, the Pensions Ombudsman said, was the situation in the present case. But he indicated that he had not needed to go on to consider this point further because of what followed in his Determination. He did, however, point out that if the limitation period were extended, then the cut-off date in respect of recovery would also change which would be relevant to what followed in his Determination. I regret that I cannot follow this at all. As far as I can see Teachers' Pensions had never suggested that the limitation period should be extended because of some acknowledgment or part payment. So this was not in issue before the Pensions Ombudsman. I have seen no indication of any acknowledgement by Mr Webber. True it is that he did pay the sum of £3,775 but that was on 3 August 2010. That was after, on the Pensions Ombudsman's Determination, the cut-off date for limitation had passed. In any event, Mr Webber is clear (and as I have earlier indicated I have not seen Teachers' Pensions challenging this) that he paid the £3,775 to repay the pension overpayment

for the tax year 2009/2010 which could not possibly have been statute barred;

- (2) Nugee J.'s view was simply a provisional one, where Nugee J. had not heard submissions and where the matter had not been fully considered by Nugee J. Now, as Nugee J. acknowledged, he had not heard submissions on the point. But it is self-evident from what Nugee J. had to say that his views were carefully considered and firmly held. Further, I have not the slightest doubt (for the reasons I shall develop below) that Nugee J. was right on Proposition 1 (albeit that I see more nuances and difficulties as a result of the detailed argument of which I have had the benefit on Proposition 2);
- (3) the CPR outlines when proceedings are brought before the court for the purposes of the 1980 Act. But the CPR do not apply to complaints made to the Pensions Ombudsman. The date of the claim form is not analogous to the date of the complaint form. At this point the Pensions Ombudsman referred to Regulation 5 of The Personal and Occupational Pension Schemes (Pensions Ombudsman) Regulations 1996 ("the 1996 Regulations");
- (4) if the date of the complaint form were the relevant cut-off date then an overpaid pensioner could simply delay bringing a complaint to the Pensions Ombudsman in order to maximise his limitation defence;
- (5) as a consequence it was logical that the applicable cut-off date should be the date closest to when Teachers' Pensions demanded payment from Mr Webber because that was when Teachers' Pensions made its claim;
- (6) this point is merely underlined because the Pensions Ombudsman was unable to accept a complaint which had not triggered IDR. It could not be

right that Teachers' Pensions, by engaging in IDR, should have time running against it during IDR.

48. More broadly, as I read the Determination, underpinning the Pensions Ombudsman's decision are issues of practice and policy. The Part X complaints procedure is essentially different from court proceedings. It has its own rules (Regulation 5 of the Regulations) as to the time limits for making a complaint. Within these rules an overpaid pensioner could "work the system" (especially in conjunction with IDR) to delay the bringing of the complaint. This would prejudice the overpaying pension trustees because the limitation period would be running against them. The Part X complaint scheme is designed to ensure that there is a cheap and speedy resolution of disputes such as those over overpaid pensions. The underlying policy, therefore, of the Part X scheme necessitates that limitation be treated, when it is being considered within the context of a complaint to the Pensions Ombudsman, in a different way from the way in which the 1980 Act works for the purposes of court proceedings. It would be quite inimicable to the cheap and speedy resolution of disputes under Part X of the 1993 Act if pension trustees were forced to protect themselves by issuing court proceedings over what might frequently be small pension overpayments.

The 1980 Act

49. It was common ground before me that had Teachers' Pensions sought to recover the overpaid pension from Mr Webber by way of action then that action would have been subject to a statutory limitation period of 6 years under section 5 of the 1980

Act. Although no express provision is made for a restitutionary claim of this nature in the 1980 Act, the time limit for bringing a restitutionary claim is 6 years on the basis that the claim can be regarded as fitting within section 5 of the 1980 Act (see per Hobhouse J. in Westdeutsche Landesbank Girozentrale v. Islington LBC [1994] 4 All ER 890 at 942-943 and paragraphs 99 to 101 of the judgment of Mr Steven Morris QC (sitting as a Deputy High Court Judge) in Diamandis v. Wills [2015] EWHC 312 (Ch)). Section 5 provides that an action falling within it:-

“shall not be brought after the expiration of 6 years from the date on which the cause of action accrued.”

Although not expressly addressed before me, all argument proceeded on the underlying basis that Teachers’ Pensions’ cause of action accrued when overpayments of pensions were made from time to time, and at any time, to Mr Webber. Again the underlying basis of the submissions before me was that each individual overpayment of pension was an individual cause of action.

