Neutral Citation Number: [2007] EWHC 242(Admin)

Case No: CO/4927/2006

IN THE HIGH COURT OF JUSTICE
QUEENS BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 21st February 2007

Before :

THE HON. MR. JUSTICE BEAN

Between :

THE QUEEN on the application of **1. Henry Bradley** **2. Robin Duncan** **3. Andrew Parr** **4. Thomas Waugh**	**Claimants**
- and –	
Secretary of State for Work and Pensions	**Defendant**
-and-	
Parliamentary Commissioner for Administration	**Interested Party**

Dinah Rose QC and Thomas Hickman (instructed by **Bindmans**) for the **Claimants**
Philip Sales QC and Daniel Stilitz (instructed by **The Solicitor, Department of Work and Pensions**) for the **Defendants**
Clive Lewis QC and Ben Hooper (instructed by **The Treasury Solicitor**) for the Attorney-General, intervening on behalf of the Speaker of the House of Commons
The Interested Party did not appear and was not represented

Hearing dates: 7-9 February 2007

Approved Judgment

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

.....

THE HON MR JUSTICE BEAN

Mr Justice Bean :

1. On the 15 March 2006 the Parliamentary Commissioner for Administration ("the Ombudsman"), Ms Ann Abraham, published a special report to Parliament entitled "Trusting in the Pensions Promise". The report found that the Department for Work and Pensions, and its predecessor the Department of Social Security, had been guilty of maladministration which was one of a number of factors that had caused injustice to over 75,000 people who had lost all or part of their final salary occupational pensions on the winding up of their pension schemes. Among her recommendations was that the Government should consider arrangements for the restoration of the core pension entitlements of these individuals. In a written statement to Parliament of 15 March and a more detailed oral statement by the Secretary of State in the House of Commons on 16 March the Government rejected all but one of the Ombudsman's findings and recommendations. The present claim is for judicial review of the decision to reject two of the findings and one of the recommendations which lie at the heart of the report.

The Pensions Act 1995

2. Before the passing of the Pensions Act 1995 there was no comprehensive legislative regime for the regulation of occupational pensions. Occupational pension schemes were governed essentially by the law of trusts. Following the activities of the late Robert Maxwell in diverting the assets of the pension schemes of his companies' employees it was widely recognised that additional protection for scheme members was required.

3. Part I of the 1995 Act was concerned specifically with occupational pensions. The principal innovations included the following: - the establishment of the Occupational Pensions Regulatory Authority ("OPRA") to oversee the trustees of pension schemes; the requirement for member nominated trustees; the imposition of a range of statutory duties and responsibilities on trustees; the requirement for a scheme auditor and a scheme actuary to provide professional advice to the trustees; the introduction of a statutory Minimum Funding Requirement ("MFR"), and the establishment of a statutory system of priorities for the application of a scheme's assets in the event of the scheme being wound up with insufficient assets to meet its liabilities in full.

4. Section 56(1) of the 1995 Act, establishing the MFR, required that the value of the assets of a defined benefit occupational pension scheme should not be less than the amount of the liabilities of the scheme. Since both assets and liabilities would inevitably fluctuate in value, the statute required assumptions to be made from time to time about whether the assets held were sufficient to meet liabilities falling due well into the future. Detailed provisions as to the method of calculation of the MFR were prescribed in the Occupational Pension Schemes (Minimum Funding Requirement and Actuarial Valuations) Regulations 1996. Regulation 3(2)(c)(ii) provided that it should be assumed that liabilities in respect of members will be so secured that the benefits of active and deferred members will be "reasonably likely" to be equal in value to those payable in respect of their accrued rights under the scheme.

5. Section 73, headed "Preferential liabilities on winding up", provided for the order of priorities where on a scheme being wound up the assets were insufficient to satisfy the liabilities of the scheme in full. In summary the order was (a) liabilities derived from

the payment of voluntary contributions; (b) pensions paid to members who have retired, and on their death to their dependants (including at that time, though not since 2004, increases in such pensions); (c) liabilities for pensions to members who have not yet retired.

6. On 3 January 1996 the DSS published a leaflet ("PEC3") entitled "The 1995 Pensions Act", running to 21 pages. Its contents were strongly criticised by the Ombudsman in her Report. She was also critical of certain later literature, in particular an edition of leaflet PM3, called "Occupational Pensions: Your Guide", which appeared on 7 May 2002.

