



Neutral Citation Number: [2023] EWCA Civ 1258

Case No: CA-2022-001913

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
BUSINESS LIST: PENSIONS (ChD)

Mr Justice Leech
[2022] EWHC 2130 (Ch)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 01/11/2023

Before :

SIR JULIAN FLAUX, CHANCELLOR OF THE HIGH COURT
LADY JUSTICE ASPLIN
and
LADY JUSTICE WHIPPLE

Between :

THE PENSIONS OMBUDSMAN

Appellant

- and -

(1) CMG PENSION TRUSTEES LIMITED
(2) CGI IT UK LIMITED

Claimants/
Respondents

Paul Newman KC and Michael Ashdown (instructed by Pensions Ombudsman) for the
Appellant
Andrew Short KC and Elizabeth Grace (instructed by Addleshaw Goddard LLP) for the
First Respondent

Hearing date: 10 October 2023

Approved Judgment

This judgment was handed down remotely at 12 noon on 1 November 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Lady Justice Asplin:

1. This appeal is concerned with whether the Pensions Ombudsman is a “competent court” for the purposes of section 91(6) Pensions Act 1995 (“PA 1995”). The question arose in the context of a Part 8 Claim issued by CMG Pension Trustees Limited, the First Respondent to this appeal (the “Trustee”). The Trustee sought the determination of a series of complex questions concerning the construction and effect of the rules of the CMG UK Pension Scheme (the “Scheme”). The Defendant to the Part 8 Claim and the Second Respondent on appeal is the principal employer in respect of the Scheme, CGI IT UK Limited (the “Principal Employer”).
2. All of the questions were addressed and determined by Leech J in a detailed and comprehensive judgment the citation of which is [2022] EWHC 2130 (Ch). The majority of the questions which the judge was asked to address are irrelevant for the purposes of this appeal.

Background

3. The judge’s interpretation of Rule 5.11 of the Scheme Rules, however, led to the conclusion that some members and beneficiaries of the Scheme had received an overpayment of benefits. It was necessary, therefore, to address the final set of questions posed in the Part 8 Claim. They were concerned with the circumstances in which a member or beneficiary has been paid sums to which he/she is not entitled in accordance with the Scheme Rules and the proper construction of section 91(6) PA 1995 in those circumstances. Section 91(6) is concerned, amongst other things, with set-off against pension benefits. It was accepted that an equitable right of recoupment of overpaid benefits would fall within its terms.
4. The judge was asked: (i) whether in accordance with section 91(6) PA 1995 the Trustee must obtain an order of a “competent court” before recouping sums allegedly overpaid where there is a dispute with the member about the amount to be recouped or the rate of deduction from future pension payments which should be applied; (ii) whether it was necessary to obtain an order that the person repay the overpayment in question or whether a declaration that there had been an overpayment to a particular extent would be sufficient; and (iii) whether for these purposes and for the purposes of section 91(6) PA 1995, the Office of the Pensions Ombudsman is a “competent court”.
5. In summary, the judge held that: (i) an order of a competent court is required; (ii) a declaration is sufficient and an order for repayment is not required; and (iii) that the Office of the Pensions Ombudsman is not a “competent court” for the purposes of section 91(6) PA 1995. The answers form part of his Order dated 11 August 2022, in accordance with paragraph 2 of that Order. Neither the Trustee nor the Principal Employer sought permission to appeal the judge’s Order.
6. The Pensions Ombudsman was not a party to the Part 8 Claim. Having been advised that the judge was wrong in law in relation to whether the Office of the Pensions Ombudsman is a “competent court”, he sought permission to appeal in relation to this issue. The Pensions Ombudsman was granted permission to appeal and an extension of time to file an Appellant’s Notice by Lewison LJ by an Order sealed on 24 February 2023. Permission was granted on condition that the Pensions Ombudsman

pay the Trustee's reasonable costs of resisting the appeal. The Principal Employer has taken no part in this appeal.

