

# The Pensions Ombudsman and the courts

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## A Introduction

I have no illusions why I have been invited by the Association of Pension Lawyers to give this prestigious lecture. It is not because I am a pension lawyer or have any expertise in this field or have any jewels to cast before you. It is solely and simply because I have year in year out figured so large in the imaginative annual reports of the Pensions Ombudsman. I shall refer to him generally as the Ombudsman. It is not that I am alone in the attention afforded to me: the company includes most of my brethren in the Chancery Division, the odd judge in the Queen's Bench Division and members of the Court of Appeal (two of whom are now Lords in Ordinary). The year 2000 Report adds to the list of perceived aberrants the Court of Appeal of Northern Ireland. The Court of Appeal has been castigated as being 'ombiphobic'. The Ombudsman has applied the epithet 'incorrigible' to a former Vice-Chancellor (on page 59 of the 1999-2000 Annual Report), the description 'not noted for subtlety' to a member of the Court of Appeal (*Trustees v Pensions Ombudsman*, PMI News September 1999) and to a judgment of a present member of the House of Lords the commendation that it is 'simplistic, legalistic, restrictive or wrong' (Annual Report 1996/7 p41). In the Ombudsman's ombicentric world however, I evidently stand out as the very figure of ombiphobia. I have disturbed a number of decisions of his which have come before me on appeal and this has in turn disturbed him. But he gives me credit where I merit it. He quotes in his 1999-2000 Annual Report p.61 with pride a move in the right direction in my judgment in *Legal and General v Pensions Ombudsman* [1997] 62 PBLR (13) where I said: '> . . whilst the Ombudsman's decision is on the margins of rationality, with some hesitation I have concluded that I cannot disturb his decision on this ground.'

My hesitation at accepting the offer of speaking today, following the path of some many more distinguished members of the judiciary, is because I profess no special knowledge of the pension law or practice, let alone comparable to that of the members of this Association. But my experience hearing appeals from the Ombudsman has perhaps equipped me to survey the relationship between the Court and the Ombudsman, identify areas of contention and make suggestions as to the way ahead. In this exercise I readily acknowledge my debt to a real pension lawyer, my friend Robin Ellison, who has made available to me much of the material for this talk, but I must emphasise that the views expressed and the errors are mine alone.

Parliament in its wisdom has established for the Ombudsman two distinct areas of jurisdiction, namely first a jurisdiction complementary to that of the Court to resolve disputes of fact and law and secondly an exclusive jurisdiction in respect of complaints of injustice in consequence of maladministration. In both areas the exercise of his jurisdiction is subject to the supervisory and appellate jurisdiction of the High Court. The statutory purpose behind establishing the office of the Ombudsman was to afford to

those interested a cheap, informal and expeditious procedure for vindicating pension rights which (like their counterpart employment rights) are central to their holders existence and dignity B the entitlement to pensions being for many the only security for an otherwise uncertain future. The existence of the two distinct regimes of the Court and the Ombudsman, and the existence of the supervisory and appellate jurisdiction of the Courts, inevitably creates scope for a degree of tension and conflict. Both the Court and the Ombudsman are at risk of being dazzled by the glare of the perceived shortcomings, the mote in the eyes, of the other, blind to the beam in their own eyes, and indeed on occasion they may have some reason for doing so. But so long as Parliament continues to vest the present judicial role in the Ombudsman, the two jurisdictions will have to co-exist. Today is a useful time to examine the role of the Ombudsman in the context of the somewhat changed legal landscape from that which prevailed in 1990 when that office was created and to explore some of the issues to which that co-existence has given rise.

Before I begin however I wish to make it clear that there is no personal ill-feeling between the Ombudsman and myself. In my judgments perhaps I have not applauded everything that he has done; and in his comments in his Reports on my decisions, (like my headmaster at school in my reports), put mildly, the refrain has indeed been: ~~He could do better~~. But the disagreement is professional only. I sincerely believe that we both recognise the commitment on the part of the other to do what we perceive it to be our duty in common pursuit of achieving justice for all parties in the field of pensions, and the occasional chide (the one to the other), whether in a report or lecture, is not out of place. We are both blunt speakers and no offence is intended or to be taken tonight or at any other time. Indeed to prepare myself for this lecture we met (without seconds) for lunch with of course Robin Ellison as mediator. It was a valuable session.

## B The function of the Pensions Ombudsman

The legislature has long expressed its preference, in a number of areas, as a medium for dispute resolution, for a body other than the courts. Amongst the most important today are the Employment Tribunals, the Social Security Tribunals and the Immigration Appeals Tribunal. The establishment in 1990 of the Ombudsman is one of the latest in a long line of such ~~contracting out~~ arrangements, albeit with certain unique features. The reasons for suggesting that there might be better ways of resolving disputes than resort to the courts had firm foundations:

- < first, disputes involving technical matters may be best resolved by an expert in the field, rather than a jack-of-all-trades, as most judges are;
- < second in certain areas of dispute the costs involved in conventional litigation are often out of all proportion to the sums and issues involved or the remedies required. There are undoubtedly disputes which merit a ~~cheap and cheerful cost free and informal~~ alternative. This was clearly the thinking of the then Occupational Pensions Board in its report ~~Protecting Pensions~~ in 1985;
- < thirdly, the speed of conventional litigation was until relatively recent times glacial. Any system which could get a decision out of somebody within the lifespan of a pensioner (shorter than most of us) was to be welcomed.