7. From time to time amendments were made to the level of the MFR. In response to advice from the actuarial profession that the MFR was stronger than intended the Government twice reduced its level, in May 1998 and March 2002. The latter decision was the subject of an adverse finding by the Ombudsman. The profession also twice advised (in 2001 and 2003) that the level was weaker than intended but on both occasions the Government decided not to increase it.

8. A revised legal framework was created by the Pensions Act 2004, the principal relevant provisions of which came into force on 6 April 2005.

The complaints to the Ombudsman

9. The Ombudsman's Report records (paragraph 1.44) that she had received more than 200 complaints referred to her by Members of Parliament of all political parties and from all parts of the United Kingdom on the subject of pension losses. The complaints which formed the basis of her investigation had four elements:-

(1) First, it was alleged that the legislative framework during the relevant period (which she defined as being from commencement of the 1995 Act to commencement of the 2004 Act) had afforded inadequate protection to the pension rights of members of final salary occupational schemes;

(2) Secondly, it was alleged that on a number of occasions Ministers and officials had ignored relevant evidence when taking policy decisions related to the protection of pension rights accrued in such schemes;

(3) Thirdly, it was alleged that the information and advice provided by a number of government departments and other public bodies about the degree of protection that the law provided to accrued pension rights had been inaccurate to the extent that it had amounted to the misdirection of the members and trustees of such schemes;

(4) Fourthly, it was alleged that public bodies were responsible for unreasonable delays in the process of winding up the schemes. (This final element was the subject of a finding and recommendation by the Ombudsman which was accepted by the Government and formed no part of the case before me.)

The Financial Assistance Scheme

10. On 14 May 2004 the then Secretary of State for Work and Pensions announced that the Government would be providing £400 million of public money to be paid over 20 years, to create the Financial Assistance Scheme (FAS) to provide assistance to those who had lost part or all of their pension rights due to their scheme winding up underfunded and who were within three years of the scheme's pension age at 14 May 2004. In December 2006, by which time this litigation was already under way, the FAS was significantly extended so as to be available to people within 15 years of their scheme's pension age, though on a tapering basis for those in the bracket of 7-15 years from that age. The FAS is not available to assist members of pension schemes which have been wound up by a solvent employer.

The Claimants

11. Mr Bradley worked at Irish Fertiliser Industries Ltd for 27 years until that company went into liquidation in 2002. He paid into the pension scheme throughout, and his evidence is that he was assured by others that it was safe. Following the insolvency he learned that he could only expect to receive a fraction of his expected pension from the company's scheme. His case is that he would have made different plans and choices, had the true security of the scheme been properly publicised. A colleague of Mr Bradley described as "Mr J" is one of the paradigm cases considered by the Ombudsman in her report. IFI was based in Belfast, but it is not suggested that this fact deprives the Administrative Court of jurisdiction.

12. Mr Duncan worked for British United Shoe Manufacturers Ltd for 36 years. As a shop steward and convenor, and a member-nominated trustee of the company pension scheme, he actively promoted it to colleagues, believing it to be safe and secure. He states that he formed this belief on the basis of Departmental and OPRA publications which he not only read and relied upon personally, but disseminated to others. He made substantial additional voluntary contributions to the fund. Following the insolvency of BUSM he is likely to obtain no more than about 10% of his expected pension from the company scheme. He has sold his house because of the financial circumstances in which he and his wife found themselves. He now works long hours as a night shift driver for Royal Mail. His is one of the paradigm cases mentioned in the Ombudsman's Report, where he is described as Mr B.

13. Mr Parr worked for 20 years at Allied Steel and Wire until that company's insolvency. He too claims that he relied upon and disseminated information from Government literature to others, though since ASW was non-unionised this was done through a staff consultative committee. Despite ill health including a cardiac arrest he has been forced to continue working because, notwithstanding the company scheme being funded beyond the MFR requirement, there were insufficient funds to meet the liabilities to him and other non-pensioner members at insolvency.

14. Mr Waugh worked for Burgess Agricultural Engineers Ltd for 26 years. The company continues to trade, but the scheme was wound up at a time when its assets were insufficient to meet its liabilities to non-pensioner members in full. Mr Waugh's expected pension has been reduced by about two thirds. He is ineligible for assistance from the FAS since the employer remains solvent.

