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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.

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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

> forming part of those proceedings in Parliament; (b) otherwise questioning or establishing the credibility, motive, intention or good faith of any person; or (c) drawing, or inviting the drawing of, inferences or conclusions wholly or partly from anything forming part of those proceedings in Parliament."

Their Lordships went on to say that that Act declared what had previously been regarded as the effect of article 9 of the Bill of Rights 1689 and that section 16(3) contained "the true principle to be applied" in the case.

32. Sub-sections (a) and (b) of the section cited from the Australian statute are uncontroversial. But sub-section (c), if read literally, is extremely wide. It would seem to rule out reliance on or a challenge to a ministerial statement itself on judicial review of the decision embodied in that statement (which was permitted in *R v Secretary of State for the Home Department ex parte Brind* [1991] 1 AC 696, and to which no objection has been raised in the present case), or to resolve an ambiguity in legislation (*Pepper v Hart* [1993] AC 593), or to assist in establishing the policy objectives of an enactment (*Wilson v First County Trust Ltd* [2004] 1 AC 816). It would also prohibit reliance on reports of the Joint Committee on Human Rights, which, as Mr Lewis' submissions rightly state, have been cited in a number of appellate cases in this jurisdiction: a very recent example is *R v F* [2007] EWCA Crim 243 at paragraph 11. As Lord Nicholls of Birkenhead observed in *Wilson*, "there are occasions when courts may properly have regard to ministerial and other statements made in Parliament without in any way 'questioning' what has been said in Parliament, without giving rise to difficulties inherent in treating such statements as indicative as the will of Parliament, and without in any other way encroaching upon Parliamentary privilege by interfering in matters properly for consideration and regulation by Parliament alone". I therefore do not treat the text of subparagraph (c) of the Australian statute as being a rule of English law.

33. In *Hamilton v Al-Fayed* Lord Woolf MR, giving the judgment of the Court of Appeal said ([1999] 1 WLR 1569 at 1586F) that "the vice to which Article 9 is directed (so far as the courts are concerned) is the inhibition of freedom of speech and debate in Parliament that might flow from any condemnation by the Queen's Courts, being themselves an arm of government, of anything there said." The case went to the House of Lords but their Lordships' speeches do not appear to cast doubt on the accuracy of Lord Woolf's observations.

34. I consider that in deciding this case I should place reliance on neither the Ombudsman's evidence to the PASC nor the Committee's report itself, but for quite different reasons. I agree with Mr Speaker that to allow the evidence of a witness to a Select Committee to be relied on in court would inhibit the freedom of speech in Parliament and thus contravene article 9 of the Bill of Rights. It would have been open to the Ombudsman, who was served with this claim as an interested party, to have put the substance of the observations she made to the Select Committee into a witness statement, a letter or a public statement which could be adduced in evidence by either side. But she has not done so, and has (entirely properly) decided not to take an active part in these proceedings. I should not, therefore, allow her oral evidence to the Select Committee to be relied upon in court.

35. Turning to the PASC report, however, I do not consider that citation from it would inhibit freedom of speech in Parliament, or otherwise infringe Article 9 of the Bill of

Rights. The report of a Select Committee bears no resemblance to a minister answering supplementary questions or a member of either House speaking in debate. It is a written document published after a draft report has been placed before and approved by the Committee, or at least a majority of its members. It seems to me unlikely that a Committee would be inhibited from expressing its view, whether critical or supportive of the actions of government, by the thought that its report might be referred to in support of a party's submissions in civil litigation. My view is that I should not place reliance on the PASC report for an entirely different and more fundamental reason, which is that, in the words of the Privy Council in *Prebble*, the courts and Parliament are both astute to recognise their respective constitutional roles. It is for the courts, not the Select Committee, to decide whether the Secretary of State has acted unlawfully in rejecting the findings and recommendations of the Ombudsman in this case. I note and respect the views of the Select Committee but in the end they are not of assistance on the questions of law which I have to determine.

The 1967 Act

36. The Parliamentary Commissioner Act 1967 establishes the office of Commissioner. Section 1(3) gives the Commissioner, during the fixed term of her appointment, the same security of tenure, subject to removal on an Address from each House of Parliament, as High Court judges have enjoyed since the Act of Settlement 1701. Section 5, so far as material, provides:-

> (1) Subject to the provisions of this section, the Commissioner may investigate any action taken by or on behalf of a government department or other authority to which this Act applies, being action taken in the exercise of administrative functions of that department or authority, in any case where –
>
> a) a written complaint is duly made to a member of the House of Commons by a member of the public who claims to have sustained injustice in consequence of maladministration in connection with the actions so taken; and
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> b) the complaint is referred to the Commissioner, with the consent of the person who made it, by a member of that House with a request to conduct an investigation thereon.
>
> (2) Except as hereinafter provided, the Commissioner shall not conduct an investigation under this Act in respect of any of the following matters, that is to say – (a) any action in respect to which the person aggrieved has or had a right of appeal, reference or review to or before a tribunal constituted by or under any enactment or by virtue of Her Majesty's prerogative; (b) any action in respect to which the person aggrieved has or had a remedy by way of proceedings in any court of law:
>
> Provided that the Commissioner may conduct an investigation notwithstanding that the person aggrieved has or had such a right or remedy if satisfied in the particular circumstances that it is not reasonable to expect him to resort or have resorted to it."