50. Section 38(1) of the 1980 Act defines “action” as including any proceedings in a court of law, including an ecclesiastical court.
51. The 1980 Act is, of course, formulated on the basis of statute barring causes of action only where an action (as defined in section 38(1)) is commenced. That is why, at first blush, it appears to have nothing whatsoever to do with complaints to the Pensions Ombudsman under Part X of the 1993 Act. And that is why Parliament

found it necessary to enact section 13 of the Arbitration Act 1996 (expressly applying the Limitation Acts (as therein defined) to arbitral proceedings). There is no equivalent of section 13 for complaints to the Pensions Ombudsman under Part X of the 1993 Act.

52. In Barnes v. St Helens MBC [2007] 1 WLR 879 the Court of Appeal held that a claim is “brought” for the purposes of the 1980 Act when a claimant’s request for issue of a claim form (together with the requisite court fee) is delivered to the court office. Thus it matters not what stamped date the claim form (when issued) bears. Underpinning the reasoning of the Court of Appeal (see per Tuckey LJ. at paragraph [16]) is the expectation that the expiry of a limitation period would be fixed by reference to something which the claimant has to do, rather than something which someone else, such as the court, has to do. The time at which a claimant “brings” his claim form to the court with a request that it be issued is something the claimant has to do; the time when his request is complied with is not (because it is done by the court and is something over which the claimant has no real control). The former act is unilateral, the latter act is transactional. Underpinning this reasoning, therefore, is a high degree of emphasis on the unilateral act of the claimant. I make these points because one of the difficulties with Proposition 2 is that the act which stops time running is not the act of the claimant at all but, rather, the act of the defendant.

53. The question as to when an action is brought has, more recently, been considered again by the Court of Appeal in Page v. Hewetts [2012] EWCA Civ 805. In delivering the only judgment Lewison LJ. referred to Barnes and identified the policy underlying

the decision in Barnes as being one of risk allocation. The claimant's risk stops once he has delivered his request (accompanied by the claim form and fee) to a court office (see paragraph [33]). Again the emphasis is (as it must be under the terms of the 1980 Act) on what the claimant himself has to do to stop time running.

Part X

54. Section 146 of the 1993 Act sets out the functions of the Pensions Ombudsman. Thereby the Pensions Ombudsman is authorised to investigate and determine certain matters. These include:-

- (1) 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 suffered injustice in consequence of maladministration in connection with any act or omission of a person responsible for the management of the scheme (section 146(1)(a));
- (2) 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 (section 146(1)(c)).

However, section 146(1A) provides that the Pensions Ombudsman shall not investigate or determine any dispute or question falling (inter alia) within section 146(1)(c) unless it is referred to him by or on behalf of the actual or potential beneficiary who is a party to the dispute. "Actual or potential beneficiary" is defined for the purposes of section 146 as being a member of the scheme (or the widow,

widower or surviving civil partner or any surviving dependant, of a deceased member of the scheme): see section 146(7).

55. Accordingly, Teachers' Pensions could not have made any complaint to the Pensions Ombudsman in order to seek to recover the overpaid pension from Mr Webber. The only remedy available to Teachers' Pensions to recover the overpaid pension was by the commencement of an action.
56. Further, by section 146(6) the Pensions Ombudsman is prohibited from investigating or determining a complaint or dispute if, before the making of the complaint or the reference of the dispute, proceedings in respect of the matters which would have been the subject of the investigation have been begun in any court and those proceedings are proceedings which have not been discontinued.
57. Accordingly, had Teachers' Pensions issued a claim form seeking to recover the overpaid pension from Mr Webber before Mr Webber made his complaint to the Pensions Ombudsman then the Pensions Ombudsman would have been prohibited by section 146(6) from investigating or determining Mr Webber's complaint (save, as I understand it, to the extent that the complaint dealt with pure issues of maladministration under section 146(1)(a) since the court does not deal with issues of pure maladministration).
58. Conversely, nothing in Part X prohibited Teachers' Pensions from seeking to recover the overpaid pension from Mr Webber by the issue of a claim form after Mr Webber

had made his complaint to the Pensions Ombudsman. On the contrary, section 148 of the 1993 Act expressly contemplates that this can occur and provides for what should happen if it does occur. By section 148(2) any party to the legal proceedings may any time after acknowledgement of service, and before delivering any pleadings or taking any other step in the proceedings, apply to the court to stay the proceedings. Section 148(4) provides that on any application under section 148(2) the court may make an order staying the proceedings if it is satisfied (a) that there is no sufficient reason why the matter should not be investigated by the Pensions Ombudsman and (b) that the applicant was at the time the legal proceedings were commenced and still remains ready and willing to do all things necessary to the proper conduct of the investigation.