There were two special features of the pensions industry to be taken into account:

- (a) The first is the fiendishly complex structure of pension arrangements in this country. It would be unreasonable for a private individual to have to expect to

know his way round the complexities and indeed even the providers of pensions have to struggle to cope with the complications of pensions. The difficulties in this area are one of the compelling reasons for the practice of including exoneration and indemnity clauses in Pension Deeds B clauses to which I must subsequently refer.

- (b) The second is the need for a customer friendly forum complementary to that afforded by the courts for those who might otherwise be deterred from seeking protection of their rights.

Since 1990 the legal landscape has however significantly changed most particularly in three respects:

- 1 with the Woolf Reforms and increasingly proactive hands-on case management, trials can be and are expedited and heard expeditiously. The longevity of cases (like the longevity of judges) is now part of history. The Ombudsman estimates in his reports an average of some 12 months between receipt of a complaint and its adjudication. There is no reason to believe that the courts cannot and indeed do not do better. Indeed they should be expected to be able to do so, for there are now some 17 judges in the Chancery Division alone and there is only one decision maker in proceedings before the Ombudsman, namely the Ombudsman himself. The degree of formality required in court proceedings has likewise reduced;
- 2 the European Convention on Human Rights and the Human Rights Act give greater significance and attention to the legal process and its adequacy to afford a fair trial. It is the duty of the State to provide such a process: it is no longer sufficient to require the public to make do with a procedure which falls short but affords something better than nothing. There are serious questions whether proceedings before the Ombudsman meet the requirements satisfactorily;
- 3 mediation (and most particularly in the field of pensions disputes) is now very much a feature of the legal landscape. In this context I should mention the work of the subcommittee of the APL chaired by Giles Orton of Eversheds promoting the use of mediation and other forms of ADR in this field. This non-confrontational approach to pension dispute resolution may be seen as reducing what may have seemed in 1993 an urgent need for role of the Ombudsman as a form of mediator or medium to achieve a friendly settlement.

Practical experience since 1990 has brought to the fore anxieties, first whether the jurisdiction of the Ombudsman is being exercised in cases where the sums and issues involved and the remedies required, far from calling for a summary or cheap and cheerful procedure before the Ombudsman, merit and demand the protection afforded to the parties by more conventional proceedings; secondly whether the Ombudsman (who prior to his appointment will ordinarily have no previous experience or expertise in the field of pensions) is particularly well equipped to assume the role of an expert in the field and provide the necessary guidelines in the area of maladministration; and thirdly whether his judicial role is acceptable or desirable now that the Human Rights Act has come into force.

My thesis this evening is that, under the law as it stands, in the area where the court and the Ombudsman have complementary jurisdictions, the court has jurisdiction (albeit a jurisdiction yet to be invoked) to decide which cases should proceed before the court and which before the Ombudsman; and that the existing judicial jurisdiction of the

Ombudsman raises serious questions regarding compliance with the Human Rights Act and (for this and other reasons) should be transferred to a tribunal; and that the constitution of the tribunal should be such that as to make available all necessary expertise not present in proceedings before the Ombudsman: this will enable it to develop a jurisprudence which can provide guidance (most particularly to the standards to be expected of trust administrators) in the area of maladministration.

## C The coordinate jurisdiction to decide disputes of fact and law

Section 146(1) and (2) of the Pensions Act 1993 provides as follows:

- ×(1) The Pensions Ombudsman may investigate and determine any complaint made to him in writing by or on behalf of an authorised complainant who claims that he has sustained injustice in consequence of maladministration in connection with any act or omission of the trustees or managers of an occupational pension scheme or personal pension scheme.
- (2) The Pensions Ombudsman may also investigate and determine any dispute of fact or law which arises in relation to such a scheme between
- (a) the trustees or managers of the scheme, and
  - (b) an authorised complainant,
- and which is referred to him in writing by or on behalf of the authorised complainant.

Accordingly the primary jurisdiction of the Ombudsman relates to complaints of maladministration, but he has also a co-ordinate jurisdiction to resolve disputes of fact or law referred to him.