37. Section 7, "Procedure in respect of investigations", provides:-

> "(1) Where the Commissioner proposes to conduct an investigation pursuant to a complaint under this Act, he shall afford to the principal officer of the department or authority concerned, and to any person who is alleged in the complaint to have taken or authorised the action complained of, an opportunity to comment on any allegations contained in the complaint.
>
> (2) Every investigation shall be conducted in private, but except as aforesaid the procedure for conducting an investigation shall be such as the Commissioner considers appropriate in the circumstances of the case; and without prejudice to the generality of the foregoing provision the Commissioner may obtain information from such persons and in such manner, and make such enquiries as he thinks fit, and may determine that any person may be represented by counsel or solicitor or otherwise, in the investigation…..
>
> (4) The conduct of an investigation under this Act shall not affect any action taken by the department or authority concerned or the person to whom the complaint relates, or any power or duty of that department, or authority, or person to take further action with respect to any matters subject to the investigation…."

38. Section 8, "Evidence", provides:

> (1) For the purposes of an investigation under this Act the Commissioner may require any minister, official or member of the department or authority concerned or any other person who in his opinion is able to furnish information or produce documents relevant to the investigation to furnish any such information or produce any such document.
>
> (2) For the purposes of any such investigation the Commissioner shall have the same powers as the Court in respect of the attendance and examination of witnesses (including the administration of oaths or affirmations and the examination of witnesses abroad) and in respect of the production of documents.
>
> (3) No obligation to maintain secrecy or other restriction upon the disclosure of information contained by or furnished to persons in Her Majesty's service, whether imposed by any enactment or any rule of law shall apply to the disclosure of information for the purposes of an investigation under this Act; and the Crown shall not be entitled in relation to any such investigation to any such privilege in the respect of the production of documents or the giving of evidence as is allowed by law in legal proceedings."
>
> (Section 8(4) makes an exception for the Cabinet or its committees.)

39. Section 10, "Reports by Commissioner", provides:

> (1) "In any case where the Commissioner conducts an investigation under the Act or decides not to conduct such an investigation, he shall send to the member of the House of Commons by whom the request for investigation was made (or if he is no longer a member of that House, to such member of that House as the

Commissioner thinks appropriate) a report of the results of the investigation or, as the case may be, a statement of his reasons for not conducting an investigation.

(2) In any case where the Commissioner conducts an investigation under this Act he shall also send a report of the results of the investigation to the principal officer of the department or authority concerned and to any other person who is alleged in the relevant complaint to have taken or authorised the action complained of....

(3) If, after conducting an investigation under section 5(1) of this Act, it appears to the Commissioner that injustice has been caused to the person aggrieved in consequence of maladministration and that the injustice has not been, or will not be, remedied, he may, if he thinks fit, lay before each House of Parliament a special report upon the case".

40. Section 12(3) provides:

> "It is hereby declared that nothing in this Act authorises or requires the Commissioner to question the merits of a decision taken without maladministration by a government department or other authority in the exercise of a discretion vested in the department or authority".

41. Schedule 2 to the Act lists the public bodies who are subject to investigation by the Ombudsman. Her remit is by no means confined to Government departments. The list includes bodies as diverse as the Advisory Council on Historical Manuscripts, the British Potato Council, and the Horniman Public Museum and Public Park Trust. In short, as Lord Woolf MR said in *R v Parliamentary Commissioner ex parte Fayed* [1998] 1 WLR 669 at 673, the Ombudsman is concerned with the "proper functioning of the public service outside Parliament", with the exception of local authorities, which are covered by a different statutory regime to which I shall shortly turn.

42. Since this claim is concerned with both findings and recommendations of the Ombudsman it is important at this stage to note the difference between them. Section 5 enables the Commissioner to investigate a complaint that an individual has "sustained injustice in consequence of maladministration"; and, where she does conduct such an investigation, section 10 requires her to report its results. The results of the investigation, therefore, will consist of findings by the Ombudsman on whether maladministration has occurred and, if so, whether injustice has been caused by it. That is as much as the statute requires her to do. But it is open to her to make recommendations for the remedying of the injustice she has identified, and Mr Sales QC does not submit otherwise. It is a matter for the Ombudsman whether she makes such recommendations or not. She can simply say "here is maladministration caused by injustice, you sort it out." And it is plain that the Act gives the Ombudsman no power to issue mandatory orders.

43. Ms Rose QC accepts, rightly in my view, that *recommendations* of the Ombudsman cannot be binding on the Secretary of State, and that I cannot order the Defendant to carry them out. She submits, however, that *findings* of the Ombudsman are binding; that the Secretary of State was wrong to reject them in this case; and that the Ombudsman's First Recommendation should accordingly be reconsidered on a proper

basis. Before considering these submissions I will set out the relevant provisions of the Local Government Act 1974, which form an important part of Ms Rose's argument on this issue.