The Judge's decision in more detail

7. The judge decided that, as a matter of law, the equitable right of recoupment did not require a member who had been overpaid to repay anything to the scheme and noted that it was difficult to apply section 91(6) to that equitable right because the section (when read with section 91(5)(f)) makes reference to a "monetary obligation" on the part of the member. He concluded that the phrase "the obligation in question" which appears in section 91(6) itself must be interpreted in a very broad sense as "an obligation to give effect to the charge, lien or set-off" [150] – [151]. He held that it followed that it was unnecessary for the Trustee to obtain a money judgment or an order for payment and that it was "enough for it to satisfy a court of competent jurisdiction that it is entitled to exercise the right". He went on: "I am satisfied that the requirements of section 91(6) would be met if the Trustee obtained a declaration against Member Y that it was entitled to exercise its right to recoup £1,000 by deducting the sum of £8.33 per month from future instalments of pension beginning immediately." He also noted that Arnold J had thought the same and referred to the last sentence of [166] in *Burgess v BIC UK Ltd* [2018] EWHC 785 (Ch), [2018] Pens LR 13 [152].
8. The judge went on to consider the question of whether the Office of the Pensions Ombudsman is a "competent court" at [153] – [160] of his judgment and concluded at [172] that it was not. He referred to Arnold J's decision in *Burgess* in which Arnold J had stated at [168] that the determination of the Pensions Ombudsman did not itself constitute "an order of a competent court" because the Ombudsman is not a court. The judge stated that he was not satisfied that the passage from *Burgess* should be treated as no more than obiter dictum and concluded that it formed part of the ratio of the decision [157] and [158]. He went on to note the divided academic commentary in relation to the *Burgess* decision [159] but stated that it did not affect his conclusion that Arnold J's decision on this point formed part of the ratio of his decision [160].
9. At [160], he also decided that he was not satisfied that the decision in *Burgess* was wrong or that he should refuse to follow it and set out six reasons for his decision. In summary, they were:
 - (i) Whether a tribunal is to be treated as a court for the purposes of a statute or rule, depends on the context: *Watson v Hemingway Design Ltd* [2021] ICR 1034 per Bean LJ at [23]. However, the fact that the Divisional Court and the Court of Appeal may have found that an industrial tribunal or an employment tribunal should be treated as a court in other contexts, does not demonstrate that the decision in *Burgess* is wrong [160(1)];
 - (ii) The relevant context is the enforcement of trustee rights which have been circumscribed by statute. He went on: "A trustee may not now enforce those rights where there is a dispute without "an order of a competent court". I have held that in the case of the equitable right of recoupment section 91(6) extends to a declaration that the Trustee is entitled to exercise a self-help remedy. But the sub-section also extends to the enforcement of a charge or lien or other rights of set off. Moreover, the dispute may relate to the question whether the

person entitled has been guilty of criminal, negligent or fraudulent conduct or a breach of trust (in the capacity of a trustee).” [160(2)];

- (iii) The Pensions Ombudsman only has jurisdiction to investigate a dispute of fact or law if it is referred to him by or on behalf of a potential or actual beneficiary and not at the behest of a trustee: section 146(1A) Pension Schemes Act 1993 (“PSA 1993”). It seems unlikely that Parliament would have extended the power of enforcement in section 91(6) to the Pensions Ombudsman if the Trustee itself had no right to apply for enforcement [160(3)];
- (iv) As Arnold J pointed out at [168] in *Burgess*, the PSA 1993 does not treat the Pensions Ombudsman as a court. Section 150(8) defines “the court” as the County Court in England and Wales. Section 150 confers a number of analogous powers but it does not describe the Pensions Ombudsman as a court as such [160(4)] [160(6)];
- (v) Section 151(5) PSA 1993 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”. It follows that the Pensions Ombudsman has no direct powers of enforcement and any determination or direction and any application for committal for breach of a determination or direction or for other enforcement remedies, must be brought in the County Court (sections 150(4) and (5)) [160(5)]; and
- (vi) The drafter of section 91(6) would have had the distinction between the judicial functions of the court and the wider powers of investigation of the Pensions Ombudsman as well as the different enforcement regimes in mind and if Parliament had intended to extend section 91(6) to a determination by the Pensions Ombudsman, the sub-section might have been expected to make express provision to that effect.

Grounds of Appeal

- 10. There are ten grounds of appeal. They include an alleged failure on the part of the judge to give proper weight to the significance of the need for a “dispute” for the purposes of section 91(6) PA 1995 and the fact that the dispute will have been determined by the Pensions Ombudsman in accordance with his statutory powers.
- 11. In their skeleton argument, Mr Newman KC and Mr Ashdown distilled the remainder of the grounds under five heads. They are that the judge: (i) wrongly treated *Burgess* as authority from which he should not depart rather than a mere obiter dictum and allowing this to colour his approach to the question; (ii) wrongly failed to give proper weight to the judicial character of the Pensions Ombudsman’s statutory functions and the status of his determinations; (iii) wrongly treated two specific limitations of the Pensions Ombudsman’s functions, namely that he cannot enforce his own determinations and that trustees cannot refer disputes to him as indicating that his office is not a “competent court”; (iv) failed to attribute proper significance to the Pensions Ombudsman’s statutory function of resolving disputes of fact and law between scheme managers, including trustees, and members; and (v) failed to give proper weight to the practical consequences of construing section 91(6) so that the

Pensions Ombudsman is not a “competent court”, requiring greater resort to litigation as a result.

12. In oral submissions, Mr Newman focussed on the Pensions Ombudsman’s statutory functions, the proper construction of section 91(6) PA 1995 in the light of its statutory context and the practical consequences of the judge’s decision. I shall do the same.

The task of statutory construction

13. As this appeal is concerned with a question of statutory construction, it is important to have the nature of that exercise in mind. The task was described by Lord Burrows and Lady Arden in *Kostal UK Ltd v Dunkley* [2021] UKSC 47, [2022] 2 All ER 607 at [109] in the following terms:

“The modern approach to statutory interpretation requires the courts to ascertain the meaning of the words in a statute in the light of their context and purpose... In carrying out their interpretative role, the courts can look not only at the statute but also, for example, at the explanatory notes to the statute, at relevant consultation papers, and, within the parameters set by *Pepper v Hart* ..., at ministerial statements reported in Hansard.”

