

## DEALING WITH A PENSIONS OMBUDSMAN INVESTIGATION

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## **1. INTRODUCTION**

Investigations by the Pensions Ombudsman should not be taken lightly. Although the procedure may seem less formal than court proceedings, he can make all of the directions the court can and even some which it cannot. Not even his creator, the Conservative government of the 1980s, was beyond his reach. He found they had wrongly taken GBP 168 million from the busworkers' pension scheme on privatisation and the money was finally returned to the trustees, with interest, last year.

Many investigations get off on a wrong-footing from a respondent's point of view, often because the procedure is not understood or the possible consequences of an adverse ruling are not fully appreciated. This paper provides guidance on the Ombudsman's procedures and how investigations should be handled.

## 2. JURISDICTION ARGUMENTS

Jurisdictional arguments are worth careful consideration by respondents because this will mean that the merits of the case become irrelevant. The key components of the Ombudsman's jurisdiction are set out in s.146 Pension Schemes Act 1993 ("PSA 1993"). The following table illustrates his current jurisdiction by reference to the type of complainant and respondent. Extensions of his jurisdiction introduced from 1 December 2000 by s53 of the Child Support, Pensions and Social Security Act 2000 ("CSPSSA") are included.

		<b>Respondent</b>			
		trustees or managers of another scheme	employer	administrator	trustees or managers of same scheme
<b>Complainant</b>	actual or potential beneficiary	N	Y	maladministration	Y
	trustees or managers of scheme	Y	Y	N	dispute of fact or law (also maladministration if complaint by independent trustee)
	employer	N	N	N	Y

Y = maladministration or dispute of fact or law

NB. Not shown is ability of sole trustee to refer a question to the Ombudsman (introduced under CSPSSA)

Three jurisdictional issues which have arguably received the most attention in the last few years (by the courts or by parties) are time limits, group actions and who is an administrator. Each issue is considered below.

### 2.1 Time limits

Time limits can sometimes get respondents off on a technicality. They do not have to defend themselves successfully on the merits of the case and therefore the time limit argument can be very attractive. As an example; in the year ended 31 March

2000, 196 complaints or disputes were rejected by the Ombudsman as being out of time. The two essential elements to time limits on claims are:

- (a) for how long does the clock run; and
- (b) when does the clock start running?

### **2.1.1 Limitation period**

The normal limitation period is three years for complaints of maladministration and disputes of fact or law. The period was first introduced from 1 April 1991 by the Personal and Occupational Pension Schemes (Pensions Ombudsman) Regulations 1991 (SI No588).

The provision is now contained in the Personal and Occupational Pension Schemes (Pensions Ombudsman) Regulations 1996, reg 5. For consideration of the retrospective effect of the legislation, including in the context of the Personal and Occupational Pension Schemes (Miscellaneous Amendments) (No2) Regulations 1997, see the decision of Lightman J in *Westminster City Council v Haywood* (No 2) [2000] 10 PBLR 12.

The period compares favourably with the six months usually imposed on employment related claims such as unfair dismissal or sex discrimination but less favourably than claims such as breach of contract which is usually a six year period.

A complaint or dispute must actually be received in writing by the Ombudsman before the three years has expired, unless he extends the period using the discretion explained below. It is usually enough (according to David Laverick's current approach) for a case to be referred to OPAS or to be going through IDR. If, however, an OPAS case has dragged on for a long time, the Ombudsman may be reluctant to treat the limitation clock as having stopped.

### **2.1.2 From when?**

The three year period will either begin to run from the date when the act or omission which is the subject of the complaint or dispute occurred or under reg 5(2) of the new regulations:

"Where, at the date of its occurrence, the person by or in respect of whom the complaint is made or the dispute is referred was, in the opinion of the Pensions Ombudsman, unaware of the act or omission .... the period of 3 years shall begin on the earliest date on which that person knew or ought reasonably to have known of its occurrence."

Therefore reg 5(2) provides a way for a complainant to avoid being beaten by the three year limitation period. The complainant could argue that although the events giving rise to the complaint or dispute happened, say, six years ago, he only discovered the facts two years ago and is therefore within the three year limitation period.

### 2.1.3 Discretion to extend

Even if a complainant is out of time due to a combination of the limitation period and the date from which time runs, reg 5(3) could offer a solution. It provides:

"Where, in the opinion of the Pensions Ombudsman, it was reasonable for a complaint not to be made or a dispute not to be referred before the end of the period allowed under ... [the rules set out above] ..., the Pensions Ombudsman may investigate and determine that complaint or dispute if it is received by him in writing within such further period as he considers reasonable."

In the Ombudsman's Annual Report 1996/97, the wording of the new regulation is contrasted with the wording of the 1991 regulations which permitted the period to be extended "where it was not reasonably practicable" for a complaint or dispute to be made or referred before the end of the period allowed ...". The Ombudsman felt compelled to apply the approach of the Court of Appeal in *Biggs v Somerset County Council* [1996] 2 All ER 734 in relation to part-timers; the Court held that although they misunderstood the legal position that claims were possible, it was nonetheless "reasonably practicable" for them to begin proceedings. This was quite a harsh approach; the court was essentially saying that even where domestic law provides no remedy an individual can bring a test case arguing that domestic law should provide one.

However, the Ombudsman pointed out that in the new regulations the wording is less limited i.e. "where ... it was reasonable for a complaint not to be made" the Ombudsman can extend the limitation period. Although he acknowledged that the amended wording is probably intended to cover time reasonably spent pursuing internal dispute resolution procedures (required for member/trustee disputes under Pensions Act 1995, s50) or with OPAS, "nevertheless, it would also appear to cover people like the part-timers in *Biggs* who had excusably mistaken their rights."

Such discretions to extend time limits are quite common. For example Lord Denning MR in *R v Local Commissioner for Administration ex parte Bradford* [1979] QB 287 said:

"Time bars are not to be enforced rigidly against a complainant where justice requires that the time be extended and his complaint heard. In the present case the mother (or the father's father for her) explained the delay in these words:

'The main reason for delay was that I had no one to help me or give me advice, to complain about my children being taken away. I did not understand the law and consequently it was all too easy for the authorities to take my children from me and make me believe that they had powers, which I, a 21 years old female, was powerless to do anything about.'

The Local Commissioner considered that the matters amounted to "special circumstances" making it proper to entertain her complaint, even though it was not made within 12 months. I see nothing wrong with that assessment of his. He was quite justified in extending the time."

An example of the Ombudsman extending his three year limitation period was in the determination which was appealed in *Duffield v Pensions Ombudsman* [1996] OPLR 149. The events complained of occurred between 1984 and 1986 but the complaint was not made until 1991. On appeal it was pointed out that the first time a complaint was specifically regarded by the Ombudsman as made against Mr Duffield was in 1995, when he was included in the investigation. Mr Duffield argued that the Ombudsman had failed to consider whether it was reasonable to allow the complaint under an extension of the usual time-limit and it seemed unreasonable given the long time that had passed (around 10 years). Carnwath J was not required to rule on this point but he observed (at p157) that:

"... I see considerable force in the submission that, before deciding to reconstitute it as a complaint against Mr Duffield, he had an obligation to reconsider the question of time-limits ..."

Another possible limit on the Ombudsman's ability to extend the usual time-limit was raised by Lightman J in *NHS Pensions Agency v Beechinor* [1997] PLR 95. He said (at p96):

"One of the surprising features of this case is that the Ombudsman has granted relief in respect of the alleged commission of a tort by the Administrators against the complainant some fourteen years before the date of her complaint. There is no allegation of any breach of fiduciary duty. I find it difficult to believe that Parliament intended that the Ombudsman's jurisdiction to grant relief in respect of maladministration should extend to tort claims of this character and to overriding defences of limitation to such claims and that the respondent to the complaint should

be deprived of the substantive and procedural safeguards of a trial before a judge. It is however unnecessary to decide this question in this case. I have only to decide whether the alleged tort was committed."

Following *NHS Pensions Agency* the reasonableness of the exercise of this discretion will be judged in the light of comparable limitation periods e.g. for contract, breach of trust and negligence claims.

The most spectacular application of an extension of the bare three year time limit was in the Ombudsman case of *Wheeler v NBC Pension Trustee Ltd* [1996] OPLR 337, the Ombudsman investigated events that occurred in 1985 and 1986 following a complaint made in 1991. He directed the trustee to seek repayment of GBP 168m plus interest from the Department of Transport which had received the monies from scheme surplus on privatisation of the bus industry. A settlement was reached in 1999.

The reasonableness of the Ombudsman's exercise of discretion to extend was considered in *Legal and General Assurance Society v Pensions Ombudsman* [1999] All ER 1206. Lightman J held that although he considered that the complaint was not brought within a reasonable period, he could not conclude that no reasonable ombudsman would have held the period reasonable. Accordingly, the Ombudsman's decision to extend the usual three year limit was upheld.

## **2.2 Class actions - beyond *Edge***

Although most complaints and disputes referred to the Ombudsman concern a particular individual's grievance, some cases involve a question of general importance to a large group of scheme members. To what extent can the Ombudsman effectively deal with this type of case?

The question was considered by the current Ombudsman in case B10747. Two pensioners from the Airways Pension Scheme and the New Airways Pension Scheme, both relating to British Airways, complained to the Ombudsman. They alleged maladministration and breach of duty by the employer and trustees on the basis that pensioners had not been considered when deciding on the use of surplus in the schemes. The summary of complaint was expressed by the two pensioners to be on behalf of themselves and the members of the Association of British Airways Pensioners. The Ombudsman said:

"My primary role may be regarded as being to deal with individual complaints and disputes, rather than with collective complaints and disputes. Nevertheless, according to the statutory provisions quoted [ss146 and 150 PSA 1993], complaints may be made and disputes referred to me "on behalf of an authorised complainant" and as a rule of construction the

singular includes the plural (Interpretation Act 1978, s.6(c)). Thus a representative action is not necessarily outside my jurisdiction. In any event, reliance may be placed in appropriate cases upon the proposition that any individual beneficiary has locus standi to require trustees to account for breaches of trust (cp *Boardman and another v Phipps* [1967] 2 AC46 (HL))." (See the report of the Ombudsman decision, *Packwood and another v Trustees of Airways Pension Scheme and others* [1995] OPLR 369 at p372).