Section 146(6) provides that the Ombudsman shall not investigate or determine a complaint or dispute if, before the making of the complaint or reference of the dispute, proceedings have begun in any court in respect of the matters which would be the subject matter of the investigation. Section 148(1) and (2) provide as follows:

- ×(1) This section applies where
- (a) a complaint has been made or a dispute referred to the Pensions Ombudsman;
- and
- (b) any party to the investigation subsequently commences any legal proceedings in any court against any other party to the investigation in respect of any of the matters which are the subject of the matters in dispute.
- (2) In England and Wales where this section applies any party to the legal proceedings may at any time after acknowledgement of service, and before delivering any pleading or taking any other step in the proceedings apply to that court to stay proceedings:

...

- (4) On an application under subsection (2)... the court may make an order staying the proceedings if it satisfied C
- (a) that there is no sufficient reason why the matter should not be investigated by the Pensions Ombudsman; and (b) that the applicant was at the time when the legal proceedings were commenced and still remains ready and willing to do all things necessary to the proper conduct of the investigation.=

The statutory scheme is accordingly that the Ombudsman is debarred from the exercise of his jurisdiction in respect of any matter which is the subject of previously commenced court proceedings; and that where the Ombudsman's jurisdiction has been triggered, subsequent proceedings in respect of the subject matter of the complaint or dispute referred to him may on application by a party to the complaint or reference be stayed if the application is made before taking any other step in the action. Aspects of this scheme merit closer examination:

- (1) the right of a party to the complaint or reference to the Ombudsman to apply for a stay of subsequent court proceedings is analogous to that of a party to a contract containing an arbitration clause. Unless he moves promptly to assert his right to the stay, the statutory right to a stay is lost;
- (2) in deciding whether to grant a stay the court must take into account all the relevant circumstances. The respective timings of the complaint or reference to the Ombudsman and the commencement of proceedings are a consideration but its weight may vary. Also relevant is the seriousness of the issues for the parties, the effect on non-parties to the complaint or reference to the Ombudsman, the existence of related proceedings, the need for interlocutory relief, the sums involved, the requirement for a (protracted) oral hearing and examination of witnesses, and the hardship and the advantage or disadvantage for one or other party of taking one form of proceedings rather than another. The availability of legal aid or a conditional fee agreement may be taken into account as may the offer by a party to bind himself not to seek to recover costs or to make a contribution to the other party's costs of legal proceedings. Plainly the court can and should take into account the complexity of legal issues, for the Act provides for the Ombudsman referring such questions to the court for decision. The stay may except any necessary application for interlocutory relief not available in proceedings before the Ombudsman;
- (3) where no stay is granted, it must be implicit in the statutory scheme that during the currency of the court proceedings, any proceedings before the Ombudsman relating to the same subject matter must be stayed either on the motion of the Ombudsman or (if necessary) by order of the court;
- (4) but the absence of the availability of a stay does not however necessarily mean that the court may not under the CPR have and exercise jurisdiction to strike out the proceedings before the court (whether or not the issue of the writ predated any complaint or reference to the Ombudsman) so as to enable a question to be decided by the Ombudsman, if justice is more completely achieved by the adoption of this course. The tactic of issuing 'protective writs' to preclude exercise of jurisdiction by the Ombudsman (which I understand is not unknown in this field) may not accordingly always prove effective. This jurisdiction of the

court may be necessary as well as healthy in cases where the issue of the writ for this purpose is considered oppressive or where the manner or speed of conduct of proceedings before the court leaves anything to be desired and most particularly where it is such as to penalise one of the parties unfairly in terms of costs or delay.

I have gone into these matters in some detail because my (no doubt) limited understanding is that practitioners are not generally aware of and do not consider the questions which I have raised and because on a number of occasions I have felt grave concern on appeals from the Ombudsman that the reference had been made to the wrong forum. At present the question which of the Ombudsman and the courts should determine a dispute is regarded as following mechanically the accident of which is earlier in time, the issue of proceedings or the making of the complaint. But that is (as I have said) only one factor in the equation. The resolution of what in itself may be a matter of minor significance (a few hundred pounds) between a pensioner or prospective pensioner and a pension fund may involve questions of principle affecting thousands of like pensioners with a financial impact running into many millions of pounds and involving questions of law or mixed fact and law of the greatest difficulty and complication. Today complainants are often too ready to hurl serious allegations against trustees, often without just cause. It is to be remembered that an allegation of negligence against a professional trustee or manager threatens his standing and professional reputation. How much more serious are charges of fraud not infrequently faced by trustees. To deprive trustees in these circumstances of the protection afforded by conventional proceedings before an experienced, trained judge is a very serious step which can scarcely have been intended by the legislature. The position may be the same where a trustee faces a claim eg for reconstituting a very substantial trust fund.

On an application for a stay of court proceedings, the court must in the absence of a sufficient reason to the contrary exercise its discretion in favour of granting the stay. The judges will be only too willing to do so, for they are only too anxious to lighten the load on the courts when this can properly be done. But when there are compelling reasons to the contrary the court can be expected to refuse the stay and assert its jurisdiction over the dispute, though in the exercise of its discretion whether to grant a stay it may do so only on terms that secure fairness and equality of arms for the financially disadvantaged.