The Ombudsman's Report

15. The Ombudsman's Report, the product of a lengthy and careful investigation, is 254 pages long. A summary of the relevant findings and recommendations is necessary for the purposes of this judgment but must inevitably omit the detailed narrative of the evidence leading up to them. The Ombudsman begins her findings in chapter 5 by noting that throughout the period relevant to her investigation (1995-2005) the Government:-

> "saw itself as acting – and told the public that it was doing so – in partnership with others both to promote the benefit of occupational pension schemes and to remind individuals that where they could, they had an obligation to save for their retirement …
>
> recognised throughout the relevant period that pensions were complex and often not a topic that was generally understood and that, consequently, there was a need for greater financial education, for improved awareness of pensions, and for clearer information about the various savings options;
>
> saw itself as having a key role in promoting such better education, awareness and information about pensions and saving for retirement – and told others that it would do so;
>
> said at the relevant time that the information leaflets and other official public publications issued by public bodies were an integral component of the promotion of the benefits of saving for retirement and aimed to assist people to make informed choices about the various pensions options;
>
> [and] accepted at the relevant time that it had certain obligations in relation to the accuracy, completeness, clarity and consistency of its publications."

16. In paragraphs 5.67 to 5.68, after an extensive review of official publications issued by the Department and its own formal internal guidance, the Ombudsman wrote:-

> "I have seen nothing that would make me doubt that the Government's intention behind the MFR was always that it could only provide a limited degree of security to non-pensioner members – which was apparent from its design – and I have seen that the discussion behind closed doors within and between the public bodies responsible for occupational pensions policy generally reflected this.
>
> However this was not properly disclosed to those most affected by such an intention. I consider that the official information given to the public about the degree of security provided by a scheme being funded to the MFR level:
>
> (1) was, prior to September 2000, misleading, incomplete and inaccurate – in that it gave assurances which were incompatible with the design and purpose of the MFR as prescribed by Government, and with its practical operation. These assurances were that the MFR was designed to ensure that schemes had sufficient assets to meet their liabilities and that a scheme funded to the MFR level would be able to pay cash transfers of accrued rights to non-pensioners. In addition, no disclosure or even mention was

made of risks to accrued rights or of the potential effects of the statutory order of priority on wind-up;

(2) was, between September 2000 and April 2004 deficient – in that it lacked any degree of consistency of what might be expected from the MFR. Some official statements and publications – especially those aimed at the general public – continued not to mention risk and to give a misleading impression as to the security of pension rights, while others began to explain the true position; and

(3) was only broadly accurate from April 2004 onwards."

She summarised her finding of maladministration relating to official information (part of what was described in argument before me as the First Finding) as being (para 5.164): "that official information about the security that members of final salary occupational pension schemes could expect from the MFR provided by the bodies under investigation was sometimes inaccurate, often incomplete, largely inconsistent and therefore potentially misleading, and that this constituted maladministration."

17. The Ombudsman also found ("The Third Finding") that a decision in 2002 by DWP to approve a change to the MFR basis was taken with maladministration. I return to this topic later in the judgment.

18. Having determined that maladministration did occur, the Ombudsman turned to consider whether individuals had suffered injustice as a result. She noted that those who had complained to her claimed to have suffered injustice in four respects: lost opportunities to make informed choices about pensions and savings options or to take remedial action in relating to the funding position on their scheme; financial loss of a considerable proportion, in some cases all, of their expected pension once the wind up of the scheme was triggered; a sense of outrage because public bodies responsible for the framework of pensions law and regulations did not provide adequate protection or accurate information about the level of protection provided by that framework; and distress, anxiety and uncertainty caused to them and their families by the effects of the above. She was satisfied that the complainants had indeed suffered injustice in all these respects, and that the FAS as then in force had not remedied it. She then turned to assess what were the causes of the injustice she had outlined, noting first that it must be common ground that the trigger for the financial losses incurred by the complainants was the winding up of their schemes with insufficient funds.

19. She found that her first category of injustice (lost opportunities) was caused by "the incomplete, inconsistent, unclear, and often inaccurate information given to scheme members, trustees and sponsoring employers through official sources". She found that the sense of outrage and distress that the complainants had suffered was caused to a significant degree by the shock that they felt when what they never knew might happen to their pensions did occur, and when they realised that the official assurances that they had trusted had proved to be misplaced.

20. Finally, in paragraphs 5.198 to 5.246 she turned to the critical question of how the financial losses were caused. She noted that the trigger for the losses – the winding-up of schemes – "clearly was not caused by deficiencies in official information about pension security". She noted that it was not until 2005 that all pension schemes were

able in law to seek to recoup the full costs of buying out pension liabilities from sponsoring employers. The position prior to this was that even where an employer had discharged in full its legal liabilities in relation to scheme funding there might nevertheless have been significant – but lawful – shortfalls. The statutory framework was also relevant. The Act and subordinate legislation governing the MFR established a context in which financial loss was quite lawfully able to occur. The statutory priority order prescribed how the assets of a scheme should be distributed on wind-up. The legal provisions which allowed employers to take "contribution holidays" during periods when the scheme funding was strong were also, in her view, relevant. So too were some discretionary policy decisions taken by Government, such as the abolition in 1997 of the system of tax credits given to pension schemes. Some of these policy decisions were and are controversial, but the Ombudsman correctly noted that it was not for her to question whether they were appropriate. She was satisfied, however, that such decisions "played a significant contributory role in the context in which the financial losses suffered by complainants occurred".