59. Accordingly, at any time both before and after the making by Mr Webber of his complaint to the Pensions Ombudsman, Teachers' Pensions could have sought to protect themselves against the running of time by the issue of a claim form.
60. Section 50 of the Pensions Act 1995 imposes obligations on the trustees or managers of an occupational pension scheme to secure that dispute resolution arrangements complying with the requirements of section 50 are made and implemented ("IDR").
61. Under Regulation 3 of the 1996 Regulations the Pensions Ombudsman is prohibited, subject to Regulation 3(2), from investigating or determining a complaint or dispute concerning an occupational pension scheme to which section 50 of the 1995 Act applies unless written notice of a decision in respect of that complaint or dispute has

first been issued by the trustees or managers of the scheme under section 50(5)(b) of the 1995 Act. However, by Regulation 3(2) the Pensions Ombudsman is given limited jurisdiction to investigate or determine such a complaint (in advance of written notice of a decision being issued in respect of it under section 50(5)(b) of the 1995 Act) provided that the Pensions Ombudsman is satisfied that (a) there is no real prospect of a notice being issued within a reasonable period from the date on which the complaint or dispute was received by him in writing and (b) it is reasonable in the circumstances that he should investigate and determine the complaint or dispute.

62. Finally, I should refer to Regulation 5 of the 1996 Regulations. Under Regulation 5(1) the Pensions Ombudsman is prohibited from investigating a complaint or dispute if the act or omission which is the subject thereof occurred more than 3 years before the date on which the complaint or dispute was received by the Pensions Ombudsman in writing. However, this is subject to Regulation 5(2) which provides that where, at the date of occurrence, the person by or in respect of whom the complaint is made or the dispute is referred was, in the opinion of the Pensions Ombudsman, unaware of the act or omission in question then the period of 3 years shall begin on the earliest date on which that person knew or ought reasonably to have known of its occurrence. Further, by Regulation 5(3) where in the opinion of the Pensions Ombudsman it was reasonable for a complaint not to be made or a dispute not be referred before the end of the periods allowed under Regulations 5(1) and 5(2) then the Pensions Ombudsman may investigate and determine the

complaint or dispute if it is received by him in writing within such further period as he considers reasonable.

63. Section 151(5) of the 1993 Act provides that any determination or direction of the Pensions Ombudsman shall be enforceable in England and Wales in the County Court as if it were a judgment or order of that court.

64. As Lewison J. pointed out in ARJO Wiggins Limited v. Ralph [2010] IDS Pensions Law Reports 11 (at paragraph [5]) complaints and disputes being heard by the Pensions Ombudsman may involve solely issues of “pure maladministration” without engaging the legal rights of any party. But, equally, a complaint or dispute before the Pensions Ombudsman may involve the Pensions Ombudsman in determining the legal rights and liabilities of the parties to the complaint. It is important to bear this distinction clearly in mind. The former type of dispute cannot engage issues of limitation (save for those contained in Regulation 5). The latter type of dispute (where the legal rights and liabilities of the parties to the complaint are being determined) most certainly does engage issues of limitation. That is the very point decided in ARJO Wiggins.

65. I remind myself of the undoubted statutory purpose behind Part X. As Robert Walker J. said in Westminster Council v. Haywood [1996] 2 All ER 467 at 475j:-

“A very important part of legislative purpose was to provide a quick, inexpensive and informal means of settling complaints and disputes about

occupational pensions, especially where an individual or a small group of individuals (whether employees or pensioners) find themselves in conflict with trustees who have large resources and may sometimes (rightly or wrongly) be thought to be more attentive to the views of the employer than to those of the employees or pensioners”.

66. Robert Walker J. also pointed out (at 476c) that:-

“The Pensions Ombudsman’s task in delivering rapid, unlegalistic justice, without cutting too many corners, is a dauntingly difficult one.”

67. However dauntingly difficult the task, what is crystal clear, and clearly set out in the decision of the Court of Appeal in Wakelin v. Read [2000] IDS Pensions Law Reports 319, is that when considering complaints or disputes which engage parties’ legal rights the Pensions Ombudsman must act in accordance with legal principles (see, in particular, per Mummery L.J. at paragraphs [72 to 76] and per Pill L.J. at paragraph [87]). As Knox J. stated in Hillsdown Holdings Plc v. Pensions Ombudsman [1997] 1 All ER 862 at 899e:-

“It is trite law that pension funds must operate within the law and it does not seem to me right that there should be a different answer to the question “are you legally liable to repay this sum” according to the tribunal to which resort is had so that the answer is: “If I am sued in court, No, but if a complaint is made to the Pensions Ombudsman, Yes”.