The Local Government Ombudsman

44. Part III of the Local Government Act 1974 established a Commission for Local Administration in England. (The Act also established a Commission for Local Administration in Wales, but the statute has been significantly amended under the devolution legislation and I say no more about the Welsh Commission.) The Parliamentary Commissioner is herself a member of the English Commission. The other members are known as Local Commissioners. The term "Local Government Ombudsman" (LGO) is often used to describe the chairman of the Local Commissioners, or alternatively to describe any of the Local Commissioners carrying out an investigation. I shall use the abbreviation "LGO" in the latter sense. Section 26(1) provides that the LGO may investigate a complaint in writing "made by or on behalf of a member of the public who claims to have sustained injustice in consequence of maladministration" in connection with action taken by or on behalf of a relevant local authority. The usual vehicle is a complaint by a councillor on behalf of a constituent, although unlike his Parliamentary counterpart proceeding under section 5 of the 1967 Act the LGO, under the 1974 Act as amended, may receive a complaint direct from a member of the public, and under the 1974 Act in its original form had a discretion to do so where a councillor had been asked to refer the case and refused or failed to refer it. Section 28 provides for a procedure corresponding to that laid down in section 7 of the 1967 Act; and section 29 of the 1974 Act gives the LGO powers to require the attendance and examination of witnesses and production of documents corresponding to those in section 8 of the 1967 Act.

45. Section 30, concerned with the LGO's report on his investigation, is similar to section 10 of the PCA 1967, but there are some differences. The report is to be sent to the complainant, the referring councillor (if any), and to the authority concerned. Since the report is sent to the authority concerned in all cases, there is in section 30(3) a presumption, except where sub section (3A) or (3AA) applies, that the complainant and other individuals involved are to remain anonymous in the report unless after taking into account the public interest as well as the interests of the complainant and of persons other than the complainant, the LGO considers it necessary to "name names".

46. Under the Parliamentary scheme the Ombudsman, if she considers that an injustice which has occurred in consequence of maladministration will not be remedied, may by section 10(3) of the 1967 Act lay a special report before Parliament (such as the report in this case), but that is the end of the line. Section 31 of the 1974 Act went further. As originally enacted, and as it stood at the time of the *Eastleigh* decision, it provided:

(1) "If in the opinion of the Local Commissioner, as set out in the report, injustice has been caused to the person aggrieved in consequence of maladministration, the report should be laid before the authority concerned, and it shall be the duty of that authority to consider the report, and to notify the Local Commissioner of the action which the authority has taken, or propose to take.

(2) If the Local Commissioner:-

a) does not receive any such notification within a reasonable time; or

b) is not satisfied with the action which the authority concerned has taken;

c) does not within a reasonable time receive from the authority concerned that they have taken action, as proposed, to the satisfaction of the Local Commissioner,

he shall make a further report setting out those facts; and section 30 above shall apply, with any necessary modifications, to that further report."

Were the findings of the Ombudsman binding on the Secretary of State?

47. Ms Rose submits that unless subsequently found by a court to be flawed in law or *Wednesbury* unreasonable, a finding by the Ombudsman that maladministration has occurred and has caused injustice is binding on the public authority against which it is made, either (a) absolutely, or (b) unless it can be objectively shown to be flawed or unreasonable. Mr Sales, for his part, submits that the Defendant is entitled to reject the Ombudsman's findings on the basis of a *bona fide* difference of view, and that unless the rejection is itself flawed in law or *Wednesbury* unreasonable judicial review should not be granted.

48. In *R v Local Commissioner for Administration ex parte Eastleigh Borough Council* [1988] 1 QB 855 a Local Commissioner had made findings against the claimant borough council which were held to be beyond his powers. The council's application for judicial review was successful. Lord Donaldson of Lymington MR said (at 867b):-

> "....the Parliamentary intention was that reports by Ombudsmen should be loyally accepted by the local authorities concerned. This is clear from section 30(4) and (5) which require the local authority to make the local report available for inspection by the public and to advertise this fact, from section 31(1), which requires the local authority to notify the Ombudsman of the action which it has taken and proposes to take in the light of this report and from section 31(2), which entitles the Ombudsman to make a further report if the local authority's response is not satisfactory. Whilst I am very far from encouraging councils to seek judicial review of an Ombudsman's report, which, bearing in mind the nature of his office and duties and the qualifications of those who hold that office, is inherently unlikely to succeed, in the absence of a successful application for judicial review and the giving of relief by the court, local authorities should not dispute an Ombudsman's report and should carry out their statutory duties in relation to it."

49. The interpretation of the last few words of this passage was the subject of much argument before me; in particular, as to whether Lord Donaldson meant that in the

absence of judicial review local authorities are bound only by the findings of the LGO or by his recommendations as well. Mr Sales submits that Lord Donaldson intended to refer to recommendations as well as findings: and since it is conceded on behalf of the Claimants that recommendations of the Parliamentary Commissioner are *not* binding, Mr Sales uses this distinction as the foundation of a submission that *Eastleigh* is of no assistance in the present case.

50. It is clear to me that Lord Donaldson, in saying that local authorities should "loyally accept" an LGO's report, only intended to refer to findings that maladministration and injustice have occurred and not to recommendations. The 1974 Act, like the 1967 Act, gives the ombudsman no power to make mandatory orders. It would be extraordinary if an LGO could do so by the back door in the form of recommendations. Suppose, for example, that the LGO made a recommendation which the local authority declined to carry out for the reason that it was too expensive. It is difficult to see on what established ground for judicial review the court could intervene to quash the recommendation: yet the allocation of budgets and the establishment of spending priorities are classic issues for the elected body's discretion. The reference to the council's statutory duty means the duty to publish a response pursuant to section 31(1), not a duty to accept the LGO's recommendations as if they were directions.

