IN THE HIGH COURT OF JUSTICE **Claim No. CO/ /2006**
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

B E T W E E N :

THE QUEEN

(on the application of

(1) HENRY BRADLEY
(2) ROBIN DUNCAN
(3) ANDREW PARR
(4) THOMAS WAUGH)

Claimants

- and -

THE SECRETARY OF STATE FOR WORK AND PENSIONS

Defendant

CLAIMANTS' STATEMENT OF GROUNDS FOR JUDICIAL REVIEW AND FACTS RELIED ON

INTRODUCTION

1. On 14 March 2006 the Parliamentary Commissioner for Administration ("the Ombudsman") published her report, "Trusting in the pensions promise" ("the Report") (HC 984). The Report found that the Government had been guilty of maladministration in relation to its role in over 75,000 people losing their final salary occupational pensions. She found that this maladministration was one of a number of factors that had caused these losses. Amongst her recommendations was that the Government should consider arrangements for the restoration of the core pension entitlements of these individuals. On 16 March 2006 the Government rejected all but one of the Ombudsman's findings and recommendations.

2. By this claim, the Claimants challenge the Government's rejection of the First Finding and the First Recommendation of the Ombudsman as well as the

Government's failure to provide adequate compensation or other restoration or redress to those who have lost their pensions.

3. The Claimants contend here that the Government's rejection of certain of the recommendations and findings was unlawful. In summary, in the following respects:

   (a) The Government has failed to advance any cogent or rational reasons for rejecting the Ombudsman's First Finding of maladministration, that the published leaflets on occupational pensions were sometimes inaccurate, often incomplete, largely inconsistent and potentially misleading. The Government's response has failed to address or rebut the Ombudsman's findings.

   (b) The Government's rejection of the Ombudsman's First Recommendation, that the Government consider making arrangements for the restoration of core pension benefits, misunderstood the recommendation and accordingly failed properly to address it. Furthermore its rejection was based on incorrect and/or unsupportable factual assumptions.

   (c) The Government's refusal to ensure restoration of core pension entitlements or to provide compensation to individuals who have lost their pensions, breaches a positive obligation under Article 1 of the First Protocol of the European Convention of Human Rights and accordingly is unlawful under section 6 of the Human Rights Act 1998. The Government was under a duty to take reasonable and appropriate steps to protect individuals from losing their pensions, including a duty to warn individuals of the risks of which the Government had special knowledge. Its failure to fulfil theses obligations triggered a duty to ensure proportionate compensation or restoration is provided to affected scheme members.

General background

4. The background to this claim is the winding-up of more than 380 final salary occupational pension schemes in circumstances where the schemes do not have sufficient assets to pay non-pensioner members (that is, those members who are still in employment at the time of wind-up or who are deferred members of the scheme) the accrued value of their pension. Members have lost their own contributions, their employer's contributions and, in addition, in many cases, they have also lost much of their State Earnings Related Pension ("SERPS") which they gave up as a member of their contracted-out company occupational pension scheme.

5. The schemes considered by the Ombudsman had all wound up because,

   (a) The sponsoring company had become insolvent (as is the case with the first, second and third claimants), or

   (b) The sponsoring company had voluntarily decided to terminate the scheme (as is the case with the fourth claimant).

6. It is estimated that this course of events has deprived over 75,000 people of all, or substantially all, of their expected pensions, including lump sum payments to which they would have been entitled on retirement and other significant benefits besides an annual income. In very many cases schemes are still in the protracted process of winding up and scheme members remain in a state of uncertainty as to the amount of their future pension (if any).

7. All the schemes considered by the Ombudsman were funded in compliance with the minimum funding requirements set by the Government by regulations made under section 56 of the Pensions Act 1995 ("PA 1995") (known as "the Minimum Funding Requirement" ("MFR")). Some, such as the scheme to which the third claimant belonged, were funded beyont the 1005 MFR level.

The Parties

The claimants

8. The claimants' circumstances are broadly similar to those of the people who complained to the Ombudsman, and indeed all of them individually complained to her save for the fourth claimant. The second claimant is one of the four paradigm cases identified by the Ombudsman in her report (at paragraphs 2.26 to 2.34). The Court is asked to read each of their statements. It is anticipated that further witness statements will be filed shortly, possibly additional claimants, to ensure that the Court has before it information from a representative range of individuals. There will also be a detailed witness statement from Dr Ros Altmann, the advocate of the complainants to the Ombudsman, containing important contextual information and explaining her role. In very brief summary, however, the claimants circumstances are as follows:

(a) The first claimant, Harry Bradley, worked at IFI (the company mentioned at paragraphs 2.4 to 2.10 of the Ombudsman's report) for 27 years until 2002 when that company went into liquidation. He paid into the pension scheme throughout and throughout was assured by others that it was safe. Following the insolvency he learned it was not, and that he could only expect to receive a fraction of his expected pension. To date, he has had nothing and lives on means tested benefits. He explains how he would have made different plans and choices, had the true security of the scheme been properly publicised.

(b) The second claimant, Robin Duncan, worked for BUSM for 36 years. He was a union shop steward and convenor who actively promoted the company pension scheme to other members, believing it to be safe and secure. Although scheme materials encouraged this belief, he formed it on the basis of DWP and OPRA materials which he not only read and relied upon personally, but disseminated to others. He made approximately £25,000 of additional voluntary contributions over the years. He has been told that, thanks to the BUSM insolvency, he is likely to see about 10% of his pension at best. He sold his house and moved North because of the financial crisis his wife and himself found

themselves in. He presently works a night shift driving a 500 mile nightly run for the Royal Mail for a minimum of 49 hours each week. He often works a seven day week to afford the holidays he and his wife expected his pension would pay for.