ARJO Wiggins

68. In ARJO Wiggins Lewison J. had to consider whether, and how, the provisions of the 1980 Act impacted on a complaint before the Pensions Ombudsman. Lewison J. concluded that the Pensions Ombudsman had no power to award substantive relief to a complainant whose complaint would have been defeated by a limitation defence had it been brought by action in court (paragraph [33]).
69. Lewison J. pointed out that it was common ground that the 1980 Act did not directly apply to matters referred to the Pensions Ombudsman. The Pensions Ombudsman did not decide “actions” as defined by the 1980 Act. However, at paragraph [13] Lewison J. pointed out that it was now well settled that, in principle, the Pensions Ombudsman had to decide disputes in accordance with established legal principles rather than by reference to what he himself considered to be fair and reasonable. Lewison J. referred to Henderson v. Stephenson Harwood [2005] PLR 209, Hillsdown Holdings and Wakelin. Accordingly (paragraph [14]) the Pensions Ombudsman did not have power to make an order that the court could not make (subject to the qualification that in cases of pure maladministration which were not actionable in court then the Pensions Ombudsman could grant a measure of relief which the court could not (paragraph [15]).
70. Having carefully considered the impact of Regulation 5 Lewison J. concluded (paragraph [20]) that the Pensions Ombudsman had jurisdiction to investigate and

determine a complaint or dispute even where the comparable cause of action would be dismissed on the ground that it was statute barred (paragraphs [20] and [23]).

71. But that was merely a question of jurisdiction. The key question (as identified by Lewison J. in paragraph [23]) was what powers did the Pensions Ombudsman have when exercising such a jurisdiction.

72. In paragraph [26] Lewison J. made clear that, in these circumstances, the Pensions Ombudsman was bound to give effect to a valid limitation defence. This meant that the challenges (which Lewison J. had rejected) to the jurisdiction of the Pensions Ombudsman to investigate a complaint where the underlying cause of action was statute barred became largely academic. The simple fact was that the Pensions Ombudsman had to give effect to any limitation defence.

73. Of course, in the present case, the Pensions Ombudsman has not sought to neglect that injunction. The issue which arises is as to how the 1980 Act should be applied in the context of Mr Webber's complaint. But underlying the whole of Lewison J's judgment (and all the cases which he cites) is the requirement to equate, so far as possible, a complaint before the Pensions Ombudsman (other than a complaint of pure maladministration) with the resolution of a dispute by the court. There should be no different answer dependent on the happenstance as to whether an action be brought or a complaint be made to the Pensions Ombudsman.

74. This reasoning, as it seems to me, entirely vindicates Proposition 1 as formulated by Nugee J.

The November Letter

75. Mr Margo's primary submission is that the cut-off date for limitation purposes should be the date of the November Letter. On behalf of the Pensions Ombudsman Miss Campbell, whilst very properly discussing the potential alternatives, commends the November Letter as being the correct answer to the problem. The essence of their submissions is that the actual making of the complaint by Mr Webber is not an act of the relevant claimant for limitation purposes and, hence, inapposite to be taken as the cut-off date. The November Letter can broadly be equated to the bringing of a claim by Teachers' Pensions. Further, the advantage of taking the November Letter as the cut-off date is that it vindicates the policy underlying the Part X scheme by obviating the need for overpaying pension trustees to protect themselves by issuing a protective claim form (when those trustees are facing potential limitation difficulties). Such a claim form would, if issued before the complaint were made to the Pensions Ombudsman, prohibit the Pensions Ombudsman from investigating the complaint at all (thereby placing a person such as Mr Webber at risk of substantial costs in court proceedings and depriving him of the cheap and informal remedy of a complaint to the Pensions Ombudsman).

76. There is some force in the submissions on practicalities which each of Mr Margo and Miss Campbell made to me. The undoubted irony, on the facts of this case, is that if the November Letter be not treated as the relevant cut-off date then Mr Webber

would have been far better off, from a limitation point of view, in delaying making his complaint to the Pensions Ombudsman until the last possible moment allowed under Regulation 5. That would seem to have been 3 years from the date on which Mr Webber received the November Letter (i.e late November 2012). In fact Mr Webber's complaint was received by the Pensions Ombudsman on 18 April 2011. Miss Campbell submits to me that not taking the November Letter as the relevant cut-off date could lead to manipulations of the timings of Part X complaints by astute overpaid pensioners.