In *R (O) v Secretary of State for the Home Department, R (Project for the Registration of Children as British Citizens) v Secretary of State for the Home Department* [2022] UKSC 3, [2023] AC 255, Lord Hodge summarised the correct approach as follows:

“29. The courts in conducting statutory interpretation are “seeking the meaning of the words which Parliament used”: *Black-Clawson International Ltd v Papierwerke Waldhof-Aschaffenburg AG* [1975] AC 591, 613 per Lord Reid. More recently, Lord Nicholls of Birkenhead stated: “Statutory interpretation is an exercise which requires the court to identify the meaning borne by the words in question in the particular context.” (*R v Secretary of State for the Environment, Transport and the Regions, Ex p Spath Holme Ltd* [2001] 2 AC 349, 396). Words and passages in a statute derive their meaning from their context. A phrase or passage must be read in the context of the section as a whole and in the wider context of a relevant group of sections. Other provisions in a statute and the statute as a whole may provide the relevant context. They are the words which Parliament has chosen to enact as an expression of the purpose of the legislation and are therefore the primary source by which meaning is ascertained...

30. External aids to interpretation therefore must play a secondary role. Explanatory notes, prepared under the authority

of Parliament, may cast light on the meaning of particular statutory provisions. Other sources ... may disclose the background to a statute and assist the court to identify not only the mischief which it addresses but also the purpose of the legislation, thereby assisting a purposive interpretation of a particular statutory provision. The context disclosed by such materials is relevant to assist the court to ascertain the meaning of the statute, whether or not there is ambiguity and uncertainty, and indeed may reveal ambiguity or uncertainty: Bennion, Bailey and Norbury on Statutory Interpretation, 8th ed (2020), para 11.2. But none of these external aids displace the meanings conveyed by the words of a statute that, after consideration of that context, are clear and unambiguous and which do not produce absurdity.

31. Statutory interpretation involves an objective assessment of the meaning which a reasonable legislature as a body would be seeking to convey in using the statutory words which are being considered. Lord Nicholls, again in *Spath Holme* [2001] 2 AC 349, 396, in an important passage stated: “*The task of the court is often said to be to ascertain the intention of Parliament expressed in the language under consideration. This is correct and may be helpful, so long as it is remembered that the ‘intention of Parliament’ is an objective concept, not subjective. The phrase is a shorthand reference to the intention which the court reasonably imputes to Parliament in respect of the language used. It is not the subjective intention of the minister or other persons who promoted the legislation. Nor is it the subjective intention of the draftsman, or of individual members or even of a majority of individual members of either House. ... Thus, when courts say that such-and-such a meaning ‘cannot be what Parliament intended’, they are saying only that the words under consideration cannot reasonably be taken as used by Parliament with that meaning.’”*

Statutory landscape

14. Restrictions upon the exercise of a charge, lien or set-off against short service pension benefits were first introduced in Schedule 16 paragraph 18 of the Social Security Act 1973 (“SSA 1973”). It prohibited any rule enabling a member’s employer to exercise any description of charge, lien or set-off on or against such benefits except “for the purpose of enabling the employer to obtain the discharge by the member of some monetary obligation due to the employer and arising out of a criminal, negligent or fraudulent act or omission by the member”. The exercise of such a right was made subject to various conditions set out in paragraph 18(2). In particular, the member was entitled to a certificate showing the amount retained or recovered and its effects on his benefits or prospective benefits (paragraph 18(2)(b)) and paragraph 18(2)(c) provided that:

“in the event of any dispute as to the amount to be retained or recovered, the employer is not entitled to enforce the charge,

lien or set-off except after the obligation has become enforceable under an order of a competent court or the award of an arbitrator or in Scotland an arbiter to be appointed (failing agreement between the parties) by the sheriff”.

The term “competent court” was not defined. These provisions were subsequently re-enacted in section 79 PSA 1993 and the wording of paragraph 18(2)(c) was replicated in section 79(4)(c) PSA 1993.

15. As Mr Short KC, who appeared with Ms Grace on behalf of the Trustee, pointed out in his written argument, the Report of the Pension Law Review Committee Cm 2342-1, presented to Parliament in September 1993, proposed that the protections afforded to short service benefit be extended to the entirety of a member’s pension benefits. It stated, at 4.14.30, that:-

“We consider these rules as broadly satisfactory as far as they go. However, the requirement that a court order be obtained does not apply to long service benefit, even in respect of the GMP element. There seems no good reason to deny this protection to long service benefit, and we recommend that the statutory provisions be extended accordingly”.

This recommendation was accepted (see *Security, Equality, Choice: the Future for Pensions*, Cm 2594-II (1994) at Recommendation 166) and as a result, provision was made for controlling the alienation of occupational pension scheme rights (by assignment, forfeiture, bankruptcy etc) in sections 91 to 94 of the PA 1995.

16. Subject to section 91(5), section 91(1) PA 1995 contains a prohibition on the alienation of a pension under an occupational pension scheme or the right to future pension under such a scheme. It prohibits the assignment, commutation or surrender of such rights or the charge, the exercise of any lien or set-off in respect of such rights. This prohibition is subject to various exceptions which are set out in sections 91(4) and (5) PA 1995. Section 91(7) provides that the section is subject to section 159 PSA 1993 which is concerned with the inalienability of guaranteed minimum pensions.
17. The exceptions in section 91(4) are not relevant for these purposes. We are concerned with those in section 91(5) and particularly with section 91(5)(f). For the sake of completeness, I should mention that section 91(5)(a) creates an exception for certain assignments; section 91(5)(b) excepts certain surrenders of pension rights; and section 91(5)(c) excepts certain commutations, for example, in the event of serious ill-health. I refer to sections 91(5)(d), (e) and (f) in detail below.
18. Section 91(6) contains almost identical provisions to those which had been enacted in paragraph 18 of Schedule 16 SSA 1973 and section 79 PSA 1993 in relation to short service benefits and uses substantively the same wording. The combination of section 91(6) and 91(5)(d) provide that section 91(1) does not apply to a charge, lien or set-off for the purposes of enabling the employer to obtain the discharge of a monetary obligation due to the employer arising out of a criminal, negligent or fraudulent act or omission by the person entitled to the benefits, that a certificate of the deduction must be provided and that where there is a dispute, the charge, lien or set-off must not be