21. The Ombudsman found (at 5.232) that had official information about the degree of protection afforded by the MFR and the resulting risks to members' pension rights been accurate, complete and consistent, certain actions could have been taken which "might well have ameliorated the financial position of schemes and would therefore most probably have led to lesser, if any, financial loss of this type". Such actions could have included a changed investment strategy by scheme trustees so as to maximise employers' contributions; pressure by scheme members on employers to increase contributions; and additional arrangements for increased contributions made by sponsoring employers. The Ombudsman concluded her findings as follows:-

> "5.239. But what of whether that **maladministration caused injustice?** It seems to me that the financial losses suffered by complainants did not come about as a result of the workings of a system about which individuals had been properly informed – and where the risks inherent in that system had been highlighted to them clearly by those responsible for it.
>
> 5.240. On the contrary, the financial losses incurred by complainants were crystallised before those individuals even knew that such an eventuality might befall them and in context where they had had no warning to enable them to take remedial action or to otherwise protect their position.
>
> 5.241. That seems to me to be a clear injustice. Not only did those individuals trust the information they were provided with about the framework put in place by Government to protect their pensions, they were unable to properly consider their financial position or to make fully informed choices about their pension options.
>
> 5.242. They were also unable to consider what action they could take to remedy the financial weakness of their scheme, as the official information given to them was deficient.
>
> 5.243. Official information effectively distorted the reality of the position in which scheme members found themselves. As a result, they were wholly unaware that their pension rights were dependent on the ongoing security of the employer sponsoring their scheme.

5.244. That constitutes an **injustice which was caused by maladministration.** While I cannot say that maladministration **alone** caused the financial loss suffered by complainants, I do consider that it was a significant factor in creating the environment in which those losses were crystallised.

Injustice: summary of findings

5.245. I have found that injustice – in the forms of a sense of outrage, lost opportunities to make informed choices or to take remedial action, and distress, anxiety and uncertainty – was caused by maladministration.

5.246. I have also found that the maladministration I have identified was a significant contributory factor in the creation of the financial losses suffered by individuals, along with other systemic factors. A further consequence of that maladministration was financial injustice – the distortion of the reality facing scheme members so that they were wholly unaware that their pension rights were dependent on the ongoing security of their employer."

22. The Ombudsman's First Recommendation related to remedying financial injustice. She considered that it should apply not only to those who had complained to her but also to those in a similar position, that is to say all those individuals:-

(1) who were members of final salary schemes which commenced wind-up from 6 April 1997 to 31 March 2004; where

(2) the scheme wound up with insufficient assets to secure pensions in payment and to pay cash equivalent transfer values in respect of fully accrued pension rights to all non-pensioner members or to secure the full liabilities for each non-pensioner in other ways; and where

(3) the scheme is not eligible for the pensions compensation scheme, because it had not suffered losses wholly attributable to fraud or other unlawful behaviour; and where

(4) the individual has incurred an actual financial loss because of the shortfall in the pension promised in respect of, inter alia, the contributions made by them and/or their employer to the scheme.

The number of people within this definition is estimated by the parties to be between 75,000 and 125,000.

23. The Ombudsman's First Recommendation was in these terms (paragraph 6.15):-

"I recommend that the Government should consider whether it should make arrangements for the restoration of the core pension and non-core benefits promised to all those to whom I have identified above are fully covered by my recommendations – by whichever means is most appropriate, including if necessary by payment from public funds, to replace the full amount lost by those individuals."

24. On 21 December 2005 the Ombudsman sent a draft of her report to the Permanent Secretary at the DWP. He replied on 27 January 2006 rejecting her findings and

recommendations. Further exchanges of correspondence took place during February 2006. The final report was published on 15 March 2006. Its findings and recommendations (save on the delay issue) were rejected in a written statement of 15 March 2006 by the Minister of State, amplified in an oral statement by the Secretary of State the following day. In June 2006 the DWP published a detailed response to the report.