The Ombudsman concluded that in failing even to consider using their unfettered amendment power to improve benefits for members, including pensioners, the trustees of the Airways Pension Scheme acted in breach of trust and were guilty of maladministration. Therefore the Ombudsman's approach to the case can be justified using the *Boardman* principle i.e. it is not necessary to get hundreds or thousands of beneficiaries to formally and separately make a claim for breach of trust.

A similar approach was taken by the Ombudsman in case C11520 (*Burt v FMC Superannuation and Pension Scheme Trustees Limited and others* [1995] OPLR 385), which has become known as the *Hillsdown* case. The complainant was a pensioner of the FMC Superannuation and Life Assurance Scheme. He enlisted the support of 51 other scheme pensioners. The Ombudsman decided that a transfer of assets, including surplus, to the HF Meat and Foods Processing Pension Scheme and the subsequent extraction of surplus from that scheme by Hillsdown Holdings plc was wrongful on the basis of breach of trust and breach of the employer's duty of good faith.

Perhaps not surprisingly given the direction for Hillsdown to repay millions of pounds to the HF Scheme, the determination was appealed (*Hillsdown Holdings plc v Pensions Ombudsman* [1996] OPLR 291). Knox J said:

"There were some 1,100 members of the FMC scheme. The 52 complaints were stated by the Pensions Ombudsman to be in substance identical. Mr Oliver [Counsel for Hillsdown Holdings] not surprisingly recognised that his submission that only Mr Burt's injustice caused by maladministration (if there was one) could be the subject of remedial steps was not an attractive one because it would require separate treatment of all complaints and effectively prevent an effective system of taking a test case. Nowhere in the Act or the relevant Regulations is there express provision for representation orders. In my view the argument advanced for thus limiting the Pensions Ombudsman's jurisdiction not only leads to inconvenient results but is also unsound in principle."

The judge was able to rely on the legal principle that the appropriate remedy even for a single beneficiary who demonstrates that assets have been improperly taken from a trust is a return of those assets.

Group actions were given a strong endorsement by Knox J in *Hillsdown* where he said that in addition to the Ombudsman dealing with individual claims:

"... the object of providing a quick inexpensive and informal means of settling complaints was equally aimed at large cases where a large group of individual members was involved in such a dispute. The great majority of a large group of members would individually be likely to have resources far too slender to contemplate litigation in such a technical, difficult and thereby expensive, field of law."

However, the Vice-Chancellor (and, on appeal, the Court of Appeal) put limits on Ombudsman's ability to deal with certain types of group actions in *Edge v Pensions Ombudsman* [1998] PLR 15.

The case concerned the agreement by the employers and trustees of the Industrial Training Board Pension Scheme to a number of amendments to the scheme. These provided a contributions holiday for active members and the employers and also benefit improvements to active members still in service at a date in the future.

A complaint was made to the Ombudsman that the trustees could not have been acting properly in agreeing to changes which did not also benefit other members. The Ombudsman upheld the complaint. He ordered that the amendments made should be treated as void and that the trustees should reconsider their powers in conjunction with the employers to give "fair" improvements as between all beneficiaries. This would have resulted in active members and the employers making substantial retrospective contributions and the benefit improvements provided to active members being reconsidered.

The Vice-Chancellor overturned the Pensions Ombudsman's determination on two grounds. He did not accept that the trustees had acted in any way improperly. The judgment confirmed the basic principle that the Ombudsman could not substitute his own decision for that of a trustee body simply because he does not agree with it. Also, the employers and active members had been given no formal notice of the investigation and no opportunity to make representations. No court could make an order affecting a person without them being given the right to put their own case; neither could the Ombudsman. The Ombudsman appealed to the Court of Appeal.

The Ombudsman had treated the complaint in this case as one of maladministration by the trustees. Accordingly the principal employer had not

been involved. The Court of Appeal confirmed ([1999] PLR 215) that by treating a complaint as a dispute of fact or law (on the validity of the deed of amendment concerned), then the employer too could have been involved and been bound by the determination. Even so, no matter how the complaint had been categorised, the interests of *active members* could not have been represented (unless they were all parties to the investigation process).

The Court of Appeal could not accept that Parliament had intended the Ombudsman to investigate cases where, as in this case, he could make no effective order. Further, without any statutory procedure for the interests of different classes to be heard, such an investigation could easily offend against the basic principles of natural justice.

The Court of Appeal did not consider that the Ombudsman could not investigate such claims at all; rather that he should not.

It is important to consider the Court of Appeal's findings in context. The case was very unusual in that a group of members (the actives) would have lost out as a result of the complainant's class (non-actives) "winning". There are very few cases where one group of members seeks to gain and another group will consequently lose property rights (as opposed to a mere reduction in the overall funding position of the scheme). So is the Court of Appeal decision of limited practical effect? The answer is probably 'no' following the High Court ruling in *Williamson* that even where directly affected (but not consulted) members all stand to gain, the Ombudsman has no jurisdiction to deal with the matter.

Following *Edge*, Section 54 of the Child Support, Pensions and Social Security Act 2000 was introduced to give the Ombudsman the following provisions to deal with class actions:

- power to link to a case those whose interests may be affected by the complaint or dispute or its outcome;
- a requirement to give actual or potential beneficiaries the opportunity to make representations;
- regulations to be introduced to permit the Ombudsman to appoint a person to represent a group of those who have the same interest in a complaint, for instance, all the pensioner members, and this appointed person would be able to make representations on behalf of that group.

Draft regulations were issued which included provisions to allow the Ombudsman to order that the cost of legal expenses in a particular case could be met from the funds of the scheme.

However, no final regulations have been issued and s.54 has not been activated. It was announced in March 2003 that these provisions would be put on hold (and may never be introduced) while pensions law is revamped following the Government's Green Paper on pensions. This means that some other complaints lodged with the Ombudsman concerning GMP equalisation (similar to the *Williamson* case) cannot be dealt with by the Ombudsman and so the uncertainty on this important legal issue will remain until a case on the matter reaches the courts.

### **2.3 Who is an "administrator"?**

The extension of the Ombudsman's jurisdiction to administrators is another example of the ability to extend the scope of his jurisdiction under the legislation. The Personal and Occupational Pension Schemes (Pensions Ombudsman) Amendment Regulations 1996 (S.I. No. 1271) extended his jurisdiction with effect from 1 July 1996 to "the administrator of the scheme" in relation to "any complaint in relation to the administration" of the scheme.

The term "administrator" was defined as "any person, other than the trustees or managers of a scheme or the employer to which the scheme relates or has related, concerned with the administration of the scheme".

The regulations were replaced by the Personal and Occupational Pension Schemes (Pensions Ombudsman) Regulations 1996 (S.I. No. 2475) with effect from 6 April 1997. Regulation 2(1) of the new regulations corrects the omission of "maladministration" and "injustice". The then Ombudsman pointed out in his Annual Report 1996/97 that the new regulations refer to a complaint being made against "an administrator" whereas the previous regulations referred to a complaint against "the administrator". Presumably the Ombudsman thought this may be significant as the regulations may envisage multiple administrators of a scheme rather than only one.

He went on at page 49 of the Annual Report to say:

"The definition of an administrator - 'any person ... concerned with the administration of the scheme' - appears extremely wide. There is no requirement of day-to-day administration, so a one-off act could lead to a complaint. There is no mention of 'outsourcing', so in-house administration may be investigated at all levels. Indeed the definition expressly catches persons who are not themselves trustees or managers or employers. It follows that the Pensions Ombudsman can investigate and, when considered appropriate, make directions against individuals, e.g. officers or employees of the trustees or managers or employers. So such people as the Finance Director or Pensions Manager and even their staff

might find themselves personally in jeopardy. Indeed they may already have been in jeopardy, since the complaint could be about past acts or omissions ...”

The above passage will not provide much comfort for anyone involved in administering a scheme, even at a low level in their organisation. In case G00016 the former pensions manager of an occupational scheme with an insolvent employer was ordered to pay £500 compensation to a member following his maladministration.

There has been a steady stream of cases where the issue of who can be considered a person concerned with the administration of the scheme has been considered.

Actuaries have had rulings made against them. The first rulings were against actuaries in their administrative capacity rather than their pure actuarial functions. However, this all changed in a determination issued on 22 April 1999 (F00265 and others). The Ombudsman said the following about his jurisdiction over administrators (in this case “Administrators” meant the firm of actuaries involved):

“I have also considered whether I am bound to consider only the administrative tasks of the Administrators or whether my jurisdiction allows me to look at the actuarial functions performed by the Administrators for the Scheme. In *Halifax Building Society and others -v- Edell and others* [1992] 3 All ER 389 the question of whether the failure to exercise due skill and care in matters of professional judgement (in that case by a surveyor) could constitute maladministration was considered. Morritt J held that the failure of an employee of the building society to exercise reasonable skill and care in the making of his basic valuation was maladministration. I therefore conclude that I do have jurisdiction to consider whether employees of the Administrators have exercised due professional skill in providing advice in respect of the Scheme.”

He has also decided in a previous determination that, by their very nature, actuaries must be “persons concerned with the administration of a scheme”. He concluded that the actuaries were guilty of maladministration in the following respects:

1. They had omitted the liabilities for three pensioners
2. They had failed to warn the independent trustee that the opinion they gave on investments in a particular letter should be reviewed.
3. They had calculated and paid transfer values at their full value despite the deteriorating funding position of the scheme.