exercised unless the obligation has become enforceable under an order of a competent court. Section 91(5)(e) takes the same form but is concerned with a monetary obligation due to the scheme, arising out of a criminal, negligent or fraudulent act or omission, or, where the person in question is a trustee, a breach of trust by the person in question.

19. The exception in relation to a charge, lien or set-off arising from an overpayment, with which we are concerned, is at section 91(5)(f). It was introduced with effect from 6 April 2005, by section 266 Pensions Act 2004. The Explanatory Notes to section 266 state:

“This section amends section 91(5), at subsection (5)(f), to provide for a further exception to section 91(1), where a payment of a pension is made in error, giving rise to a monetary obligation in favour of the scheme. This amendment brings section 91 into line with what had always been the policy intent.”

20. The provisions with which we are directly concerned are as follows:

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

...

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

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

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

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

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

Although certain definitions appear in section 94, as in the predecessor statutes, the term “competent court” is not defined.

The Pensions Ombudsman and his jurisdiction

21. The Office of Pensions Ombudsman was created in 1990 by section 59B of the Social Security Pensions Act 1975 (as inserted by the Social Security Act 1990). The statutory regime is now contained in Part X PSA 1993. Section 145 PSA 1993 provides that for the purposes of conducting investigations in accordance with Part X PSA 1993 there shall be a commissioner known as the Pensions Ombudsman.
22. The Pensions Ombudsman’s functions are set out at section 146 PSA 1993. In summary, the Pensions Ombudsman may investigate and determine: complaints made to him/her by or on behalf of an authorised complainant (broadly, members, prospective members and other beneficiaries) who alleges that they have sustained injustice in consequence of maladministration in connection with any act or omission of a person responsible for the management of an occupational (or personal) pension scheme (section 146(1)(a)); complaints made by or on behalf of a person responsible for the management of an occupational pension scheme in connection with an act or omission of another person responsible for its management alleging maladministration or in connection with any act or omission of any trustee or manager of another scheme alleging maladministration of the other scheme (sections 146(1)(b) (i) and (ii)); and complaints made by or on behalf of an independent trustee in relation to an act or omission of the other trustees of the scheme or former trustees, alleging maladministration (section 146(1)(b)).
23. The Pensions Ombudsman can also investigate and determine any dispute of fact or law in relation to an occupational or a personal pension scheme between a person responsible for the management of the scheme and an actual or potential beneficiary as long as the dispute is referred to the Pensions Ombudsman by the actual or potential beneficiary, or on that person’s behalf (section 146(1)(c) and section 146(1A)). Although he can also investigate complaints or references made to him by those responsible for the management of such a scheme (including independent trustees), such complaints can only be made against other responsible persons (including other trustees who are not independent trustees), under section 146(1)(b) to 146(1)(f), which was introduced with effect from 6 April 1997 by section 157(2) PA 1995.
24. To be clear, it is common ground that a trustee or manager of a scheme cannot refer a dispute with a member in relation to an alleged overpayment of pension benefits to the Pensions Ombudsman or otherwise complain against a member in their capacity as member (although a trustee could make a complaint about a member who was, for example, a former trustee in relation to their capacity as a former trustee).
25. Furthermore, the Pensions Ombudsman cannot investigate any complaint if, before the making of the complaint, proceedings have begun in any “court or employment tribunal” in respect of matters which would be the subject of the investigation (section 146(6)). If any party to an investigation subsequently commences any legal proceedings in any court against any other party to the investigation, in respect of any matters which are the subject of the complaint or dispute, any party may apply to that court to stay the proceedings (section 148(2)).