51. The *Eastleigh* case, therefore, is authority for the proposition that in the absence of a successful application for judicial review the *findings* of an LGO are binding on the relevant local authority. Mr Sales, however, submits that there are differences between the two statutory schemes which render *Eastleigh* distinguishable. In particular, he points to section 10(3) of the 1967 Act which provides that, where the public body concerned refuses to provide a satisfactory remedy, the Ombudsman's only recourse is to lay a special report before Parliament, after which the matter passes into the political domain. The Ombudsman, he submits, is not there to make binding findings of fact. The function for a section 10(3) special report is no more and no less than to provide a stimulus to political debate.

52. I reject this submission. As it happens, the present case is about a decision of a Secretary of State announced in an oral statement to the House of Commons, affecting many thousands of people, and concerning a significant issue of public policy. But much of the Ombudsman's work concerns decisions of non-departmental public bodies or "quangos" affecting a single individual or family. If Mr Sales' submission is correct, the non-binding nature of the findings of fact would apply equally in such a case. If the case were raised in the House of Commons, for example in a parliamentary question or an adjournment debate, the Ministerial reply might well be that the Government has no power to do anything about it.

53. Members of Parliament can and regularly do raise in the House alleged acts of maladministration by local authorities. Nevertheless the effect of Mr Sales' submission, if it is correct, must be that an elected local authority such as Birmingham City Council, in the absence of a successful application for judicial review, must loyally accept the findings of an LGO (*Eastleigh*); whereas a quango such as the British Potato Council is free simply to disagree with any adverse findings of the Ombudsman unless its disagreement is itself flawed in law or *Wednesbury* unreasonable, which would be for the complainant to establish by an application for

judicial review. I can see neither logic nor constitutional principle in such a distinction.

54. Mr Sales, while accepting that there is jurisdiction to grant judicial review of a public body's rejection of findings by the Ombudsman, submits that the remedy should be closely confined because it operates as an impediment to the activation of the political process (although the PASC were not impeded from taking evidence and issuing a report on the present case after the issue of proceedings, and so far as I am concerned there is no reason why they should have been). But in any event judicial review is only likely to be a temporary impediment, and its purpose is simply to require the decision maker to consider the Ombudsman's recommendations on a proper basis.

55. The Court of Appeal in *Eastleigh* were not considering whether there are any exceptions to the binding nature of the findings of an LGO. In *R* v *Warwickshire County Council ex parte Powergen plc* [1998] EWCA Civ 2280 the issue was whether a highway authority, whose road safety objections to a proposed development had been rejected on appeal by a planning inspector, could nevertheless maintain its original view. The Court of Appeal held that "the inspector's conclusion on that issue, because of its independence and because of the process by which it is arrived at, necessary becomes the only proper tenable view on the issue of road safety and thus is determinative of the public benefit"; but they indicated that this was in the absence of new facts or changed circumstances. In *R v Secretary of State for the Home Department ex parte Danaei* [1997] EWCA Civ 2704 the question was whether the Home Secretary was entitled to depart from the findings of fact of an adjudicator as to whether or not the claimant, an applicant for asylum, had committed adultery. Simon Brown LJ said (at page 8):-

> "On an issue such as this it does not seem to me reasonable for the Secretary of State to disagree with the independent adjudicator who has heard all the evidence unless
>
> (1) the adjudicator's factual conclusion was itself demonstrably flawed, as irrational or for failing to have regard to material considerations or for having regard to immaterial ones – none of which is suggested here;
>
> (2) fresh material has since become available to the Secretary of State such as could realistically have affected the adjudicator's finding – this too was a matter we considered in *Powergen*;
>
> (3) arguably, if the adjudicator has decided the appeal purely on the documents or, if, despite having heard oral evidence, his findings of fact owe nothing whatever to any assessment of the witnesses. This third scenario seems unlikely and I express no concluded view as to whether in this event the Secretary of State could properly ignore the fact that the adjudicator is an independent tribunal whereas he is not."

56. Judge LJ said (at page 9):-

> ".....the desirable objective of an independent scrutiny of decisions in this field would be negated if the Secretary of State were entitled to act merely on his own assertions and reassertions about relevant facts contrary to express findings made at an oral hearing by a special adjudicator who had seen and heard the relevant witnesses. That would approach uncomfortably close to decision making by executive and administrative diktat. If therefore the Secretary of State is to set aside or ignore a finding on a factual issue which has been considered and evaluated at an oral hearing by the special adjudicator he should explain why he has done so, and he should not do so unless the relevant factual conclusion could itself be impugned on *Wednesbury* principles, or has been reconsidered in the light of further evidence, or is of limited or negligible significance to the ultimate decision for which he is responsible. "

57. Mr Sales seeks to distinguish these two authorities by pointing to the contrast between planning inspectors or immigration judges on the one hand and the Ombudsman on the other. The inspector and the judge exercise adjudicative functions following an oral adversarial hearing; whereas the Ombudsman, in the words of Sedley J in *R* v *Parliamentary Commissioner for Administration ex parte Balchin* (CO/2323/95, 25 October 1996, unreported) is "an investigative officer and not an adjudicative tribunal".