(c) The third claimant, Andrew Parr, similarly relied upon and disseminated information from government materials to others, though as his workplace, ASW, was non-unionised, this was done through a staff consultative committee. He worked there for 20 years and has since suffered from cardiac problems including a major arrest. Nevertheless, like Mr Duncan, he has been forced to continue working because, notwithstanding his company scheme being funded beyond the MFR level, there were insufficient funds to meet the liabilities to him and other non-pensioner members at insolvency.

(d) The circumstances of the fourth claimant, Thomas Waugh, are similar to those of Mr Bradley in the sense that he too believed that his pension was safe not least because of a lack of information about the real risks. Like Mr Duncan, he made additional voluntary contributions that he could have saved elsewhere had he known the true risks. Unlike the other claimants, Mr Waugh's scheme was wound up by his employer notwithstanding its solvency. The main implication of this is that he cannot benefit from the governments Financial Assistance Scheme in any way. Mr Waugh has yet to receive any pension, but expects what he does receive to be reduced from £7200 to £2700 per annum on current estimates.

The Secretary of State for Work and Pensions

9. The Department for Work and Pensions ("DWP"), or its predecessor the Department of Social Security ("DSS"), for which the Secretary of State is responsible, has at all material times had responsibility within Government for occupational pensions policy as well as for the framework of law and regulation relating to occupational pensions. The Secretary of State has responded on behalf of the Government to the Ombudsman's report.

BACKGROUND: THE OMBUDSMAN'S INVESTIGATION

The Ombudsman

10. The Ombudsman is appointed under the Parliamentary Commissioner Act 1967 ("PCA"). The Ombudsman's function is to investigate administrative action taken on behalf of the Crown.

11. Section 5 of the PCA sets out the matters that are subject to investigation by the Ombudsman, as follows:

> *"**5 Matters subject to investigation***
> *(1) Subject to the provisions of this section, the Commissioner may investigate any action taken by or on behalf of a government department or other authority to which this Act applies, being action taken in the exercise of administrative functions of that department or authority, in any case where—*
>
> > *(a) a written complaint is duly made to a member of the House of Commons by a member of the public who claims to have sustained injustice in consequence of maladministration in connection with the action so taken; and*
> > *(b) the complaint is referred to the Commissioner, with the consent of the person who made it, by a member of that House with a request to conduct an investigation thereon. …"*

12. Section 7 of the PCA sets out the way in which the Ombudsman must conduct her investigation, as follows:

> *"**7 Procedure in respect of investigations***
> *(1) Where the Commissioner proposes to conduct an investigation pursuant to a complaint under [section 5(1) of] this Act, he shall afford to the principal officer of the department or authority concerned, and to any person who is alleged in the complaint to have taken or authorised the action complained of, an opportunity to comment on any allegations contained in the complaint.*
> *(2) Every [investigation under this Act] shall be conducted in private, but except as aforesaid the procedure for conducting an investigation shall be such as the Commissioner considers appropriate in the circumstances of the case; and without prejudice to the generality of the foregoing provision the Commissioner may obtain information from such persons and in such manner, and make such inquiries, as he thinks fit, and may determine whether any person may be represented, by counsel or solicitor or otherwise, in the investigation."*

13. Section 10 of the PCA establishes the process by which the Ombudsman must report, as follows:

> *"**10 Reports by Commissioner***
> *(1) In any case where the Commissioner conducts an investigation under this Act or decides not to conduct such an investigation, he shall send to the member of the*

House of Commons by whom the request for investigation was made (or if he is no longer a member of that House, to such member of that House as the Commissioner thinks appropriate) a report of the results of the investigation or, as the case may be, a statement of his reasons for not conducting an investigation.
(2) In any case where the Commissioner conducts an investigation under [section 5(1) of] this Act, he shall also send a report of the results of the investigation to the principal officer of the department or authority concerned and to any other person who is alleged in the relevant complaint to have taken or authorised the action complained of. …"

14. If, after conducting an investigation and having concluded that injustice has been caused as by maladministration, the Ombudsman nonetheless considers that the injustice has not been or will not be remedied, section 10(3) of the PCA, confers a power on the Ombudsman to lay the report before Parliament:

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

Conduct of Ombudsman's investigation

15. The Ombudsman received more than 200 complaints from individuals who were members and trustees of occupational pension schemes that have either wound up or are in the process of winding up. These complaints were forwarded to her by Members of Parliament of all political parties (about a further 500 complaints were received by the Ombudsman directly from individuals, although these cannot themselves activate an investigation). The complaints related to the role of various Government departments in the course of events leading to the loss (or in many cases the impending loss) of members' pensions. On 16 November 2004 the Ombudsman announced her decision to investigate a number of these complaints under section 5(1) of the PCA.

16. The central complaint investigated by the Ombudsman was that the complainants had not been able to make informed decisions about whether:

(a) to join occupational pension schemes
(b) to diversify their savings,

(c) to remain in schemes when leaving the employment of the sponsoring company, or when making other employment and life choices, such as retirement or seeking new employment with a more secure employer. [Report, 2.38]

17. These complaints related to official information published in particular by the DWP following the enactment of the Pensions Act 1995 ("PA 1995"). This information is considered in detail below.

Lead- up to enactment of the Pensions Act 1995

18. Prior to 1993, occupational pensions were governed almost entirely by trust law. Trustees had a great deal of freedom, for instance in dividing up scheme assets upon wind-up. However following the Maxwell pension scandal in December 1991, additional protections for scheme members were recognised as necessary.