77. But there are counter-arguments. Ultimately it is for the overpaid pensioner to decide whether or not, and when, to bring a complaint to the Pensions Ombudsman. It is his choice, his right. Conversely, overpaying pension trustees, conscious of limitation problems, can always protect themselves by the issue of a protective claim form. It needs to be remembered that normally a diligent pension trustee will attract the protection of section 32(1)(c) of the 1980 Act. Granted that protection then limitation problems ought not to be particularly acute for diligent trustees. And conversely, no doubt, the courts would be astute, in an appropriate case, to protect a person such as Mr Webber in costs if he were deprived of his Part X complaint entitlement through the commencement of an action which had been necessitated only by the need for indolent pension trustees to protect themselves against limitation issues.

78. If the November Letter be the correct cut-off date then I do not see how the date which the letter bears can be the relevant date for limitation purposes. The relevant

date must surely be the date of receipt of the November Letter by Mr Webber. Until receipt, Teachers' Pensions would not have completed the relevant unilateral act in accordance with the principles set out in Barnes and Page. If it be, indeed, a matter of risk allocation then Teachers' Pensions must be the person assuming the risk that the letter in question is not, in fact, sent or is lost in the post.

79. A further fundamental problem with taking the November Letter as the relevant cut-off for limitation purposes is to identify a definition which the November Letter satisfies. Before me the words "unequivocal demand" were used. But within what legal definition must an unequivocal demand fall? And what must be the procedural requirements for any such unequivocal demand? Must the unequivocal demand contain detailed reasoning for the sums demanded? Must the sums demanded be correct? The point can be illustrated this way. Would a standard form letter sent by Teachers' Pensions to each and every pensioner at the end of each and every tax year containing the words "*we hereby demand repayment of all (if any) sums overpaid to you by way of pension in the last tax year*" suffice? Surely not. And what if, for example, the November Letter had made no reference whatsoever to sums overpaid in the tax year 2002/2003 and had then, by mistake, overcalculated the sums repayable for subsequent tax years so that the ultimate sum demanded (although incorrectly calculated on the face of the letter) was more than sufficiently large so as to encompass the sums overpaid during the 2002/2003 tax year?
80. Accordingly, simply to describe the November Letter as an unequivocal demand seems to me merely to beg, not to answer, the question. Neither Mr Margo nor

Miss Campbell suggested to me any legal definition of the relevant cut-off event against which definition the November Letter could then be tested to see if it satisfied that definition.

81. But even more fundamentally it seems to me that to take the November Letter as the equivalent of “action brought” for the purposes of the 1980 Act is entirely wrong in principle. The November Letter could not possibly have constituted “action brought” for the purposes of the 1980 Act had there been an action brought in court. So to treat it as “action brought” for the purposes of a Part X complaint by Mr Webber is to produce a fundamentally different answer on liability for Mr Webber (dependent on whether he was sued in court or whether the matter be dealt with by complaint to the Pensions Ombudsman). This would not be acting in accordance with legal principles: it would be creating fundamentally new principles of limitation applicable only to complaints to the Pensions Ombudsman under Part X. And, of course, Mr Webber would have brought this misfortune on himself (and delivered this immense good fortune to Teachers’ Pensions) by the very act of making his complaint.

82. As it seems to me, taking the November Letter as the relevant cut-off for limitation purposes is directly contrary to the principles set out by the Court of Appeal in Wakelin and by Lewison J. in ARJO Wiggins. It is not, and cannot be, legally correct.

Claim Form

83. At the other end of the spectrum Miss Campbell draws to my attention a wholly different possible answer (whilst arguing in the strongest possible terms against it). If, as is the fact in this case, no Claim Form has ever been issued by the overpaying pension trustees then there is no cut-off date at all for limitation purposes.
84. This possible answer has superficial attractions. If Teachers' Pensions wished to stop time running they could, and should, have issued a claim form. If Teachers' Pensions did not so act then they had only themselves to blame for the fact that time never stopped running in Mr Webber's favour. Only the issue of a claim form can stop time running and the Pensions Ombudsman must conduct the Part X complaint accordingly.
85. Obviously this is deeply inconvenient. It would necessitate pension trustees incurring what may be substantial issue fees for a claim form in every case which had limitation defence potential. It would deprive the Pensions Ombudsman of jurisdiction if a claim form is issued before the complaint is made. But practical inconveniences are no answer to substantive legal questions.
86. Rather, as it seems to me, on analysis this potential answer is wholly wrong in principle. Under this answer Mr Webber does better in law in a Part X complaint than he would have done had an action been commenced. The action would have stopped time running. But the complaint does not. The Part X complaint system is meant to be an alternative to court proceedings. On this particular answer the Part X complaint scheme bears no equivalence whatsoever to court proceedings. Teachers'

Pensions cannot stop time running within the Part X complaints procedure at all. That cannot be correct and seems to me to be directly contrary to the reasoning in Wakelin and ARJO Wiggins. Indeed it is directly contrary to the reasoning I have used to reject the November Letter as the cut-off. I therefore have no difficulty in rejecting this potential answer.

