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The Pensions Ombudsman, David Laverick

**To: The Right Hon Andrew Smith,
Secretary of State for Work and Pensions**

I have pleasure in submitting the Annual Report of the Pensions Ombudsman for the year 1 April 2002 to 31 March 2003.

A handwritten signature in black ink that reads "David Laverick". The signature is written in a cursive style and is positioned above a short horizontal line.

DAVID LAVERICK
Pensions Ombudsman – June 2003

CHAPTER 1: Introduction

This report marks the end of my first full year as the Pensions Ombudsman. It has in some ways been a turbulent time. Talk of a Pensions Crisis has frequently been heard in the news and broadcasting media. Despite that talk, in the early part of the year there was no marked increase in the amount of work coming into the office. That was not true of the latter half of the year when growing numbers of complaints about occupational pensions schemes were accompanied by a transfer of work in relation to complaints about personal pensions from the Financial Ombudsman Service. The net result is that despite a great deal of hard work from my staff and myself we have been failing to keep up with the incoming tide.

In at least one way, however, this has been a calmer year. I refer to my involvement with the Courts. I have now worked through the litigation caseload which was bequeathed to me and there have been only a few of my own decisions which have been subject to appeal in the Courts. Only two of those appeals were successful and one of those was subject to a further successful appeal in which the Court of Appeal came to a decision which, at least from the complainant's point of view, accorded with mine.

There has, however, been another decision by the Court of Appeal, arising from a decision of my predecessor, which I see as less than helpful to the way my office should operate and less than fair to members of pensions schemes.

This was the decision taken following an application for Judicial Review brought by Britannic Asset Management Ltd who paid over substantial sums (believed to be about £3m) belonging to the Cheney Pension Fund to recipients which allegedly included a whisky distillery and a bookmaker. The Court of Appeal held that although such payments were actions taken in connection with the pension scheme they were not actions taken by "a person concerned with the administration of" the scheme and thus could not be investigated by the Pensions Ombudsman. The decision of the Court of Appeal was received shortly before I talked with the all-party group on Occupational Pensions. As I said to that group:

"I wonder how confident Members of Parliament feel about explaining to constituents whose pension fund has allegedly been filched, that Parliament has been judged to have put aspects of that matter outside the jurisdiction of the Pensions Ombudsman?"

Although I have been pleased to note that the amount of litigation involving the office has much reduced, I was concerned by comments made by Lord Scott of Foscote who gave the Annual Lecture to the Association of Pensions Lawyers. In that lecture Lord Scott cited part of a Judgement of Salmon LJ in the case of *Re Londonderry's settlement*:

"The settlement gave the absolute discretion... to the trustees and not to the courts. So long as the trustees exercise their power... bona fide... with no improper motive, their exercise of this power cannot be challenged in the courts – and their reasons for acting as they did are, accordingly immaterial."

Lord Scott went on to say that the Pensions Ombudsman's statutory function to investigate and remedy maladministration cannot be a basis on which to avoid the principles laid down in *Re Londonderry* and cannot be elevated so far as to be a fetter on the Trustees' discretionary powers.

I was pleased to note, however, that he also cited other judgements (*Kerr v British Leyland per Fox LJ* and *Kettoy Pensions Trustees v Evans per Warner LJ*) which he recognised meant that:

“The exercise by pension fund trustees or managers of discretionary distributive powers that affect the size and nature of the benefits to which the beneficiaries will become entitled cannot be based on... ‘an uncontrolled discretion’.”

My investigations as to whether Trustees’ powers have been exercised properly (a word I deliberately choose as having a wider meaning than “bona fides”) may well involve less reticence than the courts have chosen to impose on themselves by statements such as those made by Lord Salmon but seem to me to fall within the supervision and control envisaged by the last quotation that I have set out from Lord Scott’s lecture.

In my view, maladministration is a wider concept than that of unlawfulness. That may well lead to the Ombudsman providing remedies in circumstances where they would not be available in the Courts. The Public Sector Ombudsmen, (Parliamentary, Health Service and Local Government Ombudsmen) were specifically established to investigate complaints of, and secure remedies for, maladministration rather than for unlawful actions. Matters which could be subject to remedy by way of legal proceedings do not usually lie within the jurisdiction of those Ombudsmen. In choosing an Ombudsman as the method for resolving pensions disputes, Parliament has specifically included the determination of legal disputes in the jurisdiction of the Office. To argue that the Pensions Ombudsman should confine himself to the same territory as the Courts is to overlook the fact that it was not a Court which Parliament established.

Later in the year I gave evidence, at the Committee’s request, to the Select Committee on Work and Pensions. My evidence is set out in Appendix 3. I mentioned to the Select Committee the complicated matrix which governs who can complain to the Pensions Ombudsman, about what, and against whom. I hope that the forthcoming overhaul of pensions legislation will provide an opportunity to replace that complicated system with a much simpler provision.

I welcomed the opportunity to share the experience gained by the office with the Select Committee and in the later stages of the year with the Secretary of State, Ministers and Civil Servants as part of the consultative process following the Green Paper which appeared in December. The key points I have sought to stress during these various consultations are:

- The need for much greater security of occupational pensions funds than the law presently provides
- There should be a radical simplification of the IDR process and of the Regulations governing my own office
- There would be advantage in replacing the large numbers of individually designed pension schemes by a small number of model schemes
- Death Benefit payments should be made in accordance with the wishes of the scheme member (or the rules on intestacy in the absence of such wishes) and not at the discretion of pension scheme trustees

The casework I have undertaken during the year has led me to express concern about the effect of exoneration clauses, an issue which is being considered by the Law Commission. I have responded to the Law Commission consultation paper and a copy of that response is also produced in Appendix 4. I do not feel comfortable about identifying maladministration, noting that injustice has been caused to one or more scheme members but then telling them that no remedy can effectively be provided for that injustice because those responsible have the benefit of a clause in the Trust Deed which absolves them of responsibility for their actions. I do not have an answer when those who have lost out ask "Where is the justice in this system?" It seems to me to be particularly wrong when the maladministration has been the fault of Trustees who are charging for their services.

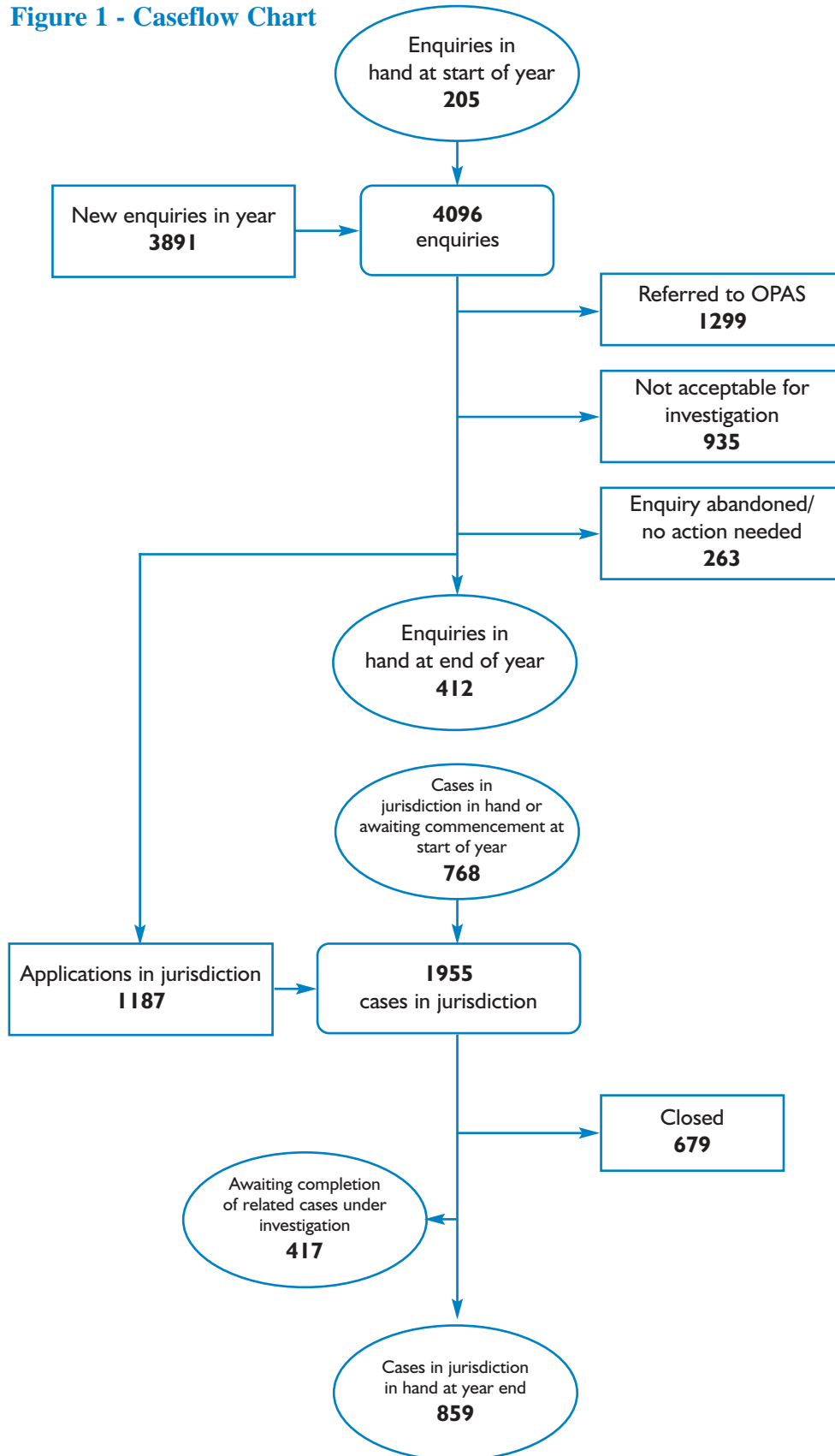
While the amount of pension involved was (fortunately) small I was unhappy about the determination I had to issue in a complaint from someone who had been a member of the Bourne and Hollingsworth Pension Scheme. The member had not had her benefits secured (as they ought to have been) when the scheme was wound up. By the time the complaint was made to me the Employer had itself been liquidated and ceased to exist. No award could, as a matter of law, be made against the various professionals who had been involved. The one person whose actions clearly had not been the cause of the problem was the scheme member concerned yet she is the one person who has lost out. A legal system which allows this to happen (and of which my office is part) cannot claim to be providing justice.

I have taken opportunities throughout the year to meet and talk with a wide range of people interested in the work of the office. I particularly welcome those meetings where I can listen as well as talk. Arrangements were made in the course of the year to set up a User Group, with members drawn from both the provider and consumer sides of pensions administration with the brief of providing me with feedback on how the Office might be more user friendly.

Within the year I have changed the structure of the office. Whereas previously complaints were considered by one team of staff and then, at a later stage, handed over for investigation by others, complaints now are handled throughout their life in the office within one multi-disciplinary team. The previous system made it difficult for complainants to understand where their point of contact was with my office and also led to some internal delays, as files were handed on from one member of the staff to the next.

As the year drew to its close I was conscious that I was likely to lose the services of Tony King. He first worked with Michael Platt, the original Pensions Ombudsman, served throughout Julian Farrand's tenure, and has been a great source of help to me in settling me into the role. For Tony's sake I am delighted that he is now to become an Ombudsman within the Financial Ombudsman Service. I am conscious that Tony King is the embodiment of much of the received wisdom of the office and his absence will leave a gap that will not easily be filled.

Figure 1 - Caseflow Chart



CHAPTER 2: Casework

I receive a large number of what the office describes as “enquiries” from people who believe that they have issues that fall within my jurisdiction. Very often, however, that belief is unfounded or there is a need for them to take some other step before I can accept their complaint for investigation. Very many of these enquiries are directed to another organisation, for example, the Financial Ombudsman Service or (in the case of disputes about state pensions to the Department for Work and Pensions) or the Parliamentary Ombudsman. Another common referral is where the person concerned would, on the face of it, benefit from the advice or conciliation services offered by OPAS, the Pensions Advisory Service, whose London based staff and national network of volunteer advisers can explain or mediate as necessary.

Many of the complaints and disputes which are within my jurisdiction will have originated as enquiries. Some complaints will arrive fully-fledged as matters needing investigation but many investigations have their source in a matter with which OPAS has tried to assist but has been unable to resolve to the satisfaction of the person concerned.

For the purposes of this largely statistical chapter, I address each of the two work areas in turn.



Casework Director, Tony King

Enquiries

The bare facts are that in 2002-2003 I received 3891 enquiries and dealt with 3684. The 3891 was an all-time high for the office. The previous highest was 3269 in 1999-2000. Figure 1 shows a comparison with the previous 4 years.

Figure 1 – New enquiries received (last 5 years)

There are some specific reasons for the increase. First, identical complaints were received from 151 scheme members, in the case of one scheme, and, in the case of another, from 71 members. Whilst it is not uncommon for the office to receive multiple complaints, two such large batches in one year is rare. Second, I have taken over from the Financial Ombudsman Service responsibility for complaints about the management of personal pension schemes, and enquiries about such complaints started to arrive in appreciable numbers around the middle of this year.

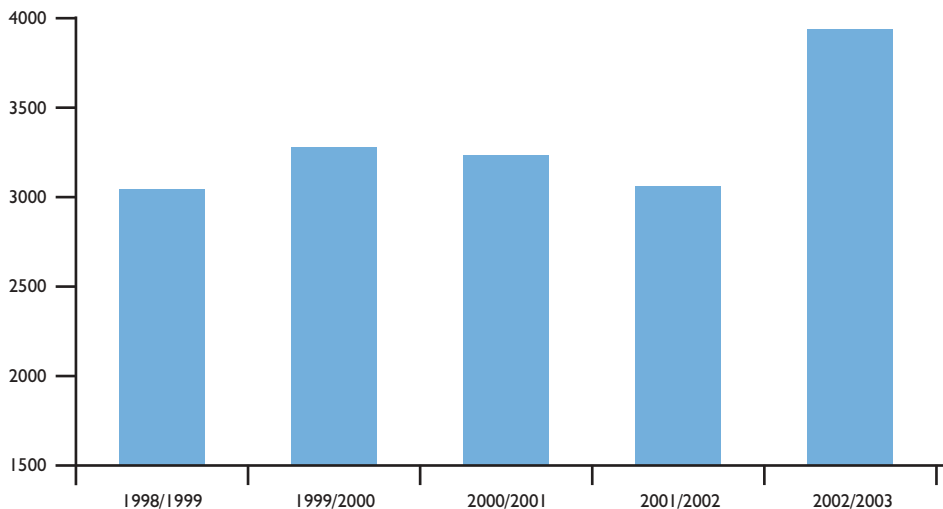


Figure 2 shows the incidence of enquiries in each month for the last five years. It shows an upward trend which is perhaps clearer in Figure 3, which shows the number of complaints in the twelve-month period ending in each month in the last five years.