4. They failed to warn the trustees that there might be insufficient surplus to pay the second tranche of a member's benefits.

The first case where solicitors were held by the Ombudsman to be "administrators" was H00439 (16 September 1999). The solicitors, acting for scheme trustees, demanded repayment of overpaid monies from a member within 7 days, otherwise legal proceedings would be taken. The solicitors should have considered a more conciliatory approach and were ordered to pay £200 to the member as compensation for distress.

On appeal to the Court of Appeal in Northern Ireland, it was held that on the facts of the case the solicitors were not "administrators". They were merely seeking to recover a debt owing to their client (see *Ewing v Arthur Cox* [2000] 22 PBLR 7).

The issue of who is an 'administrator' has now also been explored by the Court of Appeal in England, in *R v Pensions Ombudsman ex parte Britannic Asset Management and others* [2002]. It was held that on the facts of the case, Britannic was not an 'administrator' as its only role was to pay monies out under the terms of a unit linked policy on the instructions of the scheme trustees. This very limited role did not render it a person concerned with the administration of the scheme. The test seems to be one of degree. One-off acts, or occasional acts, of third parties may not bring them within the 'administrator' definition. It was also noted by the Court of Appeal that although there is a regulation-making power in the Pension Schemes Act to widen the 'administrator' concept to persons concerned with the 'financing' of, or the 'provision of benefits' under, a scheme, no such regulations have yet been made. This argument might be able to be used to take actuaries or investment managers out of the Ombudsman's jurisdiction, except in relation to pure administrative actions.

### **3. THE INVESTIGATION PROCESS**

The basic structure of the process of an investigation by the Ombudsman is laid down in ss149 and 150 of the Pension Schemes Act 1993 ("PSA").

Section 149(4) of PSA summarises the role of the Ombudsman in investigations:

"... the procedure for conducting such an investigation shall be such as the Pensions Ombudsman considers appropriate in the circumstances of the case; and he may, in particular, obtain information from such persons and in such manner, and make such enquiries, as he thinks fit."

The whole process is very different to traditional litigation before the courts. Instead of the adjudicator adopting a fairly passive role, being fed facts and arguments by the lawyers acting for the parties, the Ombudsman's role can be (but is not always) more inquisitorial. Very often the parties never have any contact directly with each other during the whole investigation process. His investigators can decide on what questions to ask the parties and what documents to request. David Laverick has encouraged his investigators to telephone parties for more information when appropriate and he has even had some face to face meetings with parties.

The rules relating to the investigation procedure are contained in the Personal and Occupational Pension Schemes (Pensions Ombudsman) (Procedure) Rules 1995 ("the Rules"), as amended by the Personal and Occupational Pension Schemes (Pensions Ombudsman) (Procedure) Amendment Rules 1996. The Rules were devised after consultation with the Council on Tribunals under the Tribunals and Inquiries Act 1992.

#### **3.1 Details from Complainant**

Rule 2(1) provides that details of a complaint or dispute must be referred to the Ombudsman in writing. The Ombudsman has devised a standard form for this purpose. The Rules require that the following information is provided:

- (a) the name and address of the complainant
- (b) the name and address of the respondent
- (c) the facts relating to the complaint or dispute
- (d) whether or not the complaint or dispute has been brought to the attention of the Pensions Advisory Service (OPAS)

- (e) the name, address and profession of the representative (if any) of the complainant and whether this is the address for correspondence to the complainant for the purposes of the investigation.

Rule 3 permits a complainant to submit a supplementary statement or amend the details of his complaint or dispute or his supplementary statement at any time provided the Ombudsman gives leave (which must not be unreasonably refused). So as with pleadings in traditional litigation, the substance of the claim and the way it is expressed can, and often does, evolve as the case progresses.

Walker J in *National Grid v Laws* [1997] PLR 157 illustrated the fluidity of the process compared to litigation when he said the precise terms of the complaints were "not of central importance, since the Ombudsman rightly did not treat them as a formal pleading limiting the scope of his investigation."

As most complainants have been dealt with by OPAS before they reach the Ombudsman, the OPAS adviser will often be able to assist the complainant in framing their complaint. However, the Ombudsman does not require that complaints be expressed in a legal or technical way. This is of great benefit to complainants but often leads to respondents having to think carefully about what exactly is the substance of a claim. Dr Farrand said that it is perfectly proper for respondents to ask the Ombudsman to identify at an early stage the key issues raised by a complainant.

Under r5(1) the Ombudsman must send the complainant or his representative an acknowledgement of receipt.

### **3.2 Withdrawal of complaint or dispute**

Under r4 a complainant may withdraw his complaint or dispute:

- (a) within 14 days of when he receives a copy of the respondent's reply (see below) by sending the Ombudsman a notice confirming his withdrawal signed by himself or his representative; or
- (b) after that with the leave of the Ombudsman (which must not be unreasonably refused).

In practice a complainant is usually able to withdraw his complaint at any point.

### **3.3 Action by Respondent**

Under r5(2) the Ombudsman must supply the respondent with a copy of the details of the complaint or dispute together with any amendments or

supplementary statements, written representations or other documents received from the complainant.

Rule 6(1) provides:

"Upon receiving a copy of the details of a complaint or dispute the respondent shall deliver to the Pensions Ombudsman a written reply acknowledging receipt of the details and stating -

- (a) the facts relating to the complaint or dispute, whether or not the respondent opposes the allegations made in the complaint or dispute and any details on which it relies in opposing those allegations;
- (b) whether in the opinion of the respondent, any other person has a direct interest in the subject matter of the complaint or dispute and if so the name and address of such other person;
- (c) the name, address and profession of the representative (if any) of the respondent and whether such address is the address for correspondence to the respondent for the purposes of the investigation."

The reply must be delivered to the Ombudsman within 21 days after the date on which the copy of the details of the complaint or dispute was received by the respondent (r6(3)). There is power for the Ombudsman to extend this time limit under r16(1)(a).

The respondent must send the Ombudsman sufficient additional copies of the reply to enable him to send copies to the complainant and any other person named by the respondent as having a direct interest in the subject matter of the case.

Quite often there are insufficient details in the summary of the complaint or dispute to enable a respondent to properly reply. Rule 6(4) allows a respondent in its reply or in a separate notice to the Ombudsman submitted within the 21 day reply period to request further particulars of the complaint or dispute or a determination of any question as a preliminary issue. This is a very useful provision which will often help to avoid wasted effort dealing with irrelevant claims or allegations or trying to cover every interpretation of a vague claim or allegation.

Lightman J held in *Legal and General Assurance Society v Pensions Ombudsman and others* [1999] All ER 1206 that there is no right of appeal under PSA 1993 from decisions on preliminary issues (or, indeed, from the Ombudsman's preliminary conclusions).

Just like a complainant, a respondent can at any time submit a supplementary statement or amend any reply or supplementary statement with the leave of the Ombudsman, which must not be unreasonably refused (r7(1)). If the respondent does so, he must send the Ombudsman sufficient copies to circulate to the complainant and any other person named by the respondent as having a direct interest in the case.

If no reply is received by the Ombudsman within the 21 day period or any extension allowed by the Ombudsman, or if the respondent does not oppose or withdraws his opposition to the allegations, the Ombudsman may determine the complaint or dispute immediately, provided there is no other opposition to the allegations, for example from other respondents (r8).

The Ombudsman's procedures and investigatory practices have been scrutinised by the courts.

In *Brooks v Civil Aviation Authority*, the Court of Session upheld the Ombudsman's discretion to base his decision on whether a member qualified for ill-health retirement on the information which was already available to him from a tribunal decision. He was not required to conduct a further investigation. The Court also said that the Ombudsman's powers of investigation were very wide and he had a wide discretion to decide how best to use it.

The courts provided further guidance to the Ombudsman in *Glossop v Copnall*. Where a complainant has not complained of maladministration to the Ombudsman, the Ombudsman has no statutory jurisdiction to make any finding in relation to maladministration. The court also said that in cases where a finding of maladministration was likely to be made against a person, that person was entitled to fair notice of that decision.

In *R (on the application of Legal & General Assurance Society) v Pensions Ombudsman* [2002] PLR 99 Legal & General had asked for two extensions of the three week time limit given to respond to the Ombudsman's preliminary conclusions, as its counsel and actuary were on holiday. The Ombudsman refused the extension, apparently for reasons of administrative convenience in the Ombudsman's office. The High Court held that Legal & General would clearly be prejudiced by not being able to have the benefit of the views of its advisers and this clearly outweighed any detriment suffered by anyone in delaying the matter. It therefore seems that administrative convenience will not be an acceptable basis on which the Ombudsman can make his decisions about, for example, extensions of time, where other parties would be prejudiced by that decision.

There is no set formula for the presentation of a response to the Ombudsman. The Association of Pension Lawyers published a useful guidance note for

investigations in March 1999 which was updated in May 2000 (copy available at [www.apl.org.uk](http://www.apl.org.uk)). The Pensions Litigation Committee of the APL considers that it is generally preferable to use a formal submission rather than a letter, though letters may be appropriate if dealing with short points raised by the Ombudsman's office. A useful suggestion by the Committee is to number all paragraphs in the body of the submission. This will help with cross-referencing later on in the investigation.

On a very practical level, the Ombudsman's office uses four hole ring-binders for investigations and so there is nothing to be gained by using expensive binding for the submission. Another important point at a practical level is that the Ombudsman's office does not usually keep any chronological bundle of documentation relating to the complaint in the way that a court would normally have a chronological "trial bundle". This means that considerable cross-reference will be needed to previous submissions; the Ombudsman's office prefers not to be sent extra copies of documentation already before it, although judicious use of such duplication will sometimes be in the interests of clarity for all parties.