26. The procedure to be followed by the Pensions Ombudsman in relation to any investigation is set out in sections 149 and 150 PSA 1993 and in regulations. Section 150(2) provides that for the purposes of an investigation, the Pensions Ombudsman “shall have the same powers as the court” in relation to the attendance and examination of witnesses and the production of documents. Sections 150(4), (5) and (8) provide that where a person who obstructs an investigation or otherwise behaves in a way which would amount to contempt of court, the Pensions Ombudsman may certify the offence to the court, the County Court may inquire into the matter, including hearing any witnesses, and deal with the person “in any manner in which the court could deal with him if he had committed the like offence in relation to the court.”
27. Section 151 PSA 1993 is concerned with the Pensions Ombudsman’s decisions, having conducted an investigation. In summary, it provides that:
- (i) a written statement of the determination of the complaint or dispute containing reasons must be sent to the complainant and the responsible person (section 151(1));
 - (ii) where a determination has been made, the Pensions Ombudsman may direct any person responsible for the management of the scheme to take or refrain from taking steps specified in the determination (section 151(2)). (There is no power to make directions in relation to the conduct of a member or beneficiary);
 - (iii) the determination and any direction given are binding and final upon the complainant and the person responsible for the management of the scheme and those claiming under or through them, subject to an appeal on a point of law to the High Court or Court of Session (section 151(3) and (4)); and
 - (iv) a determination or direction shall be enforceable “in England and Wales, in the county court as if it were a judgment or order of that court” (section 151(5) (a)).
28. In relation to enforcement, Mr Short referred us to the County Court (Pensions Ombudsman) (Enforcement of Directions and Determinations) Rules 1993/1978 (the “Enforcement Rules”). They were made on 4 August 1993 and do not appear to have been amended since they came into force on 1 September 1993. They were made in exercise of the powers conferred upon the Secretary of State by section 59J (1) and (2) Social Security Pensions Act 1975 (the “SSPA 1975”) and all other enabling powers. In rule 1, the SSPA 1975 is defined as the “principal Act” and it is stated that an Order referred to by number means the Order so numbered in the County Court Rules 1981. Rule 2 is concerned with the enforcement of a direction for the payment of money made by the Pensions Ombudsman and rule 3 applies where the Pensions Ombudsman directs a person to take or refrain from taking a step. In both cases, the rules provide that the County Court Rules 1981 concerning enforcement shall apply as if the direction were a County Court direction or order and that the applicant for enforcement must file a copy of the direction certified by the Pensions Ombudsman to be a true copy of the original with his enforcement application.

29. The relevant provisions of the SSPA 1975 were consolidated in the PSA 1993 and the County Court Rules 1981 have been repealed to be replaced by the Civil Procedure Rules. CPR Rule 70 is concerned with the enforcement of judgments and orders. It makes no express reference to the Pensions Ombudsman. CPR Rule 70.5(1)(a), however, is concerned with circumstances in which an enactment provides that: “a decision of a court, tribunal, body or person other than the High Court or the County Court . . . may be enforced as if it were a court order or that any sum of money payable under that decision . . . may be recoverable as if payable under a court order”. The detailed procedure and the way in which the application for enforcement must be made is set out in the remainder of CPR Rule 70 and the Practice Direction. Suffice it to say that where CPR Rule 70 applies, a copy of the decision to be enforced must be filed with the application and the matter will be dealt with by a court officer without a hearing. As to the latter, see CPR Rule 70.5(7).

Submissions in brief

30. In summary, Mr Newman’s first submission was that section 91(6) PA 1995 does not bite at all where a member has referred a dispute about the existence, extent or rate of any set-off which a trustee proposes to make from pension benefits by way of equitable self-help because once the Pensions Ombudsman has determined that dispute it no longer exists and therefore, the section, which on its own terms applies where “there is a dispute”, is no longer relevant. The dispute is resolved as a result of the Pensions Ombudsman’s determination and/or directions which are final and binding, subject to an appeal on a point of law, and therefore, he says that there is no need to follow the procedure in section 91(6). There is no longer a dispute.
31. Mr Newman’s second and alternative submission turns upon the fact that as the judge pointed out at [151] and [152] of his judgment, a right to equitable recoupment does not sit neatly with section 91(5)(f) and section 91(6) because in the strict sense, there is no “monetary obligation” due from the beneficiary/member to the scheme. As I have already mentioned, the judge concluded at [151] that the “obligation” referred to in section 91(6) must be interpreted in the broad sense of an obligation to give effect to the charge, lien or set-off and that it is enough for the trustee to satisfy a competent court that it is entitled to exercise the right to recoup [152].
32. Mr Newman submitted that the entitlement to give effect to the self-help remedy of recoupment is passive and there is no need for enforcement by way of an order and nothing more than the determination is necessary. Accordingly, there is no need to enforce the Pensions Ombudsman’s determination in the County Court and his determination and directions are sufficient. They are valid, effective and binding when made: section 151(3) PSA 1993 and they are “enforceable” for the purposes of section 91(6).
33. He says that this makes complete sense because the Pensions Ombudsman’s jurisdiction and procedure is intended to provide an informal, quick and cost- free regime principally for members and beneficiaries of occupational pension schemes and it cannot have been intended that further costly, formal and lengthy proceedings should be necessary. Furthermore, he emphasised that section 151(3) PSA 1993 provides that the Pensions Ombudsman’s determinations and directions are final and binding and, therefore, it cannot be right that section 91(6) would require the trustees of a scheme to commence a separate action in the County Court and, in effect,

relitigate the dispute already determined by the Pensions Ombudsman following a reference by the member.