58. It is true that the Ombudsman does not generally, and did not in this case, conduct her investigation as though it were a tribunal hearing. That is because by section 7 of the Act she has a very wide discretion (save for the stipulation that the investigation shall be conducted in private) to adopt such procedure for conducting an investigation as she thinks fit. She may allow any person or public body to be legally represented in the investigation. She may require witnesses to attend and be examined on oath. She has powers, more extensive than those of the courts, to compel production of documents. She must give the Department complained against the opportunity to comment on any allegations contained in the complaint. She may, and in the present case did, send a draft report to the Permanent Secretary with an invitation to comment. All this provides a substantial degree of due process. A public adversarial hearing is not the only fair way of finding facts, and it is not the way that Parliament has required to be followed under either the 1967 Act or the 1974 Act. Nevertheless the Court of Appeal in *Eastleigh* made it clear that the findings of fact by the LGO are binding on local authorities, subject in my view to the exceptions identified in *Danaei,* namely where the findings are objectively shown to be flawed or irrational, or peripheral, or there is genuine fresh evidence to be considered. The same in my judgment applies to findings of the Ombudsman.

The First Finding – Maladministration

59. The Ombudsman's First Finding was that official information about the security that members of final salary occupational schemes could expect from the MFR was "sometimes inaccurate, often incomplete, largely inconsistent therefore potentially misleading". Her report deals with a number of official publications, but the one that attracted most criticism in oral argument was leaflet PEC3, "The 1995 Pensions Act", issued in January 1996 by the Department of Social Security. Ms Rose drew attention to the following passages in particular:

a) On page 1, the question is asked "why was the Pensions Act needed?" Four reasons are given, the first being that "the Government wanted to remove any worries people had about the safety of their occupational (company) pension following the Maxwell affair";

b) On page 14, under a heading "Trustees' duties", PEC3 states that "trustees will still be responsible for running schemes and investing in the money for the benefit of the members. But they will also have to talk to the employer before deciding how to invest the money. The trustees must make sure that the scheme keeps to the law, including the rule that a scheme must be funded to a certain level (the "minimum funding requirement"…)";

c) On page 15, under the heading "new minimum funding requirement for salary related schemes", the leaflet states:-

> "The Pensions Act introduces a new rule aimed at making *sure* that salary related schemes have enough money in them to meet the pension rights of their members. If the money in the scheme is less than this minimum level, the employer will need to put in more money within time limits. The minimum funding requirement is intended to make *sure* that pensions are protected whatever happens to the employer. If the pension scheme has to wind up, there should be enough assets for pensions in payment to continue, and to provide all younger members with a cash value of their pension rights which can be transferred to another occupational pension scheme or to a personal pension." (emphasis added)

60. Mr Sales points out that on the back page of PEC3 the reader is warned that "this leaflet gives general guidance only and should not be treated as a complete and authoritative statement of the law." This, of course, is correct as far as it goes. The Pensions Act contains 181 sections and 7 schedules, and no one could expect a 22-page leaflet to be comprehensive. Mr Sales also submits that the leaflet made it clear that primary responsibility for looking after the interest of scheme members rested with the trustees.

61. Paragraph 97.4 of the Skeleton Argument on behalf of the Defendant warrants quotation in full:-

> "The description of the MFR was, in the context of a general information leaflet, accurate and adequate. The description is couched in qualified, non-technical language. Thus the MFR is described as being "*aimed*" at making sure schemes have enough money. It "*is intended*" to ensure schemes are protected. Adherence to the MFR entails that there "*should*" (not "*will*") be enough assets. Nowhere does the leaflet state or imply that adherence to the MFR provides a guarantee that all liabilities will be met. The description of the MFR was appropriate given that what was being described was a new

> protective measure, in circumstances where there had been no such protective measure prior to the introduction of the 1995 Act. "

62. Such minute textual analysis of a pamphlet aimed at the general public can in my view only give comfort to those who consider that it is unwise to believe anything one reads in a government publication. It is particularly ironic when applied to a leaflet whose back cover boasts that it has been awarded a Crystal Mark for clarity by the Plain English Campaign. PEC 3, especially page 15, gives the clear impression that following the enactment of the new law scheme members can be reassured that their pensions are safe whatever happens. I have no doubt that this is what it was designed to do. I agree with the Ombudsman that it was inaccurate and misleading.

63. Ms Rose also relies on the Ombudsman's finding that only six weeks before the issue of this leaflet, in a letter dated 22 November 1995 cited in the Ombudsman's report at paragraph 4.64, the then Government had instructed the actuarial profession that they should devise an actuarial basis for the MFR that would only deliver a "reasonable expectation", defined as "at least an even chance", that non-pensioner members would receive a cash value that, when invested elsewhere, would replicate the pension that they would have received had their scheme not wound up: in other words, there could be an even chance of a scheme complying with the MFR at the time of being wound up *not* meeting its liabilities in full. There is no mention of this 50% chance in the PEC 3. It is right to say that the "even chance" policy is not contained in the statute, and that the Regulations with the phrase "reasonably likely" followed in 1996; but a description of the intended effect or aim of the MFR as being to make "sure" that members received the pensions due to them, in an official publication by the same Department that devised the policy, was plainly inaccurate and misleading. It was not even the intended effect, still less the actual effect, of the MFR.

64. Another publication which attracted criticism from the Ombudsman and from Ms Rose was the May 2002 edition of leaflet PM3, "Occupational Pensions: Your Guide". This was, as Mr Sales rightly submits, a publication at the highest level of generality. Nevertheless it makes no mention of the risks to accrued pension rights should a scheme be wound up with insufficient funds to meet all of its liabilities; nor is anything said about the statutory order of priorities. On one page there is a heading, "How do I know my money is safe?" This is answered obliquely with two columns of information about the duties of trustees and the laws about eligibility to be a trustee and like matters, but nothing is said to warn members that despite these legal precautions their money may *not* be safe after all.