Figure 2 – Enquiries per month (last 5 years)

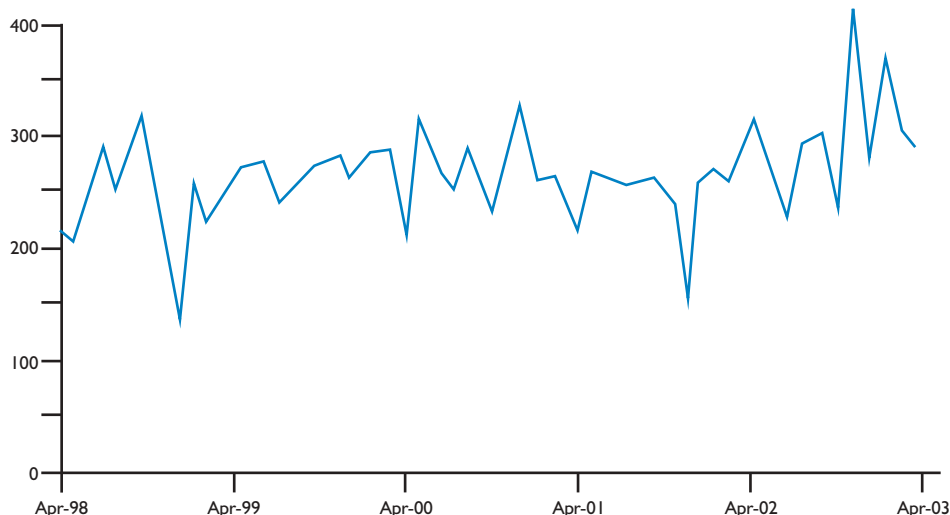
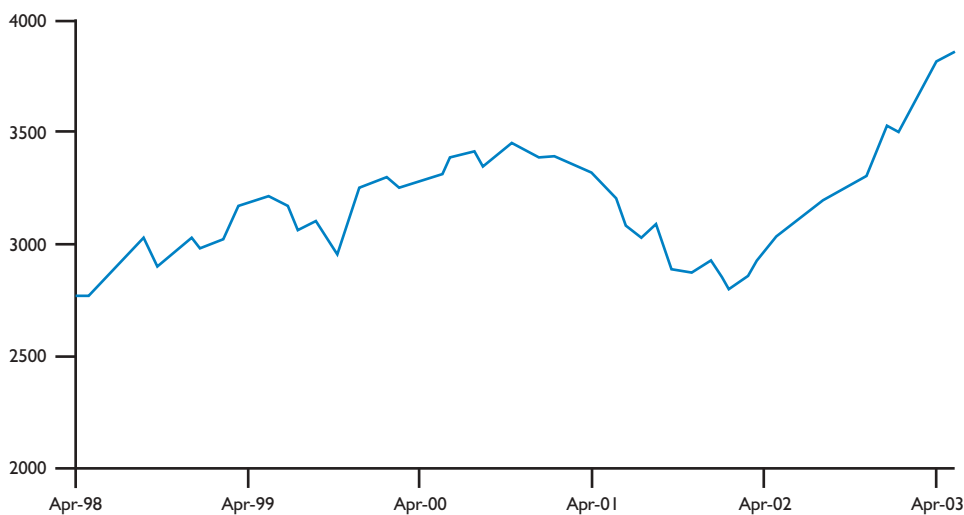


Figure 3 – Enquiries in preceding 12 months



The office's target for dealing with straightforward referrals (or rejections in the relatively few cases in which there is no other body which can deal with a matter which is outside my jurisdiction) is two working days. 94% of enquiries were dealt with within this time. 2% were dealt with in three days and another 2% in four. Most of these cases were in the batch of 151 identical complaints referred to above which I received together and could not process within the target because of the sheer number.

Figure 4 shows what happened to the enquiries which could not be accepted as within jurisdiction. As can be seen, the pattern is broadly consistent with the previous year. The majority (52%) were referred to OPAS for advice, explanation or mediation. Fewer cases (7% as opposed to 14% the previous year) were referred to the Financial Ombudsman Service. This is partly because of the change in dealing with complaints about personal pensions to which I have already referred and perhaps also because fewer complaints than previously are now being made about the miss-selling of pensions in the 1990s.

In Chapter 1 I alluded to the complex matrix of complainants and respondents that covers my jurisdiction. Not all kinds of complainant can, as the law presently stands, complain about the same kind of matter. Not all complainants can complain against the whole range of possible respondents. Working my way through these complications resulted in my having to decline to become involved with a handful (4%) of the matters brought to me. A change to the law, allowing anyone with a complaint about a pension scheme to come to me without the need for them (and me) to check whether the particular category of complainant (scheme member, trustee, employer) is making the right kind of complaint available to that category and against a respondent against whom a complaint of that kind from someone in that category can be made, would be a great deal simpler for the public to understand and for my office to interpret and explain. A great deal of work and aggravation would be saved without leading to more than a marginal increase in the number of complaints to be investigated.

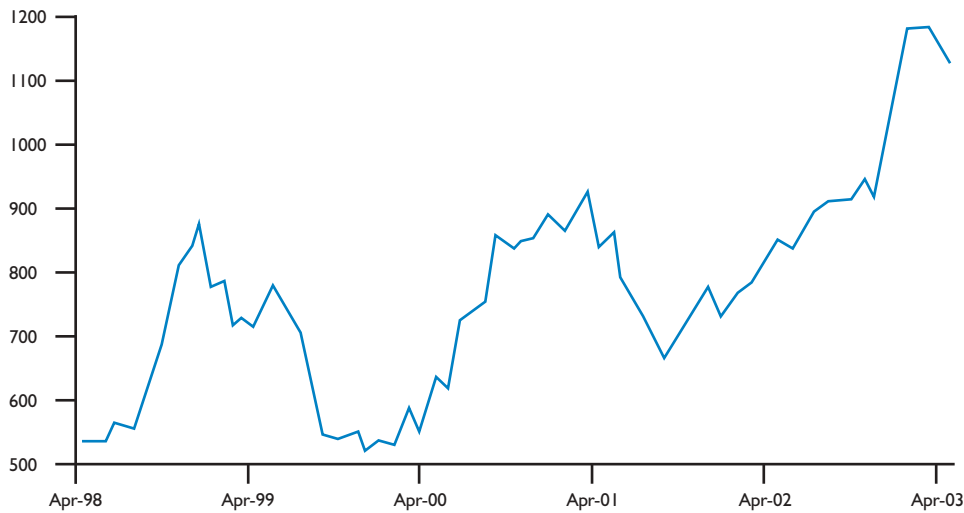
Figure 4 –Referrals and rejections (showing %age of total referred/rejected)

Reason	2002-2003		(2001-2002)	
	Number	%	%	%
State scheme benefits	88	4	(4)	
Not relating to pension scheme	9	0	(1)	
Seeking financial advice	3	0	(0)	
Respondent not in remit	83	3	(1)	
Not person permitted to complain	23	1	(1)	
Enquiry not yet put to scheme/IDR not used	333	13	(9)	
Referred to OPAS	1299	52	(53)	
Appropriate for FSA or FOS	169	7	(14)	
Appropriate for Pension Schemes Registry	58	2	(2)	
Appropriate for OPRA	2	0	(0)	
Subject to prior court proceedings	18	1	(0)	
Outside time limit	137	6	(6)	
Discretion not to investigate exercised	4	0	(0)	
Enquiry abandoned/no action needed	271	11	(8)	
Total	2,489			

Cases in Jurisdiction

1187 cases were accepted as being within jurisdiction. This too is an all-time high for the Office. The previous year's equivalent is 831. The 911 of the year before that had been the highest until this year. Figure 5 shows the number of acceptances over twelve months ending on each month over the last five years. The recent increase in the office's workload is clear.

Figure 5 – Cases accepted in preceding 12 months (last five years)



There has been a shift in the way that I deal with cases that fall within jurisdiction. My aim is to deal with them as expeditiously as possible. This consists of weeding out at an early stage those matters which cannot succeed, including identifying those parts of a complaint which may not be within jurisdiction.

If the caseworker takes the view that talking to, or corresponding with, the parties might result in a mediated solution, then this will be done. Typically in such cases, the caseworker will have reached the conclusion that the complaint is unlikely to succeed, or that it will only succeed to the extent of payment of a relatively small sum – perhaps for distress and/or inconvenience rather than financial loss. If the parties accept the caseworker’s view then the case will be closed as satisfactorily resolved.

Second, in the cases where the caseworker does not think that the complaint can possibly succeed and that a reasoned decision to this effect is called for, then a letter will be written saying that the caseworker believes that I would not uphold the complaint and giving reasons for that view. The letter goes on to say that if the complainant is unhappy he or she may ask me to review the file. If the complainant accepts the caseworker’s view, then the file is closed. If the complainant asks for a decision from me, then I do indeed review the papers and either issue a short formal Determination or, less usually, refer the matter back to the caseworker for more work to be done.

The longest path that an investigation will take is where the caseworker obtains submissions from all of the parties, obtains the complainant’s observations on those submissions and pursues any other necessary avenues such as calling for documents, making enquiries or asking for specific points of view. A formal decision will be drafted and sent to the parties as a “Notification of Preliminary Conclusions” for final comment before my Determination is issued. Unless I am away on leave for more than a week at a time I will also have personally settled the Notification of Preliminary Conclusions. Where I do have an extended absence then the Notification can be sent out after review by a senior member of my team. Only I have the statutory power to issue such Determinations and regardless of which of my staff carried out the investigation and prepared the draft, the Determination is mine and can only be issued above my signature when I am satisfied with it.

In some cases my staff decide that on the evidence that emerges the case cannot be, or should not be, investigated further even though the case had originally been seen as likely

to go through the full investigation process. An example of where this happens would be if I had initially accepted that the complaint had been made within three years of when the complainant knew of the matter but later discover that he or she had, or ought to have had, previous knowledge. In other cases a document might, for example, be uncovered which puts an entirely fresh complexion on the matter. The parties concerned are, of course, given an opportunity to comment on the changed view of the complaint before a formal decision is taken.

In the year under review, 679 cases were closed compared with 633 in the previous year. Figure 6 gives a comparison with the last four years from which it can be seen that the closure level in 2002-2003 is in line with four of the last five years. I observe that in the exceptional year there were an unusually low number of cases accepted for investigation.

Figure 6 – Investigations closed (last five years)

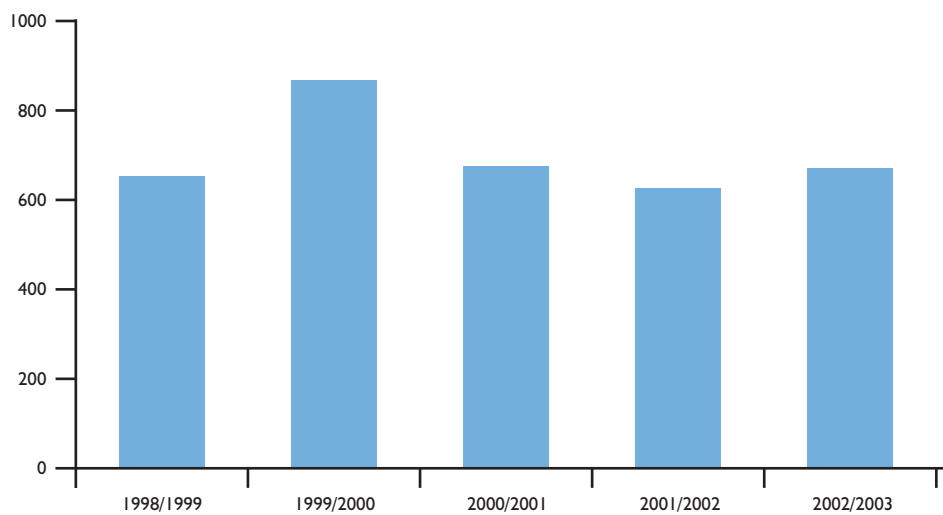


Figure 7 gives a breakdown of the paths that the cases took. The indication is that the change away from formal Determinations is having its effect. The 126 cases which the caseworker’s decision was accepted compares with 53 the year before and 36 the year before that.

Figure 7 – Closures

Discontinued	95
Resolved	72
Caseworker’s decision letter accepted	126
Determination following caseworker’s decision	137
Full investigation and Determination	249
Total	679

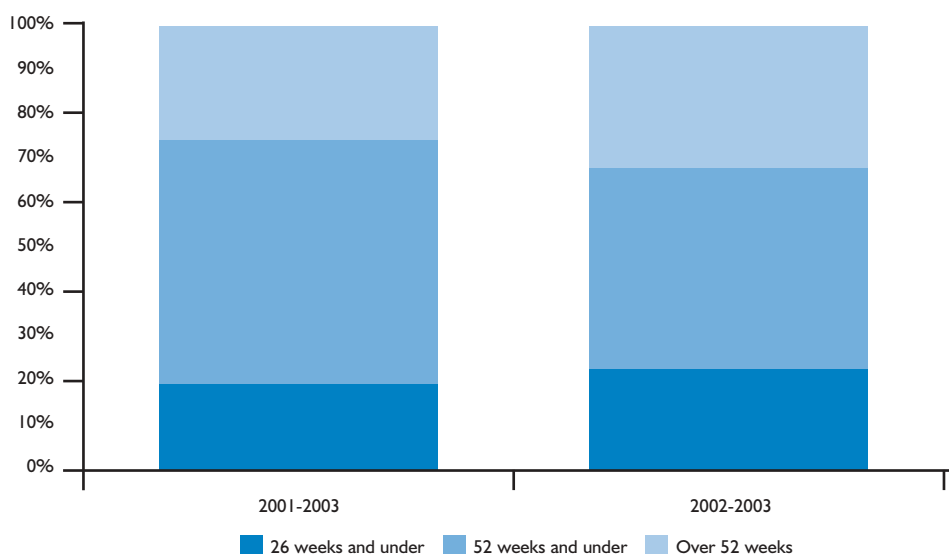
Performance Indicators

In my Annual Report for 2001-2002 I noted an intention to measure the timescales for closing cases differently from previous years. I reported on the time taken to close cases measured from the date of receipt of the application. I also included all cases rather than just those formally determined and I showed percentages of cases closed within time bands rather than averages. Figure 8 shows the outcome for 2002-2003 on the same basis and Figure 9 gives a graphic comparison with the previous year.

Figure 8 – Closure times

	Number	%
6 months or less	184	27
12 months or less	439	65
Over 12 months	240	35

Figure 9 – Closure times (last two years)



Thus there has been some small progress towards my aim of increasing the proportion of cases closed within six months. There has, however, also been an increase in the number completed in over a year. The older cases completed during the year will all have undergone the old process of following the full journey to formal determination – a process which the newer cases will avoid if it is not necessary. I will continue to work – provided I am given the necessary resources – to reduce timescales.

Subject Matter

The issues brought to me are often multi-headed and can be attributed to a number of a related problems. To give a view on what those problems are, I seek to categorise each complaint according to one main issue. A sizeable proportion (23% this year) cannot be put into any particular category.

Figure 10 – Subject matter

	2002-2003		(2001-2002)
	No	%	%
Contributions refunds and queries	56	8	6
Transfers	47	7	4
Preservation requirements	4	1	3
Membership conditions	26	4	3
Enhancement of pensions	16	2	12
Early retirement	39	6	4
Ill-health benefits	65	10	9
Spouse's and dependant's benefits	31	5	4
Additional voluntary contributions	48	7	3
Incorrect/late or no payment	29	4	6
No response from scheme	10	1	7
Winding up	40	6	7
Use of surplus	6	1	5
Disclosure of information	5	1	4
Calculation of benefits	95	14	12
Miss-selling	7	1	2
Other	155	23	32
Total	679		

The overall picture is very similar to last year. The two most frequent matters giving rise to problems are the payment (or more probably non-payment) of ill-health pensions, and the calculation of benefits.

Ill-health pensions have historically always been a source of disputes which come to my office. The decision on whether to grant such a pension may involve difficult medical prognoses and the scheme member will be at a very vulnerable point of his or her life. A decision to pay a pension may make the difference between a financially secure future and a life of poverty. It is also not always understood by members that their employers can use different criteria in deciding whether their employment should continue than those which apply to whether an ill-health pension can be paid. For example an employer may fairly dismiss an employee because the latter's state of health means that he is not presently able to do the job. But whether an ill-health pension can be paid might depend on whether the employee's ill-health is likely to be permanent. I need, when reviewing such decisions, to have careful regard to the scheme rules and the relevant evidence to see whether the decision is one which a reasonable body of trustees could reasonably take. There are times when I might privately think that if I had been a trustee I would have come to a different view but, provided the decision of the trustees is one which they could reasonably take on the evidence I do not interfere.

The heading "Calculation of benefits" covers a broad range of matters from simple calculation errors through allegations that promises have not been kept and to problems caused by benefits being quoted of higher amounts than eventually turn out to be payable. Case 27 is an example of how I deal with such misinformation when it occurs. Essentially I look to see whether the member has acted on the information and then try to put them in the situation that they would have been in had they been correctly informed in the first place.