34. In the final alternative, Mr Newman submitted that if, in addition to the determination or direction by the Pensions Ombudsman, enforcement is necessary pursuant to section 151(5) PSA 1993, all that would be required would be a rubber stamping exercise. A County Court officer, having received a certified copy of the determination/direction, would make an order, as if the determination/direction were a judgment or order of the County Court itself. It would not require the trustee to commence a claim, nor would it require judicial input of any kind, the substantive decision having already been made by the Pensions Ombudsman.
35. Furthermore, in their skeleton argument, Mr Newman and Mr Ashdown stated that the judge gave too little weight to the practical consequences of deciding that section 91(6) applies in such circumstances and that “competent court” means the County Court. The Pensions Ombudsman is concerned, not only about the cost and delay if further court proceedings are necessary but also that his jurisdiction will be undermined because in cases of this kind, a trustee may well choose to take the matter to court in the first place, rather than wait for it to be determined by the Pensions Ombudsman at the behest of the member. This was a further reason for doubting the judge’s conclusion.
36. Mr Short, in response, appeared to go as far as to say that even if the Pensions Ombudsman can determine a question of recoupment, that determination cannot be enforced whether under the Enforcement Rules or section 151(5) PSA 1993. He submitted that: the Pensions Ombudsman has no jurisdiction to require a member to take any step or make a payment; he does not have power to grant declarations; and cannot direct the trustee that it “may” recover an overpayment as opposed to expressly directing that step to be taken. Further, his determination is purely as to whether the member has won or lost and is often in narrative form including reasons; that does not equate to something which can be enforced and cannot be characterised as an order of a competent court rendering a monetary obligation enforceable for the purposes of section 91(6). Accordingly, Mr Short submits that it is necessary to seek a declaration as to overpayment and an order for repayment in the County Court and that that exercise would not be purely administrative, even if the Pensions Ombudsman has been seized of the issue.
37. Further, he submits that the Office of the Pensions Ombudsman is not a “competent court” because: the Pensions Ombudsman’s procedure is different from a court and he conducts investigations; only a member can refer the issue of overpayment and recoupment to the Pensions Ombudsman and therefore, the procedure is one-sided; the Pensions Ombudsman cannot enforce a monetary obligation or require a payment to be made by a member of a scheme; and it would be odd if the Office of the Pensions Ombudsman were a “competent court” for the purposes of section 91(6) because there would be difficulty differentiating between the Pensions Ombudsman’s reasons and his determination, and it is a matter of chance whether a dispute in relation to recoupment is referred to him by a member.

Discussion and Conclusions

38. It goes without saying that it is necessary to determine the meaning of the phrase “competent court” and to construe section 91(6) itself in the context of section 91 as a whole and the legislative framework of which it forms part. The legislative history of the wording used in section 91(6) and the relevant legislative landscape, including the nature and extent of the Pensions Ombudsman’s jurisdiction, are all directly relevant to its proper interpretation.
39. In this regard, I note the wider context in which the section arises. As the judge pointed out, although the Pensions Ombudsman has power to determine questions of fact and law (section 146(1)(c) PSA 1993, subject only to an appeal on points of law), he also conducts informal investigations into maladministration on an inquisitorial basis which are not comparable with the functions of a court. (See *Miller v Stapleton* [1996] 2 All ER 449 per Carnwath J at 462 and *Westminster City Council v Haywood (No 2)* [2000] 2 All ER 634, per Lightman J at 645 in this regard, although they are not concerned directly with section 91(6) PA 1995.)
40. A more powerful indicator as to whether the Office of the Pensions Ombudsman is a “competent court”, is, as the judge observed, that save in circumstances which are not relevant for present purposes, the Pensions Ombudsman only has jurisdiction where a matter is referred by a member or beneficiary or on behalf of such a person. The jurisdiction in this regard is one-sided, therefore and accordingly, is unlike that of a court. As the judge observed at [160(3)] of his judgment, it seems unlikely that Parliament would have intended the reference to “competent court” in section 91(6) to include the Pensions Ombudsman in circumstances in which a trustee has no power itself to apply to the Pensions Ombudsman for such an order.
41. Furthermore, I agree with the judge that the phrase “competent court” must be interpreted in the light of the distinctions in section 150 PSA 1993. As I have already mentioned, section 150(2) PSA 1993 states expressly that for the purposes of an investigation the Pensions Ombudsman “shall have the same powers as the court” in specified respects. Section 150(4) is concerned with conduct which “would constitute contempt of court” and section 150(5) is concerned with how the court must deal with an offence certified under section 150(4). It may deal with the offender as “if he had committed the like offence in relation to the court”. The “court” is defined for the purposes of section 150 as the County Court (section 150(8) PSA 1993). It seems to me that these distinctions between the court, in the sense of the County Court, and the jurisdiction of the Pensions Ombudsman, weigh against the Pensions Ombudsman’s interpretation of “competent court” in section 91(6) PA 1995.
42. In any event, if one turns to the natural and ordinary meaning of the words used in section 91(6) PA 1995 when read with section 91(5), viewed in the light of section 151(5) PSA 1993, it seems to me that they are clear.
43. First, I disagree with both Mr Newman’s argument that where the dispute has been considered and resolved by the Pensions Ombudsman, section 91(6) does not bite at all and his submission that it is sufficient that any determination and/or direction is “enforceable”.
44. Although the “dispute” is referred to in the present tense, by the use of “is”, if one reads the tail end of section 91(6) as a whole, it is clear that where there is a dispute as to its amount, the charge, lien or set-off cannot be exercised unless the obligation in

question “has become enforceable under an order of a competent court” (emphasis added). It seems to me that despite the use of “is” in the earlier part of the wording, the use of “has become” leads to the conclusion that the set-off or other remedy cannot be exercised until the obligation is enforceable, which occurs only once the dispute, referred to in the opening phrase in the present tense, has been resolved.