Proposition 1/Proposition 2

87. Accordingly, Proposition 1 must be correct. Some event in the complaints process under Part X must be the cut-off date for limitation purposes by analogy with the 1980 Act. And Proposition 1 is correct not merely by default of other alternatives. In my judgment it is correct in principle through applying by analogy the provisions of the 1980 Act in the complaints procedure (with the complaints procedure being an alternative to action in court). This is in accord with the underlying reasoning in Wakelin and ARJO Wiggins.
88. It is Proposition 2 which I find to be more difficult. As a starting point I am deeply reluctant to depart from the firm provisional view expressed by Nugee J. Nevertheless I have difficulties in equating the bringing of the complaint by Mr Webber to the Pensions Ombudsman with the issue of a claim form in an Action.
89. I deal, initially, with a side issue. As it seems to me the date of acceptance by the Pensions Ombudsman of Mr Webber's complaint (be it provisional acceptance or acceptance following an investigation on the merits) cannot possibly be the correct cut-off date. The acceptance is merely the equivalent of the actual issue of the claim

form by the court. As pointed out in Page at paragraph [33] it is delivery by the claimant of the relevant documentation to the relevant court (with the appropriate fee) which matters. Thereafter if, in error, a member of the court staff might have put the request for issue of the claim form into the shredder then still the action would have been brought for the purposes of the 1980 Act. To use the language of Tuckey LJ. in Barnes, the making of the complaint by Mr Webber is the unilateral act of Mr Webber; its acceptance by the Pensions Ombudsman is transactional. Obviously, if the Pensions Ombudsman refuses to accept the complaint then the complaint cannot proceed. But if the Pensions Ombudsman does accept the complaint then the complaint was made by Mr Webber on the date on which Mr Webber's Application Form was first received by the Pensions Ombudsman.

90. More widely, the essence of Nugee J.'s reasoning for his firm provisional view on Proposition 2 was that, with the formal bringing of a complaint by Mr Webber to the Pensions Ombudsman the question of the recovery of the overpayments was in issue between the parties before the Ombudsman. But there was, in fact, such an issue only when both (1) Mr Webber's complaint was accepted by the Pensions Ombudsman and (2) by letter dated 19 December 2011 (in response to the Pensions Ombudsman's letter of 26/28 November 2011) Teachers' Pensions indicated that it opposed the allegations in Mr Webber's complaint. The letter of 19 December 2011 was the very first "unilateral" activity of Teachers' Pensions in the complaints process. It was Teachers' Pensions first assertion in the complaints procedure of its entitlement to repayment of the overpaid pension. It may be said that until receipt of the letter of 26/28 November 2011 Teachers' Pensions knew nothing of the

complaint which Mr Webber had made. And the date on which they were informed of such complaint was entirely dependent on the speed at which the Pensions Ombudsman worked. But, conversely, and not knowing that Mr Webber had made any complaint at all to the Pensions Ombudsman, Teachers' Pensions did not choose to protect itself at any time prior to its letter of 19 December 2011 by issuing a protective claim form. On this basis Nugee J.'s formulation of Proposition 2 gives Teachers' Pensions a windfall benefit and improves its position over what it would have been in court.

91. I do not see how the making by Mr Webber of a complaint ought to avail Teachers' Pensions (which had done nothing to protect itself against limitation) against the running of time. Had Mr Webber made no complaint at all then time would have continued to run against Teachers' Pensions until it chose to issue a claim form. Is Teachers' Pensions to be given a windfall of the stopping of running of time by the making of a complaint by Mr Webber of which Teachers' Pensions was entirely unaware? I cannot see why, in principle, Teachers' Pensions should be given that windfall. To give the windfall would again be to apply in the Part X complaints process a different law of limitation to that contained in the 1980 Act. Obviously, in the Part X complaints process something other than the issue of a Claim Form has to be done to stop time running. But I cannot see why that something should be an act which is done by a person other than the true claimant (in this case Teachers' Pensions).