19. The Government proposed what it initially described as a "minimum solvency requirement" for all final salary occupational schemes. It announced this policy in a published letter from the Secretary of State for Social Security, Peter Lilley MP, to Sir John Butterfill on 8 December 1994. The letter stated:

> *"The basic rationale for a minimum solvency requirement is clear and is set out forcibly in the report of the Pension Law Review Committee. In the modern world, no employee can make the comfortable assumption that his employer will be around 20, 40, 60 years hence to pay pension benefits as they fall due. If an employer makes a defined benefit pension promise, the pension fund should therefore be adequate to* <u>*secure*</u> *that promise, irrespective of what may happen to the employer over the period before the final pension payment is made. The proposed statutory minimum solvency requirement will provide an important, objective measure of the adequacy of a pension fund; something which members and trustees will be able to monitor and against which the performance of the fund and other important matters can be measured."* (emphasis in original). [Report, 32/4.16-4.20]

20. On 20 January 1995 the actuarial profession wrote to the Secretary of State for Social Security objecting that the word "solvency" would mislead people into thinking that their pensions were fully secure. The name was changed to the "minimum funding requirement". This prompted a further letter from the actuarial profession dated 20 March 1995 on the ground that it was "very

concerned at the misleading impression" that would be given by a scheme being certified as meeting the MFR [Report, 4.25-4.27].

21. The reason for the concern of the actuarial profession was made clear by a letter to the profession from the DSS dated 22 November 1995. The DSS set out the "underlying purpose of the MFR",

> *"...that the intention underlying the MFR (which was clearly expressed by Ministers during the passage of the Pensions Bill) is to require schemes to have a level of assets which should as a minimum be sufficient, if the scheme were to wind up, to enable it to pay in respect of each non-pensioner member a sum which if invested in an appropriate alternative pension vehicle could reasonably be expected to generate a pension benefit at least equivalent to that which the scheme would otherwise have paid in respect of rights accrued up to that point in time. By reasonable expectation we mean that there should be at least an even chance."* [Report, 37/4.63-4.64]

22. The MFR was therefore designed and set at a level that would secure active members only a 50% chance of receiving their pension.

23. A number of important statements on the minimum funding requirement were made during the passage of the Pensions Bill through Parliament. None of these mentioned the 50% risk of active members losing their pensions when schemes wound up. On the contrary, they stated that the accrued pension rights of active members were secure.

    (a) On 13 March 1995, at the Report Stage of the Bill, Lord Mackay stated:

> *"During Committee, I said that the central weakness of an ongoing funding requirement is that it does not aim to provide any level of protection in the event of a scheme winding-up. I know that some noble Lords may want to argue that the bulk of employers do not become insolvent and that it is therefore unreasonable to require schemes, at all times, to have sufficient assets to meet their accrued liabilities. I do not accept that argument. On the contrary, I believe that scheme members have the right to a clearly defined measure of protection... Members who have had their benefits reduced on a wind-up are unlikely to take much comfort from the fact that they would have been secure had their employer remained in business. To put it another way, it is quite unacceptable that employers should be able to continue trading at the risk of leaving their employees' legitimate pension expectations unfulfilled." [Report, 35/4.41]*

(b) Lord Mackay stated in the clearest possible terms that the purpose of the MFR was to protect accrued pension rights,

> *"... by changing the name to a 'minimum funding requirement', there is not the slightest deviation from what the requirement will do. It will mean that members can be confident that the value of their accrued rights is secure, especially in the event of the scheme or the employer company winding up... true solvency could only mean the ability to buy out all benefits with guaranteed insurance annuities. The PLRC recognised that such a measure of solvency would not be practical and would be unduly costly. The Government fully accepted this... It is only right that the members' investment, and their accrued pension rights, should be properly protected. Our proposals are designed to provide that protection. As suggested by the PLRC Report, we had called the vehicle for providing that protection a 'minimum solvency requirement'. The change of name in no way reduces what the requirement is intended to achieve." [report, 35/4.44]*

(c) Likewise in the Commons Committee William Hague MP, then Minister for Social Security, stated that the MFR is "a target which means that if at any stage that scheme winds up, it will be able to keep its pension in payment and give the equivalent of accrued rights to the non-pensioner members". [Report, 36/4.57].

(d) The Claimant relies on the full citation of relevant Parliamentary statements at 33/4.28 – 37/4.58 of the Report.

Pensions Act 1995

Main changes introduced by PA 1995

24. The main changes introduced by the PA 1995 were,

(a) The establishment of the MFR (considered below).

(b) The establishment of the Occupational Pensions Regulatory Authority ("OPRA") to ensure that pension schemes complied with the PA 1995 and regulations made under it (section 1).

(c) A requirement that occupational pension schemes must employ a scheme actuary and an auditor (section 47).

(d) Provision for the nomination of one-third of a scheme's board of trustees to represent members' interests (sections 16 and 20).

(e) Provision for compensation in specified circumstances where a sponsoring employer is insolvent and the loss in value of scheme assets is attributable to an act or omission constituting a criminal offence (section 81).

(f) A system of priority in the event of schemes winding up for payments out of the scheme's assets (section 73) (considered below.)

25. Under the provisions of UK pensions legislation, schemes were permitted to (and in practice almost all did) contract of out of SERPS, and were encouraged by the Government to do so. Unlike the flat-rate Basic State Pension, SERPS is an earnings-related state pension based on the amount of National Insurance Contributions made in respect of an employee prior to retirement. SERPS provides an enhanced State Pension linked to contributions. However where schemes were contracted out the position was different:

(a) Sponsoring companies obtained a "rebate" on earnings-related National Insurance contributions. The intention and effect was that the Government subsidised the company occupational pension scheme from public funds.

(b) Members lost their entitlement under SERPS upon retirement.

(c) The scheme had to provide a "Guaranteed Minimum Pension" ("GMP"). However, where schemes wind up with insufficient funds this was often not in fact provided, since the priority order on wind-up does not provide for these guaranteed minimum pensions for all members ahead of pensioners' pension rights. It is consequently often the case that all of a scheme's assets are used to purchase pensions for the pensioners, leaving insufficient assets to secure even the GMP rights of other members.