I should mention one curious (and in my view unsatisfactory distinction) between the exercise of the co-ordinate jurisdiction by the court and the Ombudsman. An appeal lies from the decision of the court on ground of error of law or error of fact, yet an appeal lies from the Ombudsman on the ground of error of law alone. I cannot see how this distinction is rational in the exercise of such a co-ordinate jurisdiction. The distinction can scarcely reflect any greater proneness of the court to error of fact. There is no reason why a party to proceedings before the court should be disadvantaged in this way, and the limitation on appeals from the Ombudsman perpetuates that fine distinction fraught with difficulties between a mistake of law and fact. As I have already intimated, it will be my suggestion that the judicial role of the Ombudsman should be transferred to a Tribunal. If such transfer is effected, that would be an appropriate time to abolish this distinction as to the grounds of appeal.

## D The exclusive jurisdiction

Few areas of law have given rise to greater debate and confusion than that of the exclusive jurisdiction of the Ombudsman to determine complaints of injustice arising from maladministration. It is by definition a jurisdiction exercisable outside and beyond the

area of 'civil wrong', an area where there is no remedy available in private law (see *Westminster City Council v Haywood No 2* [2000] 2 All ER 634; [2000] ICR 827; [2000] 10 PBLR (12)). There is no confining statutory definition of maladministration, but it is clear that it is concerned only with procedures. As Lord Donaldson MR said in *R v Local Commissioners for Administration ex parte Eastleigh BC* [1988] QB 855 at 863:

'Administration and maladministration in the context of the work of a local authority is concerned with the manner in which decisions by the authority are reached and the manner in which they are or are not implemented. Administration and maladministration have nothing to do with the nature, quality or reasonableness of the decision itself.'

On the other hand, within the field of the area of procedures, the Ombudsman has a wide jurisdiction subject only to control by judicial review in case of error of law or unreasonableness (including a failure to be proportionate). As Sedley J said in *R v Parliamentary Commissioner for Administration ex parte Balchin* (1996) unreported transcript p14 (QBD, [1997] JPL 917):

'So far as a court of judicial review is concerned the question is not how maladministration should be defined, but whether the Commissioner's decision is within the range of meaning which the English language and the statutory purpose together make possible. For the rest, the question whether any given set of facts amounts to maladministration or by parity of reasoning to injustice is for the Commissioner alone.'

Accordingly maladministration may extend to any conduct or omission in the administration of the trust which significantly falls below the standards currently to be expected of the trustees or managers in question in the manner in which they discharge their duties. It may for example embrace delay, neglect, arbitrariness or rudeness or perversity. But it does not extend to stigmatising decisions because to the mind of the Ombudsman they are wrong.

The exclusive jurisdiction raises a whole series of questions:

- (a) what (if any) is the legal nature of the 'duty' which the Ombudsman is enforcing? It is not a freestanding legal duty. It can only be a standard, or a particular species of duty, recognised and enforceable by the Ombudsman.
- (b) to whom is it owed? It is prima facie owed to beneficiaries and prospective beneficiaries, but is it also owed to a prospective member of a scheme, exposing trustees and managers to liability when no legal liability lies for non-disclosure or misrepresentation?
- (c) by whom is it owed? Clearly it is owed by trustees and managers, but can also be owed by anyone else? Some limit has recently been imposed by the Court of Appeal of Northern Ireland which held that a solicitor instructed by the trustees or managers to write a letter ordinarily does not.
- (d) what remedy is available? The present state of the authorities limit any award to compensation for distress which may only be given if such distress is proved and there is no applicable exoneration clause, and the amount must be modest.

These four questions have yet to be authoritatively answered. There are those who maintain that Parliament intended to confer upon the Ombudsman jurisdiction to judge trustees and managers by the standards which he decides to be appropriate and in case of any shortcoming to award compensation unbounded by the ordinary legal constraints on the award of compensation for breach of duty and that the courts have frustrated this