65. It is not an answer to this point, in scrutinising a general publication directed to lay people, to say that everyone knows that there is no certainty in life; that the value of shares may go down as well as up; and that if your employer goes out of business you are likely to lose your job. A member of the general public between 1995 and 2005 could indeed be assumed to have known these facts of life without being told them in an official publication; but not that if his employers went out of business just before he reached retirement age he might get no occupational pension at all, despite the contributions he had made from his earnings over many years, and despite the existence of people called "trustees" who he thought were there to protect his interests.

66. I do not consider that it is necessary to go through each item of official information which was scrutinised by the Ombudsman. It is sufficient to say that in my view her finding that official information was "sometimes inaccurate, often incomplete, largely inconsistent and therefore potentially misleading" was well open to her on the evidence. Indeed, in the case of leaflet PEC3, I consider that no reasonable Secretary of State could rationally disagree with that view. I therefore quash the rejection by the Secretary of State of the Ombudsman's First Finding of maladministration.

The First Finding: Causation of Injustice

67. There was no challenge in the Claimant's Grounds to the separate rejection by the Defendant of the Ombudsman's First Finding of causation of injustice. But the subject is raised in the Skeleton Argument for the Claimants, and no objection was taken to it being argued before me. I have set out above a summary of the Ombudsman's findings in this respect. They culminate in paragraph 5.244: "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". Similarly. in paragraph 5.246 she finds that the maladministration she had identified was "a significant contributory factor in the creation of the financial losses suffered by individuals, along with other systemic factors".

68. Section 5(1)(a) of the 1967 Act makes it clear that the Ombudsman's task is to investigate and report on whether the complainant has suffered injustice *in consequence of maladministration*. It may not be necessary to establish causation on the balance of probabilities in each individual case; but even on a flexible approach to the issue it must be necessary to show at least a material increase in risk, or the loss of a chance of a better outcome, caused by maladministration in the individual case. Maladministration is not defined in the Act, and it is common ground that the Ombudsman has a wide discretion to define it. But I do not consider that the Ombudsman has a similar discretion to define the circumstances in which it can be said that X has occurred in consequence of Y.

69. The difficulties inherent in this issue cannot be surmounted by saying, as Ms Rose does in paragraph 137 of her skeleton argument, that "ombudsmen routinely apply more flexible principles of causation than the courts". The only authority cited for that submission is the decision of the Court of Appeal in *R v Local Government Commissioner ex parte Liverpool City Council* [2001] 1 All ER 462 at paragraphs 17 and 47. That case concerned bias in the grant of a planning application for a new stand at Liverpool FC's Anfield ground. Henry LJ said that while there is a substantial overlap between maladministration and unlawful conduct, the two terms are not synonymous:

> "So there is no reason in principle why the considerations which determine whether there has been maladministration should necessarily be the same as those which determine whether there has been unlawful conduct. The Commissioner's power is to investigate and report on maladministration; not to determine whether conduct has been unlawful. So there is no reason why, when exercising the power to investigate and report which has been conferred on him by the 1974 Act he should necessarily be constrained by the legal principles which would be

applicable if he were carrying out the different task (for which he has no mandate) of determining whether conduct has been unlawful."

This is, with respect, clearly correct, and indeed binding on me; but Henry LJ was not, as I understand his judgment, suggesting that all legal principles, including causation, could be set aside. He was confining his remarks to the differences between maladministration and unlawful conduct.

70. If the First Finding had been limited to the causation of injustice to any scheme member who had read the offending leaflets, or who relied on advice from colleagues or others who in turn relied on the leaflets, it would not be open to challenge. But I cannot follow the logic of the Ombudsman's finding that everyone who between 1995 and 2005 suffered losses on the winding up of their pension scheme was the victim of injustice in consequence of maladministration, whether or not official misinformation had anything to do with it and whether or not there were any remedial steps open to them. I therefore conclude that even on the Claimant's case in law (ie that the Ombudsman's findings bind the Defendant subject to the exceptions identified in *Danaei)* this finding is logically flawed and in that sense unreasonable. If the correct legal approach were as submitted by the Defendant the position would be *a fortiori.* I therefore decline to quash the Secretary of State's rejection of the First Finding on the issue of causation.

The Third Finding

71. The Third Finding was that the Department's decision in 2002 to approve a change to the MFR basis was taken with maladministration. This was not originally the subject of challenge but by an amendment for which Collins J gave permission on 18 October 2006 it was added to the claim.

72. On 5 September 2001 the Faculty and Institute of Actuaries wrote to the DWP recommending a reduction in the dividend yield figure for the equity market value adjustment factor used in MFR valuations from 3.25% to 3%, and providing reasons for that recommendation. The profession had indicated in previous communications with the DWP that it was minded to make this recommendation.

73. The DWP asked the Government Actuary's Department ("GAD") to consider and give an opinion on the recommendation. GAD responded on 25 September 2001 endorsing the profession's view without qualification.

74. The DWP then considered whether there were any overriding policy reasons why it should not accept the recommendation; and, in particular, whether the recommended change was sufficiently straightforward to allow its implementation before the MFR was expected to be replaced. It concluded that the proposed change could be implemented quickly and without due costs to pension schemes. The change was therefore approved and took effect from 7 March 2002.