25. Following the laying of the report before Parliament, the matter was considered by the Public Administration Select Committee ("PASC") of the House of Commons, which reported on 30 July 2006. The committee heard oral evidence from the Ombudsman, and considered both the report and the Government's response. The PASC's report was critical of the Government in some respects. The Committee considered that in rejecting the findings of maladministration the Government was being "at best naive and at worst misleading". It regarded the line of argument that it was for trustees and employers to provide information to members and potential members as "unsustainable". On the other hand, in a passage relied on by the Defendant, it expressed the view that for the Government to ask a court to review the Ombudsman's findings would effectively make matters which are currently not justiciable subject to judicial decision. The committee considered that when there are disputes between Government and the Ombudsman, Parliament is the proper place for them to be debated.

The Speaker's intervention

26. At the outset of the substantive hearing Mr Clive Lewis QC, instructed by the Attorney-General on behalf of the Speaker of the House of Commons, applied pursuant to Rule 54.17 of the Civil Procedure Rules for permission to make representations. Neither Ms Dinah Rose QC for the Claimants nor Mr Philip Sales QC for the Secretary of State opposed this procedural application and I accordingly heard Mr Lewis before the main submissions at the hearing got under way. In deference to the importance of the subject matter of the intervention I shall deal with it in full, although it has not in the event proved decisive of any issue in the case.

27. Mr Speaker's concern was the use to which the report of the PASC, and evidence given by the Ombudsman to that Committee, were apparently to be put in the course of the case, which it was submitted might infringe Article 9 of the Bill of Rights 1689 and Parliamentary privilege. Mr Lewis was at pains to point out that Mr Speaker was not seeking to intervene in or comment upon the substance of the dispute between the Claimants and the Defendant, which he recognised was a matter properly for the court to adjudicate upon.

28. Article 9 of the Bill of Rights 1689 provides:-

> "Freedom of Speech – That the freedome of speech and debates or proceedings in Parlyament ought not to be impeached or questioned in any court or place out of Parlyament".

As Lord Browne-Wilkinson observed in tendering the advice of the Judicial Committee of the Privy Council in *Prebble v Television New Zealand Ltd*

[1995] 1 AC 321 at 332:-

> "In addition to Article 9 itself, there is a long line of authority which supports a wider principle, of which Article 9 is merely one manifestation, viz. that the courts and Parliament are both astute to recognise their respective constitutional roles."

29. The claimant in *Prebble* sued the defendant company for defamation in respect of a television programme alleging that he was corrupt. The pleaded defences included justification. The particulars of justification relied mainly on statements and actions outside Parliament, but alleged that the claimant and other ministers had made statements in the House of Representatives which were calculated to mislead the House, or were otherwise improperly motivated. An order striking out the particulars insofar as they relied on statements in the House was upheld by the New Zealand Court of Appeal and by the Privy Council on the basis that the courts "will not allow any challenge to be made to what is said or done within the walls of Parliament in performance of its legislative functions and protection of its established privileges" ([1995] 1 AC 321 at 332D).

30. The ratio of the case, in my view, is to be found at page 337A:-

> "….. their Lordships are of the view that parties to litigation, to whomsoever commenced, cannot bring into question anything said or done in the House by suggesting (whether by direct evidence, cross-examination, inference or submission) that the actions or words were inspired by improper motives or were untrue or misleading. Such matters lie entirely within the jurisdiction of the House …..
>
> However, their Lordships wish to make it clear that this principle does not exclude all references in court proceedings to what has taken place in the House. In the past, Parliament used to assert a right, separate from the privilege of freedom of speech enshrined in Article 9, to restrain publication of its proceedings. Formerly the procedure was to petition the House for leave to produce Hansard in court. Since 1980 this right has no longer been generally asserted by the United Kingdom Parliament, and their Lordships understood from the Attorney-General that in practice that the House of Representatives in New Zealand no longer asserts the right. A number of authorities on the scope of Article 9 betray some confusion between the right to prove the occurrence of parliamentary events and the embargo on questioning their propriety……. their Lordships wish to make it clear that if the defendant wishes at the trial to allege the occurrence of events or the saying of certain words in Parliament without any accompanying allegation of impropriety or other questioning there is no objection to that course."

31. The difficulty in *rebble* arises from the citation (at page 333D) of section 16(3) of Australia's Parliamentary Privileges Act 1987:-

> "In proceedings in any court or tribunal, it is not lawful for evidence to be tendered or received, questions asked or statements, submissions or comments made, concerning proceedings in Parliament, by way of, or for the purpose of – (a) questioning or relying on the truth, motive, intention or good faith of anything