purpose. This thesis is persuasively advanced by Richard Nobles in his recent article *Enforcing Employees Pensions Rights: B the Court Hostility to the Ombudsman*, Industrial Law Journal, Vol 29 No 3, September 2000. The courts' approach may be decried as somewhat legalistic, but what the courts have done is to require the Ombudsman to confine his investigations and adjudications within the area of his jurisdiction (and in particular to procedural errors or omissions) and test his decisions by the *Wednesbury* standard. It is not within the jurisdiction of the Ombudsman to add to or vary the substantive law obligations of the parties. The courts have accordingly held that the Ombudsman has jurisdiction to investigate complaints of maladministration by an employer only in connection with its functions under or in relation to the pension scheme in question, and not in connection with the ordinary contractual relations between employer and employee, even where these impacted directly on the employee's pension rights: see *Engineering Training Authority v Pensions Ombudsman* [1996] 28 PBLR (11). Likewise they have held that acting honestly and without negligence on an incorrect view of the law is not maladministration and that compensation for maladministration cannot extend beyond an award for the loss it occasioned: so that when a complainant was promised an over optimistic estimate of the benefits to which he would become entitled on retirement, (save for a modest award for distress) he could not recover compensation except where he could show that, as a result of his reliance on the trustee's promise, he had lost some property or financial responsibility that he would otherwise have enjoyed: *Westminster City Council v Haywood* [1996] 2 All ER 467; [1996] 14 PBLR (21). Again where the trustee gave an incorrect statement of benefit entitlement and only provided a correct statement too late to take advantage of a guarantee of transfer value, the court overturned the Ombudsman's decision (i) to extend the time limit a further three months and (ii) that the trustee's failure to offer such an extension was itself an act of maladministration: the complainant had to prove that the incorrect statement caused any loss claimed: *Hogg Robinson v Pensions Ombudsman*. In a case where the trustees of the scheme failed to advise the complainant that, if he delayed his retirement by a month, his pension would be substantially increased, the Ombudsman held that the employer could easily and should have warned the complainant before he took voluntary retirement and that the failure to do so constituted maladministration. The court reversed that decision holding that there was no such implied contractual duty to warn under the contract of employment and accordingly no liability for any extended duty could be imposed under the guise of maladministration: *University of Nottingham v Eyett* [1999] 12 PBLR (11).

This lecture does not afford the opportunity to say more on this topic than this. At the moment there are legitimate concerns that standards laid down on complaints of injustice occasioned by maladministration and the awards made vary with each Ombudsman, even as the length of his foot. There is no set of standards laid down as a guide; there are no series of reported decisions which can provide guidance or afford confidence in a consistency of approach and decision-making. It is troubling that the Ombudsman as the investigator sets the standard and as judge rules on compliance and decides on the remedy. It is indeed the role of the Ombudsman to maintain standards, but no other Ombudsman (so far as I am aware) combines this role with that of a judge whose decisions are enforceable as judgments of the court. I am sympathetic to the concerns expressed by Mr Noble, but that loosening of reins which he advocates might more readily be expected, if the standard setting and enforcing body was a tribunal whose members could represent the various interests in the industry and bring to bear the expertise required and whose fully reasoned decisions could be reported and circulated to the industry as a whole,

## E Two distinct topics

Before I leave the areas of the co-ordinate and exclusive jurisdiction, I want to say a word on two topics on which differences have arisen in the past between the court and the Ombudsman. The issues have been resolved, but they remain important.

## 1 Interference with discretion

The law relating to the jurisdiction of the Court to interfere with and override the discretion of trustees is reasonably clear. The question arises generally in one of three situations: (1) the trustees may apply to the Court for a decision on a question surrendering the exercise of their discretion to the Court. In that case the Court is vested with the original discretion of the trustees; (2) the trustees may apply to the Court for guidance whether the proposed exercise of their discretion is proper. In that case the court will in any ordinary case merely give to the trustees their view on this question and any consequent exercise of discretion is by the trustees alone; and (3) a challenge may be made by a beneficiary to an actual or proposed exercise of discretion by the trustees. In this case the court will decide the validity of the challenge on established principles and grant any consequent relief (eg award compensation) and (in the ordinary course) unless the Court orders the replacement of the existing trustees, the matter goes back to the trustees to reconsider in the light of the Court's decision on the challenge.

The jurisdiction of the Ombudsman in this regard is confined to (3). The decision of the Court of Appeal in *Edge v Pensions Ombudsman* [2000] Ch 602; [2000] 3 WLR 79; [1999] 49 PBLR (36) provided a healthy reminder that when such a challenge is made, the Ombudsman has no jurisdiction to interfere with such an exercise by the trustees save upon those established principles and that the Ombudsman cannot arrogate to himself the power to exercise that discretion. Therefore the personal view held by the Ombudsman that the decision of the trustees how to reduce the surplus in that case was ~~unfair~~ was not a ground for upholding a complaint challenging that decision: the trustees had no duty to be impartial as between the classes of members and could properly exercise their judgment. The Ombudsman could not substitute his own.

## 2 Exoneration and indemnity clauses

Exoneration clauses may either limit the duties of a trustee or save him from liability if he commits a breach of duty. Distinct from exoneration clauses but closely analogous to them are indemnity clauses which supplement the implied right of trustees to an indemnity from the trust fund in respect of liabilities incurred as a trustee. The indemnity may extend to costs and liabilities incurred by reason of an allegation of a breach of duty or indeed by reason of a found breach. The only legal limitation the efficacy of an exoneration or indemnity clause is that it cannot protect a trustee from liability for a breach of his core duty to act in good faith for the benefit of the specified beneficiaries, but subject to this limitation it is open to the settlor in the trust deed to limit the duties and the liabilities for breach of duty of the trustee and grant as broad a right of indemnity as he thinks fit. There are no public policy constraints. The only relevant legislative constraints are to be found in sections 31 and 33 of the Pensions Act 1995. Three alternatives are available to a settlor:

- (1) an exoneration clause;
- (2) an indemnity clause;
- (3) provision for insurance.