26. The PA 1995 has been largely repealed by the Pension Act 2004.

Minimum Funding Requirement

27. Section 56 of the PA 1995 established the MFR:

> *"56. Minimum funding requirement*
> *(1) Every occupational pension scheme to which this section applies is subject to a requirement (referred to in this Part as "the minimum funding requirement") that the value of the assets of the scheme is not less than the amount of the liabilities of the scheme.*
>
> *(2) This section applies to an occupational pension scheme other than—*
> *(a) a money purchase scheme, or*
> *(b) a scheme falling within a prescribed class or description.*
> *(3) For the purposes of this section and sections 57 to 61, the liabilities and assets to be taken into account, and their amount or value, shall be determined, calculated and verified by a prescribed person and in the prescribed manner.*
>
> *(4) In calculating the value of any liabilities for those purposes, a provision of the scheme which limits the amount of its liabilities by reference to the amount of its assets is to be disregarded.*
>
> *(5) In sections 57 to 61, in relation to any occupational pension scheme to which this section applies—*
> *(a) the amount of the liabilities referred to in subsection (1) is referred to as "the amount of the scheme liabilities" ,*
> *(b) the value of the assets referred to in that subsection is referred to as "the value of the scheme assets" ,*
> *(c) an "actuarial valuation" means a written valuation prepared and signed by the actuary of the scheme of the assets and liabilities referred to in subsection (1), and*
> *(d) the "effective date" of an actuarial valuation is the date by reference to which the assets and liabilities are valued.*

28. Section 57 of the PA 1995 imposed requirements on trustees of schemes to obtain actuarial valuations to identify whether the scheme assets conformed to the MFR:

> *"57 Valuation and certification of assets and liabilities.*
> *(1) The trustees or managers of an occupational pension scheme to which section 56 applies must—*
> *(a) obtain, within a prescribed period, an actuarial valuation and afterwards obtain such a valuation before the end of prescribed intervals, and*
> *(b) on prescribed occasions or within prescribed periods, obtain a certificate prepared by the actuary of the scheme—*
>
> > *(i) stating whether or not in his opinion the contributions payable towards the scheme are adequate for the purpose of securing that the minimum funding requirement will continue*

to be met throughout the prescribed period or, if it appears to him that it is not met, will be met by the end of that period, and (ii) indicating any relevant changes that have occurred since the last actuarial valuation was prepared.

(2) Subject to subsection (3), the trustees or managers must—
(a) if the actuary states in such a certificate that in his opinion the contributions payable towards the scheme are not adequate for the purpose of securing that the minimum funding requirement will continue to be met throughout the prescribed period or, if it appears to him that it is not met, will be met by the end of that period, or (b) in prescribed circumstances,
obtain an actuarial valuation within the period required by subsection (4).

(3) In a case within subsection (2)(a), the trustees or managers are not required to obtain an actuarial valuation if—
(a) in the opinion of the actuary of the scheme, the value of the scheme assets is not less than 90 per cent. of the amount of the scheme liabilities, and
(b) since the date on which the actuary signed the certificate referred to in that subsection, the schedule of contributions for the scheme has been revised under section 58(3)(b).

(4) If the trustees or managers obtain a valuation under subsection (2) they must do so—
(a) in the case of a valuation required by paragraph (a), within the period of six months beginning with the date on which the certificate was signed, and
(b) in any other case, within a prescribed period.
(5) A valuation or certificate obtained under subsection (1) or (2) must be prepared in such manner, give such information and contain such statements as may be prescribed.

(6) The trustees or managers must secure that any valuation or certificate obtained under this section is made available to the employer within seven days of their receiving it.

(7) Where, in the case of an occupational pension scheme to which section 56 applies, subsection (1), (2) or (6) is not complied with—
(a) section 3 applies to any trustee who has failed to take all such steps as are reasonable to secure compliance, and
(b) section 10 applies to any trustee or manager who has failed to take all such steps."

29. Importantly, the powers of the trustees to require payments into schemes only arose if the MFR was not met, which effectively tended to cause this "minimum" funding requirement to become a "maximum" funding standard.

30. The level and method for calculating the MFR was prescribed by the Secretary of State under the Occupational Pension Schemes (Minimum Funding

Requirement and Actuarial Valuations) Regulations 1996 (SI 1996/1536), which came into force on 6 April 1997. In 2002 these were replaced by the Occupational Pensions Schemes (Minimum Funding Requirement and Miscellaneous Amendments) Regulations 2002 (SI 2002/380).

Priority on winding up

31. Section 73 of the PA 1995 established a priority order for payments out of the pension fund upon winding up with insufficient assets,

> *"73. Preferential liabilities on winding up*
>
> *(1) This section applies, where a salary related occupational pension scheme to which section 56 applies is being wound up, to determine the order in which the assets of the scheme are to be applied towards satisfying the liabilities in respect of pensions and other benefits (including increases in pensions).*
>
> *(2) The assets of the scheme must be applied first towards satisfying the amounts of the liabilities mentioned in subsection (3) and, if the assets are insufficient to satisfy those amounts in full, then—*
>
> *(a) the assets must be applied first towards satisfying the amounts of the liabilities mentioned in earlier paragraphs of subsection (3) before the amounts of the liabilities mentioned in later paragraphs, and*
>
> *(b) where the amounts of the liabilities mentioned in one of those paragraphs cannot be satisfied in full, those amounts must be satisfied in the same proportions.*
>
> *(3) The liabilities referred to in subsection (2) are—*
>
> *(a) any liability for pensions or other benefits which, in the opinion of the trustees, are derived from the payment by any member of the scheme of voluntary contributions,*
>
> *(b) where a person's entitlement to payment of pension or other benefit has arisen, liability for that pension or benefit and for any pension or other benefit which will be payable to dependants of that person on his death (but excluding increases to pensions),*
>
> *(c) any liability for—*
>
> *(i) pensions or other benefits which have accrued to or in respect of any members of the scheme (but excluding increases to pensions), or*
>
> *(ii) (in respect of members with less than two years pensionable service) the return of contributions,*
>
> *(d) any liability for increases to pensions referred to in paragraphs (b) and (c);*
>
> *and, for the purposes of subsection (2), the amounts of the liabilities mentioned in paragraphs (b) to (d) are to be taken to be the amounts calculated and verified in the prescribed manner.*

(4) To the extent that any liabilities, as calculated in accordance with the rules of the scheme, have not been satisfied under subsection (2), any remaining assets of the scheme must then be applied towards satisfying those liabilities (as so calculated) in the order provided for in the rules of the scheme.