75. In making her Third Finding that the DWP thereby acted with maladministration, the Ombudsman noted (at paragraph 5.106) that it was "clearly not the case that the decision making approach taken by DWP was consistent in relation to each recommendation from the actuarial profession"; she referred to recommendations in 2000 and 2003 which were not implemented. The Department's response, in a letter

from the Permanent Secretary of 28 February 2006 commenting on a draft of the report, was in these terms:-

> "In the Department's view it would have been far more vulnerable to justified criticism if it had substituted an alternative judgment in the face of clear and consistent advice from the actuarial profession and from the Government Actuary's Department without good reason, such as applied in the case of the recommendations made by the actuarial profession in 2000 and 2003. Both of those recommendations involved more complex changes which would have required long administrative lead-in times. In both cases the Minimum Funding Requirement was expected to have been abolished by the time the changes would have had much, if any, practical effect. "

76. It is not clear to me from chapter 5 of the Ombudsman's report whether she considers that this explanation of the apparent inconsistency was genuine or not.

77. Returning to the substance of the 2002 decision, the Ombudsman wrote (at paragraphs 5.124 to 5.125):-

> "As with any decision, I should say that I do not consider that advice or recommendation from the actuarial profession – or from GAD or any other professional advisor – absolved DWP from seeking to establish all of the relevant facts before making their decision. A decision maker, although acting with the benefit of professional advice, retains responsibility for their decision. Regard should be had to all relevant considerations and those that are not relevant should be ignored. It should also be ensured that any decision taken is made on an adequate evidence base and the reasons for any decision can be demonstrated subsequently."

78. She concluded that this decision was taken with maladministration as there was insufficient documentary evidence that explained its rationale. She had doubts (at paragraph 5.149) about the reliance of DWP on professional advice which seemed to her "not to have been sufficient in itself to enable DWP to come to a decision that took account of relevant considerations and which ignored irrelevant ones". She notes in particular that the only documentary proof of advice from GAD on this subject is contained in two sentences of a single email.

79. As with the topic of causation in relation to the First Finding, I regret that I cannot accept that the Third Finding is logically sound. The Department had a clear recommendation from the leading professional body and the concurrence of its own specialist adviser, the GAD. The Ombudsman was in effect expecting the Secretary of State, who is not an actuary, to keep a watchdog (the GAD) and then bark himself. The fact that additional evidence might have been sought in support of the actuarial profession's considered view is not equivalent to maladministration. Indeed, the Government Actuary, in an observation quoted in the DWP's Response document of July 2006, has commented that the evidence based for the 2002 decision was

"extremely strong and much stronger than for many (probably most) of the decisions that have to be taken by Government". While I am conscious of the substantial research and thought which lies behind the Ombudsman's conclusion on this issue, I decline to quash the Department's rejection of the Third Finding. If there had been any disagreement between the Faculty and the GAD, or any qualification in the endorsement given by the GAD, the position would have been quite different.

The First Recommendation

80. The Secretary of State puts forward four grounds on which it was argued he was entitled to reject the First Recommendation. Firstly, by the scheme of the 1967 Act such recommendations are not binding. I have already noted that this is common ground. Secondly, since he was entitled to reject each of the relevant findings, it follows that he was entitled not to act on the First Recommendation. Thirdly, even if any of the findings of maladministration is binding on him, causation of injustice is unproven and perhaps unprovable. Fourthly and in any event, he is entitled to take the view that taxpayers should not have to foot such a large bill.

81. Taking the last point first, some complaint is made in the Grounds of the use, by the Prime Minister among others, of the figure of £15 billion as being the cost of implementing the First Recommendation in full. The Department's evidence makes it clear that this is the estimated total to be paid over several decades; the present-day actuarial cost is in the region of £3-3.5 billion. The difference is important as a matter of presentation, but is not in truth a difference of substance. A more telling point is that neither figure takes account of the tax that would be payable by the recipients of pensions if full payments are restored, nor the benefits that have to be paid to those who have lost all or most of their occupational pensions on winding-up. But the Department's rejection of the recommendation is not based on the exact cost, gross or net, which involves an element of speculation in any event. On any view it is a large sum of money.

82. Ms Rose also submits that the Department has misinterpreted the First Recommendation as being that the taxpayer should foot the entire bill, whereas the recommendation is that the Government should "consider making arrangements" to restore the lost pensions, "including if necessary" payments from public funds. She submits that the Department failed to give proper consideration to alternative sources of funds. She points to the fact that voluntary particulars of what alternatives had been considered were only served shortly before the substantive hearing of this claim, and argues that they constituted an *ex post facto* rationalisation.

83. I cannot accept this argument. I do not consider that the Department misunderstood the First Recommendation, or failed to notice that it was not a simple request for the Treasury to write a cheque. On the contrary, I accept that on receipt of the draft report they did indeed consider whether there were any practicable alternatives, and concluded that there were not. A levy on solvent pension schemes to pay for insolvent ones, for example, was understandably regarded as unacceptable. The rejection of the First Recommendation was not unlawful on the ground that it was misunderstood.

84. The other, and very important, ground for rejecting the First Recommendation was causation. The Department has consistently argued, in the manner of a formal pleaded defence to a claim in the civil courts, that, even if maladministration is proved in this

dispute, causation is not. For example, the Permanent Secretary's letter of 27 January 2006 complains that "the draft report does not show that, but for having been misled by the alleged maladministration, the complainants would have taken steps to protect their accrued rights and that this action would have been effective in preventing the losses". Mr Sales argued that in the event of my upholding the First Finding of maladministration but not the corresponding finding on causation, which is what I have done, the rejection of the First Recommendation would be unaffected.