Finally, the Committee suggested that wherever possible a response to a complaint by a respondent should be drafted in the following order:

1. List of enclosures.
2. Executive summary.
3. Jurisdiction.
4. Facts.
5. Legal analysis.
6. Other parties.

Although not appropriate to all cases, the above list does provide a useful checklist of the items which should be covered.

### **3.4 Disclosure of documents and other material**

The complainant or respondent must supply the Ombudsman by such date as he may specify a copy of any document or other material on which he intends to rely (r9(1) of the Occupational Pension Schemes (Pensions Ombudsman) (Procedure) Rules 1995). Again, the respondent must send multiple copies for the complainant and any other party to the investigation (unless the other parties already have copies or the Ombudsman already has sufficient copies).

Where the Ombudsman obtains documents he must copy these to the other parties (r9(4)). A party to the investigation may only use a document supplied to it during an investigation for the purposes of the investigation.

The disclosure of actuarial advice was considered in F00814. The trustee changed the commutation and early retirement factors of the scheme. A member asked for copies of the actuarial advice that the trustee had received on the issue, arguing that it was a trust document paid for out of scheme assets. The trustee argued that the member was on a fishing expedition and there should be no requirement to disclose actuarial advice until the member had demonstrated a proper cause of action. The trustee also argued that it was not obliged to divulge any material indicating the reasons for discretionary decisions. After being threatened by the Ombudsman with proceedings for contempt of court, the trustee eventually produced copies of the actuarial advice. The Ombudsman remarked that, if the trustee's submissions were correct, any trustee could seek to argue that every document generated by or for them was in some way "relating to" their deliberations. The Ombudsman concluded that the advice was factual rather than revealing the trustee's own reasons for its decisions. The Ombudsman directed the trustee to supply the member with an unabridged copy of the actuarial advice.

Disclosure of legal advice was considered in F00898. Members complained about the winding up of the scheme and the payment of some surplus assets to the employer. The trustee initially refused to provide the Ombudsman with copies of legal advice obtained in relation to the proposal to deal with surplus. Copies of the legal advice were eventually produced to the Ombudsman after he threatened contempt of court proceedings. The solicitor's attendance notes were also demanded and eventually produced.

### **3.5 Oral hearings**

Although the Ombudsman has power to conduct oral hearings as part of his investigations, these are extremely rare. However, rr10 to 15A of the Occupational Pension Schemes (Pensions Ombudsman) (Procedure) Rules 1995 set out in detail the procedure to be followed at any hearing.

Rule 10(1) confirms the Ombudsman's discretion to conduct an oral hearing whenever he considers it appropriate. He must have due regard to the convenience of the parties when fixing the time and place of any such hearing and give at least 21 days notice of the time and place of the hearing (or such shorter time if the parties agree).

The Ombudsman should also include in or with the notice of hearing -

- "(a) information as to attendance at the hearing of the parties and witnesses, the bringing of documents and the right to representation by another person;
- (b) a statement explaining –
  - (i) the right of any party to the investigation, who does not attend and is not represented, to make representations in writing; and
  - (ii) the possible consequences of non-attendance." (r10(2)).

The Ombudsman can alter the time and place of any hearing by giving the parties at least seven days notice (r10(3)).

If the Ombudsman adjourns any hearing then no further notice is required provided he has announced the time and place of the reconvening of the hearing before the adjournment (r10(4)).

Each party to the investigation must inform the Ombudsman whether or not he intends to attend or be represented and whether or not he intends to call witnesses (r11(1)). If a party does not wish to attend or be represented, he can send additional written representations to the Ombudsman (r11(2)).

Hearings should generally be in public except where:

"... by reason of the disclosure of any matter that relates to intimate personal or financial circumstances, is commercially sensitive, consists of information communicated or obtained in confidence or concerns national security, it is just and reasonable for the hearing or any part thereof to be in private." (r12(1)).

The Ombudsman can exclude any person whose conduct has disrupted or is likely to disrupt the hearing (r12(4)).

Provided that the party has been properly notified, the Ombudsman can conduct a hearing and determine a complaint or dispute even if the party fails to attend or be represented at a hearing. Alternatively, the Ombudsman can (and most likely would) adjourn the hearing (r13(1)). The Ombudsman must consider any written representations submitted by an absent party before coming to his decision.

At the hearing a party can conduct his case himself or may be represented by any person whether or not legally qualified provided that where there are good and sufficient reasons for doing so the Ombudsman may refuse to permit a particular person to assist or represent the party at the hearing (r14).

Rule 15(2) highlights the intended difference between court proceedings and Ombudsman investigations. It provides that the Ombudsman "shall so far as seems appropriate seek to avoid formality in the hearing." He can therefore conduct the hearing in such manner as he considers appropriate to the clarification of the issues and the just handling of the investigation.

He must explain the order of proceeding at the beginning of the hearing (r15(1)) and can decide in which order the parties shall be heard (r15(3)).

The parties are entitled to give evidence, call witnesses, question any party to the investigation or witnesses and address the Ombudsman on evidence and generally on the subject matter of the investigation (r15(3)).

Where the Ombudsman considers it appropriate, evidence may be given by affidavit or written statement but the Ombudsman can at any stage of the hearing require attendance by the person who has sworn the affidavit or made a written statement (r15(4)).

The Ombudsman can accept as evidence any fact which he considers relevant even if such evidence would be inadmissible in proceedings before a court. He must admit evidence which is admissible at law and is relevant (r15(5)).

Rule 15A was inserted by the Personal and Occupational Pension Schemes (Pensions Ombudsman) (Procedure) Amendment Rules 1996. It gives the Ombudsman power to reimburse reasonable travel and subsistence expenses and compensation for lost earnings. The rule is quite detailed and reference should be made to it if an expenses claim is being considered. In any event, under r15A(9) the Ombudsman must provide an actual or potential beneficiary who has made the complaint or referred the dispute with full particulars of the arrangements made for travel and subsistence of expenses and compensation for lost earnings.

The Ombudsman commented in his Annual Report 1995/96 that "oral hearings may be held where it seems to me necessary to test credibility for the purpose of reaching findings of fact. During the year only one such hearing was held as against two last year. The complaint in question was upheld." Therefore oral hearings have so far been quite rare.

In case E00645 an oral hearing was held to deal with a fundamental conflict of evidence between the complainant and the company secretary of the employer. The evidential issues dealt with at the hearing concerned the meaning of a handwritten note enclosed in a Christmas card sent to the complainant and the substance of a telephone conversation. Having had the benefit of a hearing, at which the employer was represented by leading counsel and solicitors, the Ombudsman concluded that:

"Mr N did not impress me at the oral hearing as a credible witness. Instead I prefer the Complainant's version of the telephone conversation and the meaning to be attached to Mr N's note to him. Accordingly, by way of determination of the preliminary issue, I find as a fact that Mr N advised the Complainant that the changed terms would apply to him."

The Ombudsman went on to find that although the complainant had not suffered financial loss as a result of the employer's maladministration, he had "suffered significant injustice in the form of distress and disappointment which has been exacerbated by what I regard as false testimony throughout on the part of Mr N, a senior employee of the Employer." The employer was ordered to pay compensation of £1,000, and would of course had a sizeable legal bill related to the hearing.

The appropriateness of an oral hearing was considered in *Elliott v Pensions Ombudsman* [1998] OPLR 21. The Ombudsman ruled that two trustees of the scheme in question wrongfully refunded surplus to the employer without providing for limited price indexation for scheme members (which was about to be introduced as a statutory pre-condition of any payment of surplus to an employer). On appeal, two of the trustees argued that they should have the benefit of an exoneration clause under the rules of the scheme which excluded liability of a trustee "... for anything whatever except for breach of trust knowingly and intentionally committed by him ...". After the Ombudsman had made his determination, the Court of Appeal in *Armitage v Nurse* [1997] 2 All ER 705 confirmed that exoneration clauses which exclude liability for everything except "wilful default" mean that a trustee will only be liable if he is conscious that what he is doing or omitting to do is a breach of his duty, or he is recklessly careless whether it is a breach of his duty. Therefore the ability of the two trustees to enjoy the protection of their exoneration clause depended very much on their state of knowledge. The Ombudsman had not, in the view of Blackburne J, sufficiently explored this evidential point.

Therefore in cases involving the alleged bad faith of trustees, oral hearings may be particularly appropriate.

The same approach was taken by Carnwath J in *Duffield* where he commented (at p156) that:

"... I find it surprising that on a matter involving such serious criticisms of Mr Duffield, and against a background where, unlike the other trustees, he had shown himself fully cooperative, the Ombudsman did not think it necessary to interview him personally."

This again highlights how judges have criticised the Ombudsman for not doing what a judge would have done if the case had been dealt with by a court.

In *Duckitt v Pensions Ombudsman* [2001] 18 PBLR, the trustees gave oral evidence to the Ombudsman as they had been accused of maladministration in making loans to the company. However, the Ombudsman stated that he did not accept the oral evidence they had given.

However the European Convention on Human Rights could, at least in theory, lead to oral hearings becoming more common. Article 6(1) of the Convention provides:

"In the determination of his civil rights and obligations of or any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interest of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice."

The concept of a "fair and public hearing" is far removed from the predominantly paper-based method so far used by the Ombudsman. The Convention has now been incorporated into domestic law in the Human Rights Act 1998. The Ombudsman has apparently for some time now treated himself as subject to those principles but in practice very few parties have availed themselves of the right to demand a hearing. In some circumstances it may be in a respondent's interests to seek a hearing in order to establish the credibility of his evidence, especially in the absence of paperwork which corroborates his side of the story.

In a recent development, David Laverick has begun having meetings with parties where it is appropriate and convenient. He does not believe it is a breach of natural justice/Human Rights Act if only one party is present at such a meeting, because he will raise any points of relevance afterwards with the other party or parties.