Exoneration and indemnity clauses do not have an entirely beneficial effect on the

administration of pensions. Indemnity clauses merely pass the cost to the trust fund and accordingly the other beneficiaries. As an alternative the taking out of insurance adds a cost to the fund as a whole, but avoids the adverse effects to which I have referred of exoneration and indemnity clauses. The need and demand for protection will ensure that protection in one or other of these forms will continue to be expected and found in practice in all trust deeds.

The exposure of trustees and managers to adverse orders by the Ombudsman has added importance to the protection afforded by such clauses. The issue was at one time regarded as wide open how far a trustee could rely on an exoneration clause in the trust deed to ward off claims for compensation for maladministration awarded by the Ombudsman. The risk of an award of compensation against him is a real consideration for an informed candidate for the office of trustee or manager. Since the decision in *Seifert v Pensions Ombudsman* [1999] 25 PBLR (28) there can have been no doubt that this protection is available to a trustee whether the complaint was made before or after he has left office. But exoneration clauses do not extend to cases of dishonesty. Experience could give rise to the anxiety that such findings are too readily arrived at in proceedings before the Ombudsman but the recent decision of the Court of Appeal in *Duckitt v Farrand* [2000] 19 PBLR (11) has given the healthy reminder that such a finding must clearly and distinctly be made and made on evidence which is sufficient to sustain so serious a charge. Where such a charge is made, I would expect trustees and managers today to consider carefully whether they should seek a stay of proceedings before the Ombudsman in favour of proceedings in court.

The importance of exoneration and indemnity clauses is brought to the fore by another and much more recent development and that is the growing number of threats made by single issue extremist groups to investors in businesses to which they are opposed. The existence of these threats pose a dilemma to trustees and fund managers: do they have a single minded duty in their decision-making to adopt a purely financial judgment whether or not to disinvest and accordingly, where the threat, (as it is intended) creates a situation where (using only financial criteria) the investments are likely to fall in value, should the investor cave in and sell and, by doing, afford encouragement and support to the campaign? This is the traditional property and profit oriented approach of English trust law reflected in the decision in *Cowan v Scargill* [1984] 2 All ER 750; [1985] Ch 270; [1984] 3 WLR 501; [1990] 08 PBLR (23); (1984) 128 SJ; [1984] ICR 646; [1984] IRLR 260; (1984) 81 L Soc Gaz 2463. In that case, the court held that a trustee's natural repugnance to supporting apartheid by investing in South Africa was no ground for refusing to invest there if the profits to be achieved made such investment advantageous financially for the beneficiaries. Or can or should the investor take to heart Burke's famous words: 'The only thing necessary for the triumph of evil is for good men to do nothing' and stand up to the blackmail? In my view in the age of the European Convention on Human Rights and the Human Rights Act, in administration of trusts trustees can no longer be obliged blindly to follow profit when human rights and human values are at stake. An analogous situation recently arose when Penguin Books (a subsidiary of Pearsons) published a book by Dr Lipstadt which exposed David Irving and his historical methods. David Irving sued for libel. The directors of Pearsons decided to defend this massively expensive action though Penguin had at the date of service of the writ sold only 21 copies in Great Britain. It can scarcely have been in the financial interest of shareholders to incur the financial cost, but a moral principle was at stake. Likewise trustees, when faced by the threats of extremist groups should surely recognise (or at least be entitled to recognise) that there is a public dimension to the issue before them and that there is involved a very real threat to the rule of law and democracy in this country. Equity can surely acknowledge in these very special circumstances that trustees may recognise a social as well as a pure profit making responsibility. But, so long as this question is left unresolved in their favour by the courts, it is a serious matter to expect that the trustees

should stand up to be counted without the protection of an exoneration or indemnity clause. They may however decide that their safer course is to apply to the court for guidance.

## F Human rights

The European Convention on Human Rights requires that in the determination of civil rights a court or tribunal affords to the parties before it a fair trial before an impartial and independent tribunal. In respect of his judicial role the Ombudsman is clearly a tribunal within the meaning of Article 6. There are a number of questions raised whether these requirements are satisfied in respect of hearing before the Ombudsman.

### 1 Is he an independent tribunal?

This turns upon the term of his appointment and the powers for his removal. In *Findlay v UK* (2nd January 1997) Reports of Judgments and Decisions 1997 (1997) 24 EHRR 221; Times Law Report 27 February 1997 (*Findlay*), the principle is laid down (para 73):

“In order to establish whether a tribunal can be considered as independent regard must be had inter alia to the manner of appointment of its members and their term of office, the existence of guarantees against outside pressures and the question of whether the body presents an appearance of independence.”

Until recently the Ombudsman could be removed at anytime by the Secretary of State for Social Security by notice in writing, but in order to secure compliance with the Convention he was in 1999 granted a fixed two year term of appointment.