Outcomes

A great deal of caution should be attached to interpreting the figures for the number of cases upheld or not upheld. I record a case as upheld when I have accepted that there has been maladministration which has caused injustice or an error of fact or law which calls for a remedy. On that basis I have recorded that 155 cases were upheld during the year, but that does not mean that each of the 155 complainants was satisfied with the outcome (though doubtless many were). For some, however, their claim will have been wider and larger than that which I upheld in part. Additionally, as mentioned earlier, my caseworkers will have negotiated settlements which have satisfied the complainant but these are not included in the 155.

Subject to that note of caution, the 155 cases represent about 23% of the cases closed in the year. This can be compared with 27% last year.

Sources

Finally, a note on where the cases came from. My main jurisdiction remains complaints of maladministration made by scheme members and their dependants. Many of these complaints will also involve determining matters of fact or of law. I can also deal with matters referred by trustees and employers. The breakdown of cases closed in the year is set out in Figure 11.

Figure 11 – Source

	Number
From members etc	660
From employers	16
From trustees or managers	2
From statutory independent trustees	1

Thus under 3% of cases came from employers, trustees or managers. The percentage is almost identical to the previous year.

CHAPTER 3: Case Summaries

This chapter aims to highlight some of the more significant cases determined during the year. This year a handful of cases is included which did not reach a formal determination but were instead resolved by other means or, in one case, found to be outside my jurisdiction.

The summaries are just that; the definitive document is the determination itself. Where there was a formal determination this can be found on my website (www.pensions-ombudsman.org.uk) and the formal document should be treated as authoritative rather than the summarised version.

I. J00034

Small self administered scheme – assignment of policies – beneficial interest in policies

Background

Mr A was a member of two pension schemes (**the first schemes**) and trustee of one of them. He stopped working for the employing company. Subsequently he applied to become a member of a third scheme, to which this matter directly related, which was a small self-administered scheme (**SSAS**). However, he was not entitled to become a member because he did not work for the SSAS's employer then, or ever. Mr A and two of the SSAS's trustees knew he was ineligible. The third trustee, a pensioner trustee, was deceived into believing Mr A was an actual employee. Mr A was aware of the deceit. The trustees of the first schemes then assigned four policies on Mr A's life to the SSAS trustees, to be held subject of the provisions of the SSAS. One of these was surrendered and another was part surrendered. The proceeds were paid into the SSAS' bank account. The SSAS trustees then lent money to a non-trading company owned by Mr A and made him a further wrongful payment from the trust funds. The pensioner trustee became aware that Mr A was not a genuine member of the SSAS. It resigned and was not replaced, although the scheme was required to have a pensioner trustee.

Mr A then applied to become a member of yet another scheme (**the last scheme**). Shortly afterwards the Occupational Pensions Regulatory Authority (**Opra**) appointed a trustee to the SSAS and the two remaining trustees were removed. The Opra-appointed trustee discovered a deed assigning the remaining policies – which had been held by the first schemes and were subsequently held by the SSAS – to the last scheme. The deed appeared to be between the trustees of the last scheme, Mr A himself as “member”, the pensioner trustee, and the two other trustees, one of whom was a convicted criminal and ineligible to be a trustee.

Mr A commenced proceedings in the High Court against the pensioner trustees and the two other original SSAS trustees. The action did not involve the last scheme. It was concerned primarily with status within the SSAS of those policies which had been transferred from the first schemes as well as with the proper destination of the monies paid upon those policies which had been surrendered or part-surrendered. The validity of the deed of assignment to the last scheme was not put in issue.

The Opra-appointed trustee asked me to determine the validity of the deed of assignment. Investigations were stayed pending the outcome of Mr A's court proceedings, which ultimately went to the Court of Appeal. The Court of Appeal gave judgement that a transfer power is fiduciary and can only be exercised by the trustees if acting in good faith and for the purpose for which it was granted i.e. on a transfer from one genuine employment to another. There was a finding that Mr A knew that the transfer from the first schemes to the SSAS was improper and deceitful. Although the legal interest in the policies passed under assignment from the first schemes to the SSAS, the legal entitlement remained in the first schemes. The surrender monies were held in the SSAS on a resulting trust in favour of the trustees of the first scheme. At first instance, the judge made a finding of fact that no transfer out of the SSAS had occurred. This finding was not challenged on appeal.

Outcome

The principal argument of the trustees of the last scheme was that although I had jurisdiction to determine the dispute between them and the Opra-appointed trustee, I should not do so because the trustees of the first schemes were not party to the dispute. The Opra-appointed trustee urged me to proceed to a full determination as it was important to his dealings with the SSAS to know on what basis he held the policies, or whether the assignment to the last scheme validly disposed of the SSAS's interest.

I found that although the beneficial interest in the policies remained with the first schemes, there was no reason why the dispute about the validity of the deed of assignment to the last scheme should not be determined. The deed of assignment was based on a sham transaction and was false or misleading in almost every particular. I held it to be invalid and resolved the dispute in favour of the Opra-appointed trustee.

2. L00080/81

Small self-administered scheme – tax approval – liquidator's role – insurer's duty to inform

Background

The complainants were directors of the company. The company went into liquidation in 1991. The scheme was a small self-administered pension scheme under which the complainants were the sole members and managing trustees. The insurer was the pensioner trustee. The assets of the scheme consisted of loans to the company and insurance policies with the insurer.

In July 1994 the insurer contacted the liquidator referring to the *Retirement Benefits Scheme (Restriction on Discretion to Approve) (Small Self-Administered Scheme) Regulation 1991 (the 1991 Regulation)*, and enclosing a set of amending documents to be signed and dated on behalf of the company as principal employer. These documents needed to be completed and returned to the Pension Schemes Office (**PSO**) by 5 August 1994. The liquidator returned the documents to the insurer unsigned stating that as liquidator he could not commit the managing trustees to rule changes of which they might not be aware.

The insurer informed the PSO that the company had ceased trading and so the documentation incorporating the amendments for the 1991 Regulations would not be completed. In November 1994 the PSO told the insurer that as it had not received the relevant documentation the scheme had lost its approval. The insurer asked the PSO whether it could sign the documents in its capacity as pensioner trustee, but the PSO said that this was not possible.

Eighteen months later, in 1996, the insurer informed the complainants that it had been told by the PSO that the approval of the scheme had lapsed with effect from 5 August 1994. The insurer added that this would not affect any tax relief already received as interim approval had been granted for the period the policies had been in force.

Three and a half years later the insurer told the complainants that the scheme was being treated as a funded unapproved retirement benefits scheme with a consequential tax liability to be borne by the members.

Outcome

Enquiries confirmed that in the absence of the principal employer, the PSO would have been satisfied with the managing trustees along with the insurer, as pensioner trustee, signing the documents.

I concluded that the liquidator could and should have signed the relevant documents on behalf of the company. The liquidator's explanation that he did not sign the documents because he could not commit the managing trustees to the change of rules, of which they were not aware, was not accepted. The reason for this is because the liquidator was not being asked to commit the managing trustees to the change without their knowledge. Furthermore the rules of the scheme required that the managing trustees consent to the changes.

The insurer could have done considerably more than it did to protect the approval of the scheme. They should have informed the complainants in 1994 of the documentation that needed to be completed to maintain the tax approval of the scheme; obtained the consent of the managing trustees to the proposed amendment before presenting it to the liquidator; explained to the liquidator the consequences of not signing the documents; and made enquiries in 1994 with PSO as to whether the complainants, as managing trustees, could sign the documents.

As a result of the maladministration by the company and the insurer the complainants' benefits were subject to tax, which could have been avoided.

I judged that the company was one-third responsible and the insurer two-thirds. As there would be no dividend to unsecured creditors, the complainants were unlikely to receive the company's share of the restitution and compensation.

3. L00174

Insurance policy – tax approval – surplus – duty to inform

Background

The rules of a scheme of which Mrs A was the sole member provided that if it became necessary to withhold part of the proceeds of a policy to comply with Inland Revenue limits, the surplus could be paid to the trustee. The trustee then had the absolute discretion to apply the surplus to one or more other policies under the plan.

The scheme was set up under a declaration of trust and the company was both principal employer and trustee. Mrs A was the sole member and a controlling director of the company. In 1994 she wrote to the managers explaining that her husband did not have a pension arrangement and that contributions made to the plan in her name were theoretically for him. Mrs A also explained that she was a member of the local government pension scheme and had been advised that she might be paying contributions in excess of the Inland Revenue limits. Mrs A asked the managers for their professional opinion and advice.

The managers asked for some additional information to enable them to calculate Mrs A's maximum benefits. They said that any excess funds after Mrs A's maximum benefits had been secured would have to be returned to the company less 40% tax. Mrs A asked if the surplus funds could be transferred to another pension plan operated by a related company. The managers confirmed that Mrs A's benefits were likely to exceed those maximum limits and explained that the related company would have to be brought into the plan as an associated company.

The managers suggested that a policy should be set up for Mrs A's husband and any surplus funds transferred to it. A policy was set up for Mr A in December 1995 and three monthly contributions were paid into it in January, February and March 1996. Mr A also applied for a personal pension plan with the managers but decided not to go ahead with it and signed a cancellation form. Mrs A asked the managers to confirm that the surplus would be transferred to her husband's policy and said she needed to know because the company was due to close down at the end of March 1996. The managers wrote to Mrs A confirming that the surplus would be transferred to Mr A's policy when she took her benefits. They also said that she would have to take her benefits when the company closed down.

In 1999 Mrs A asked why the surplus had not been transferred. The managers explained that they were unable to do so and that the Inland Revenue had said that, because the company had been dissolved, the surplus should revert to the Crown. The managers explained that their previous advice had been based on Mrs A retiring at the end of March 1996 when the company still existed and Mr A's policy was still running. They explained that Mr A's policy had lapsed in 1997 when the charges exceeded the funds. The managers also explained that, since the company had been dissolved, there were no trustees.

Outcome

For the transfer to take place Mrs A had to take her benefits; it was not possible to identify the surplus before this. The major bar to the transfer was not the lack of a trustee but the fact that Mr A's policy had lapsed. The managers had told Mr and Mrs A that the transfer would only take place once Mrs A had retired. However, they were aware that the company, as trustee, intended the transfer to take place. Therefore the managers were aware of the consequences of Mr A's policy lapsing and also that the company could not receive the surplus when it was dissolved. The managers had advised setting up a policy for Mr A but had not alerted Mr or Mrs A to the fact that it would lapse if the charges exceed the funds. They were directed to identify the surplus funds after Mrs A had taken her benefits and purchase an equivalent annuity for Mr A.

4. L00188

Targeted final salary scheme – premium increases – duty to inform

Background

Mrs F worked for a firm of solicitors and was a member of an insured, with-profits, money purchase scheme, which sought to provide a targeted final salary benefit of 32/60ths of final pensionable salary. The employer (partnership) was also the trustee of the scheme, so the partners had joint responsibility for providing the benefits. The scheme had been in existence since 1974. Until 1993 the firm advised the insurance company of revised salaries and the insurance company calculated revised benefits and contributions and advised the firm of the new premiums required to keep the policy on track to provide the targeted benefits. The firm then increased the premiums accordingly.

Annual benefit statements issued by the insurance company had shown guaranteed benefits and target benefits, but the 1993 benefit statement had shown only guaranteed benefits, plus two projected funds based on standard LAUTRO rates of return. By 1998 Mrs F was becoming increasingly concerned that her target pension of 32/60ths of final pensionable salary was unlikely to be met, and the insurance company explained that, because of LAUTRO (subsequently PIA) regulations, it could no longer specifically target a set pension in its illustrations.

In future years premiums were not increased, or were not increased sufficiently, partly because, in some years, the firm did not advise the insurance company of annual increases in Mrs F's salary.

Outcome

Although the insurance company could no longer quote for targeted benefits as a matter of course from 1993, it did not inform the firm adequately of the change in procedure, and this constituted maladministration. The firm had no way of knowing, without making specific enquiries, what level of premium increase would be needed, using one of the standard LAUTRO rates of return, to continue to meet the target.

The firm, on the other hand, had never advised Mrs F that it no longer intended to try to meet the final salary target so, in accordance with the scheme documentation, Mrs F maintained her entitlement to the targeted pension of 32/60ths of her final pensionable salary. One of the partners had failed to discuss Mrs F's pension situation with her, despite many requests to do so, and this undoubtedly caused her to suffer considerable distress and worry.

The insurance company was directed to calculate, on the basis of the lower assumed rate of return, the additional premiums which should have been paid in recent years to keep Mrs F's fund on track to meet the final salary pension target. The firm was then directed to meet this shortfall. The insurance company was also directed to meet, from its own resources, any investment growth there would have been if the incremental contributions had been paid on time. Additional premiums were also to be paid in the years leading up to Mrs F's normal retirement date to keep her prospective pension in line with the target. Neither partner had responded to the complaint brought to my office and the firm was directed to pay Mrs F £500 as compensation for the distress and worry she had suffered.

5. L00525

Insurance policy – demutualisation compensation – trustee's discretion to distribute

Background

The scheme was an insured executive pension arrangement with three members; Mr C, Mr L and Mr M. Mr C (the complainant) was the longest serving member. He had been a director of the company but was made redundant in 1999. Mr L and Mr M were also directors. The company acted as corporate trustee of the scheme.

In June 1999 the mutual office with which the scheme had invested announced that it was to become a public limited company. This would involve paying "compensation" to policyholders in recognition of their loss of rights to participate in the insurer's surplus assets if it were to be dissolved. On his redundancy after the date of this announcement, Mr C's policy was assigned to him and it ceased to be an asset of the scheme.

The insurer calculated that the compensation due to the scheme was approximately £75,000, and asked the trustee to give instructions about how it should be applied. Some £61,000 of this compensation had been generated by Mr C's policy, with the remaining £14,000 attributable approximately equally to Mr L's and Mr M's policies.

Mr L (apparently acting on behalf of the trustee) gave an instruction which the insurer interpreted as requiring £41,000 to be invested in his policy and £34,000 into Mr M's policy. When Mr C learned that he had been excluded from the allocation, Mr L at first instructed the insurer to reallocate the compensation. However, he was informed that the compensation "belonged" to the scheme and so it was for the trustee to decide how to apply it. Mr L then confirmed that his initial instruction stood and that no redistribution of funds to Mr C should take place. Mr L later sought to

explain his decision by claiming that “Mr C ceased to be a trustee on the day he left service and is therefore not entitled to any proceeds”.

Outcome

The trustee had not taken the trouble to establish the facts and had therefore misdirected itself. It had also given no consideration to what was fair and equitable in the circumstances, nor had it demonstrated that it had exercised its discretionary power honestly. The complaint was upheld and the trustee was directed to consider the matter afresh.

6. G00635

Insurance policy – discontinuance terms – disclosure of basis – market adjustment factors

Background

The employer made a complaint concerning the surrender terms imposed by the insurer under the scheme’s policy (its sole asset) which resulted in a loss to the scheme of £734,000. A specific part of the complaint related to the failure by the insurer to disclose the basis of the calculation of the surrender value.

In previous¹ litigation arising from the complaint Lightman J said “(the insurer) however refused to disclose the “basis currently in use”...for the purpose of the calculation of the single cash sum (“the Formula”) on the ground that it was highly confidential. ... the refusal on the part of (the insurer) to disclose the Formula has been the occasion for dissatisfaction on the part of (the employer) and members of (the) scheme and has given rise to the Complaints.”

Various figures were produced and described as the formula. The employer asserted that no basis for the calculation of the market value adjustment factors (MVAFs – a factor in the formula) had been supplied so that it was not possible to verify the accuracy of the percentages quoted. It asserted that this is the key component of the formula and ultimately the component responsible for reduction in surrender value.

In response to requests for the calculations underlying the MVAFs, the insurer initially did not accept that the basis of calculation was part of the formula and subsequently said that the underlying calculations used for preparing the specific MVAFs for the month of April 1992 could not be located – stating that it was likely that the file had been destroyed.

The insurer said that Lightman J had been content with what was to be disclosed as described to him and accepted that this was proper disclosure. It further asserted that the basis of the formula was a matter of fact wholly for it and that the employer was seeking to go behind the figures of the formula to establish how the MVAFs have been calculated – thereby questioning fairness by the back door.