92. Further, here it was not guaranteed that there would be an “issue” between the parties until in response to the Pensions Ombudsman’s letter of 26/28 November 2011 Teachers’ Pensions confirmed it opposed the allegations. Such was, of course, the likely (indeed almost inevitable) response from Teachers’ Pensions. But it remains the fact that this was the first time within the complaints procedure under Part X that Teachers’ Pensions had engaged in any unilateral act of demanding repayment. It seems to me to be highly germane that Teachers’ Pensions could have issued a claim form to protect itself (but chose not to do so) whilst the complaint procedure was proceeding.

93. Accordingly, in my judgment the cut-off date for limitation purposes is the date of receipt by the Pensions Ombudsman of Teachers’ Pensions’ letter of 19 December 2011. I have already indicated (paragraph 30 above) that this was the Reply of Teachers’ Pensions as required by Rule 6 of the 1995 Rules. It is receipt of this Reply by the Pensions Ombudsman which is, in my judgment, “action brought” by Teachers’ Pensions by analogy with the 1980 Act.

94. In reaching my conclusions set out in paragraph 93 above I have carefully considered whether there is anything in section 35 of the 1980 Act which negates, or prohibits, that conclusion. The combined effect of sections 35(1) and (2) is that a claim by way of counterclaim is deemed to have been commenced on the same date as the original claim. By section 35(3) this automatic result is negated in the case of any counterclaim, other than an original counterclaim, by prohibiting the making of any such counterclaim after the expiry of the limitation period which would affect

enforcement of that counterclaim. Such second, or subsequent, counterclaims are allowable only in accordance with the rules of court.

95. The argument which might be advanced, therefore, is that the receipt by the Pensions Ombudsman of Mr Webber's complaint under Part X was "the claim" for the purposes of section 35 and the receipt by the Pensions Ombudsman of Teachers' Pensions' Rule 6 Reply (being the letter of 19 December 2011) was, effectively, the "counterclaim" for the purposes of section 35. That would mean, at least according to section 35, that Teachers' Pensions' "counterclaim" would be backdated to the date of receipt by the Pensions Ombudsman of Mr Webber's complaint.

96. Section 35 is, of course, concerned only with actions commenced in court. I do not think that it is directly applicable to complaints under Part X nor do I think that it affords any meaningful assistance by way of analogy. My reasons for saying this are as follows:-

- (1) Teachers' Pensions could never itself have brought a complaint against Mr Webber under Part X (see paragraph 55 above);
- (2) in these circumstances it would be strange in the extreme if Teachers' Pensions' Rule 6 Reply could be backdated, as an independent counterclaim, to a date when Teachers' Pensions could not itself have brought a complaint against Mr Webber. This contrasts with an action in court where the defendant could always have brought the subject matter of his counterclaim as an independent claim (with the defendant being the claimant);

- (3) accordingly, whilst it may be superficially attractive to seek to categorise Teachers' Pensions' Rule 6 Reply as a "counterclaim" for the purposes of section 35, that categorisation seems to me to be inaccurate. True it is, as here, that the overpaying pension trustees can in the Rule 6 Reply indicate that they want the overpaid pension back. But what the Pensions Ombudsman determines is the original complaint (as in this case made by Mr Webber) and not some form of independent "counterclaim" as made by Teachers' Pensions. In this case this was reflected in the two Determinations of Ms Jane Irvine as referred to in paragraphs 31 and 34 above. Ms Irvine held that Mr Webber's complaint against Teachers' Pensions should not be upheld. There was no Determination that Mr Webber should pay some specific sum of money to Teachers' Pensions on some specific date or within some specified timescale;
- (4) in these circumstances, to regard the Rule 6 Reply as a "counterclaim" engaging section 35 seems to me to be wholly inappropriate and grossly over formalistic. This would be to apply section 35 to a procedure (Part X) which does not equate with proceedings in court and in a way which seems to me to be unjustifiable. In terms of the stopping of the running of time for the purposes of the Part X complaint as made by Mr Webber I find it difficult to see why Teachers' Pensions should obtain the windfall benefit of favourable limitation treatment simply because it has served a Reply as required by Rule 6 of the 1995 Rules. The first, and only, "unilateral" activity of Teachers' Pensions was the provision to the Pensions Ombudsman of the Rule 6 Reply. As it seems to me, therefore, it is that first "unilateral" activity of Teachers'

Pensions which should, for the purposes of the Part X complaint by Mr Webber, stop time running against Teachers' Pensions. I fail to see why an inapposite analogy with section 35 should create a fiction in Teachers' Pensions' favour (when the first, and only, thing which Teachers' Pensions did was to provide the Rule 6 Reply to the Pensions Ombudsman).