(5) If the scheme confers power on any person other than the trustees or managers to apply the assets of the scheme in respect of pensions or other benefits (including increases in pensions), it cannot be exercised by that person but may be exercised instead by the trustees or managers.

….
(7) Regulations may modify subsection (3)…."

32. The effect of this section was that payments to persons who had already started claiming pension were given statutory priority over payments of accrued benefits to active members. The scheme's assets could not be distributed equitably if they were insufficient, and trustees no longer had discretion to decide on a "fair" division of assets.

Official publications

33. On 3 January 1996 the DSS published a leaflet entitled "The 1995 Pensions Act (PEC 3)" ("PEC 3") [Report, 37/4.65-38/4.68]. This ran to 21 pages. Page 1 stated,

"*This leaflet is a brief summary of the changes. More detailed information will be published later.*

Why was the Pension Act needed?
Changes were needed for the following reasons:

- *The Government wanted to remove any worries people had about the safety of their occupational (company) pension following the Maxwell affair; …*"

34. PEC 3 included the following statement at page 15,

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

> *pension rights which can be transferred to another occupational pension scheme or to a personal pension.*

35. PEC 3 concluded by stating that if the reader considered that they "need advice" they should speak to the pension trustee or manager. If they "have any question" they were advised to speak to their employer [p.19]. PEC 3 contains no disclaimer that the statements should not otherwise be relied upon.

36. On 10 June 1996, when the MFR Regulations were agreed, the DSS issued a press release in the following terms,

> *"Schemes funded to this minimum level will be able, in the event of an employer going out of business, to continue paying existing pensions and provide younger members with a fair value of their accrued rights which they can transfer to another scheme or to a personal pension."* [Report, 38/4.70]

37. In July 1997 OPRA published a guide for pension scheme trustees ("OPRA's trustee guide"). It also published a leaflet called "guide to the MFR: a summary for pension scheme members" this included the statement,

> *"'the MFR refers to the minimum amount of funds that should be in the scheme at any one time in order to meet the schemes liabilities if it were to be discontinued".* [Report, 4.181].

38. In June 1998 DWP published "a guide to your pension options" (PM1) ("PM1"). [Report, 4.365]. This is substantially the same as later versions of this leaflet (considered below), which were the versions considered by the Ombudsman. The information contained in the "PM" Leaflets was also reproduced on a DWP web-page "Impartial information about pensions".

39. On 15 December 1998, the Pensions Green Paper, entitled "A New Contract for Welfare: Partnership in Pensions" [Report, 4.130-4.151] stated,

> *"We know that one of the areas of concern to employers is the MFR. The concept behind the MFR is a straightforward one – that is, people who have built up pension rights should be able to draw their pensions in full, even if the employer is no longer there to pay extra contributions. But devising a method of securing pension rights without imposing too much of a burden on employers is not so straightforward.*

We are asking the actuarial profession to look again at the present valuation method, and consider whether there are different ways of delivering the level of security we feel is right. There will need to be full discussions about any proposals." [Report, 4.141]

40. The Green Paper did mention that "very unfair results" to active scheme members could arise when schemes wind up because of the operation of the priority provisions for payments out of schemes. However, these comments were only made in the context of under funding caused by fraud [Report, 4.143].

41. 1 May 1999 OPRA published a "guide to the MFR: a summary for pension scheme members". It stated,

> *"What is the MFR ?*
> *A scheme that complies with the MFR will either already be funded to at least the minimum level required by the law or will be aiming to have that level of funding within certain time limits. This will not necessarily ensure that all of a scheme's liabilities can be met fully if the scheme were to be wound up. However, the MFR sets a benchmark against which the trustees must measure the funding level of a scheme. The MFR means that any shortfall below that benchmark must be corrected."* [Report, 4.178-4.181]

42. The leaflet contained the statement that:

> *"...this is only a guide and is not a definitive statement of the law. You should always take appropriate legal advice about how the Act will affect your scheme. You will also need the advice of the scheme actuary."*

43. In June 1999 the Financial Services Authority published a "guide to the risks of pension transfer". This stated that *"[]f you transfer from a final salary scheme to a money purchase scheme run by a new employer or to a personal pension, you give up the promise of a guaranteed pension."* [Report, 4.194-4.198].

44. On 14 September 2000 the DWP and the Treasury published a joint consultation document. [Report, 4.305-4.326] This document,

    (a) Acknowledged that "the amount of reassurance that the MFR can deliver is commonly misunderstood".

(b) Admitted for the first time that MFR did not guarantee the accrued assets of members. It only provided members with a "reasonable chance" of recovery.

45. Nonetheless this did not lead to any amendments in the leaflets, which DWP continued to publish and distribute throughout this period.

46. In July 2001 the DWP published a revision of PM1 (first published in June 1998) [Report, 4.365-4.370]. This leaflet,

(a) Provided "helpful information" to assist individuals in deciding whether to join occupational pension schemes.

(b) Encouraged individuals to join such schemes. Whilst it affirmed that "only you can make decisions about **your** pension", this was followed, under the section entitled "should I join my employer's occupational pension scheme?", by the advice that, "If your employer runs an occupational pension scheme you should think carefully before you decide **not** to join it."

(c) Omitted to mention the 50% risk on wind-up or the effect of the priority order on non-pensioner members' accrued rights, even though it contained a section headed "what else do I need to think about?".

(d) Only recommended seeking further information where after reading the leaflet the reader remained "in any doubt" about whether to join an occupational pension scheme.