¹ *Legal & General Life Assurance Society v Pensions Ombudsman (2000) 2 AllER 577*

Outcome

Although the insurer had disclosed a formula, it had not disclosed the basis for the calculation of a factor in that formula. It was essential to disclose the calculation of the MVAFs if the purpose envisaged by Lightman J was to be met. If the basis of the formula was a matter of fact wholly for the insurer then it could simply declare that the formula was anything it chose thereby defeating the ability to check the accuracy of the surrender value. The essence of Lightman J's judgement was clear – what should have been disclosed were such calculations as were necessary so that it would be possible to identify how the discontinuance sum had been calculated and verify it. The “basis currently in use” was defined by the insurer as the MVAFs and it was that basis which required verification of accuracy when applied to calculate the discontinuance sum.

The insurer's failure to provide full details of the formula was maladministration as was the subsequent loss of the supporting calculations. A direction was intended to permit the employer to check the correctness of the calculation so far as was now possible. The insurer was directed to instruct an independently nominated actuary to calculate the MVAFs likely to have been used in April 1992.

This decision is currently subject to an appeal, which has yet to be determined.

7. K00133

Life assurance – trustees' failure to arrange cover – payment of lump sum from fund – remoteness of injustice

Background

The employer was an insurance broker and the trustees properly delegated to it the task of arranging insurance cover for the death-in-service benefit, which had to be paid out from the scheme. The employer failed to arrange the right form of cover with the consequence that when one of the members died while in service the cost of paying the benefit had to be met by the scheme. The trustees did not take any steps to attempt to recover the cost from the employer, and there that was no evidence they attempted to take such steps. The employer went into voluntary liquidation and an independent trustee was appointed. The scheme was put into wind-up.

A member, backed by the independent trustee, brought a complaint against the five trustees in office at the time the independent trustee was appointed. His major complaint was that there had been maladministration by the trustees in connection with the uninsured death-in-service benefits. He also complained that three of the trustees had improperly paid the fees of the scheme's actuary out of the fund. Subsidiary complaints related to the admission to scheme membership of two of the trustees; the payment of legal costs after the appointment of the independent trustee; and the alleged withholding of documents.

The member complained that, in circumstances where the scheme was not in deficit on winding-up, the injustice to him would be that he would lose the chance of having the liquidators enhance his benefits out of the surplus.

At the time of appointment, and at all times until just before the determination was issued, it was not known whether there would be a surplus or a deficit in the scheme. However ultimately it was apparent that there was a small surplus. Under the scheme rules the surplus could be used to augment benefits. The combined effect of the scheme rules and Section 76 of the Pensions Act 1995 was that before any decision was taken to return the surplus to the company, the liquidators were required to consider exercising their discretion to augment benefits.

The parties were given the opportunity to make oral submissions during the course of investigations. The complainant did not avail himself of the opportunity but the trustees did, three of them being represented by solicitors and by leading counsel. The solicitors representing the three trustees, and the solicitors for the complainant each contended that much expense had been incurred in the way that information had been requested and in the way that such requests have been acted on. Both sides suggested that the funds of the scheme had been unnecessarily depleted as a result of the way the other side dealt with the complaint. In addition the solicitors for the three trustees said that their clients had been faced with 'ruinous expense' in defending themselves against the allegations made against them.

Outcome

The subsidiary complaints were dismissed. No injustice flowed from the admission of two of the trustees to the scheme even if there had been a failure to dot administrative i's and cross administrative t's. The complainant did not establish that the documents sought were in the possession of the trustees rather than in the possession of the liquidators. The legal costs were not improperly incurred. There was maladministration by three of the trustees in relation to the payment of actuary's fees from the scheme and in relation to the death-in-service benefit. The other two trustees were not implicated. However, despite the findings of maladministration, the complaint was not upheld. On the balance of probabilities the complainant had not suffered injustice as a result of the maladministration as the link between the loss to scheme funds and any loss to the complainant was too tenuous.

8. L00087

Small self-administered scheme – terms of annuity – five year guarantee

Background

Mrs O's husband had retired in 1995 and was receiving a pension from the scheme. The scheme, a small self-administered pension scheme, was invested in insurance policies, property and loans to the company. Mr O was paid a pension from the general assets of the scheme.

In determining the level of pension to be paid to Mr O, the managing trustees obtained the cost of the pension from the insurer who held the policies. The insurer, in calculating the cost, made a number of assumptions, one of which was that should Mr O die within 5 years of the commencement of his pension, a lump sum equal to the discounted value of the balance would be payable.

Mr O died on 23 July 1998. Mrs O was initially informed by the managing director of the company, who was also a managing trustee, that there was a guarantee that her husband's full pension would be paid for 5 years. She would receive the pension that was being paid to her husband until March 2000 when the guarantee period would cease and the amount would reduce to 50% of Mr O's pension.

Mrs O continued to receive a pension, at same level as her husband's from the general assets of the scheme. Three months later this stopped and she started to receive payments of an annuity, which had been bought for her by the managing trustees, of approximately 55% of the pension her husband had been receiving. The managing trustees and the company said that:

- no promise had been given to Mr O that a lump sum would be paid to any party in the event of his death within 5 years;
- the managing trustees had initially mistakenly believed that they were required to continue full payment of Mr O's pension to Mrs O;
- it was clear from the rules of the scheme that pension benefits were not guaranteed in the general sense, though the scheme contained a power to guarantee a pension for a period not exceeding 10 years;
- the rules give the managing trustees absolute discretion to pay lump sums to various classes of people;
- the reference in the insurer's quotation to a 5 year guarantee was an assumption and had no binding force on the managing trustees - this was confirmed by the fact that after Mr O's death the managing trustees continued to make monthly payments of his pension to Mrs O rather than commuting it to a lump sum;
- if a lump sum were to be paid in lieu of the guarantee period of Mr O's pension, the amount would have had to be deducted from the funds available for the purchase of Mrs O's annuity.

Outcome

There was nothing in the rules which provide for the payment of the pension to be guaranteed for a period of time. However, the decision as to whether or not a pension is guaranteed should be made before the pension starts to be paid and not after the member's death. If a guarantee was provided at the outset, then in the event of the member's death within the guaranteed period, a lump sum equal to the remaining guaranteed pension payments would be payable under the rules. The managing trustees had no discretion after death.

At the time Mr O retired the managing trustees should have decided and informed him of the pension payable and the basis on which it would be paid. There was no correspondence between them and Mr O on the matter at the time he retired and there was nothing to show what had been decided.

That the managing trustees at first continued to pay Mrs O the level of pension they were paying to Mr O confirmed that they were initially of the opinion that there was a guarantee. That, combined with the fact that the insurer's quotation for the cost of Mr O's pension assumed a 5 year guarantee period, led to the conclusion that, on the balance of probability, Mr O's pension was guaranteed and payment of pension at the appropriate level was directed.

The managing trustees were also directed to pay two-thirds of Mrs O's legal expenses to the extent that they were incurred as a result of the managing trustees' maladministration.

9. L00272

Winding up – failure to secure annuity

Background

Miss C left the employer, a retailer, in 1977 and became a deferred member of the scheme at that time. In 2001, about 12 months before her planned retirement in October 2002, she made enquiries about her deferred benefits. Unfortunately, none of the agencies she contacted could locate any benefits in her name.

Investigation revealed that the employer, also the sole trustee of the scheme, had gone into liquidation in August 1992 triggering the wind-up of the scheme. Further investigation, involving enquiries with a liquidator, an administrative receiver and two annuity providers, revealed the trustee had arranged for benefits to be provided through the purchase of annuities in 1993 but had failed to arrange for benefits for Miss C.

Outcome

The complaint was upheld. It was maladministration on the part of the employer as sole trustee to fail to arrange for an annuity for Miss C and that as a consequence she had suffered injustice in the form of a lost pension, of the modest sum of £70 a year. Regrettably, there could be no remedy, as the employer could not be pursued having been dissolved by the Registrar of Companies in March 1996.

Miss C had suffered injustice as a result of maladministration but no remedy could be provided.

10. L00606

Membership – evidence of – satisfactory resolution by investigator

Background

Mr P claimed to have been a member of a pension scheme operated by his company before 1974 and complained that his membership had been denied.

He had also been complaining about other matters and the allegations about the pre-1974 scheme were not made explicitly at first, but were introduced gradually into the correspondence. At first the claims were fairly vague but, by the time the complaint was referred to me, Mr P was alleging

that one of the principals of the company had offered him membership of a non-contributory pension scheme in 1965, and that he had accepted.

The trustees of the company's present pension scheme had carried out extensive investigations which had revealed no evidence that Mr P was entitled to retirement benefits in respect of his pre-1974 service. Indeed, the evidence they had obtained (for example, copies of announcement letters issued to him, and his category of membership when he did join one of the company's pension schemes in 1974) pointed fairly clearly to his not having been a member of an earlier scheme. Mr P questioned and disputed many of the trustees' findings.

Outcome

My investigator wrote to Mr P informing him that, in his opinion, the complaint could not be upheld. Mr P had speculated at great length about what might have happened and what should have happened, but he had produced no evidence in support of his claims. On the other hand, the evidence which had been collected by the trustees indicated strongly that he was mistaken.

Mr P decided not to pursue the matter further and the file was closed.

II. M00887

Transfer – resolution by explanation

Background

Mr A was a member of an occupational pension scheme insured with an Insurance Company (the Insurer). He decided to transfer his benefits out of the scheme and the trustees said that they notified the Insurer accordingly in writing on 26 June 2002. The Insurer said that it did not receive this instruction until 4 July. Downward adjustments were being applied to transfer values and on 1 July the Insurer had increased the financial adjustment to 20%.

Mr A claimed that he had learned from the previous weekend's (29/30 June) newspaper that the financial adjustment was about to be increased, and said that he made calls to check that his transfer application had been received in time. The Insurer had a record of a telephone enquiry on 1 July, when it replied that his application had not been received.

The trustees wrote to the Insurer on 2 July "confirming" that Mr A wished to proceed with the transfer "as initially advised on 26 June". The transfer value was reduced by 20% because the Insurer had not received firm instructions to transfer before 1 July. Mr A complained that the reduction should not have applied because he had given his instruction to transfer before the adjustment was increased to 20%.

Outcome

It was not known why the trustees had felt the need to confirm an instruction apparently already given, nor did Mr A explain what discussions had taken place with the trustees or his employer on 1 or 2 July. He was invited to consider whether the trustees had a case to answer, but declined to make a complaint against them.

The investigator wrote to Mr A informing him that, in his opinion, the complaint could not be upheld. The Insurer had acted in accordance with its stated practice by imposing a 20% reduction because his transfer instruction was received after 1 July. It could not be held responsible for postal delays. The Insurer was also entitled to take at face value the trustees' confirmation on 2 July that the transfer was to proceed, which was given after Mr A said he became aware that the financial adjustment had increased to 20%.

Mr A did not reply to the investigator's letter and the file was closed.

12. L00459

Transfer out near retirement age – misinformation – power to direct exemplary damages

Background

Mr C said that he had not been allowed to transfer his benefits out of the scheme, a final salary scheme, in the year before he reached his normal retirement date (NRD), although he had been told, when he left service, that he would be allowed to transfer out of the scheme at any time before his NRD.

Mr C had left service in 1989 and had opted for a deferred pension, payable from his NRD of 22 October 2001 (his 60th birthday). He had been given transfer value quotations in December 1998 and January 2000, but had not proceeded. He said he had asked for details of his pension benefits in October 2000, but had been told that these would be provided three months before his 60th birthday. He considered transferring to a personal pension in May 2001. He had been subject to a stroke, and considered that after transferring out he would be able to purchase an impaired life annuity on advantageous terms. He was also divorced, with no dependants, so had no need for widow's pension cover. He was told that the scheme rules did not permit him to transfer his benefits out of the scheme in the year before his NRD.

Mr C submitted a complaint to my office just after his 60th birthday.

The trustees agreed that there was no statutory obstacle to granting Mr C a transfer value, but submitted that the scheme rules did not permit them to do so. If a discretion to allow a transfer did exist they felt it should only be exercised in exceptional circumstances, and did not see Mr C's circumstances as being exceptional.

Mr. C considered that he had suffered severe financial loss by not being able to transfer, and was looking for exemplary damages against the respondents, whom he considered to have been unhelpful and obstructive. The respondents considered his loss to have been considerably less than he had estimated, and thought that he would suffer no long-term financial loss if he were allowed to transfer, as the tax-free lump sum would be much higher on retirement under a personal pension, and the enhanced pension payments would cover, within a few years, any shortfall caused by the delay in payment.

The scheme's history of rule amendments was complex and it was not clear which provisions applied to Mr. C's case.

Outcome

The wording of the several sets of pension scheme rules was considered but it was not necessary to make a finding as to which set of rules applied since on any analysis he was incorrectly informed that he could take a transfer at any time up to NRD. If Mr. C had known that a transfer value could not be paid in the year before his NRD, he would have transferred earlier, when he had a statutory right to take a transfer value. The transfer value could and would have been paid by 22 October 2000, a year before Mr. C's 60th birthday. Both parties, however, asked for directions on the assumption that the transfer value would not have been paid until 22 October 2001.

Mr. C had not suffered any financial loss as a result of the delay in settling his benefits that he would not recoup by the receipt of a significantly larger cash sum and pension on transfer to, and immediate retirement under a personal pension.

Mr. C had suffered distress and inconvenience because of the failure to grant him a transfer value, but his many and repeated allegations had had the effect of prolonging the investigation unnecessarily. The award of the exemplary damages he was seeking would not have been appropriate, even if the power to make such an award had been present.

My direction was that, if Mr. C wished to transfer, a transfer value should be paid of the greater of the transfer value as at 22 October 2001, plus interest from that date to the date of payment, and the transfer value available at the date of payment. Mr. C was also to be paid £500 for distress and inconvenience.

13. L00471

Early retirement – reduced life expectancy – giving advice

Background

Mrs T was diagnosed with motor neurone disease in 1999. In May 2000 she wrote to the scheme's administrators asking what she needed to do to receive her pension. The administrators (an insurance company) sent Mrs T a schedule of her benefits and a bank mandate form. The notes accompanying the schedule explained that the pension was payable monthly and that there was a five-year guarantee.

Mrs T completed the option form in July 2000 and indicated that she would like to take a lump sum and reduced pension. She asked that the lump sum cheque be made payable to her son, who was looking after her because of her failing health.

In October 2000 Mrs T's daughter wrote to the administrators because she felt that her mother should not have exercised her option to retire early. Mrs T's life expectancy was reduced and her daughter believed that early retirement was not the best option for Mrs T. The administrators wrote to Mrs T explaining that they would require authorisation from the Inland

Revenue in order to reinstate her benefits. When contacted, the Inland Revenue said that, although they sympathised with Mrs T, it was not possible for her benefits to be reinstated.

Mrs T's daughter believed that the administrators should have advised her mother to seek financial advice so that arrangements could have been made to take account of her reduced life expectancy.

Outcome

There was no responsibility for the administrator to advise members in these circumstances. In view of the seriousness of Mrs T's condition, the administrators might have made further enquiries about her life expectancy. However, if they had done so, they would probably have ascertained that her life expectancy was more than one year and so she did not meet the Inland Revenue criteria for commutation.

14. L00370

Early retirement pension – decision whether to augment – giving reasons for decision

Background

The complainant said that the trustee had not awarded him an unreduced early retirement pension to which he believed he was entitled to under the rules as a result of having worked for the same company for over 40 years. He also complained about the trustee's failure to provide a copy of its decision.

The company was part of a group of companies participating in the scheme. However, shortly before the complainant attained 40 years 'group service', the company was sold and ceased participating in the scheme. When the complainant made enquiries about his benefits he was advised that if he wished to take early retirement a reduction would apply. However, the scheme booklet stated that no reduction would apply if a member had 40 years' company service. The complainant was told that the '40 year rule' referred to service within the group. Nevertheless, the trustee agreed to consider him for an unreduced pension on a discretionary basis. It was decided not to offer him such a pension. It transpired that only the chairman of the board of directors of the trustee had considered it. The complainant sought reconsideration by the full board of trustee directors. They agreed to do so but beforehand told the complainant that the rules were quite clear and required 40 years' service with a company whilst it participated in the group and that this was not a matter for discretion. The board rejected the application. The complainant sought the minutes of the meeting refusing his application. The trustee refused on the basis that it was not normal policy to provide minutes and that the complainant had been given all the information from that part of the meeting that referred to him.