Maladministration

97. In his oral submissions to me Mr Webber did not address this issue at all. However, after submissions had been concluded and when I was about to leave court Mr Webber indicated that he wished this aspect of his appeal to be considered as well. I can deal with it briefly.

98. Looking at Mr Webber's Skeleton Arguments in support of his appeal his complaints of "Maladministration" appear to be an amalgam of:

- (1) complaints about the incompetence of Teachers' Pensions in making overpayments to him at all;
- (2) complaints about the unfairness of the decision of Teachers' Pensions to seek recovery from him;
- (3) complaints about the unwillingness of Teachers' Pensions to enter into settlement negotiations with him or to offer him easy payment terms for a highly reduced amount;
- (4) complaints about the two Determinations of the Deputy Pensions Ombudsman;

- (5) complaints about the failure of Teachers' Pensions to follow the firm provisional view expressed by Nugee J. on limitation; and
- (6) complaints about the fact that matters have been so conducted that he has had to engage in three appeals.

99. I have already pointed out above how in her first Determination the Deputy Pensions Ombudsman identified one element of pure Maladministration but considered (correctly in my judgment) that Mr Webber had suffered no loss thereby. Before the Deputy Pensions Ombudsman in her second Determination were all issues of pure "Maladministration" and of law relating to recovery of the overpaid pension. The Deputy Pensions Ombudsman considered all issues before her and (save for the limitation issue) her Determination was upheld by Nugee J. If Mr Webber considered that the Deputy Pensions Ombudsman in her second Determination had failed properly to deal with some allegation of "Maladministration" then that is a matter which he should have raised before Nugee J.

100. I have set out, above, the terms of the Order of Nugee J. which remitted matters to the Pensions Ombudsman for his Determination (which is now the subject matter of the appeal before me). That Order did not remit any issue of "Maladministration".

101. As it seems to me, therefore, Mr Webber's complaints of "Maladministration" have already been adjudicated on and were not made the subject of his appeal to Nugee J. Nor were they remitted to the Pensions Ombudsman. The Pensions Ombudsman was quite right to refuse to consider Mr Webber's submissions on "Maladministration" in his Determination of 2 February 2016.

Determination

102. I therefore dismiss Mr Webber's appeal on the issue of "Maladministration" but allow his appeal on the limitation issue.

103. However, this still leaves issues as to the form of Order which I should make.

104. First, Mr Webber never argued before me (or in his Appellant's Notice) that the cut-off date should be the one which I have found. Rather, by section 8 of his Appellant's Notice he sought an order that "the applicable date of recovery of overpayment is 26 November 2011".

105. I have not as yet heard submissions on whether, granted the way in which he presented his appeal, Mr Webber should be entitled to the benefit of the slightly later date which I have identified or should be confined to the date of 26 November 2011.

106. Next, I do not know the date on which the letter of 19 December 2011 was received by the Pensions Ombudsman's Office.

107. Nor in his Determination of 2 February 2016 did the Pensions Ombudsman identify any figure for the quantum of overpayments repayable by Mr Webber if the relevant cut-off date be 26 November 2011 (or the later date which I have identified above).

I am extremely loath to refer this matter back to the Pensions Ombudsman for a

fourth time simply for the purposes of calculating the relevant figures. But, subject to any further submissions I might hear, it seems to me that I will have to do so (unless the parties can agree) since my powers under section 151(4) do not extend to the finding of primary facts.

108. Clearly, if there is a remission to the Pensions Ombudsman then what I am about to say does not apply. But if the parties are able to agree on dates and figures then I will require submissions on the form which my Order should take. I am conscious that any determination or direction of the Pensions Ombudsman is to be enforceable in the County Court as if it were a judgment or order of that court (section 151(5) of the 1993 Act). It is not presently clear to me what form any Order I make should take in the light of section 151(5). If necessary I will hear further submissions on the issues I have raised above.

109. The Pensions Ombudsman concluded his Determination of 2 February 2016 by expressing his expectation that Teachers' Pensions and Mr Webber would now enter into sensible discussions about how the money should be repaid. I echo that expectation. Whilst for the reasons set out by Nugee J. Mr Webber is most certainly not free from criticism, still Teachers' Pensions cannot be happy about how it came to overpay Mr Webber for so long without realising, as it should have done, what it was doing. Mr Webber has had to battle long and hard against the opposition of Teachers' Pensions to get to the position in which he finds himself today. I would very much hope that, in these circumstances, Teachers' Pensions would take a highly

charitable view of any modest but sensible repayment programme put forward by
Mr Webber.