### **3.6 Fast track procedure**

The Ombudsman said the following (at p10) in his Annual Report 1996/97:

"Of this year's output, 76 Determinations were issued under "fast track" procedures. By way of explanation this means that, if, in the opinion of an investigator, a complaint is unlikely to be upheld, he or she will write straightaway to the complainant giving reasons for that conclusion. The complainant is invited to write to me if he or she disagrees and/or has

further evidence. I then consider the matter, but if I concur with my investigator I will determine the complaint accordingly with a short but formal letter. I may (and on occasion do) disagree, whether in the light of new evidence or not, in which case a full investigation of the matter is set in progress."

This procedure therefore weeds out the "no-hope" claims and allows the Ombudsman's limited resources to be concentrated on dealing with the claims which may have merit. Respondents may wish to encourage the Ombudsman's office to use this procedure where the claim appears to be without merit.

David Laverick has also encouraged his investigators to issue letters to complainants explaining that they do not think the Ombudsman will uphold their complaint. The complainant can ask for the Ombudsman to issue a full determination in the case (and about 60 per cent do this). The letter from the investigator is not a 'determination' for the purposes of the legislation.

### **3.7 Confidentiality**

Complainants and respondents are warned by the Ombudsman from the beginning of an investigation that the matter must be treated in confidence. This also applies to the provisional determination (now called "preliminary conclusions"). It does not apply to the final determination and cannot apply to matters which are in the public domain anyway e.g. the fact that a scheme has been terminated. Although they have in the past appeared in anonymised form in the Ombudsman's Annual Reports, this practice has now been dropped (except where sensitive personal information is involved). The pensions press monitor with each month's determinations (which appear on the Ombudsman's website, which is regularly updated) and this usually leads to publicity about significant determinations.

## 4. ANATOMY OF AN INVESTIGATION

### 4.1 Chronology

A real life illustration should help to explain the timescale involved in an Ombudsman case. The investigation which became the subject of the appeal in *Edge* took the following course:

- |                   |   |
|-------------------|---|
| 7 February 1994   | Letter from a pensioner, Eric Nicholson, on behalf of a number of ITB Pension Funds pensioners sent to the Ombudsman.   |
| 23 May 1994       | The first Ombudsman informed Mr Nicholson that he did not consider there was any evidence of a breach of trust or maladministration and that he did not propose to investigate the complaint.   |
| 21 September 1994 | Current Ombudsman informed Mr Nicholson that he would conduct an investigation into the complaint.  |
| 16 January 1995   | Trustees of the ITB Pension Funds were informed of the Ombudsman's decision to investigate the complaint and were provided with a document entitled Summary of Complaint plus supporting documents. The Summary of Complaint had been prepared with Mr Nicholson's input and had been approved by him before it was sent. |
| 9 March 1995      | Trustees' written response to the Summary of Complaint. Copy forwarded to Mr Nicholson by the Ombudsman.  |
| 18 April 1995     | Mr Nicholson replied to the trustees' response. His reply consisted of 18 pages of argument dealing with the points raised in the trustees' response. No new allegations or charges were made against the trustees.   |
| 2 June 1995       | Further comments from the trustees sent to the Ombudsman following some correspondence they had with the Ombudsman. No new facts of any relevance came out.   |
| 13 December 1995  | Letter from the Ombudsman's office indicating that work on the preparation of a provisional determination had begun.  |
| 5 June 1997       | Copy of provisional determination sent to the trustees and to Mr Nicholson inviting their comments. Some minor  |

comments were made by Mr Nicholson and by solicitors acting for the trustees.

14 July 1997 Final determination issued. The Ombudsman found in favour of Mr Nicholson.

5 December 1997 The trustees appealed to the High Court against the determination and were successful.

The Ombudsman subsequently appealed to the Court of Appeal and lost.

The above chronology illustrates that some cases investigated by the Ombudsman can last a considerable length of time. The case was not straightforward and involved an alleged wrongful use of surplus by trustees in that they used it to benefit active scheme members and the employer to the exclusion of the rest of the members.

It also illustrates the problem for complainants where after a long struggle they are successful in bringing a complaint, only for it to be appealed so that the matter ends up in court despite their attempts to use an alternative form of dispute resolution.

#### **4.2 Case study**

The following case study is loosely based on a case CMS Cameron McKenna advised on and seeks to illustrate how an Ombudsman investigation is carried out in practice.

A member of an occupational final salary scheme claimed he was promised by the pensions manager a pension based on two-thirds of his final pensionable salary. This was communicated by verbal assurances and handwritten amendments to benefit statements which had originally shown a considerably lower pension. This communication by the pensions manager was after the member had transferred in to the scheme from an inferior scheme of the employer.

The employer became insolvent and the pensions manager's employment ended. The member then requested payment of the pension at the level indicated to him by the pensions manager.

The trustees investigated the case (by writing to those who could have sanctioned the position) and could not find evidence that the enhanced pension had been authorised by the employer or the trustees at the time. They therefore put the pension in payment at what the actuary advised was the correct level given the small amount transferred in to the scheme by the member. This was in line with the benefit statement before the pensions manager had amended it.

The member complained to the Ombudsman who referred him to OPAS. OPAS failed to resolve the case with the trustees and so helped him draft a complaint to the Ombudsman.

The Ombudsman accepted the case and asked the trustees and employer for their comments on the complaint within 21 days.

Although the dispute began before Internal Dispute Resolution (IDR) was introduced under PA 1995, s50 it was in theory open to the trustees to ask that the IDR process be followed (as s50 was by this stage in force). However, there seemed little to be gained for either party because the dispute had been running for some time and even OPAS had not managed to resolve it.

Therefore the trustees drafted a response which was checked by their actuary and solicitor. The solicitor consulted counsel on a couple of key legal questions. The response included a large chronological pack of relevant correspondence and other papers plus scheme documentation.

There then followed an exchange of correspondence whereby the Ombudsman's investigator would ask the trustees and complainant about detailed aspects of the case which often involved giving one party the chance to respond to points raised by the other party. The pensions manager failed to respond to the investigator's letters.

As part of this process the investigator asked the complainant to demonstrate as well as he could how he had relied to his detriment on the amended benefit statement. The complainant claimed that he would have

- (a) spent less money on items such as holidays and capital purchases
- (b) let out a property for longer and at a higher rent
- (c) paid additional voluntary contributions ("AVCs")
- (d) saved more by way of investments
- (e) worked elsewhere for a higher salary

The trustees made some commonsense observations on the evidence produced by the complainant (including receipts and credit card statements) about why it did not necessarily establish detrimental reliance.

A provisional determination was then issued to the parties. The provisional finding was that the scheme was not bound to honour the amended benefit statement, but was obliged to compensate the complainant for his detrimental reliance on it.

The ruling of the Court of Appeal in *First Energy v Hungarian Investment Bank* [1993] 2 Lloyds Law Rep 194 was relied on.

The Ombudsman considered that GBP 5,500 in rent had been foregone, GBP 17,000 had been unnecessarily spent and maximum AVCs would have been paid. The proposed direction was for the trustees (not personally) to increase the complainant's benefits by GBP 22,500 (the capital value of the unnecessary expenditure and lost rent) plus an amount which would be accrued if he had paid maximum AVCs from when he was misinformed by the pensions manager.

The trustees did not see why the complainant should effectively be awarded a pension attributable to AVCs without paying any such contributions. They therefore raised this point in their response to the provisional determination. They also asked counsel whether any other substantive points should be made. Counsel did not think so.

The final determination was issued and the trustees' argument about AVCs had been accepted. The maximum amount of AVCs that could have been paid was GBP 7,500, so this was knocked off the capital figure of GBP 22,500 by which the benefits had to be increased in addition to the AVC pension.

The parties had 28 days from receipt of the determination to lodge an appeal but neither party took this step. The increased pension was put into payment.

## 5. DECISIONS AND DIRECTIONS

From day one the legislation provided the Pensions Ombudsman with a formidable arsenal of powers. In most respects the Ombudsman is as powerful as a court and in some respects, such as his powers relating to maladministration, he is more powerful. This is possibly why the courts have sometimes had difficulty in coming to terms with his role.

### 5.1 Decisions

The Ombudsman is unusual in that not only does he produce written rulings or determinations, but he also issues his preliminary findings to the parties for comment in the form of preliminary conclusions (formerly called provisional determinations).

#### 5.1.1 Determinations

Section 151(1) of the Pension Schemes Act 1993 provides:

"Where the Pensions Ombudsman has conducted an investigation ... he shall send a written statement of his determination of the complaint or dispute in question -

- (a) to the person by whom, or on whose behalf, the complaint or reference was made, and
- (b) to any person (if different) responsible for the management of the scheme to which the complaint or reference relates

and any such statement shall contain the reasons for his determination."

There is therefore a statutory obligation on the Ombudsman to explain his decisions. Walker J commented in *Westminster City Council v Haywood* (1996) that:

"I do not think that minute analysis of paragraphs 11 and 12 of the decision is helpful since (as Lord Donaldson MR said in *R v Local Commissioner, ex parte Eastleigh Borough Council* [1988] QB855 at p866D) an ombudsman's report is not a statute or a judgment and ought not to be examined as if it were."

However, in a number of appeals from Ombudsman determinations considered by the High Court it is apparent that his determinations are often the subject of just such minute analysis although they were not usually designed to be put through the rigours of High Court or Court of Appeal legalistic analysis. As a result,

determinations have tended over the years to include more explanation of the reasoning and legal principles involved, although they are still much less detailed than most court judgments. This is probably an inevitable consequence of producing hundreds of determinations every year.