Outcome

I found that despite reference to a '40 year rule' by both parties, the rule did not exist. Accordingly the trustee's decision was flawed because the trustee had rejected the application on the grounds that it had no power to

disapply the (non-existent) 'rule'. The decision was remitted to the trustee for reconsideration.

Although there is no legal duty for trustees to provide copies of their minutes to scheme members this did not preclude a finding of maladministration for failure to do so, as maladministration is a wider concept than breach of law. As a matter of good administrative practice trustees should provide reasons for their decisions to those with a legitimate interest in the matter and, subject to the need to preserve rights to privacy of individual members should also make the minutes of their meeting available to scheme members. There was no good reason in this case not to provide the minutes. The trustee's failure to do so was maladministration and not knowing the basis on which an adverse decision was of itself an injustice. An award of £150 was made in this respect.

15. L00223

Early retirement – augmentation of pension – age discrimination

Background

Mr S was offered early retirement when he was aged 57 years. He expected to receive his pension from the scheme enhanced by six and two-thirds years' service. In fact, he was offered an enhancement of less than three years, up to age 60 years, which was Mr S's normal retirement age under the scheme. Mr S accepted the offer of early retirement but complained that he had been discriminated against on the grounds of his age. He referred to his employer's published equal opportunities policy and said that it was a term of his contract that he would not be discriminated against on age grounds.

The employer denied any discrimination and said that the relevant scheme rule (that service would be enhanced by the lesser of six and two-thirds years or up to normal retirement age) applied to every member irrespective of his or her age on entering the scheme. Alternatively, the employer argued that any discrimination on the basis of age was justified.

Outcome

The complaint was not upheld. Discrimination on the grounds of age is not as yet unlawful (although it may become so as a result of a European Directive). That directive permits differences in treatment on the grounds of age if "objectively and reasonably justified". Even if Mr S had been discriminated against on the grounds of age, such discrimination could be justified and was not in breach of the employer's equal opportunities policy. Although Mr S might have been treated differently because of his age, that did not necessarily mean that he had been unfairly treated.

16. M00117

Ill-health pension – permanence of incapacity

Background

Mrs S took maternity leave with the intention of returning to work part-time. Because of ill-health, Mrs S was unable to return to work. She then applied for ill-health retirement. Mrs S's employment was terminated under a compromise agreement with her employer.

The medical evidence was that Mrs S was suffering from depression and it was clear that she was incapacitated at that time. Her doctors felt that, although severe, it was too early to judge whether the depression would cause permanent incapacity. There was scope for treatment, but the doctors were not prepared to say when Mrs S would be fit to return to work.

Mrs S's application was declined on the basis that it was too early to say that she would be permanently unable to work again.

Mrs S's husband complained, arguing that his wife had been ill for over four years and was still unable to work. He argued that nothing in life was permanent, saying that even a coma victim could wake up.

Outcome

The complaint was not upheld. The criterion for granting ill-health retirement was that the member should be 'permanently' incapacitated. Permanence needed to be considered having regard to the remainder of the member's working life. Mrs S still had approximately 25 years remaining until her normal retirement date and the medical evidence did not support the proposition that she would remain incapacitated for the duration, given treatment. However, Mrs S would be able to make a further application at a later date, should her health not improve and the medical opinions expressed prove to be unduly optimistic.

17. L00101

Ill-health pension – employer's consent to retirement

Background

Mr B complained that he was not being paid the pension appropriate to retirement on grounds of ill-health. In May 2000 he wrote to his employer, for which he had worked for 41 years, asking for early retirement on grounds of ill-health. He gave three months' notice and said he would be leaving in August 2000. His letter found its way to the trustees of the scheme but no reply was sent. Mr B offered to undergo a medical examination. He was told this would not be required.

In due course he received pension figures but realised that they were for early retirement in normal health, not the enhanced figures for early retirement on grounds of ill-health. He took the matter up, to be told that if he persisted in asking for an enhanced pension he would not receive the substantial cash sum and car which were customarily presented to retiring senior employees.

He retired in August 2000 without being granted an ill-health pension. He wrote again to his employer who replied explaining that it was not its intention that he should retire early but a decision taken by him and, in the circumstances, early retirement on grounds of ill-health did not apply. The letter added that neither the employer nor the scheme could afford to meet the extra cost of an early retirement pension on grounds of ill-health.

Mr B continued to pursue the matter. The employer replied that it sympathised with Mr B's situation, had not disputed his ill-health and had not asked for medical evidence. When it accepted Mr B's resignation it had not considered paying him an ill-health early retirement pension.

Mr B's pension was paid from January 2001. When he asked for interest for late payment the trustees told him they had decided to reserve the right to offset any future legal costs against his accumulated interest.

Outcome

The rules of the scheme provided that a member retired by the employer at any time before his normal pension date on account of incapacity would receive an early retirement pension on grounds of ill-health. The rules also provided that a member retired by the employer, or choosing to retire early, with the employer's consent for any cause other than incapacity would receive an early retirement pension calculated on normal health grounds.

Mr B's letter in May 2000 should have caused his employer to consider whether to retire him on grounds of incapacity or, if not, whether to agree to his request for early retirement on grounds other than incapacity. There was no evidence that the employer had done either. The failure properly to consider Mr B's letter and properly to communicate with him was maladministration and had resulted in injustice to Mr B whose application had never been fairly considered.

Mr B's state of health was well known to the employer. When it told him it would not be necessary to provide medical evidence to verify his ill-health, Mr B assumed, with good reason, that both the employer and the trustees accepted that his request for ill-health early retirement was both genuine and justified and would be considered in that light.

Mr B could not have anticipated that after 41 years' service his employer would not designate him as retired by it in order that he would qualify for an ill-health early retirement pension.

The employer's correspondence revealed legitimate concerns about scheme solvency and costs but did not excuse its failure to consider Mr B's application. In the joint response from the employer and trustees the trustees incorrectly associated themselves with the employer's concerns about costs.

The trustees' decision to defray future legal costs against the interest Mr B was entitled to was also maladministration which could only have increased Mr B's distress.

The trustees were directed to pay Mr B the interest he was entitled to, the employer was directed to give proper consideration to Mr B's application for ill-health early retirement and both the employer and the trustees were directed to make payments to Mr B to compensate him for the distress they had caused him.

18. L00169

Ill-health pension – delay in obtaining medical report – reimbursement of legal costs

Background

This complaint concerned a statutory scheme. Mr. H first applied for an ill-health pension in November 1998. On the basis of a report from a consultant, who had previously treated Mr. H, the application was turned down in March 1999. Mr. H appealed against the decision on 9 June 1999, and the matter was referred to medical advisers for reconsideration. The consultant was asked in July 1999 to arrange an examination of Mr. H and to provide a report on him.

In October 1999 the consultant sent the administrators a copy of a report one of his colleagues had drafted when the original decision had been made to reject Mr. H's application. Despite a number of letters to the consultant, and a letter from Mr. H's Member of Parliament to the Secretary of State for the Department sponsoring the scheme, the consultant's report was not received until July 2000, almost a year to the day after it had first been requested. The administrators then asked another doctor to examine Mr. H and, as a result of this examination, Mr. H's application for an ill-health pension was accepted. In accordance with the scheme's regulations the commencement of the ill-health pension was backdated to 29 February 2000, six months before receipt of the medical report on the basis of which the ill-health pension had been granted.

In response to the complaint brought to my office the administrators said that referral of Mr. H's case to another doctor, in the absence of any response from the consultant, would not have been appropriate.

Outcome

I took the view that if the administrators and managers were obtaining no response from the consultant they should have sought medical evidence from elsewhere. If medical evidence had been obtained sooner, it was likely that the ill-health pension would have been granted sooner, and would have been backdated to an earlier date than it was. If the scheme regulations did not cater for an earlier commencement date some other means should be found of putting Mr. H into the same position as would have prevailed had there not been unreasonable delays in obtaining medical evidence. My direction was that Mr. H's ill-health pension should be effectively backdated to 9 June 1999, the date on which he had appealed against the original decision, and that the managers should reimburse the reasonable legal costs he had had to incur in pursuing his complaint.

19. L00692

Ill-health – full and partial disability – satisfactory resolution

Background

The complainant became absent from his work as a machinist from 3 October 2000 because of ill-health. Medical evidence was that he would be unable to return to his current job and his employer decided to terminate his employment on the grounds of capability as from 27 April 2001.

On 18 April 2001, the complainant applied to the trustees for a full incapacity pension from the scheme. The trustees refused his application on 14 May 2001 after obtaining another medical report from his general practitioner.

The complainant appealed against the decision. When the trustees met to consider the appeal, two further medical reports obtained from the complainant's general practitioner's practice differed from earlier assessments. The trustees felt unable to reach a decision and asked the complainant to attend another medical examination with a nominated doctor.

On 4 February 2001, the complainant was informed that his appeal had been refused.

Outcome

In a submission made on the complainant's behalf by a solicitor, mention was made of a partial incapacity pension benefit provided by the scheme. My investigator suggested to the trustees that this provision might have been overlooked and asked if they wished to consider whether the complainant might have been eligible for a partial pension benefit.

The trustees reconsidered the complainant's eligibility for an incapacity pension and decided that he should be offered a partial incapacity pension from the scheme, backdated to the date of leaving together with interest for the delayed payment. The complainant happily accepted the offer and withdrew his complaint.

20. M00143

Death benefits – disputed recipient

Background

This complaint was made by the three grown up children of Mrs M who had been in the process of divorcing her second husband. A decree nisi had been pronounced and a draft consent application pertaining to financial matters had been prepared. The draft order was expressed to be in full and final satisfaction of all financial claims and recorded that both parties agreed that neither had any legal or equitable interest in property or assets owned by the other. The draft order sought the dismissal of both parties' claims for financial provision and property adjustment.

Before the draft consent order had been signed and lodged with the court Mrs M died suddenly. She left a will under which the sole beneficiaries were the complainants, her children. The will recorded that no provision had

been made for Mr M as the marriage had been brief and Mrs M considered him adequately provided for by his own resources.

Mrs M had been a member of the scheme but only for a relatively short period. It appeared that she believed that any benefits payable on her death would be minimal. In fact, a substantial death grant was payable.

The relevant scheme rule provided that where a death grant was payable, it was to be paid to the person nominated by the deceased to receive the grant or, in the absence of such nomination, to any surviving widow or widower. As Mrs M had not made any nomination, the death grant was paid to Mr M. The children objected to this.

Outcome

The complainants were understandably aggrieved about the decision to pay the death grant to Mr M. However, as no decree absolute had been pronounced, Mr M was legally Mrs M's widower at the time of her death. The death grant could only be paid in accordance with the rules of the scheme. The particular rule was clear and there was no provision for the exercise of any discretion. Although the outcome was manifestly not what Mrs M would have wanted, as no nomination form had been completed, Mr M was the correct recipient.

21. L00463/M00159/60

Death benefits – disputed dependency – authenticity of expression of wish

Background

The three complainants, two brothers and a sister, complained that the trustees had incorrectly identified Mrs L as falling within a named class of beneficiary when their father, Mr M, a widower, had died suddenly in January 2001 aged only 52.

The trustees said that they identified Mrs L as falling within the category of possible recipients of death benefits as she was financially interdependent on Mr M before his death. In addition Mr M had signed an expression of wish form in February 2000 naming Mrs L as sole beneficiary.

The complainants disputed the validity of the dependency argument and claimed that Mrs L was in full-time employment, owned a house and had sold her house prior to setting up home with their father in May 1998. They doubted the authenticity of the expression of wish form signed in February 2000 saying it was signed under duress. By this they meant that Mr M's health had prevented him from obtaining health assurance cover and so he was pressured into finding some means other than life assurance which would ensure that his home was not encumbered by a mortgage in the event of his death. They argued that it would have been fairer to all parties to give effect to an earlier form signed in September 1998 which nominated them and Mrs L as equal beneficiaries of Mr M's lump sum benefit.

Outcome

The complaint was not upheld. The trustees' view that Mrs L and Mr M were financially interdependent could not be attacked as being perverse

and Mrs L would have qualified as a beneficiary on the strength of the expression of wish form alone. Despite the complainants' doubts, there was no evidence to suggest that the form did not represent a genuine expression of Mr M's intentions.

22. L00609

Death benefits – spouse's pension – misleading information – reliance

Background

Mr P worked for a London Borough and was a member of the Local Government Pension Scheme until his retirement in 1976. In January 1996 Mr P wrote to the scheme's administrator requesting details of the widow's pension his wife could expect to receive on his death. The administrator replied but gave an incorrect quotation.

In August 2000 Mr P died and in October 2000 the administrator provided Mrs P with details of her widow's pension. It was less than half of that set out in the incorrect quotation.

Mrs P complained that she and her husband had relied on the information provided by the administrator and that she had suffered financial loss as a consequence. She contended that the quotation provided by the administrator led her and her husband to believe that she would be adequately provided for in the event of Mr P's death and that they could spend an amount of money they had set aside to supplement her widow's pension instead on home improvements. Over the next couple of years or so they spent over £8,500 on those home improvements.

Outcome

There was no dispute that the quotation provided in January 1996 was incorrect and that this was maladministration on the part of the administrator. There was, however, no evidence that the £8,500 or so would have been spent on some form of pension provision. First, Mr P had elected not to forgo some of his pension for a higher widow's pension in 1974. Second, that sum would have only modestly improved Mrs P's widow's pension. In any event Mrs P had enjoyed the benefit of the home improvements. An award of £250 was made for the distress caused by the quotation being incorrect.

23. L00122

Death benefits – spouse's pension – misleading information – reliance

Background

Mrs H was the widow of a doctor. He had retired early on grounds of ill-health in June 1993 and had divorced his first wife in September 1993. Mrs H had married him in August 1995.

In March 1994, before their marriage, Dr and Mrs H were told by the scheme's manager that if he should die before her, but after their marriage, Mrs H would receive a widow's pension of £8,916 pa. She and Dr H then made wills, bought a house together and made financial dispositions, which they said, took into account her widow's pension entitlement. They also

carried out a review to ensure that she would have sufficient income to maintain her lifestyle when her husband, who was not expected to survive her, died. Mrs H said that in 1995 they thought that an income in the region of £20,000 would be sufficient. Her expected widow's pension, her own occupational pension and her state pension were expected to total around £19,500 pa, a figure which was close enough to what they thought she needed.

Dr H died in October 1999 and in December 1999 Mrs H received a letter saying that her widow's pension would be £7,785 pa, rather than the £8,916 pa she and her husband had been quoted more than five years earlier.

When Mrs H questioned the figure of £7,785 pa she was told that the original figure of £8,916 pa had been overstated. Dr H's pensionable service had been augmented and this had wrongly been reflected in Mrs H's widow's pension. The larger figure was wrong and the smaller figure was right.

Mrs H reached her normal retirement age of 60 in September 2000 but felt she had to remain working because of the shortfall in her income.

Outcome

The widow's pension quoted to Dr and Mrs H in 1994 had been wrong and this was maladministration. The correct figure was significantly less. They had relied on the accuracy of the 1994 figure in making their financial dispositions and would have arranged their finances on a different footing had they known the true figure.

Because they had reasonably relied on the 1994 information, Mrs H's income was less than it otherwise would have been, she was entitled to be put in the position she would have been in had they received correct information in 1994.

The scheme was directed to pay additional sums to Mrs H so as to effectively increase her widow's pension with effect from Dr H's death to the amount she would have been paid had the figure of £8,916 pa quoted in 1994 been correct.