(e) Mentioned that it was "not a complete statement of the law".

47. On 7 May 2002, DWP published a leaflet called "*occupational pensions: your guide* (PM3)" [Report, 4.454-4.459]. This leaflet,

(a) Encouraged individuals to take out an occupational pension:

> *"Everyone needs to plan ahead for retirement. The basic state Retirement Pension will give you a start, but you'll need to build up a second pension to make sure you have the lifestyle you want in retirement. And the sooner you take one out, the better."*
> *"Generally, if you work and your employer offers you an occupational pension scheme... you would be better off joining it... If you are already a member of an occupational pension scheme, you may already be in the most beneficial pension arrangement."*

(b) Offered advice and information to scheme members and potential members:

> *"To help you, this guide tells you how occupational pensions work. It looks at some of the questions you may need to think about and it tells you where you can find more information... These guides can give you helpful information, but only you can make decisions about your pension."*

(c) Explicitly addressed the risks, and provided reassurance. In a section entitled "how do I know my money is safe?" the leaflet referred to the fact that scheme assets were kept separate from those of the employer, and to the "number of laws designed to make sure schemes are run properly and to make sure funds are used properly". It listed these laws. However, it did not refer to the risk that money could be lost even if schemes were run properly. No mention was made of the 50% risk of losing a pension on wind up, or the effect of the priority order.

48. In April 2003 the DWP published a revised version of PM1. This contained a new section, entitled *'keep an eye on your pension arrangements':*

> *"...you need to keep an eye on your pension arrangements regularly to make sure you will have the income you want when you retire. If you become better off, you may want to pay in more to build up your pension.*

49. The revised guide explained that an individual might make additional voluntary contributions to another scheme, take out a stakeholder pension to take advantage of tax concessions (in fact, it only became possible to take out another pension while still a member of a company scheme in the year 2002 – 3), or make additional contributions to other savings vehicles.[report, 5.546-4.552] The revisions, however, still failed to mention the risk to members' pensions on wind-up

Knowledge of lack of understanding amongst public and scheme members

50. The DSS knew that there was a general lack of awareness and understanding of occupational pensions and the risks associated with winding up in particular. This was highlighted by, amongst other things,

(a) The concerns communicated to the DWP on 20 January 1995 and 20 March 1995 by the actuarial profession that people would be misled by use of the terms "Minimum solvency" and "minimum funding".

(b) The DSS research report entitled "Experiences of Occupational Scheme Wind-up" (April 1998) [Report, 4.102-4.105, 4.125-4.127],

> *"the complex and changing pension system is often poorly understood …. people need more, better and accessible information on pensions, and want the Government to make sure that the public is properly advised"*

(c) The Report of the Pensions Provision Group entitled "We All Need Pensions: The Prospects for Pension Provision" (4 June 1998): *"One of the key issues … is the lack of financial awareness and good information on pensions".* [Report, 4.115-4.117]

(d) The Report of Pensions Education Working Group, "Getting To Know About Pensions" (16 June 1998): *"…lack of financial awareness and good information about pensions".* [Report, 4.118-4.123]

(e) The Pensions Green Paper, entitled "A New Contract for Welfare: Partnership in Pensions" (15 December 1998) [Report, 4.130-4.151],

> *"Few know about their own pension position … People are not sure where to get advice and who they can trust. Much of the information that is available is of poor quality. Because of this, many people run the risk of making the wrong pension choices, … action needs to be taken to educate people about pensions and provide better, more secure pension schemes which give them confidence and restore trust."* [Report, 4.136]
> *"We believe it is necessary to bring about a radical improvement in the quality and accessibility of information on pensions"* [Report, 4.147]

The Green Paper also explained the Government *"objective of increasing occupational pension coverage in the future"* and stated that it wished *"to do more to encourage people to join occupational pension schemes"*. [Report, 4.139]

(f) The actuarial profession's Review of the Minimum Funding Requirement, May 2000 [4.227-4.293].

> *"...it was inherent in the design of the original MFR test that it is not a "solvency test". This is clearly reflected in the terms of reference for the current review, which refer to giving non pensioners a "reasonable expectation" of receiving their benefits. The MFR test is not designed to "guarantee" that members will receive their promised benefits. Moreover, the MFR test does not cover any benefits provided on a discretionary basis. The general consequence of this is that, if a scheme winds up with assets equal to 100% of its liabilities on the MFR, the money available after securing immediate annuities for the retired members will only be sufficient to secure deferred annuities for the remaining members at less than 100% of their accrued benefits. We have a particular concern that this is not understood by scheme members, trustees and employers, who believe that the benefits from a scheme which meets the MFR are fully secure."* *(emphasis supplied)*

(g) OPRA response to the DSS/Treasury consultation paper on the MFR (14 September 2000, response January 2001),

> *"Risk is not generally understood by members of defined-benefit schemes, who are exposed to a different form of risk – that of the assets of the scheme on termination being insufficient to deliver the accrued benefits. These different risks need to be explained clearly to members".*

DWP guidance

51. The statements in DWP publications must also be read in the context of its own internal guidance (agreed March 2002). This states that DWP officials,

> *"should ensure that customers are given:*
> - *Full and accurate information (that is, general factual data which is not customer specific);*
> - *General advice (for example, the promotion of Government policy – work is the best form of welfare; people should save for their retirement) to enable them to make their own decisions; …"* [see Report, 3/1.25]

52. In addition, DWP's "Guide to Financial Redress for Maladministration" (2003) contains the following definition of maladministration,

> *"What is Maladministration"*
> *…*
> *knowingly giving advice which is misleading or inadequate …*
> *offering no redress or manifestly disproportionate redress"*

GROUNDS

Rejection of the Ombudsman's First Finding of maladministration

The Ombudsman's First Finding

53. The Ombudsman summarised her First Finding of maladministration in the following terms:

> *"(i) that official information – about the security that members of final salary occupational pension schemes could expect from the MFR provided by the bodies under investigation – was sometimes inaccurate, often incomplete, largely inconsistent and therefore potentially misleading, and that this constituted maladministration;"* [Report, 5.164(i)].