Determinations tend to be set out in the following format although this varies depending on the subject matter and complexity of the case:

- (a) List of the parties
- (b) Details of the complaint or dispute
- (c) Facts
- (d) Consideration of the key aspects of the complaint or dispute
- (e) Remedy and directions

The length of determinations ranges from a couple to dozens of pages. A "determination" does not, however, have to be quite so formal. In *Thomas v Pensions Ombudsman* [1996] OPLR 161, the complainant received a letter from a senior complaints investigator setting out preliminary views, followed by a short letter from the Ombudsman himself confirming the earlier view. The High Court case was treated as an appeal from a determination. If the Ombudsman had instead simply refused to investigate the complaint then judicial review would be the only form of challenge.

The duty to give reasons for the Ombudsman's decisions was re-emphasised in *Duckitt v Pensions Ombudsman* [2000] 19 PBLR (11) where trustees made loans to the employer which were later irrecoverable. After a member complained to the Ombudsman of maladministration, the Ombudsman found that the trustees were guilty of maladministration in having made the loans and he ordered that the scheme's exoneration clause did not apply. The trustees appealed to the High Court where the court emphasised the statutory duty on the Ombudsman to give reasons for his decisions. The court held that the Ombudsman had given no reason whatsoever for his decision that the breach of duty of the trustees was deliberate and therefore the exoneration clause could apply. The court also set aside the Ombudsman's awards for the members for distress as there was no evidence of the distress for the vast majority of the members. The parties to a determination are entitled to know on what evidence and grounds the Ombudsman reached his determination. The Ombudsman then appealed to the Court of Appeal which held that the Ombudsman must give reasons, particularly where there is a finding that a breach of trust is deliberate or reckless. The Court of Appeal also held that conclusive evidence is required before the Pensions Ombudsman can find there has been fraud or dishonesty on the part of trustees.

David Laverick has encouraged the practice by his investigators of issuing a letter to complainants telling them that in the investigator's view the Ombudsman will not find in their favour. This letter is not a "determination" under the legislation as it is not a decision of the Ombudsman himself (the respondent(s) will be informed if an investigation is discontinued in this way). The complainant is then given the opportunity to ask that the Ombudsman fully considers the case and makes a ruling. About 60% of such complainants avail themselves of this opportunity.

### **5.1.2 Preliminary conclusions**

The Ombudsman issues his notification of preliminary conclusions to the parties for comment before issuing a final determination. There is no mention of preliminary conclusions in the relevant legislation. The practice of using them was introduced in the year ended 31 March 1994 on the grounds that it was in the interests of natural justice. The then Ombudsman said this (at p14) in his Annual Report for that year:

"At this stage I have formed a conclusion on the evidence whether or not to uphold the complaint or in whose favour I find the dispute. Hitherto I have gone ahead and issued my determination. My practice now is to draft a statement of the evidence and reasons for my conclusion on a provisional basis; and to send this draft for comment to the trustees, managers or employer (if my provisional conclusion is to uphold the complaint or to find in the complainant's favour in a dispute) or, otherwise, to the complainant.

Mostly the comments on these drafts add nothing new but simply repeat points already taken fully into account. But in some cases the comments raise fresh considerations or include documents not previously submitted. In the light of these, the draft is then to be revised before issue as the determination."

The practice is now to send the preliminary conclusions to all parties regardless of who is going to win or lose in the Ombudsman's provisional view.

The receipt of the preliminary conclusions is usually the first time that the parties see which way the case is going. If the case is going against a party then it is their last chance to convince the Ombudsman of the merits of their case, either by emphasising or correcting some factual aspect or by attacking the line of argument set out by the Ombudsman. The parties have a chance to comment and in some, but not all, cases the Ombudsman takes into account representations in his final determination. This opportunity should not be missed. Where there is a significant change considered appropriate in the light of representations, further

preliminary conclusions have occasionally been issued for further review by the parties.

This process of giving parties a draft judgment to comment on is very unusual. Although the European Court of Justice issues an Advocate General's opinion before producing a judgment, the parties are not allowed to comment on it. Domestic courts do not usually issue provisional rulings.

In *Hamar v Pensions Ombudsman* [1996] OPLR 55, considerable reference was made in argument to the preliminary conclusions but Collins J decided (at p62):

"It seems to me that I can only look at the final determination, because that is the determination against which the appeal lies and it is that determination and its reasons that I have to examine to see whether there is in it an error of law."

The Ombudsman welcomed this approach in his Annual Report 1995/96, saying that it was bad enough that the final determination should be subjected to so much legal analysis without extending the examination to earlier versions.

However, the amendment of a preliminary conclusions in the light of representations from parties has not escaped judicial criticism. In *Seifert v Pensions Ombudsman* Staughton LJ remarked on such a change to a determination that:

"He [the Ombudsman] inserted in it some eight new paragraphs dealing with matters raised by the individual trustees in their comments. This did not, unfortunately, contribute to clarity. Instead it tended in some instances to introduce obscurity where the provisional determination had been clear."

A case on extensions of time to respond to the Ombudsman's preliminary conclusions arose in relation to a complaint against Legal & General. Legal & General had asked for the extension as its advisers on the matter were on or about to go on holiday. The Ombudsman refused the request, apparently because Dr Julian Farrand was about to step down as Ombudsman and wished to complete the necessary work on the determination.

On a judicial review, the High Court (in *R (on the application of Legal & General Assurance Society v Pensions Ombudsman)*) overturned the Ombudsman's decision saying that there were substantial issues at stake which Legal & General were entitled to take advice on – and from those advisers who had been involved up to that date. The court held that Legal & General would be prejudiced by not being able to have the views of its existing advisers and this prejudice outweighed any detriment suffered by the Ombudsman's office in delaying the matter.

The importance of giving parties the opportunity to respond to preliminary conclusions was highlighted in the case of *R (on the application of Legal & General Assurance Society Limited) v Pensions Ombudsman*. The Ombudsman refused Legal & General an extension (as their legal advisers were going on holiday) in responding to his preliminary conclusion. This was overruled by the Court, which held that Legal & General were entitled to the benefits of the views of their existing legal advisers and the prejudice they would suffer in not having the same legal advisers would outweigh any detriment suffered by anyone in delaying the matter.

## 5.2 Directions

The heart of the Ombudsman's powers lies in section 151(2) of the Pension Schemes Act 1993 (PSA) which provides:

"Where the Pensions Ombudsman makes a determination ... he may direct any person responsible for the management of the scheme to which the complaint or reference relates to take, or refrain from taking, such steps as he may specify in ... [his determination] ... or otherwise in writing."

This ability to direct the taking or refraining from taking steps appears to be very wide. In *Hillsdown Holdings v Pensions Ombudsman* [1996] OPLR 291 (judgment of 12 July 1996), Knox J observed:

"That some limits must be placed upon the steps is self-evident but that subsection [s151(2) PSA] is silent on the subject and, unless one is to resort to what would to a lawyer be a counsel of despair and leave the limits to the unfettered discretion of the Pensions Ombudsman, so as to put him under the traditional palm tree, limits must be sought elsewhere. It was not suggested by any party before me that there are no limits upon the Pensions Ombudsman's powers to direct steps to be taken or not to be taken. The appeal to the court on a point of law suffices to show, if it needs to be shown, that the Pensions Ombudsman must operate within the law."

The breadth of the power to direct steps has almost inevitably required guidance from the courts in the complete absence of any clear legislative parameters. An enormous amount of time, money and uncertainty would have been saved if the original legislation had contained guidelines about, or a non-exhaustive list of, the types of steps which the Ombudsman may direct.

As an example, it required a court case to establish that the Ombudsman does not have the power to direct parties to agree anything. In *NUS Superannuation Fund v Pensions Ombudsman* [2002] PLR 93, the Ombudsman had implied an agreement

between the two parties for the employee to be entitled to an increase in wages. Lightman J said:

"Under section 151(5) of the Pension Schemes Act 1993, a direction of the Ombudsman is enforceable as if it were an order of the County Court. An order cannot be made for parties to agree anything and likewise neither can the Ombudsman make a direction to that effect."

In the case of *Law Debenture v Malley* [1999] 63 PBLR (20), the judge made a distinction between the Pensions Ombudsman's "determination" and "direction". The determination was that the trustees were guilty of maladministration by arranging a covert surveillance operation, whereas the order that the trustees pay compensation was a direction. They cannot be the same thing. On the appeal to the High Court, the Pensions Ombudsman had submitted that there was no right of appeal against findings of maladministration because, unlike directions, such findings did not form an enforceable part of the determination. The High Court held that the finding of maladministration could be appealed against.

## 6. APPEALS

There is an appeal procedure from a decision of the Ombudsman. This is rightly so bearing in mind that in most respects the Ombudsman is at least as powerful as a High Court judge and it would be unthinkable if none of his decisions was reviewable. Given the paucity of guidance in the legislation, the appeal process has proved invaluable in determining the scope of the Ombudsman's powers and jurisdiction.

### 6.1 Grounds

Section 151(4) of the Pension Schemes Act (PSA 1993) states that:

"An appeal on a point of law shall lie to the High Court .... from a determination or direction of the Pensions Ombudsman ... ."

An appeal can only be on a point of law; appeals on points of fact are not permitted. The role of the appellate court, be it the High Court or the Court of Appeal (or ultimately the House of Lords), when considering appeals purely on questions of law, is limited to overruling the determination of the Ombudsman only if it is satisfied that the Ombudsman's decision is wrong or there has been a procedural irregularity. This does not enable the appellate court to reach a conclusion on an essential issue of primary fact if the Ombudsman has not reached a conclusion on that issue (as confirmed by Blackburne J in *Elliott*). The court cannot therefore fill factual gaps. It is essential to ensure, therefore, that all facts which a party may wish to rely on are brought out in the investigation. It will be too late leaving it to the appeal stage.