24. L00510

Commutation of trivial pension – misquotation – reliance

Background

The scheme of which Miss S was a member was being wound up. The scheme's administrator had appointed a firm of actuaries to administer the winding up process. The actuaries advised the trustees that, because the Inland Revenue allowed trivial pensions to be commuted to a cash sum, Miss S would be entitled to a cash sum of £1,146.84.

The trustees wrote to Miss S advising this. In anticipation of receiving this amount, Miss S borrowed money from a family member and rewired her house. The work cost £1,293.50.

The trustees then advised Miss S that the amount she would receive from

the scheme as a lump sum has been wrongly calculated. Because the scheme was contracted out, her protected rights could not be commuted to a lump sum. Thus, Miss S would only be entitled to a cash sum of £139.43.

Miss S complained that she should be paid the balance of the sum originally quoted to her, because she had acted to her detriment in reliance upon that information.

The actuaries and the trustees said that Miss S had received goods and services to the value of the money she had paid. In addition, the actuaries had offered Miss S £50 compensation. Miss S had not demonstrated she had suffered any financial loss.

There was evidence from the electrician that Miss S contacted him shortly after she received the advice from the trustees. The electrician advised that he had originally discussed the necessity of the rewiring with Miss S about six months earlier when undertaking other work for her, but Miss S had been unable to afford it at that time.

Outcome

The administrator was directed to pay Miss S £500, being approximately half of the difference between the cash sum she was due and that which she was originally advised she was entitled to. There was clear maladministration by the actuaries (acting on behalf of the administrator) in failing to correctly calculate the cash sum available. Miss S had shown that she relied on that information and rewired her house. Clearly, this could not be undone. However, Miss S did have the benefit of the rewired house and, on that basis, I felt it right for the parties to share the cost.

25. L00844

Cash sum – delay in payment

Background

Mrs H was granted ill-health retirement with effect from 15 March 2001. Mrs H's former employer, a local authority which was also the scheme's manager, wrote to Mrs H's bank, at her request, stating that the amount of £30,000 (being the lump sum element of her pension) would be deposited into Mrs H's account on 16 March 2001.

Mrs H moved to New Zealand, having left instructions with her bank to transfer the £30,000 to her New Zealand bank account as soon as it was deposited.

The employer deposited the money on 23 March 2001. When the bank transferred the money to New Zealand, the exchanged amount was NZ \$102,030. Had the money been transferred on 16 March 2001, Mrs H would have received NZ \$105,975. Mrs H complained about the delay, seeking the difference.

The employer said the delay in payment followed a rumour that Mrs H had become employed in New Zealand. Time was taken up by legal advice being sought by the employer's finance director as to whether the rumoured employment affected her qualification for ill-health retirement.

On being advised that it would not have any effect, payment was made, albeit late. The employer said that this was a proper precaution to take to protect the pension fund. The employer also said that the loss Mrs H was claiming was too remote, as the employer had not been aware that Mrs H had moved to New Zealand.

Outcome

The complaint was upheld. The decision about Mrs H's qualification for ill-health retirement had been properly made by the proper person. This was not the finance director, who had no role to play in that decision except to arrange payment. Thus, the delay was as a result of maladministration.

The employer's submission that it was not aware Mrs H had moved to New Zealand was inconsistent with its reliance upon the rumour that she had taken up employment there. The employer might not have foreseen the exact consequences of its delay, but the fact Mrs H had sought written confirmation of the date payment was to be made should have made the Council aware of the possibility of financial consequences if it did not adhere to the date it had provided. The fact that the employer had some knowledge of Mrs H being in New Zealand, meant that the possibility of foreign exchange should have been foreseeable. The employer was required to pay the difference caused by the movement in exchange rates.

26. L00093

Overpayment – recovery

Background

Mrs P was a member of a public sector scheme, which provided for separate periods of qualifying employment to be linked for pension purposes, and for qualifying pensionable service to be enhanced if retirement was because of ill-health. She was advised in 1988 to opt out of the scheme with a personal pension, and did so, but rejoined in 1993. During these five years she had three periods of qualifying full-time employment and two periods of qualifying part-time employment. Mrs P's employment ended in 1995 on grounds of ill-health, and her benefits were based initially on her pensionable service from 1993 to 1995.

She later received compensation for the wrongful advice to opt-out and the periods of service between 1988 and 1993 were credited (pro-rata for part time) as pensionable service. This additional pensionable service was sufficient to qualify her for the enhanced ill-health terms. She had also paid additional contributions into her personal pension between 1988 and 1993 and these surplus contributions were also transferred into the scheme to buy more pensionable service.

In view of this complicated history, Mrs P's benefits had to be recalculated on a number of occasions. In 1998 she was informed that all arrears of benefit had been paid to her, but in July 1998 she received a further lump sum payment from the scheme. It was realised that this was a mistake and in August 1999 she was asked to repay approximately £5,000. After consulting her trade union, who advised her that she should have suspected that she was not entitled to the July 1998 payment, she agreed in

September 1999 to repay “at a realistic level”, and subsequently offered to repay at the rate of £30 per month. Lengthy correspondence then ensued during which Mrs P raised numerous questions about the calculation of her benefits. The scheme manager acknowledged that some mistakes had been made and offered her compensation of £200, later increased to £750. However, when she continued to dispute her benefits and did not agree terms for repaying the overpayment, this offer was withdrawn.

Outcome

The complaint was upheld to the extent of the acknowledged mistakes by the manager which was directed to pay £200 compensation, less than a sum which had previously been offered. Mrs P also asked for a ruling on whether the manager was entitled to pursue its claim for repayment. I determined that there was no reason to doubt the calculation of the overpayment and the manager was entitled to proceed with recovery.

27. L00416

Part-timer – sex discrimination – jurisdiction – time limits – meeting with complainant

Background

Mrs W complained about her exclusion as a part-timer from the scheme from September 1975 to June 1992. Regulations impose time limits on complaints, which can be accepted for investigation. Essentially, a complaint must be made within three years of the date of the act or omission complained of, or of the complainant learning of its occurrence. I can exercise discretion to investigate a complaint or dispute made outside such periods if it was reasonable that it should be delayed beyond three years and is brought within a further reasonable period.

Mrs W’s complaint was made in November 2001. It was not made within three years of the act or omission complained of and, as Mrs W had been aware throughout that she had not been included in the scheme, she could not argue that she had brought her complaint within three years of becoming aware of her exclusion from the scheme. Thus her complaint could only be considered if I decided that the delay was reasonable.

Mrs W argued that it was not until July 2000 when she had seen a television report dealing with part-timers’ pension rights that she realised that she might have a claim to a pension in respect of her part-time service between 1975 and 1992. She was advised that, even if that were accepted to be the case, she would still need to satisfy me that her complaint had been received within a reasonable period of her becoming aware that she might have a claim. The main problem in Mrs W’s case was that it appeared that, although she had become aware in July 2000, it was not until April 2001 that she complained to the scheme manager and not until August 2001 that she contacted me. Mrs W was informed that, in the circumstances, her complaint was out of time.

Mrs W did not accept that was the case. Mrs W was invited to come into the office to meet the investigator dealing with the matter to discuss the steps taken by her between July 2000 and April 2001.

Mrs W attended with her husband and brought her file of papers. It transpired that, in addition to contacting the scheme manager in April 2000, Mrs W had contacted her former employer in May 2000. The scheme manager had advised her in July 2000 that she contact her local Citizens Advice Bureau. Mrs W had contacted the scheme manager again and her MP but not until April and May 2001, respectively. There was nothing to indicate any activity on Mrs W's part between July 2000 and April 2001.

Outcome

Mrs W's complaint was rejected on the basis that it had not been made in time. Although Mrs W had said that it was following the television programme in July 2000 that she first became aware that she might have a claim to a backdated pension, the correspondence produced showed that earlier, in April and May 2000, Mrs W had been making enquiries of the scheme manager and her former employer. Mrs W had therefore been aware in April 2000 and had at that stage taken steps in relation to the matter. However, there was no evidence that between July 2000 and April 2001 she had pursued the matter further. In the circumstances the discretion to investigate could not be exercised since the complaint had not been received within such further period as could be considered reasonable.

28. K00472

Part-timer – sex discrimination — NHS Pension Scheme – Treaty of Rome

Background

Mrs T worked part-time for a General Practitioner's practice and was a member of the NHS Pension Scheme. She had previously been a member of the scheme between 1967 and 1976 but had taken a refund of her contributions on leaving NHS service.

The scheme is governed by regulations. These enable employees who have been members in the past but who left before April 1978 with a refund of contributions to buy back their pension rights for their earlier service at half cost.

Mrs T applied to buy back the pension rights for her earlier service but discovered that because her present employment was part-time and the earlier service full-time, she was only permitted to buy back a proportion of her earlier service. Mrs T argued that the regulations discriminated against part-timers, especially women, who wished to restore their pension rights.

The NHS Pensions Agency provided information about former employees returning to service in the NHS. For the period reviewed, of nearly 4,000 men returning to service and seeking to buy back previous pensionable service, 16.5% returned part-time. Over the same period, more than 27,000 women returned to service seeking to buy back previous pensionable service of whom 36.2% returned part-time. So 16.5% of men and 36.2% of women who applied to purchase previous pensionable

service were prevented by their part-time service from purchasing their previous service in its entirety.

Outcome

Section 62 of the Pensions Act 1995 provides that all occupational pension schemes should be treated as containing an equal treatment rule. Comparatively more women than men had been prevented from buying back the entirety of their previous service and this was indirect sex discrimination. The Agency sought to rely on Inland Revenue limits but there was no relevant Inland Revenue restriction to justify the difference in treatment as far as lump sum contributions were concerned. The discrimination could not be justified on objective grounds (as provided for in section 62(4) of the 1995 Act). In accordance with section 62 of the 1995 Act, Mrs T should have been allowed to buy back all her previous pensionable service.

Mrs T was also entitled to rely on Article 141 of the Treaty of Rome, which entitles her to equal pay. The European Court of Justice has made clear that 'pay' includes pensions. The Treaty precludes both direct and indirect discrimination on grounds of sex.

It was maladministration by the Agency to operate the scheme so as indirectly to discriminate against Mrs T without any objective justification. The maladministration had caused her injustice. The Agency was directed to offer Mrs T the option of paying a lump sum at half cost to give full year for year recognition for her previously refunded service.

CHAPTER 4: The Courts

As noted in Chapter 1 there has been less litigation involving my office than in previous years. A summary of the cases that have been determined are set out below.

23 May 2002

**London Borough of Newham v Skingle [2002] EWHC 1013 (Ch)
High Court, England – Jacob J**

Newham Council employed Mr Skingle as a site supervisor at a community school. His duties included working overtime (mostly to ensure that ‘lets’ or ‘lettings’ were covered). In calculating his pension on retirement, Newham Council did not take his overtime earnings into account. The Local Government Pension Scheme Regulations 1995 applied to the scheme. Under the regulations the amount of benefits was determined by reference to an employee’s ‘remuneration’ as defined at regulation C2. By definition remuneration did not include payments for non-contractual overtime. Mr Skingle argued that he was contractually entitled to be present at lets and therefore his earnings in this respect amounted to remuneration. Mr Skingle complained that Newham Council’s failure to include his overtime payments when calculating his pensionable pay amounted to maladministration.

I upheld his complaint. I found that the reference in part of Mr Skingle’s contract requiring him to “manage and operate systems of staffing cover” meant that he was contractually obliged to arrange cover, not that he was bound to provide the cover himself and he was therefore not contractually obliged to work the overtime. Nonetheless, I found that as there were specific contractual arrangements for the payment of overtime, these payments fell within the definition of remuneration as being contractual overtime.

Newham Council appealed and Jacob J upheld the appeal. He found that the reference in the regulations to non-contractual overtime meant non-compulsory overtime and that the mere provision in the contract of employment for a rate of pay if optional overtime was worked did not make the overtime “contractual”. Jacob J rejected an argument that Mr Skingle was subject to a contractual obligation to work the overtime.

The decision of Jacob J was itself later overturned by the Court of Appeal.

14 October 2002

**Britannic Asset Management Limited and others v the Pensions Ombudsman
[2002] EWCA Civ 1405
Court of Appeal, England – Master of the Rolls, Chadwick LJ, Keene LJ**

This was an appeal which I brought against the judgment of Lightman J, handed down on 21 March 2002 and reported in my last Annual Report for 2001-2002.

Permission to appeal was granted by Sedley LJ on 30 April 2002. Briefly the background to the appeal was that the Britannic companies (the respondents to this appeal) issued two unit-linked long-term insurance policies to the trustees of the scheme of the Cheney Pension Scheme. The central issue was whether the respondents, in paying monies under the policy to third parties on the instruction of the trustees were acting as “administrators” of the pension scheme for the purposes of regulation 2(1) of the Personal and Occupational Pension Schemes (Pensions Ombudsman) Regulations 1996. It was common ground that, unless the respondents were “concerned with the administration of the scheme”, I did not have jurisdiction to investigate a complaint against the respondents as administrators of the scheme in question.

The court found that the respondents' administration of the assets and the notional allocation or cancellation of units could not properly be regarded as "the administration of the scheme". The court accepted that these activities were administrative in nature and were administrative activities, which could be described as being carried out in connection with the scheme but that the relevant question was whether a person was "concerned with the administration of the scheme". The court found that where (as the court found in this case) the insurance company did no more than administer its own assets and calculate from time to time the amount it was liable to pay under a unit-linked policy, it was in much the same position as a trustee's banker and that this did not amount to being "concerned with the administration of the scheme".

The court considered it was relevant, in this context, to note that the respondents were willing (for an additional fee) to provide administration services in relation to the scheme. The court also accepted that an insurance company which provided full or partial administrative services may be a person "concerned with the administration of the scheme", but that on the evidence this was not the case here. The appeal was therefore rejected.

The court noted two other matters. The first was that under section 146(4) of the Pension Schemes Act 1993 there was power to make regulations whereby the Pensions Ombudsman could investigate allegations in relation to any person "concerned with the financing or administration of, or the provision of benefits under the scheme", but that the regulations enacted in this respect only defined an administrator as someone "concerned with the administration of the scheme other than a person responsible for the management of the scheme", and did not make provision for those concerned with financing or the provision of benefits.

The second arose from the fact that Lightman J had appeared to have partly based his decision at first instance on his own view that he had all the necessary evidence to determine whether there had been maladministration and had concluded that there had not. The Court of Appeal stated that if this were a correct interpretation of the judgment there was force in my criticism that the judge was usurping my function.

3 December 2002

The Queen on the Application of Janette Brown v The Pensions Ombudsman and Marc Coe (unreported) High Court, England – Williams J

Mrs Brown had complained that the NHS Pensions Agency failed to include a period of her employment (**the employment**) in its calculation of her pensionable service. Mr Coe, a member of my staff, notified the complainant by letter that in his opinion I was unlikely to find in her favour. This opinion was based on the fact that under legislation in force at the time of the employment it was permissible for a refund of contributions to be made; there was evidence from the NHS Pensions Agency that a refund had been made and the complainant was unable to disprove this. Mrs Brown was told that she could refer the matter to me for a final determination, which Mrs Brown did. I found on the balance of probabilities that she had received a refund of contributions and was therefore not entitled to have the 'missing' period of service included as part of her pensionable service. Mrs Brown was notified of her right to appeal on a point of law to the High Court.

Mrs Brown instead sought permission to apply for Judicial Review of the determination, apparently by mistake (she was within time to appeal). My office told her that the matter should be brought as an appeal in the Chancery Division. Nevertheless she chose to

continue with her claim for judicial review. She claimed my decision was unlawful; that Mr Coe had failed properly to consider her application and had sought to deter her from seeking a review by me. In addition she challenged the lack of an oral hearing. An acknowledgement of service was lodged in response stating (a) that the claim lay only against me and not my staff, (b) that Judicial Review is a last resort and there is an alternative, more appropriate remedy (an appeal) which would have adequately dealt with the issues raised, (c) the claim was without merit and that the procedure I had adopted was lawful and the decision reached was neither perverse, irrational nor unreasonable.

Mr Justice Lightman refused permission on paper on 29 October 2002 for the reasons given in the acknowledgement of service. The complainant renewed the application for permission at an oral hearing before Mr Justice Williams at which I was not represented. Permission was again refused.