85. As Ms Rose said in reply, this would be a winning argument if I were considering a claim for negligence, but political decisions are different. Mr Sales has throughout submitted that the question of whether to follow the First Recommendation is political rather than legal. If it is reconsidered on the basis that maladministration occurred, but that causation in individual cases has not so far been established, the result *may* be the same, but will not *necessarily* be the same. I therefore quash the Secretary of State's rejection of the First Recommendation and direct that it be reconsidered in the light of the Ombudsman's First Finding of maladministration and of this judgment.

The Human Rights Convention claim

86. This is a claim under section 6 of the Human Rights Act; because of time pressures both counsel asked me to deal with it on the basis of their written skeleton arguments. It is free standing, in the sense that it does not (and does not need to) rely, except as supporting evidence, on the report of the Ombudsman. It is not to be confused with the proceedings in the European Court of Justice at Luxembourg brought by colleagues of Mr Farr who suffered losses on the winding-up of the Allied Steel and Wire pension scheme, relying on the provisions of the EU Insolvency Directive (*Robins and others v Secretary of State for Work and Pensions,* judgment of 25 January 2007).

87. The Claimant's case is that the refusal of the Government to restore the pension entitlements of members of wound-up occupational pension schemes is contrary to Article 1 of the First Protocol (A1P1) of the European Convention on Human Rights. So far as material this provides that "Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law……."

88. It is submitted that an entitlement under an occupational scheme is a "possession", and that the Government owed all scheme members a positive duty to take reasonable and appropriate steps to protect them from loss of those "possessions". Ms Rose argues that this duty arose because the DWP had created a risk to such pensions, or at least had special knowledge of it; assumed responsibility for providing impartial information; encouraged people to join and remain in such schemes; and created a legitimate expectation of full recovery in the event of winding-up. By publishing information that was sometimes inaccurate and misleading as to risk, and by failing to warn properly of the risk, the Government failed to comply with that positive duty. Accordingly they are obliged to provide proportionate compensation. Even the extended FAS does not reimburse losses in full, and the fourth Claimant Mr Waugh, whose employer is still trading, is excluded from it altogether.

89. Mr Sales argues that although the making of payments into a pension scheme is capable of giving rise to a right safeguarded by A1P1, that right consists merely of a beneficiary's entitlement to any payments made by the scheme, not to a payment of a

particular amount. Even where the state had taken positive steps whose effect was to reduce an individual's pension, the European Court of Human Rights found no breach of A1P1 (*Blanco Callejas v Spain,* 18 June 2002). No right to acquire possessions arises under A1P1 *(Marckx v Belgium* (1979) 2 EHRR 330, cited by Laws LJ in *Carson and Reynolds v Secretary of State for Work and Pensions* [2003] 3 All ER 577). I accept these submissions.

90. I also accept Mr Sales' argument that a positive obligation on the state to intervene and protect against financial loss is most unlikely to arise where the risk is to a large class of individuals whose pensions schemes were not under the Government's direct control. And even if there can be a free-standing A1P1 claim based on legitimate expectation, which is itself contentious, it is difficult to see that the legitimate expectation could be one of full reimbursement for all losses sustained, given the difficulties of causation some of which have featured earlier in this judgment. Finally and similarly, though only as regards the first three Claimants: even if a breach of A1P1 had been proved, the Secretary of State contends that the FAS, in particular as recently extended, provides a proportionate response as a matter of human rights law, given the wide margin of appreciation which the Strasbourg jurisprudence gives to the judgment of member states' governments on socio-economic issues.

91. I therefore reject the A1P1 claim. Strictly speaking this makes it unnecessary to rule on the Defendant's submissions that the claim is time barred under section 7(5) of the Human Rights Act 1998, and that although there is a discretion to extend time where that would be equitable, I should not do so. But in case the matter should go further it may be of assistance to state my view on this issue. I consider that the A1P1 claim is indeed outside the one year time limit under section 7(5); but, if I had found it to have substantive merit, I would have granted the necessary extension of time to allow the claim to have been brought on the grounds that it would be equitable to do so, having regard to the desirability of allowing the Claimants and others in a like position to pursue the alternative remedy of a complaint to the Ombudsman, and to await her report and the Government's response to it before resorting to litigation. Since, however, I do not consider the claim well-founded, I refuse an extension of time and dismiss the claim.

Conclusions

92. In summary, therefore:

(a) The Secretary of State's rejection of the Ombudsman's First Finding of maladministration (consisting of the provision of misleading official information) is quashed;

(b) The Secretary of State's rejection of the Ombudsman's First Finding, in so far as it went on to conclude that the maladministration which she had identified had caused injustice to all those individuals who had suffered losses on the winding-up of their occupational schemes during the relevant period, is upheld;

(c) The Secretary of State's rejection of the Ombudsman's Third Finding of maladministration (relating to the change in the Minimum Funding Requirement in 2002) is upheld;

(d) The free-standing claim under Article 1 of the First Protocol to the European Convention on Human Rights is dismissed;

(e) The Secretary of State is directed to reconsider the Ombudsman's First Recommendation in the light of this decision.