### 6.2 Procedure

Part 52 of the Civil Procedure Rules sets out the procedural steps involved in all appeals including appeals from an Ombudsman determination.

Early appeals from determinations of the Ombudsman were, in accordance with Ord 55, r2, assigned to the Queen's Bench Division of the High Court. To rectify this unsatisfactory situation, Ord 55 was amended by the Rules of the Supreme Court (Amendment No.2) Order 1995 (SI No2897) with effect from 1 December 1995. This Order amended Ord 93, r10(2) so that appeals from the Ombudsman under PSA 1993, s151 now fall within the statutory appeals determined by a judge of the Chancery Division. Another effect of the 1995 Order was that, for appeals under s151, leave to appeal the High Court's decision is required. This is maintained by the Practice Direction to Part 52 paragraph 23.2.

Parts 52.4 to 52.6 set out the mechanics of any appeal, in particular, Part 52.4 provides that the appellant must file a notice at the High Court within the period

specified by the lower court or otherwise within 14 days after the date of the decision. The Ombudsman's practice is to specify a period of 28 days from receipt of the determination.

In *City of Edinburgh Council v Rapley* [2000] OPLR 67, the Council wanted to appeal a determination of the Ombudsman made in favour of Miss Rapley. The Council lodged an appeal 42 days after the determination. The Rules of Court in Scotland require an appeal to be lodged within 14 days from the issue of the determination. The Council conceded that they had mistaken the applicable procedure but they had relied on a note produced by the Ombudsman stating that appeals had to be started within 28 days of receiving a determination, within 42 days in Scotland. The Court exercised its discretion and excused the Council's error.

When the appellant's notice is filed this must be accompanied by all documents which are to be relied on in the appeal. In addition, skeleton arguments (i.e. a summary of the arguments in favour of granting the appeal) must be filed either with the notice or if not within 14 days. The appellant's notice must be served on the Ombudsman and each party to the proceedings as soon as practicable and no later than seven days after it was filed.

CPR 52.5 introduces a new procedure whereby a respondent to an appellant's notice may serve a notice of his own supporting the Ombudsman's determination on alternative or additional grounds. This must be filed at Court within 14 days after service of the appellant's notice and served on all parties as soon as practicable after it is filed, in any event not later than seven days.

The powers of the court hearing the appeal are set out in Rule 52.10. The court may allow or dismiss the appeal and also has the power, under Rule 52.10(2)(b), to remit the matter to the Ombudsman in order that critical issues may be re-heard by him. This happened, for example, in *Elliott*. The court will be more likely to remit the matter to the Ombudsman if he does not appear at the appeal and it is not clear from his determination what conclusion he has reached on a particular issue. If the court chooses this option, it may direct the Ombudsman to consider specified points or issues.

### **6.3 Ombudsman as a party**

A recurring theme in a number of appeals has been the question of whether the Ombudsman is a proper party to an appeal and, indeed, whether it is desirable that he should be a party. The concept of the Ombudsman being allowed to remain a party to an appeal of one of his determinations seems odd. High Court judges are not allowed to be a party to an appeal of one of their decisions.

The issue was first considered by Turner J in *Dolphin Packaging*. In this case the notice of appeal which was served on behalf of the appellant trustees named the Ombudsman alone as respondent. It was argued on the Ombudsman's behalf that if he could not be a party to the appeal, individual complainants would be deterred from defending appeals by the prospect of having to pay costs if they lost on appeal. It was highly desirable to avoid the risk of complainants being dissuaded from defending appeals brought by wealthier employers, trustees or managers.

The court, in deciding that the Ombudsman was a proper party to an appeal referred to the role of the Ombudsman and the primary reason why the office was created. In essence, it was to provide a cheap and accessible form of dispute resolution and it was highly likely that this purpose could be defeated if the Ombudsman were not permitted to be a party to appeals of his own determinations. Turner J said (at p338):

"I have come to the conclusion that, given the plain underlying purpose of Part IVA of the Act [the Social Security Act 1990] , and that it cannot lightly have been the intention of Parliament to give with one hand and take away with the other the supposed benefits of proceeding under that Part, the absence of the Pensions Ombudsman on the hearing of an appeal would serve to defeat the intended objects of this Part of the Act."

The *Dolphin Packaging* decision forms the foundation of the practice of the Ombudsman to appear on appeals when the complainant is not going to do so, usually because he lacks the funds to do so. The judgment leaves it to the discretion of the Ombudsman whether or not to seek to be or remain a party in each case.

The first Ombudsman was initially reluctant to be a party to the *Dolphin Packaging* appeal. As he stated (at p19) in his Annual Report 1993/94:

"I was not keen to be a party. In comparable situations, the decision-maker is not a party to proceedings at appeal stage. But I was concerned about the position of the complainant in a case such as this, where I uphold the complaint and there is an appeal by the employer (or trustees or managers). I did not feel it right that the complainant should be left unsupported. Otherwise the balance of expertise, and ability to pay for representation, would be unfairly weighted in favour of the employer or trustees or managers. I therefore sought a means whereby the complainant's case does not go by default but **without** his or her being at risk of having to pay costs."

The issue was also considered by the Court of Appeal in *Miller*. Peter Gibson LJ held that although there was nothing in the Rules of the Supreme Court which specifically dealt with the matter, it was common ground that Ord 55 (part 52 of CPR) applies to the procedure which must be followed. Rule 4(1) (52.4 of CPR) deals with the parties who must be served with notice that an appeal is being brought. They include, in para (b):

"if the appeal is against an order, determination, award or other decision of a tribunal, Minister of the Crown, government department or other person, the chairman of the tribunal, Minister, government department or person, as the case may be, and every party to the proceedings (other than the appellant) in which the decision appealed against was given."

Therefore, the Ombudsman is clearly a person to be served with the notice. However, whether the Ombudsman has the right, as a matter of course, to appear is not clear. Ord 55, r8 (now para 17.6 of the practice direction to part 52 of CPR) states that:

"Where an appeal to which this Order applies is against an order, determination or other decision of a Minister of the Crown or government department, the Minister or department as the case may be, shall be entitled to appear and be heard in the proceedings on the appeal."

This would suggest that any Minister and government department, and not the Ombudsman, have an absolute entitlement to appear and be heard. Therefore, Peter Gibson LJ concluded that the Ombudsman's ability to participate in the appeal proceedings is not an automatic right under Ord 55, r8, but is subject to the permission and control of the judge.

As a matter of practice, in particular where the complainants are unrepresented, it is now accepted that the Ombudsman is a proper party to an appeal and has a valuable role in assisting the court whilst not being seen to be too partisan in the proceedings. However, even in attempting to assist the court it is difficult for the Ombudsman to avoid defending his decisions. As stated by Blackburne J in *Elliott*:

"In accordance with what has become the practice in these cases, at any rate where the complainants are unrepresented, the Ombudsman appears before me to assist the court and effectively to uphold his determination."

However, the Court of Appeal in *Miller* accepted the force of the submissions put forward on behalf of the trustees that the Ombudsman should not be taking an active part in defending determinations appealed to the High Court. These remarks, in which Peter Gibson LJ cast doubt upon the appropriateness of the Ombudsman being a party to an appeal, have not yet been actively seized upon

and the Ombudsman has continued to appear and take an active role in proceedings, albeit to a lesser extent because of a perceived costs risk (which has lessened since the *Elliott* ruling - see below).

#### **6.4 Costs**

The first Ombudsman's initial reluctance in becoming a party to appeals may be partly explained by the fact that he anticipated the number he would be involved in and the dilemma of what priority was to be given to dealing with appeals compared with the investigation of ongoing complaints.

The main practical problem faced by the Ombudsman in becoming a party to an appeal apart from the obvious drain on his resources is the costs consequences and whether his budget can cope with financing legal representation.

The usual order for costs made by the court is that they should "follow the event", i.e. they should be paid by the unsuccessful party to the successful party.

In practice the court has a very wide discretion in deciding what costs order is appropriate. The *Hamar* case illustrates the court exercising its discretion to arrive at a just order. The successful appellant trustees were awarded their costs against the respondent beneficiary on a standard basis. Counsel for the trustees had argued that they should be allowed to make up any shortfall in their costs by recovering the additional amount out of the trust fund on an indemnity basis.

But the court decided that the trustees were, in substance, acting for their own benefit rather than for the benefit of the fund and were therefore only entitled to costs on the standard, rather than the more generous indemnity, basis.

In doing so the judge relied on Ord 62, r6 (a similar, but not identical, provision is now in r48.4 under CPR) which provided:

"(2) Where a person is or has been a party to any proceedings in the capacity of trustee, personal representative or mortgagee, he shall be entitled to the costs of those proceedings, insofar as they are not recovered from or paid by any other person, out of the fund held by him in his capacity or out of the mortgaged property, as the case may be, and the court may order otherwise only on the ground that he is acting unreasonably or, in the case of a trustee or personal representative, has in substance acted for his own benefit rather than the benefit of the fund."

In determining the Ombudsman's exposure to costs, especially bearing in mind the court's wide discretion, it is necessary to look at the orders made by the court in particular circumstances.

The *Miller* case was the first occasion where an appeal against one of the Ombudsman's determinations was allowed and he appeared as a party. When liability for costs was being discussed, Counsel representing the Ombudsman put forward the argument that because the primary role of the Ombudsman in an appeal was to assist the court to arrive at a just resolution, rather than to appear as a partisan party striving to uphold his decisions, he should not be made liable for the costs of the appeal. In effect, it was argued that the Ombudsman appeared to help ensure that no points of law were left unanswered and that they were fully argued.

However, Carnwath J rejected this approach. The judge observed that the Secretary of State in planning appeals had always appeared as a party in the knowledge that he got his costs if he won but paid them if he lost, even though he appeared as a type of arbiter. The Ombudsman was a proper party to an appeal and this put him in very much the same position as the Secretary of State. Both of these types of appeal come under Ord 55.