5 December 2002

National Health Service Pensions Agency v G A Roy (unreported) High Court, England – Mr Justice Patten

Prior to amendments in 1995, NHS Pension Scheme Regulations (**the Regulations**) made provision for doctors working in the mental health field to receive additional benefits to reflect the especially stressful nature of their work. These included the option to retire at age 55 with unreduced benefits, and a doubling, for pension purposes, of any years worked after completion of twenty years' service as a mental health officer (**MHO**). Comparable work in the mental health field outside the NHS counted towards the twenty years, provided it was notified to the administrator of the NHS Pension Scheme (**the Scheme**). In March 1995 the Regulations were amended so that MHO status was removed for new joiners to the Scheme after that date; anyone not in the Scheme at that date would lose MHO status unless they rejoined within 5 years.

The complainant, Dr Roy, had been a member of the Scheme as an MHO for just over ten years. In 1977 he left the UK (and the Scheme) to work in various psychiatric institutions in North America. His employment in North America finished in 1992 but he did not rejoin the Scheme within five years of leaving it and thus lost his MHO status. His accrued MHO service was not sufficient to allow for doubling of his pension rights.

Dr Roy's complaint to me raised two issues. First, that he should have been made aware of the changes to the Regulations of March 1995, so that he could have maintained his MHO status. Second, that the time limit of six months (given in regulation VI) for electing that any provisions creating an adverse change for the member should be extended under powers given to the Secretary of State under regulation UI. The extension of the six month time limit would, Dr Roy submitted, enable him to be re-admitted to the Scheme, even though he had been out of it for longer than five years.

On the first issue, I had found that the failure by the NHS Pensions Agency (**the Agency**) to inform Dr Roy of the changes to the Scheme was not maladministration. On the second issue, in my view, regulation UI was widely worded and, as a matter of law, there was nothing to prevent the Secretary of State from extending the time limit as requested by Dr Roy. I found that the Agency, acting on behalf of the Secretary of State, had not properly appreciated the scope of its powers and had not therefore fairly exercised the

discretion to extend the time limit. I made a direction that the Secretary of State should reconsider whether to exercise the discretion available under regulation U1 to extend the time limit.

The Agency appealed my decision on the second issue. Mr Justice Patten found that regulation U1 applied only to time limits within which certain procedural or similar steps needed to be taken. The five-year period, which Dr Roy was asking to be extended, was not a 'time limit', but a criterion imposed for determining whether or not a member qualified for special treatment. In the judge's view, it could not be altered for individual members as part of a procedural discretion. He therefore allowed the appeal and set aside my finding of maladministration by the Secretary of State and my direction to reconsider the exercise of discretion.

12 December 2002

Evans v Trustees of the DBC Pension Fund (unreported) High Court, England – Patten J

Mr Evans ceased service with his employer on 12 February 1998. After a delay during which correspondence had been exchanged with Mr Evans concerning the level of his deferred benefits, Mr Evans applied to the trustees for an ill health pension. This application was treated by the trustees as an application from deferred status and Mr Evans was granted an early retirement pension. Mr Evans appealed and asked instead to be allowed to apply for ill health retirement prior to his dismissal.

The adjudicator at stage 1 of the internal dispute resolution procedure found that the trustees should have treated Mr Evans' application as an application for ill health retirement as at the date he left service. The adjudicator also found that the trustees should have considered whether on the medical evidence Mr Evans' health in February 1998 was such as to prevent him following his normal employment (as required by the rules governing ill health under the scheme) and if so whether it was reasonable for the company to maintain that his health had not played a significant part in their reason to dismiss him (as under the rules the 'retirement' had to be due to ill health). The adjudicator therefore remitted the matter for reconsideration of the trustees. The trustees again rejected the application on the basis that Mr Evans' dismissal was due to gross misconduct and that in any event he did not meet the relevant criteria.

Mr Evans had been dismissed for gross misconduct but the employer had compromised tribunal proceedings in this respect. The trustees, in taking their decision again, had taken into account Mr Evans' state of health prior to dismissal and had acquired information from the company in respect of the reasons why Mr Evans left service.

Mr Evans complained of maladministration by the trustees in that they had failed properly to consider him for an ill health pension as at the date he left service. The complaint was dismissed for the following reasons. It was reasonable for the trustees to consider his state of health prior to dismissal and the compromise reached with the employer in the tribunal proceedings. If the trustees were reasonably satisfied that Mr Evans' state of health was not the reason for his dismissal then the trustees would also be correct in saying that he had not retired for the purposes of the relevant ill health provision. This is what the trustees sought to do; whilst his health was deteriorating before his dismissal (which would have been evident to the employer) that did not of itself prove that the reason for his dismissal was his poor health. The fact that his health was deteriorating after his dismissal did not necessarily mean that the available medical evidence would have supported ill health retirement at the time he left service. Therefore I took the view that

the trustees had considered only relevant matters and asked themselves the right questions and concluded that their decision was not perverse.

Mr Evans appealed. Patten J rejected the appeal. He held that my determination disclosed no error of law. Further that the fact that Mr Evans had been dismissed could not be challenged since the employment tribunal proceedings had been compromised and whether ill health was a reason for the dismissal was a matter of fact which was within the remit of the trustees and myself to determine and not the court.

24 January 2003

Miss S M Webb v Department for Education and Skills (unreported) High Court, England – Mr Justice Peter Smith

Miss Webb had been a teacher in Hong Kong for just over eight years and was a member of the Teachers' Pension Scheme. She had moved from Hong Kong to Malta (where she bought a house) in 1996, and in August 1997 had moved back to the United Kingdom.

Under the Teachers Superannuation (Consolidation) Regulations 1988, Hong Kong was a "specified country". For every complete year of service in a specified country, a member's entitlement to benefits is brought forward by three months. Thus, Miss Webb was entitled to receive her pension benefits two years prior to her normal retirement date. But the Teachers' Pensions Agency (**the Agency**) did not inform Miss Webb of this until her normal retirement date. At this point the Agency, acknowledging its error, paid her the arrears together with interest. Miss Webb was not satisfied with this and complained to me, the respondents being the Agency and the Department for Education and Skills (**DfES**), administrators of the scheme.

Miss Webb believed she was entitled to reimbursement of her expenses from the time she moved back to the United Kingdom in 1997 until the time she actually received her pension in June 1999. These expenses included accommodation and storage costs (she stayed in guesthouses as she said she could not afford to buy a property), and the charges arising from a number of small loans made to her. She also claimed she had lost the potential benefits of tax relief on a property purchase and had suffered non-financial injustice including distress and inconvenience.

I found that there had been maladministration by the Agency, but I did not find, with one exception, that the expenses incurred by Miss Webb had been a consequence of the maladministration. The exception was the necessity for her to take the small loans when she moved back to the United Kingdom: she had been unable to sell her property in Malta for some time and without her pension, funds had been tight. I found that this injustice was not entirely remedied by the payment of interest by the Agency. I directed that the Agency should pay Miss Webb the sum of £250 for distress and inconvenience caused by their maladministration.

Miss Webb appealed on the basis that the compensation was inadequate. The respondent to the appeal was the DfES; I did not participate. I understand that in the course of the proceedings Miss Webb raised a matter which she had not raised in the course of my investigation of her complaint.

The parties negotiated a settlement (the judge having left the court so that they could do so) and it was agreed between them that the DfES would pay an additional £1,000 in compensation, but there would be no order as to costs against Miss Webb. The appeal was dismissed on withdrawal by Miss Webb.

20 February 2003

London Borough of Newham v Skingle [2003] EWCA Civ 280

Court of Appeal, England – Aldous LJ, Kay LJ, Jonathan Parker LJ

This was an appeal by Mr Skingle from the judgment of Jacob J referred to above. Permission to appeal was granted by Robert Walker LJ but limited to the issue as to whether there was evidence on which I could have concluded that Mr Skingle was under no obligation to work overtime during out of hours lettings on the basis that it was arguable that this finding was not justified on the evidence.

The court upheld Mr Skingle's appeal. It found that the clear flavour of the contractual documents was that Mr Skingle could be required to work overtime. The court held that it was simply not realistic to suppose that (given Mr Skingle's responsibilities for maintenance and security) his terms of employment envisaged that, for example, if called upon to attend the school premises in the middle of the night to fix a burst pipe Mr Skingle would be entitled to refuse to do so and that the same principles applied to attendance at out of hours lettings. The Court found that in practical terms Mr Skingle was obliged by his contract of employment to work the overtime in question save in so far as he made proper arrangements for someone else to do so. Therefore the overtime in question was not non-contractual overtime and was therefore 'remuneration' and to be taken into account in the calculation of Mr Skingle's benefits.

26 February 2003

Watts v Barking and Dagenham London Borough Council [2003] EWHC 263 (Ch)

High Court, England, Jacob J

Miss Watts was originally employed by the Borough of Dagenham and subsequently its successors Barking and Dagenham London Borough Council (**the Council**). Miss Watts had in excess of 25 years service with the Council when she retired in 1972 and commenced receiving her pension. Miss Watts' pension was linked to her pay in her last three years of service. This resulted in her receiving an 'enhanced pension' because an element of her pension arose from a 'long service award' (**LSA**) which she had been awarded for each of her last three years of service with the Council.

As a result of legal advice the Council received in 1998-9 that LSAs may be ultra vires and following a failed attempt to get Government permission to pay the pensions enhanced by the LSA, the Council wrote to Miss Watts advising that it would no longer continue to pay that enhanced portion of her pension which arose from the LSA. Miss Watts brought a complaint which was upheld as the evidence supported the view that the award to her was not mainly for the purpose of enhancing her pension but to retain her services over the last few years of her working life. The Council was directed to reinstate the pension at the level it would have been had the reduction not taken place and to pay arrears. In addition an award was made for the distress and inconvenience Miss Watts had suffered on the withdrawal of that part of her pension.

The Council appealed against my determination. Jacob J held that I had erred in finding that the Council's decision to reduce Miss Watts' pension was maladministration. He considered that the Council in reaching its decision had acted with thoroughness and care. My decision had not faulted the process by which the Council had reached its conclusion. As there was (in his opinion) no maladministration my decision to award compensation was also in error.

However, on the point of substance he concluded that there was ample material before me upon which I could conclude that Miss Watts' LSA payment was granted on individual merit. He considered that I was correct in determining that the burden of proving that the LSA payment was made in error lay with the Council. He was not satisfied that the Council had shown that I was wrong to hold that it was not proved that Miss Watts' individual case had not been considered (and thus that the award to her might have been unlawful). Jacob J said that my decision was well reasoned and constructed, and that it was not perverse and it was right. The appeal was dismissed on the point of substance.

4 April 2003 (heard on 24 February 2003)
Secretary of State for Defence v Cheryl Ann Hulme [2003] EWHC 713 (Ch)
High Court, England – Neuberger J

Mr Hulme served in the Royal Air Force. He was killed in a mountaineering accident whilst on leave from service but undertaking preparation for an approved joint forces expedition to Greenland. Mrs Hulme, his wife, applied for a war widow's pension (**WWP**) under the War Widows Pension Scheme (**WPS**), being a state pension. Her application was initially rejected with a finding that the death was not due to service, which is a prerequisite for an award under the WPS. However, the WWP was granted on appeal.

Mrs Hulme then applied for an attributable pension under the Armed Forces Pension Scheme (**AFPS**) of which her husband had been a member. The MOD rejected this application on the grounds that her husband had died on a privately arranged trip and was not on duty at the time. Mrs Hulme complained of maladministration in relation to the MOD's decision not to award her an attributable pension. Her case was that as it had been determined that her husband's death was due to service for the purposes of the WPS that decision was binding for the purposes of deciding whether she was entitled to an attributable pension under the AFPS. The issue turned on the proper construction of regulation 3090 of the Queen's Regulations for the Royal Air Force.

Mrs Hulme's complaint was upheld on the basis that the determination made under the WPS that death was due to service was effectively determinative of the issue for the purposes of regulation 3090.

The MOD appealed. Neuberger J upheld my determination. He held that there is nothing that directly links the concept of an attributable family pension under the AFPS to a requirement that the member's death is attributable to service. Neuberger J said that in fact the concept is linked to a requirement that the WPS must have accepted the relevant death was so attributable. He rejected the argument that the MOD had a wide discretion whether to award an attributable pension entitling it to determine to its own satisfaction the question of attributability. He found instead (as I had done) that this issue did not fall within the MOD's discretion under Regulation 3090. Neuberger J was also not persuaded by the MOD's arguments that the WPS determination was stated to be for the purposes of the Order to which the award applied (and so that it could not be cross-referenced to regulation 3090 of the AFPS) or that the result was extremely generous. However, he noted that there was some force in the MOD's case.

Neuberger J commented that the complaint had been mis-categorised as it had been treated as one of maladministration when in fact it amounted to a dispute of law but stated that the distinction did not impact on the right of appeal.

The MOD have been granted permission to appeal to the Court of Appeal.

15 April 2003

**The Queen on the application of Charles Edward Meaton V Pensions
Ombudsman (unreported)
High Court, England – Munby J**

Mr Meaton had complained that the London Pensions Fund Authority's reasoning concerning his injury allowance was biased, illogical and unfair and that the authority had made an unreasonable and unfair interpretation of the injury regulations. He sought my view on whether the rules had been interpreted correctly and whether the considerations the authority had taken account of when determining the amount of his injury award were relevant. I found in favour of the authority and Mr Meaton was notified of his right to appeal the determination.

After the time limit had expired for making an appeal Mr Meaton sent a pre-action letter notifying his intention to proceed by way of Judicial Review. He sought the determination to be quashed and remitted for further consideration. In response my office told the complainant that we considered the issues raised could and should have been properly raised as an appeal and reserved the right to seek costs.

The complainant lodged a claim form seeking permission to judicially review the determination. He claimed that I erred in law in construing the scheme rules; that my decision that the authority had properly exercised its discretion was perverse and that I had breached the requirements of natural justice by denying him an oral hearing. This was challenged on the grounds that it could and should have been brought as an appeal and that the only apparent reason for not doing so was that an appeal was out of time which could be viewed as an abuse of process and in any event the claim was without merit. Costs were sought on the basis that I had had to defend the claim whereas had the complainant lodged an appeal I would not have been a party to it.

Permission was refused on paper and my office was awarded £500 costs.

CHAPTER 5: Management

Costs

The office receives its funding from the Department for Work and Pensions. The expenditure for the year was £1.464m (£1.368m in 2001-2002) against budgeted expenditure of £1.601m. A breakdown is given at Appendix 2.

One reason for the underspending is that legal fees incurred and costs awarded as a result of the unsuccessful action in the Court of Appeal had not been paid within the financial year.



Business Manager, Mike Lydon

Appendix 1 – Staff in post at year end

Pensions Ombudsman

David Laverick

Casework Director

Tony King

Business Manager

Mike Lydon

Special Legal Advisor

Sarah Jacobs

Legal Advisor and Investigator

Beverly Crossland

Claire Ryan

Velia Soames

Team Leader

Peter O'Brien

Christine O'Rourke

Investigator

Paul Strachan

Vasanthi Vijayaratna

Senior Investigators

Tom Bick

Michaela Brown

Rod Joyce

Tony Krishna

Caroline Leal

Patrick Mills

Geoff Naldrett

Terry Stevens

Lesley Stead

Investigation Assistants

Jennie Aldridge

Natasha Gardner

Kai Lau

Carl Monk

Management Assistants

Katherine Auty

Suzannah Little

Administrative Officer

Tanveer Chana



Appendix 2 – Expenditure

	2002-2003	(2001-2002)
	£'000	£'000
Staff	1,088	(977)
Telecoms/Computers	92	(55)
Printing/Stationery/Postage	43	(52)
Legal Costs	136	(195)
Other	105	(85)
Total Running Costs	1,464	(1,364)
Capital Expenses	-	(4)
Total Expenditure	1,464	(1,368)

Accommodation Rental cost now accounted for through Department for Work and Pensions and no longer a direct cost.

A significant legal charge of £77,000 received too late for accounts and will show in next year's figures.