54. It should be noted that this finding was carefully balanced. It was not a finding that all Government information was completely inaccurate and inconsistent and inevitably misleading. The finding was that the information was <u>sometimes</u> inaccurate, <u>often</u> incomplete, <u>largely</u> inconsistent and <u>potentially</u> misleading.

55. The Ombudsman's reasoning and findings relating to specific information are set out at paragraphs 5.36 to 5.74 of the Report, upon which the Claimants rely. A slightly fuller and helpful summary is provided in paragraphs 5.67-5.69:

> *"5.67. I have seen nothing that would make me doubt that the Government's intention behind the MFR was always that it could only provide a limited degree of security to non-pensioner members – which was apparent from its design – and I have seen that the discussions behind closed doors within and between the public bodies responsible for occupational pensions policy generally reflected this.*
>
> *5.68. However, this was not properly disclosed to those most affected by such an intention. I consider that the official information given to the public about the degree of security provided by a scheme being funded to the MFR level:*
>
> *(i) was, prior to September 2000, misleading, incomplete and inaccurate – in that it gave assurances which were incompatible with the design and purpose of the MFR as prescribed by Government – and with its practical operation. These assurances were that the MFR was designed to ensure that schemes had sufficient assets to meet their liabilities and that a scheme funded to the MFR level would be able to pay cash transfers of accrued rights to non-pensioners. In addition, no disclosure or even*

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

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

(iii) was only broadly accurate from April 2004 onwards.

5.69. I consider that these findings are reinforced if DWP publications are read in conjunction with other official publications."

The Government's Responses to the Ombudsman's Report

56. The Government and the DWP in particular have given a number of responses to the Report.

(a) The first response followed the Ombudsman making the Report available to the main interested parties in draft form prior to publication. The DWP's response is set out at Annex D to the final Report. The DWP's response is considered, and its arguments dismissed, by the Ombudsman at paragraphs 7.13-7.44.

(b) The second response was provided by the DWP on 28 February 2006 by way of a further pre-publication response to the Report. This is set out in paragraphs 7.115-7.117 and responded to in paragraphs 7.118-7.139 of the Report.

(c) A short written statement from the Minister for Pensions reform, Stephen Timms, 15 March 2006 [433].

(d) Oral statements by the Prime Minister to the House of Commons during Prime Ministers Questions, 15 March 2006 [434-435].

(e) A formal statement to Parliament by John Hutton, Secretary of State for Work and Pensions, on 16 March 2006 [436-441].

(f) On 30 May 2006, the Secretary of State responded to the Claimants' letter before claim dated 15 May 2006 [514-523]

(g) On 7 June 2006 the DWP published a 47 page document entitled "Response to the Report by the Parliamentary Ombudsman – "Trusting in the Pensions Promise"" [624-669] ("the Full Response").

57. The Full Response must be treated with caution. This response was compiled after criticism of the Government's reasoning and judgment had already been made, and in the knowledge of potential legal proceedings, three weeks after the Claimants' letter before claim.

The Government's rejection of the finding of maladministration

58. The Government rejected the ombudsman's finding of maladministration in the following terms,

> *"I would like today to set out the reasons why, after very careful consideration, we have reached the view that we cannot accept any of the findings of maladministration and why we have therefore decided to reject all but one of her recommendations".*

59. The recommendation that was accepted by the Government related to the length of time it takes for schemes to wind-up, which is not in issue here. Dealing with the first finding of maladministration John Hutton stated,

> *"…the ombudsman found that official information about the security that members of final salary occupational pension schemes could expect from the minimum funding requirement, introduced in the Pensions Act 1995, was sometimes inaccurate, incomplete, inconsistent and therefore potentially misleading, and that that constituted maladministration. We do not accept that the Department's leaflets were inaccurate, incomplete, inconsistent or misleading. It is true that some were more detailed than others, but that was because they were designed for different audiences. All the leaflets covered by the report carried very specific statements that they were not a full explanation of the law and were for general guidance only. The leaflets themselves make that clear."*

60. John Hutton then referred to PEC3 and OPRA's trustee guide (set out in paragraph 37 above) as, supposedly, examples of the "very specific statements" referred to. He continued,

> *"The Government do not consider that any of the leaflets or quoted statements relied on by the ombudsman could have formed a proper basis for scheme members, still less trustees who were professionally advised, to assess the security of their individual pension schemes. But, even more importantly, the Government also believe that the report fails to demonstrate that decisions taken by individual scheme members were influenced by the information that the Government did, or did not, make available. In other words, the report simply does not establish that the wording of the leaflets led to the losses suffered by individuals. "*

61. John Hutton went on to explain that the Government was also rejecting the recommendations of the Ombudsman (i.e. in addition to her findings). The reason for the rejection of these recommendation was in part that the Government did not accept the maladministration on which they were premised. John Hutton concluded,

> *"As I have already made clear, the Government are unable to accept the findings on which those recommendations are based. We do not believe that the findings of maladministration can be supported by the facts."*

62. In its written response of 7 June 2006 the Government focused its rejection of the Ombudsman's finding that the official statements were not sometimes inaccurate, often incomplete, largely inconsistent and potentially misleading on the basis that,

    (a) The Government, "does not believe that any reader of any or all of those leaflets could have been left in any doubt that they would have needed more information to get a full picture of their own individual circumstances" [637]

    (b) The Government based this "belief" on:

        (i) The supposed existence of "explicit warnings" in the leaflets that they were "not a complete statement of the law" [637]

        (ii) What it described as the "wider context" [635]. This apparently refers to the "access" that scheme members had to other sources of information.