### 2 Is he an impartial tribunal?

*Findlay* goes on to say in respect of impartiality:

“As to the question of impartiality there are two aspects to this requirement. First, the tribunal must be free of personal prejudice or bias. Secondly it must be impartial from an objective viewpoint, that is, it must offer sufficient guarantees to exclude any legitimate doubt in that respect.”

The question of an impartial tribunal and the question of a fair trial can conveniently be considered together. Concern on this score may be expressed on a number of grounds:

- (a) the Ombudsman combines investigatory and judicial roles. It is not unusual on the Continent for an investigating judge to fulfil both roles and for this reason this situation could survive scrutiny in Strasbourg, but though his procedure may perhaps satisfy the “floor test” imposed by the European Court of Human Rights, that floor test does not impose the ceiling in national courts like those in the UK where the legal tradition adopts a much more rigorous standard;
- (b) his staff investigate complaints as and when received, report to him on them and prepare draft decisions for his consideration and signature. This is inevitable in view of his very substantial workload and is (unfortunately) not infrequently apparent from the decisions themselves. This is very troubling. This procedure is perfectly normal for an administrative, but not for a judicial, body. For it means not merely that the adjudicator receives privately relevant material through and from his officials but the procedure is calculated to enable

him to sign off decisions effectively made by his staff;

- (c) since the decision of the Ombudsman is final on questions of fact, there is likely to be an entitlement to an oral hearing and the examination of witnesses. I understand that though he recognises the right to both the Ombudsman has had very few such hearings (in total not exceeding four). It is not apparent whether this is the result of informed decisions by the parties as to their entitlement in this respect. But in *Wakelin v Read* [2000] 26 PBLR (22) Mummery LJ made clear it is for the parties to request an oral hearing for evidence and argument and that a heavy price may have to be paid if the request is not made. It is however proper and it may be incumbent on the Ombudsman to point out to litigants the existence of these rights if they are not aware of them, and this must surely be so in case of litigants in person. If the parties are fully informed of their rights and exercise them on any large scale, it must be obvious that it would not be practicable for the Ombudsman to conduct any substantial number of such hearings, let alone in public, having regard to the calls on his time and his limited staff and facilities;
- (d) in cases where on grounds of entitlement to a fair trial a party in proceedings before the Ombudsman is entitled to object to a hearing before the Ombudsman, there is no alternate before whom the matter may proceed, resulting in a failure of the legal system to comply with its duties under the European Convention. I shall say more about this in a moment;
- (e) section 151(4) of the 1993 Act confers upon the Ombudsman the extraordinary role of appellant against decisions of the High Court. The Court of Appeal in *Edge v Pensions Ombudsman* [2000] 3 WLR 79 [1993] 49 PBLR (36) at 116 pointed out the incongruity:

> . . . it is surprising to find a tribunal appealing from the decision of the High Court overturning its own determination. It is important that the Ombudsman should avoid being seen to be partisan and there is a danger that by appealing on behalf of complainants he may become too closely involved with them. In our view the Ombudsman must consider carefully whether there is some proper reason why the performance of the statutory role given to him under Part X of the Act of 1993 requires that he should challenge a decision of the High Court given on appeal under section 151(4) of that Act. Unless there is some point of principle in relation to which conflicting decisions of the High Court make it difficult for him to perform his proper functions without further guidance from this court, it is difficult to see why he should not accept and act upon the decisions of that court to which Parliament has entrusted the task of hearing appeals for his determination.=

In *Duckitt* [2000] 19 PBLR (011) the Court of Appeal reaffirmed this rule, stating that the point of principle must be real, and not imaginary. But whatever the constraints so imposed, such a role is surely incompatible with his judicial function;

- (f) the Ombudsman clearly has his own evangelical agenda which he takes his every opportunity to take a high profile stance to propagate not least through his lectures and annual reports. As is clear from the quotations from his Reports and articles which I have already made, he respects none of the constraints to be expected of a judicial officer respecting decisions made by superior courts, but conducts campaigns in furtherance of his ideas casting ridicule on those members of the judiciary who have the temerity to disagree with him.

Respectfully I would venture the comment: few postures are so unbecoming as a judge, whatever his level in the judicial hierarchy, for ever in the missionary position. This must give him the appearance of being, if he is not thereby constituted, an interested party in his own decisions. The obviation of this cloud must be a further factor favouring transferring the adjudicatory role to a tribunal.