Appendix 3 – Evidence to Select Committee on Work and Pensions

Background

1. I am the Pensions Ombudsman appointed by the Secretary of State in accordance with the Pension Schemes Act 1993. The Pensions Ombudsman determines complaints of maladministration and also disputes of law and fact in relation to occupational pension schemes and personal pension schemes. My determinations are binding upon the parties but are subject to a right of appeal to the High Court on a point of law. There is also the possibility of decisions prior to a determination being subject to judicial review, for example to obtain an order preventing my carrying out a proposed investigation.

2. Resources for the office are provided by the Secretary of State with whom I have an arms-length relationship. I am supported by a staff of about 25 who are a mixture of pension experts, lawyers and administrative staff. I am the third person to hold the office of Pensions Ombudsman, my appointment dating from September 2001. I am able to draw on the collective experience of the office since its inception.

3. I came to the office with no direct experience of pensions save as a member of a public sector scheme and a contributor to the NHS AVC scheme. I did have very considerable experience as Director of the Local Government Ombudsman's office in the North of England and of determining disputes within the NHS.

4. My initial impression of the pensions scene was how over-prescriptive the legislation was both as respects my own office and for employers and employees in occupational pension schemes. Examples are:

4.1. The imposition of a highly detailed, "one-size fits all" internal dispute resolution procedure (IDRP) which is applied to occupational pension schemes. Though no doubt designed with the intention of helping scheme members, this procedure can sometimes work to their disadvantage. Scheme members are totally bemused by being told on the one hand that they have to go through the IDR procedure and on the other that the procedure cannot look at the actions of the employer.

4.2. An extremely complex matrix against which I need to determine whether a particular complainant can make his or her particular complaint against a particular respondent.

5. I was also surprised to find how protective the courts had been of those involved in the provision of Pension Schemes as opposed to the interests of those who were members of such schemes. For example:

5.1. The courts have held that Trustees do not need to provide any reasons for the exercise of their discretion. This application of historic trust law is inappropriate for modern pension trusts where the Trustees' decision may have very significant financial consequences for the member or members concerned. There is a resulting lack of accountability to members of the pension scheme in general and to individual members who are particularly affected by specific decisions.

5.2. The Court of Appeal has recently decided that I should not be allowed to investigate an allegation that there was maladministration in the actions of Britannic Investment Managers in acting upon the instructions of Trustees of the Cheney Pension

Fund and transferring very substantial monies to accounts which allegedly included a distillery and a bookmaker.

This latter example also illustrates the troubled relationship which the Pensions Ombudsman has had with the courts, whose members have expressed the view that the Ombudsman should confine himself to finding maladministration only in circumstances where the court would find that there has been some unlawful act and should provide remedies only of a kind and in circumstances where the court would itself provide a remedy. Although the legislation allows an appeal to the courts only on a point of law, the courts seem to me to have taken a very wide view of what constitutes a point of law. It seems to me that the people whom the law should be striving to protect are those from whom money has allegedly been filched rather than those who are alleged to have been at fault.

6. Legislation has, of course, sought to protect the funds held in trust for members of occupational pensions schemes but in my view gaps remain. For example, under the Minimum Funding Requirements (MFR) which apply to Defined Benefit occupational pension schemes a scheme can be certified as meeting the minimum standard by an Actuary on a Friday, the company concerned can go into liquidation over the weekend and the employees may find on the Monday that despite the scheme having been described as adequately funded there is sufficient money available to pay only part of the promised pensions. The current rules for certifying compliance with MFR provide an illusory security.

7. I would suggest there is a role for Government (if it wishes to encourage people in employment to make provision for their income after retirement) to ensure that where money has been set aside for that purpose then that money is kept secure and is available when called upon to provide the pension in accordance with the scheme rules. This might be achieved by requiring schemes to insure against default or by broadening the terms of reference of the Pensions Compensation Board. I am concerned that widely drawn exoneration clauses (designed to prevent Trustees being personally liable to provide restitution of trust funds unless they have been in wilful default of their duties) mean that it is the scheme member who loses out where Trustees have been at fault. Again I wonder whether the solution may be some compulsory scheme of indemnity insurance.

8. Despite efforts to ensure that funds are secure there will be times when schemes wind up in deficit. The present order of priority seems to me to have a very unfair effect upon active members, particularly those near to retirement. I am surprised by the lack of control on the fees charged by Independent Trustees. I am aware of schemes where there have been difficulties in ensuring that an Independent Trustee does not unduly delay in making progress with the wind-up. This may, however, be a matter where OPRA's powers are now beginning to have an effect.

9. In my evidence to the Pickering Review I suggested that a small number of more simply expressed schemes should replace the present myriad variations.

10. The key points I would wish to emphasise to the Committee are:

10.1. The need for less detailed Regulation applying both to occupational pension schemes generally and my own office.

10.2. The need for those administering Pension Schemes to be accountable both to their membership and to the Pensions Ombudsman.

10.3. I would be helped by an indication from Parliament that it does indeed intend the Pensions Ombudsman (like other Ombudsmen) to investigate and provide remedies for maladministration even though the acts of maladministration might not be regarded as unlawful by the courts or the same remedy may not be available by way of legal action.

10.4. The present legislative arrangements may not provide sufficient protection against acts of dishonesty or incompetence by those charged with safeguarding, managing or otherwise doing acts connected with the administration of pensions funds. Unless people perceive that their funds are going to be properly safeguarded they are likely to be reluctant to use a pension mechanism as a means of making adequate provision for their later years.

Appendix 4 – Response to the Law Commission Consultation Paper

Overview of the Ombudsman’s powers and the organisation

The office of the Pensions Ombudsman was established by statute. The governing provisions are in Part X of the Pensions Schemes Act 1993. The Act provides that for the purpose of conducting investigations there shall be a commissioner to be known as the Pensions Ombudsman. I have held the post since 1 September 2001.

I may investigate and determine complaints alleging injustice in consequence of maladministration and dispute of fact or law referred to me in accordance with the legislation. My jurisdiction extends to both occupational and personal pension schemes. My decisions are subject to a right of appeal on a point of law. Any determination or direction of mine is enforceable as if it were a judgement or order of the county court.

I also have power to conduct oral hearings as part of my investigations and have the powers of the court to obtain evidence. An oral hearing will usually be held if, for example, the honesty or integrity of a party is relevant. Such hearings are usually held in public.

I issue between 700 and 1000 determinations each year.

Overview of the Pensions Ombudsman’s views

Exemption clauses and the way they have been interpreted by the courts, for example, in *Duckitt and another v Farrand and others* [2000] 19 PBLR (11) have resulted in beneficiaries having less protection than equity ought to be providing. Members’ expectations may not be met in full because of exemption clauses. A trust is usually the vehicle for provision of an occupational pension scheme. I am sure that beneficiaries of the trust, i.e. the employees who are members of the pension scheme, would see themselves as being in a very different situation than the beneficiaries of a family trust. They would see the pension scheme as part of their employment relationship. Viewed in that way regulatory protection as a result of statutory provisions might be seen as less invasive than would perhaps be the case for family trusts.

I am particularly concerned by the operation of exemption clauses to provide sweeping protection for professional trustees. In my view a professional trustee ought to be accountable to the trust fund for the adverse consequences of any breach of trust and I am inclined to favour precluding them from relying on an exemption clause.

I also favour the idea of trustees holding indemnity insurance, the cost of which should be borne by the scheme.

Response to Specific Consultation questions

5.1 We do not consider that an outright prohibition of trustee exemption clauses is justified or necessary. Do consultees agree?

(Paragraph 4.19)

In the case of professional trustees I am inclined to take the view that they should be precluded from relying on exemption clauses.

Assuming compulsory insurance cover I do not see the need for exemption clauses. But I note at paragraphs 3.87 to 3.90 (Insurance) the difficulties associated with this. However, as discussed in paragraph 4.63 exculpatory relief could be obtained from the courts pursuant to section 61 Trustee Act 1925.

- 5.2 We do consider that some legislative regulation of trustee exemption clauses is justified and necessary. Do consultees agree?

(Paragraph 4.20)

Yes

- 5.3 We provisionally propose that all trustees should be given power to make payments out of the trust fund to purchase indemnity insurance to cover their liability for breach of trust. Do consultees agree?

(Paragraph 4.32)

Yes, assuming that exemption clauses are regulated/prohibited. Otherwise payments will be being made for insurance to indemnify trustees from claims for which they could or would also enjoy the benefit of an exemption clause.

- 5.4 We consider that the case for regulation of the use of trustee exemption clauses by professional trustees is very strong, but that lay trustees should in general continue to be able to rely upon trustee exemption clauses. We provisionally propose therefore that any statutory regulation of such clauses should make a distinction, in broad terms, between professional trustees and lay trustees. Do consultees agree?

Consultees are asked whether they agree with the provisional proposal that any distinction between lay trustees and professional trustees be made on the basis set out in paras 4.36 and 4.37 above.

(Paragraph 4.39)

I am inclined to apply restrictions on both professional and lay trustees on the assumption that both will be required to hold compulsory indemnity insurance. If that assumption does not come about then I would support the Law Commission's distinction between professional and lay trustees and restrict the former's reliance on exemption clauses.

The definition of what constitutes a professional trustee presents a problem. The proposed test in the Consultation paper could result in professional persons and/or corporate trustees being classed as lay trustees. In my view the definition should be broadened to include such persons. I suggest that the Law Commission may need to give further thought as to how to deal with corporate trustees who include some but not all professional people.

For example, a solicitor with a family law practice appointed as trustee to a pension fund trust, with no experience in respect of management or administration of trusts is arguably not acting in the course of a profession which consists of or includes the provision of services with the management

or administration of trusts. The same is also true of a corporate trustee not being a professional trustee carrying out the business of providing trustee services, for example, a shelf company (with experienced corporate directors) established solely for the purpose of being a trustee to the scheme.

- 5.5 While we consider that those advising a settler (whether or not they are also the trustees) should be expected, as a matter of good practice, to bring the attention of their client to any trustee exemption clause and to explain its legal consequences, we do not consider that it is appropriate that this should be a statutory requirement. Do consultees agree?

(Paragraph 4.45)

Yes, although the failure to provide such advice might expose the adviser to professional disciplinary action or to a complaint of maladministration made to an Ombudsman.

- 5.6 We invite views on statutory regulation of trustee exemption clauses such that a clause can only be relied upon by a trustee to exclude or restrict his or her liability for breach of trust in so far as the clause satisfies a requirement of reasonableness.

In so far as consultees support the imposition of a reasonableness requirement, do they consider it desirable that there be a list of matters to which regard is to be had in determining whether a particular clause satisfies the requirement?

If so, could they indicate the matters which they consider should be included in such a list?

(Paragraph 4.52)

I prefer the wholesale restriction/abolition of such clauses but, if that approach is not enacted I would support the introduction of a reasonableness requirement.

The difficulties of looking to see whether the exemption clause satisfies the requirement of reasonableness at the date of execution of the trust are noted. Perhaps the test could be determined at the time of the breach although there are shortcomings with this approach too. Taking the later date as the reference point however could allow the approach as to what is reasonable to flex over time and I would see advantage in that.

My instinct is not to produce a list of factors to be taken into account in determining what should be considered to be reasonable.

- 5.7 We do not consider it satisfactory to combine an outright prohibition of trustee exemption clauses with the exercise of a judicial discretion to exculpate trustees who have acted honestly and reasonably and who ought fairly to be excused for their breach of trust (the New Zealand model). Do consultees agree?

(Paragraph 4.66)

On the basis that I am minded that professional trustees should not be able to rely on exemption clauses, I would not be adverse, if such clauses are to

be allowed, to combining them with the exercise of judicial discretion to obtain relief from liability.

- 5.8 We do not consider that the concept of gross negligence is sufficiently clear or distinctive as to form the basis of regulation of trustee exemption clauses. We do not therefore propose that those who wish to claim for breach of trust should be obliged to establish that the trustees were guilty of gross negligence in order to deny them resort to any exemption clause in the trust instrument. Do consultees agree?

We invite views of consultees on the proposal that professional trustees should be unable to rely upon a trustee exemption clause where their conduct has been so unreasonable, irresponsible or incompetent that in fairness to the beneficiary the trustee should not be excused.

(Paragraph 4.78)

The test set out in paragraph 4.78 is considered a favourable alternative to establishing gross negligence.

Bearing in mind question 5.9 and 5.10 I favour a flexible test that would be all-embracing and have regard to the fairness to the beneficiary. The facts and circumstances, whether the clause is reasonable, nature and extent of the breach, including whether the trustee honestly believed that he was acting in the members' best interests are all relevant factors. However, if in the circumstances a reasonable trustee would not have so acted liability should not be excluded.

- 5.9 We provisionally propose that a professional trustee should not be able to rely on any provision in a trust instrument excluding liability for breach of trust arising from negligence and that clauses purporting to should not be given effect. Do consultees agree?

(Paragraph 4.85)

Yes. As I said above, I would be happier to adopt the proposal if the test were the unreasonable, irresponsible or incompetent one rather than the test of negligence.

- 5.10 We invite views as to whether professional trustees should not be able to exclude liability for breach of trust where it is not reasonable for the trustees to rely upon a trustee exemption clause contained in the trust instrument by reference to all the circumstances including the nature and extent of the breach of trust itself.

(Paragraph 4.86)

I agree with the proposition. Professional trustees should be fully accountable for their conduct.

- 5.11 We provisionally propose that in so far as professional trustees may not exclude liability for breach of trust they should not be permitted to claim indemnity from the trust fund.

We do not consider that duty exclusion clauses or extended powers clauses should be prohibited. However, we provisionally propose that in determining whether professional trustees have been negligent, the court

should have the power to disapply duty exclusion clauses or extended powers clauses where reliance on such clauses would be inconsistent with the overall purposes of the trust and it would be unreasonable in the circumstances for the trustee to be exempted from liability. Do consultees agree?

(Paragraph 4.97)

To allow a trustee to claim an indemnity from the fund where he cannot exclude liability would be to erode any benefit attributable to disallowing him to exclude liability.

In the case of pension schemes I do not see an argument for permitting duty exclusion clauses and I would be wary of extended power clauses.

- 5.12 We provisionally propose that any regulation of trustee exemption clauses should be made applicable not only to trusts governed by English law but also to persons carrying on a trust business in England and Wales. Do consultees agree?

(Paragraph 4.99)

Yes. Bearing in mind comments at paragraph 2.90, ideally any suggested reform should also apply in Scotland.

- 5.13 We provisionally propose that any legislative reform of trustee exemption clauses should apply to any breaches of trust which occur on or after the date when the legislation comes into force but that it should not apply to breaches of trust which precede that date. Do consultees agree?

(Paragraph 4.101)

Yes – as a matter of principle removing benefits/advantages should not be retrospective.

- 5.14 We would welcome comments on the substance of Part III of this Paper from consultees, and we would find any information or views about the regulatory impact of our provisional proposals extremely helpful.

(Paragraph 4.104)

Exemption clauses exist in the majority of the Pension Schemes whose provisions I have to interpret. Most pension schemes are presently submitted for approval of the Inland Revenue so that tax advantages can be obtained. There would be no great difficulty in adding compliance with an exemption clause regime to the reference test used to determine whether such approval should be given.

If statute were to introduce an outright ban of, or restriction on the scope of, exemption clauses then this could be policed by the existing mechanisms of Ombudsman and the courts.

David Laverick – Pensions Ombudsman

April 2003

Appendix 5 – Statement of Purpose and Values

OUR PURPOSE

The Pensions Ombudsman is established by Parliament

Impartially to investigate and resolve complaints and disputes about the management and administration of occupational and personal pension schemes in the U.K.

To require, where appropriate, action to be taken to correct, or compensate for, injustice in order to safeguard the interest of members and improve the administration of pensions.

OUR VALUES

To provide services which are free, user friendly and easily accessible.

To act fairly irrespective of race, colour, nationality, ethnic origin, sex, disability, marital status, sexual orientation, age or religion.

To value the contribution, and develop the potential, of staff and to encourage work ownership.