Accordingly, the Ombudsman was directed to pay the costs of the successful appellant trustees on the standard basis. Counsel representing the trustees had asked for costs to be awarded on the indemnity basis but this was considered to be inappropriate as there was no suggestion of any misconduct or special circumstances arising out of the Ombudsman's position.

At first instance in *Westminster* it was argued on behalf of the Ombudsman that there should be no order as to costs as his original determination had been partially upheld. In particular, the Ombudsman was successful in arguing that he had jurisdiction to hear the complaint and his award of compensation for distress was upheld. However, Walker J stated that the basic principle that costs follow the event, even in a case where there are several issues and the successful party does not succeed on all of them, still applied. He referred to the Court of Appeal decision in *Re Elgindata (No.2)* [1992] 1 WLR 1207 where it was held that this general principle can be varied in cases where the party who is ultimately successful has either unreasonably taken points or a great deal of time has been spent on points on which the successful party did not succeed. However, in this case it was clear that Westminster City Council had not taken any points unreasonably although quite a lot of time had been spent on questions about jurisdiction on which the Council was narrowly defeated. In the circumstances, Walker J decided that the correct order was that the Ombudsman be ordered to pay three-quarters of the costs of the appeal, payable on the standard basis.

The court in *Duffield* awarded costs against the Ombudsman on a standard basis when the appellant successfully overturned his determination. In this case the Ombudsman appeared as a party. Similarly, in *Engineering Training Authority* the

Ombudsman appeared and, following the successful appeal of his determination, was ordered to pay costs following the event on a standard basis.

In *Providence Capitol Trustees*, the Ombudsman did not take any formal part in the hearing of the appeal. At the conclusion of the substantive hearing, the court stood over the application of the appellant trustee that the Ombudsman should pay the costs of the appeal in order to give the Ombudsman an opportunity to be heard. The application that the Ombudsman should pay the costs of the appeal was ultimately dismissed. Chadwick J held that there is no inflexible rule that a successful litigant is automatically entitled to expect to recover his costs from somebody. Where a party whose decision is overturned on appeal appears on the appeal and makes itself a party to the appeal, that party puts itself at risk as to the costs of the appeal. Accordingly, if the appeal against its decision is successful, that party may expect to pay the costs. However, in circumstances where a party does not appear and does not take part, it is only in exceptional cases that an order for costs will be made against it.

In reaching his decision, Chadwick J referred to the principles laid down in *R -v- Newcastle-under-Lyme Justices, ex parte Massey and others* [1994] 1 WLR 1684 where the court held (at p1691) that "Justices who merely file affidavits and do not appear before the Divisional Court or the High Court will not, without more, normally be visited with a costs order ..."

This principle applies not only to justices but also to other tribunals, including the Ombudsman. As Lord Goddard stated in *R v Kingston-upon-Hull Rent Tribunal, ex parte Black* [1949] 1 All ER 260 (at p260) "if there had been no appearance by the tribunal, of course, we should not have given costs in this case."

Chadwick J used these principles to guide him in the exercise of his discretion over costs. He held that it would be oppressive to make an order for costs against the Ombudsman in a situation where his determination was overturned on appeal but where he himself had not been a party to the appeal and had not taken steps to defend his determination. This was especially so bearing in mind that the Ombudsman has no choice as to whether or not he is named as respondent and, indeed, no power once named as a respondent to set aside his own order so as to avoid the need for appeal proceedings.

The approach taken by Chadwick J was endorsed by the Court of Appeal in *Miller* where Peter Gibson LJ held "if the Pensions Ombudsman chooses to appear and to participate actively in resisting the appeal, then he may well be visited with costs."

At first instance in *Seifert* the Ombudsman did not appear in person. He was not represented by Counsel at the hearing of the appeal and only attended by way of

a solicitor. Prior to the hearing the Ombudsman had written to the court (beginning his letter "dear judge") seeking to assist on the issues raised on the appeal and Lightman J also gave the Ombudsman the opportunity to comment by letter on a provisional draft of his judgment.

After Lightman J had ruled in favour of the appellant trustees, he considered the question as to whether or not the Ombudsman should be held liable for costs. In following Chadwick J's reasoning in *Providence Capitol Trustees*, he confirmed that where the Ombudsman does not appear at the hearing of the appeal or otherwise take any part in resisting a challenge to his determination, exceptional circumstances have to be established to hold him liable for costs. Where he does appear in person at the hearing, or takes part in resisting the challenge to his decision, it is far more likely that the court will be ready to hold him liable for costs.

The first question in *Seifert* was whether the Ombudsman had actually taken a part in resisting the challenge to his decision. It was held that, in writing to the court and in commenting on the provisional judgment the Ombudsman was merely assisting the court by setting out his understanding of the various matters raised on the appeal. His participation should only be deemed as an effort to resist the challenge of his decision if he was seeking to influence rather than inform the court or to make a partisan rather than a balanced presentation. Lightman J made it clear that the courts should not deter the Ombudsman from providing assistance by automatically exposing him to a costs risk. He said (at p243):

"It is most undesirable that the Ombudsman should be deterred from providing to the court such assistance as he can, indeed assistance which he may be uniquely capable of providing, by the threat that by merely so doing he incurs the risk of being liable for costs... The court should be slow to find that the Ombudsman has crossed the line and entered the arena."

Lightman J then went on to consider the type of exceptional circumstances where the Ombudsman could be held liable for costs where he has not taken any part in or resisted the appeal. He referred to *Providence Capitol Trustees* and, in particular, the cases on the point cited by Chadwick J. In the context of judicial review proceedings it had been held that a party not present at a hearing should only be ordered to pay costs if he has acted:

"Perversely or with some disregard to the elementary principles which every court ought to obey, and even then only if it was a flagrant instance." (per Lord Parker CJ in *R v Liverpool Justices, ex parte Roberts* [1960] 1 WLR 585)

Further, Lord Goddard CJ in *R v Willesden Justices, ex parte Utley* [1948] 1 KB 397 said:

"it is the rarest thing for this court to give costs against justices. The only case is when the justices have done something which calls for more strong disapproval from this court."

Lightman J took an extreme view, deciding that the mistakes made by the Ombudsman both in his investigation of the complaint and the reasoning for his decision were so perverse that he should pay the costs of the appellants. As such the Ombudsman was directed to pay costs on a standard basis, with any shortfall to be paid to the trustees on an indemnity basis from the scheme concerned.

The Court of Appeal overturned this ruling by Lightman J. It did not consider that there were sufficient grounds to order the Ombudsman to pay costs. The Court of Appeal, stressing that the circumstances must be exceptional for a lower tribunal to pay the costs of an appeal, ordered that the Ombudsman should bear his own costs of the appeal but there was no order as to the costs of the appellants. It is clear from this decision that the mere fact that an appeal from the Ombudsman was necessary and that it resulted in the setting aside of the Ombudsman's determination is not a sufficient ground for ordering him to pay costs.

The Ombudsman was not so fortunate in *NHS Pensions Agency*. This case concerned an appeal against two decisions of the Ombudsman. The Ombudsman, although a party to both appeals, did not appear in person so as to reduce the costs risk.

Carnwath J sympathised with the Ombudsman's special position on appeals in the light of his quasi-judicial role. However, with regard to one of the appellants the Ombudsman's "equivocal stance" had necessitated a full hearing with Leading Counsel in attendance which had exacerbated the costs. The Ombudsman was therefore ordered to pay half of the appellant's costs.

Where the Ombudsman does actively participate in an appeal, the approach taken by Blackburne J in *Elliott* suggested that his exposure to costs would always be limited. The judge observed that the mere fact that the Ombudsman has taken part in an appeal, and the appeal has been successful, does not necessarily mean that he must bear all the costs. The judge reasoned that an appellant who wishes to have a determination set aside has no alternative but to appeal, and in doing so will necessarily incur costs whether or not the Ombudsman takes any part in the hearing. He held in his separate judgment on costs that:

"In these circumstances the guiding principle must, as it seems to me, be to assess the extent to which the appellant's costs have been increased as a result of the Ombudsman's participation in the appeal."

Therefore the Ombudsman was directed to pay the appellants' costs only to the extent that those costs were increased by his participation. Blackburne J concluded that most of those costs were incurred before the Ombudsman decided to participate in the hearing and the majority of the balance would have been incurred notwithstanding the Ombudsman's participation. Indeed it was held that the only additional costs as a result of the Ombudsman's participation were caused by a lengthening of the hearing itself. Subject to this small amount the appellants and the Ombudsman were ordered to bear their own costs.

However, the highly limited approach applied by Blackburne J in this case was rejected in *Moore's (Wallisdown) Limited v Pensions Ombudsman [2001]*. Ferris J ordered the Ombudsman to pay the entire costs of a party who had successfully appealed his determination. Relying on a Court of Appeal case relating to an appeal from a coroner (*R v Inner London North Coroner, ex parte Touche [2001]*), the judge did not follow Blackburne J's approach (i.e. where the Ombudsman was only liable for costs to the extent that he had increased the length of the appeal hearing).

This case is encouraging for those considering an appeal from an Ombudsman. It may have led to the announcement by David Laverick in his 2001/02 Annual Report that he would now only get involved in appeals where there was an important point of principle (e.g. a jurisdictional matter) involved.

To summarise, the current position, where he chooses to take an active role in the appeal hearing, and is unsuccessful, he can expect to pay the appellant's costs (and this is not limited to the extent which they have been increased by his participation). When the Ombudsman chooses not to appear on an appeal, he will only be held liable for costs in exceptional cases where his actions deserve strict censure from the appellate court. However, if the Ombudsman does not take reasonable steps to clarify his stance on any appeal, and his failure exacerbates the costs, he may face a costs sanction.