## G Tribunal

It is to be remembered that over 15 years ago the original recommendation by the Occupational Pensions Board was for a tribunal (Occupational Pensions Board, *Protecting Pensions, Safeguarding Benefits in a Changing Environment* (Cm 573) HMSO, 1989). The Pension Law Review Committee in 1993 recommended that the Ombudsman should not be replaced by a tribunal. The first reason that it gave was as follows:

>Whilst a tribunal is less formal than a court, creating a tribunal for pension disputes would still involve some of the elements that lay people find daunting: oral evidence and an adversarial procedure, in which the protagonists confront each other and ask questions whilst the tribunal listens to the evidence, as opposed to the inquisitorial approach used by the Ombudsman, who investigates the facts and then decides on the basis of them.=

This reasoning can no longer stand, for under Article 6 of the European Convention on Human Rights as applied in this country the parties are entitled to an oral hearing at which oral evidence is given and tested by cross-examination and each party is entitled to make an oral presentation of his case. Indeed the Ombudsman recognises that this is so and (when requested) provides such an oral hearing. The minimal number of oral hearings before the Ombudsman may well reflect the parties perception of his limited capacity for them and ignorance of the entitlement to oral hearings. On page 53 of his 1997-8 Report the Ombudsman refers to the fact that hearings do tend to interrupt the work of the office. I would expect the numbers to increase if there were greater facilities for them and when the right to them is better known. This change not contemplated by the Pension Law Revision Committee requires a review of the question whether the judicial role should now be transferred to a Tribunal. In my view there are very substantial advantages in favour of such a transfer. I would expect the tribunal to be constituted by a legally qualified chairman who could sit (where appropriate) with lay members drawn from both sides of the industry to have either a part time or full time deputy chairman who could hear cases which for any reason could not be heard by the Chairman. There is no reason why the administration of justice before the Tribunal should not be quick, cheap and efficient, and most certainly as professional and sure as the present procedure before the Ombudsman.

The obvious advantages would include the following:

- (1) the Tribunal will be equipped to handle expertly and efficiently the increase in the number of oral hearings for which the Ombudsman (not least because of other duties) is ill-equipped to handle;
- (2) there would be, and be seen to be, a clear demarcation between the investigatory role of the Ombudsman and the adjudicatory role of the Tribunal. This is calculated to increase the confidence in the maintenance of the balance required from the complainant and the respondent;

- (3) there would be avoided the acute problems which currently arise where (in accordance with ordinary principles) the Ombudsman should be disqualified from hearing a complaint but where there is no alternative available. In *Haywood v Westminster CC No 2*, a case I heard before the coming into force of the Human Rights Act, natural justice required that (because of the course of earlier proceedings before him) the Ombudsman be disqualified from adjudicating on an issue which wished to remit for reconsideration, but since there was no-one else to whom to refer this issue, I had only the choice of remitting the issue to him (a pointless exercise) or not remitting at all. This situation is plainly objectionable on human rights grounds and was so held in the parallel case before the European Court of Human Rights of *Kingsley*, (*Kingsley v United Kingdom*, Times Law Report 9 January 2001) which related to the grant of a gaming licence by the Gaming Board. The problem raised its head again in the case of *Duckitt v Farrand CA* (20 November 2000). The Court of Appeal suggested that in such a case a matter could be remitted to someone else exercising the functions of the Ombudsman for this purpose. That someone else was not identified, for there is as yet (so far as I am aware) no statutory provision which allows for this substitution. If the adjudication had been by a tribunal and the chairman was disqualified, provision would be made for a deputy to hear and decide the question;
- (4) the requirements of the Human Rights Act could and would clearly be satisfied, and the doubts whether they are satisfied under the present regime would need no further consideration;
- (5) legal aid is not available before the Ombudsman, the Government have indicated that it may become available before tribunals. To secure equality of arms, it might be expected that in proper cases legal aid will become available to the parties to proceedings before such a tribunal;
- (6) the decisions of the tribunal could form a body of jurisprudence of the greatest practical value for all practising or interested in this field.

## H Conclusion

I hope in this talk to have given some impetus to the debate which should take place on dispute resolution in the field of pensions. This goes well beyond questions of personality. The Ombudsman has held out the hand of friendship to the judges of the Chancery Division by including them as characters in his latest book, for having honed his dramatic powers over years of Annual Reports he has finally penned his master piece, an autobiography, the *Adventures of Ollie the Pensions Ombudsman*. The cover shows him in the arms of an Ombi-omniverous female. He is the synthesis (if such synthesis is possible) of the hero of Ian Fleming's works and a civil servant, indeed an Ombudsman. **B** an apt name might be 'James Bondsman PO Box 007'. Not merely does he include the Chancery judges as characters, but he kills most of us off. In the tradition of grand opera, it ends with a short tear jerking refrain full of pathos:

∞Ollie the Ombudsman packed his trunk and said goodbye to the circus∞

This message is full of foreboding. If (Heaven forbid) that is intended to prepare us for his retirement and for a life without him, and if that means (as it must) no more Annual Reports and no more decisions, the judges will miss him: his going will leave a gap in

their reading and their court lists. He will however know that he has left his impact on the system and the judges **B** in the language of James Bond, that character so close to his heart, we have been not shaken, but stirred—but let me reassure him and you all, we are none the worse for the experience.

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**8** The Honourable Mr Justice Lightman March 2001