45. The resolution of the dispute is insufficient to satisfy the tail end wording. Even if the dispute is determined by the Pensions Ombudsman, he has no powers of enforcement. It seems to me, therefore, that despite the fact that the dispute may have been resolved, section 91(6) would not have been satisfied. There is no doubt that the Pensions Ombudsman’s determinations and directions are enforceable in the County Court: section 151(5) PSA 1993. It seems to me, therefore, that in a case in which the Pensions Ombudsman has determined the dispute, the ordinary and natural meaning of the phrase “has become enforceable under an order of a competent court” when read in the light of section 151(5) PSA 1993, is that an order has been made by the County Court stating the amount of the overpayment and the extent and rate of the set-off.
46. Such an interpretation is consistent with the wording which appeared in relation to short service benefit in paragraph 18(2)(c) SSA 1973. (See [14] above.) More to the point, if Mr Newman were correct and the resolution of the dispute by the Pensions Ombudsman were sufficient to disapply the tail end wording to section 91(6), that wording would be robbed of any real meaning and the protection would be undermined. The protection afforded to the member is that the recoupment by way of set-off, “must not be exercised” unless the obligation, in the sense of the decision that there has been an overpayment which may be recouped at a particular rate over a particular period, has become enforceable by an order of a competent court (emphasis added).
47. In my judgment, Mr Newman’s conclusion that nothing more than a determination by the Pensions Ombudsman is needed because in these circumstances, the recoupment remedy is passive and the Pensions Ombudsman’s determination is “enforceable” albeit not enforced, must be wrong, therefore. It requires one to interpret the phrase in section 91(6) as if it read “has become capable of enforcement . . .”. That is not what the words say, nor is it their natural and ordinary meaning.
48. Secondly, unlike the judge, I consider that where section 91(5)(f) applies, the reference to the “obligation in question” in section 91(6) is to the “monetary obligation due from the person in question to the scheme arising out of a payment made in error in respect of the pension” referred to in section 91(5)(f) itself. Although the wording does not fit neatly with an overpayment of benefits, it seems to me that the payment of benefits in error leads to a monetary obligation owed to the scheme, even though that obligation may be remedied by recoupment rather than any payment by the member. The member or beneficiary has received benefits early by way of the overpayments. Those overpayments are then subject to equitable recoupment against future pension. That construction is consistent with the 2005 legislative amendment, the purpose of which was to bring section 91 in line with the policy intent by including a further exception for cases of overpayment (see paragraphs 19-20 above).
49. In circumstances in which the Pensions Ombudsman has been seized of the dispute to which section 91(6) relates, it is also important to take the remainder of section 151

PSA 1993 into account. Section 151(1) PSA 1993 provides that the Pensions Ombudsman has power to make a determination, giving reasons for it and section 151(2) provides that where a determination is made, the Pensions Ombudsman may direct the trustee/manager of the scheme “to take or refrain from taking such steps as he may specify . . .”. The determination, therefore, is separate from the reasons for it. Mr Short submitted that in a case of this kind, the determination would be unenforceable because it would amount to reasons and that the matter would have to be adjudicated upon by a court in order to satisfy section 91(6). It seems to me that he is conflating determinations and the directions made as a result with the reasons for them. He perhaps does so because of the fact that Pensions Ombudsman’s communications are intended to be easily understood and are relatively informally worded.

50. In a case which falls within section 91(5)(f), the Pensions Ombudsman might determine that there has been an overpayment and direct that the overpayment in a specified sum be recouped at a particular rate. His reasons would be likely to relate to the sums paid to the member, his entitlement under the scheme, whether there were any defences to an equitable right of recoupment and what would be appropriate in relation to the rate of recoupment in all the circumstances. The distinction between the reasons and the determination should be made clear.
51. Mr Short submitted that the Pensions Ombudsman cannot make a direction for payment against a member or a declaration and therefore, even if he had considered a dispute which fell within section 91(5)(f), it would still be necessary to commence separate proceedings in the County Court in order to obtain a declaration of overpayment and an order for payment against the member. I disagree for a number of reasons.
52. First, it is accepted that a dispute in relation to overpayment and recoupment must be referred to the Pensions Ombudsman by the member. It cannot be correct, however, that the Pensions Ombudsman’s decision is only of any consequence if it is decided in the member’s favour that there was no overpayment. That would make a nonsense of the provisions. If the Pensions Ombudsman has a dispute in relation to alleged overpayment and recoupment referred to him by the member, he is entitled to decide it and make a determination and appropriate directions. As I have already mentioned, the Pensions Ombudsman will make a determination as to the existence and extent of any overpayment and directions as to the steps to be taken to recover that overpayment. No order for payment is made against the member. There is nothing that the member will be required to pay. The monetary obligation as a result of payments made in error is rectified by recoupment. There is a set-off by way of recoupment from future pensions payments at a particular rate, excess benefits already having been received. Furthermore, there is no need for a declaration. Although such a remedy might have been granted had the dispute about overpayment come before a court, a dispute investigated by the Pensions Ombudsman is resolved by a determination and directions (section 151(1) and (2)). If Mr Short were right, the Pensions Ombudsman would be shorn of any real jurisdiction in such matters.
53. Secondly, I agree with Mr Newman that section 151(2) PSA 1993 must be read purposefully enabling directions to be made that the trustee/manager may, rather than must, take steps to recoup the amount of the overpayment at a particular rate, in order to respect the trustee’s role and discretion in deciding whether to offset any

overpayment. In reality, having been unable to agree the matter with the member, it is very unlikely that a trustee/manager would not ask for an order that it take particular steps in mandatory terms.

54. Thirdly, it is important to note that any such determination or direction will be final and binding upon the member/complainant and the trustee/manager of the scheme subject to an appeal on a point of law: sections 151(3) and 151(4). This is completely contrary to Mr Short's submission that it would be necessary to commence an action in the County Court in order to satisfy the tail end of section 91(6). It seems to me that section 151(3) PSA 1993 makes it absolutely clear that the issues which have been determined are res judicata: *Westminster City Council v Heywood (No 2)* [2000] 2 All ER 634 per Lightman J at 645 – 6. The purpose underpinning the legislative scheme is that the Pensions Ombudsman's determination is final and binding (section 151(3)) and exists as an alternative to court proceedings (sections 146(6) and 148(2)). In my judgment, therefore, the County Court cannot revisit the substance of the dispute where section 91(6) applies.
55. Fourthly, this is underscored if "competent court" is interpreted in the light of section 151(5) PSA 1993. As I have already mentioned, section 151(5) provides that any determination or direction shall be enforceable in the County Court, "as if it were a judgment or order of that court". Not only is the ordinary and natural meaning of those words contrary to an interpretation of "competent court" which includes the Office of the Pensions Ombudsman, but they are also entirely contrary to the process which Mr Short submits should be undertaken. They do not suggest that the County Court considers the merits of the underlying matter and makes its own order. Far from it. In the type of case we have been considering, it seems to me that in order to comply with section 151(5), the County Court would enforce the determination and directions by making an order stating the amount of the overpayment and specifying the amounts to be recouped over the specified period at a specified rate. The fact that this does not fall neatly within the Enforcement Rules is beside the point. They cannot govern the proper interpretation of the primary legislation. Unlike the judge, I do not consider that it is essential that a declaration is made.
56. The Enforcement Rules make clear that the party wishing to enforce the determination or direction must deliver a certified copy to the County Court and thereafter, the appropriate court officer will take the necessary enforcement steps as if the determination or direction had emanated from the County Court itself. This is consistent with CPR 70.5 which makes clear that where an enactment provides that a decision of a court, tribunal, body or person other than the High Court or the County Court may be enforced as if it were a court order or that any sum of money payable under that decision may be recoverable as if payable under a court order, the enforcement process is purely administrative.
57. I respectfully disagree with Arnold J in *Burgess* at [166], where he referred to the County Court making an order "declaring the trustees' entitlement"; the County Court does not exercise any judicial function at this stage of the process. Determinations and directions of the Pensions Ombudsman are enforceable without the need of any further judicial input.
58. To be clear, it seems to me that: the Pensions Ombudsman is not a "competent court" for the purposes of section 91(6) PA 1995; the Pensions Ombudsman may make

determinations and directions in relation to the overpayment and recoupment of benefits; those determinations and directions can be enforced in the usual way pursuant to section 151(5) PSA 1993; the fact that the Enforcement Rules have not been updated cannot affect that; enforcement in the County Court is an administrative matter and is to be carried out by a court officer; and there is no requirement to commence an action in the County Court or for that court to consider the merits of the matter.

59. For the sake of completeness, I should add that I also consider that the judge was right to reject the submission that because certain tribunals are treated as a “court” in other circumstances, the Pensions Ombudsman is a “competent court” for the purposes of section 91(6). *Peach Grey & Co v Sommers* [1995] 2 All ER 513 (whether the Industrial Tribunal counted as an “inferior court”) and *Watson v Hemingway Design Ltd* [2020] ICR 1063, in which it was held that the Employment Tribunal was a court for the purposes of section 2(6) of the Third Parties (Rights and Insurers) Act 2010, are of no real assistance. The phrase and the status of the particular tribunal or, in this case, the jurisdiction of the Pensions Ombudsman, must be interpreted in the relevant context.
60. In addition, I do not consider that there was anything in the Pensions Ombudsman’s first ground of appeal in relation to the decision in *Burgess*. It was that the judge was wrong to treat *Burgess* as binding authority on the question of whether the office of Pensions Ombudsman is a “competent court” for the purposes of section 91(6) and that this had the further effect that the judge did not consider the arguments made on behalf of the employer from a neutral standpoint.
61. As Mr Newman stated, it does not matter whether Arnold J’s single sentence to the effect that the Office of the Pensions Ombudsman is not a “competent court” because it is not a court forms part of the ratio of the decision or not. The decision in *Burgess* is not binding upon the Court of Appeal irrespective of whether the judge considered it to be binding on him. In any event, in my judgment, in addition to considering whether Arnold J’s conclusions were part of the ratio of the decision, the judge decided for himself whether the decision was wrong. There is no basis to suggest that the judge was unduly influenced by Arnold J’s decision. In addition, it seems to me that Arnold J’s conclusion did form part of the ratio of the decision. See *Jacobs v London County Council* [1950] AC 361 per Lord Simonds at 369 and the approach adopted by Leggatt LJ (as he then was) in *R (Youngsam) v Parole Board* [2020] QB 387 at [51].
62. For all of the reasons set out above, I would dismiss the appeal.

Lady Justice Whipple:

63. I agree.

Sir Julian Flaux, Chancellor of the High Court:

64. I also agree.