The Government's rejection of the ombudsman's finding was flawed and unlawful

63. The circumstances in which a public body subject to an Ombudsman scheme can legitimately reject the findings and recommendations made following an investigation are tightly circumscribed. This is clear from *R v Commissioner for Local Administration ex parte Eastleigh Borough Council* [1988] Q.B. 855 in which Donaldson MR stated (at 867):

> *"Whilst I am very far from encouraging councils to seek judicial review of an ombudsman's report, which, bearing in mind the nature of his office and duties and the qualifications of those who hold that office, is inherently unlikely to succeed, in the absence of a successful application for judicial review and the giving of relief by the court, local authorities should not dispute an ombudsman's report and should carry out their statutory duties in relation to it."*

It is similarly settled law that the courts should be extremely slow to interfere with an Ombudsman's findings: *R v Parliamentary Commissioner for Administration, ex parte Balchin* [1998] 1 PLR 1. In this instance, of course, the Secretary of State has chosen not to judicially review the Ombudsman (the precise reasons why not remain unclear, despite these being requested in the pre action correspondence). In must follow that, at the very least, the Government was bound to give the Ombudsman's findings considerable weight and deference, and to depart from them only if it could provide a cogent justification for doing so. In turn, the Court should give the Ombudsman's findings the same degree of respect, had a challenge been brought directly by the Secretary of State on the same basis.

64. The Government's various statements rejecting the Ombudsman's findings rely on highly selective quotations from the official publications, which seek to mask fundamental flaws in the reasoning. These flaws are:

(a) First, John Hutton's statement contains a manifest error in stating that the Government does not accept that the leaflets were inaccurate, incomplete, inconsistent and misleading. This was not the finding, which was that the leaflets were sometimes inaccurate, often incomplete, largely inconsistent and potentially misleading.

(b) Second, the Government's belief that any reader would not have been in doubt that the information is not a full explanation of all the terms and effects of the scheme is, of course, right. Obviously, no leaflet can be expected to include every detail of pension law. But that is quite beside the point.

(i) The Ombudsman did not find that individuals were misled into thinking that the leaflets were complete statements of the law.

(ii) The Government has not properly addressed its response to the actual findings that the leaflets were sometimes inaccurate, often incomplete, largely inconsistent and potentially misleading at all.

(iii) The fact that the leaflets did not purport to provide a complete statement of the law is immaterial to the Ombudsman's findings. In particular, the leaflets addressed risks, but failed to mention the biggest and most significant one. They also mentioned the possibility of what might happen on insolvency of the employer, but only discussed the situation where the employer had fraudulently taken assets out of the scheme, rather than mentioning the effect of the priority order and the lack of protection for accrued non-pensioner rights on wind-up.

(iv) Accordingly, the Government's reasoning is irrational, illogical and/or lacks the requisite cogency for the Government validly to reject the findings of the Ombudsman.

(c) Third, it is equally illogical and/or not cogent to point to the "very explicit statements" that the leaflets were not a complete statement of the law (which became "warnings" in the written response of June 2006). Additionally, the Government's reliance on "very explicit statements" having the character of "warnings" is irrational and/or based on a material error of fact and/or otherwise undermines the Government's reasoning given that (i) such "clear" statements/warnings do not exist,

and/or (ii) the statements referred to were not present in all of the leaflets.

(d) Fourth, no reasonable Minister could consider that the findings of maladministration "cannot be supported by the facts". It must be borne in mind that the Government has not challenged (indeed, it has accepted: see written response, p.19 para. 36) the Ombudsman's definition of "maladministration". What it contests is that the facts can support the conclusion that the leaflets were <u>sometimes</u> inaccurate, <u>often</u> incomplete, <u>largely</u> inconsistent and <u>potentially</u> misleading. Even if the Government does not agree that there has been such maladministration it cannot lawfully contend that this conclusion was not open to the Ombudsman. The facts were fully and comprehensively set out in the Ombudsman's report. The Government's reasoning is flawed and confused. (An inference may be drawn from the fact that this statement, objected to in the letter before claim, does not reappear in the written response of 7 July).

(e) Fifth, the Government's view that the leaflets could not form a "proper basis" for a member or trustee to assess the security of a scheme because they needed to take further advice in order to know all of the risks also fails properly to address the Ombudsman's findings that it was incumbent on the Government to acknowledge the 50% chance of losing a pension on wind-up. The leaflets were stated to provide impartial information, including information about "risks". For the reasons given above, even if members or trustees (not to mention prospective members) needed further information to understand in full the security of the scheme, this simply does not address the Ombudsman's finding that the leaflets were sometimes inaccurate, inconsistent, incomplete or potentially misleading in relation to their <u>contents</u>. Reliance on this ground is therefore irrational and/or inadequate.

(f) Sixth, the Government's arguments as to the supposed ability or need for individuals to obtain additional advice or information in order to be told the true risks of the scheme (the "wider context") fail to address any of

the matters central to the Ombudsman's finding of maladministration namely:

(i) The Government established the mandatory statutory scheme for occupational pensions under the PA 1995. This was part of a partnership between the Government and employers. In particular, under the PA there was (1) a priority system for division of assets from schemes that had wound up, (2) a rebate for contracted out schemes in return for individuals giving up their SERPS. a requirement that scheme members give up their SERPS.

(ii) The Government actively encouraged the general public to join their company pension scheme. It was official Government policy.

(iii) The Government set the level of the MFR. It created the risk that a scheme might wind up with insufficient funds to provide active members with their accrued pension by setting the MFR at a level that provided only 50% chance of recovery when schemes wound up.

(iv) The Government had special knowledge of this risk, which it shared only with certain members of the actuarial profession.

(v) The Government knew that individuals did not appreciate this risk.

(vi) The Government undertook to provide information to individuals and scheme trustees and announced that this information would be "impartial" and could be relied on. It was intend to be information that individuals could "trust".

(g) The matters set out above represent the true context of the Ombudsman's finding. It is these matters that render the Government's statements to the effect that the MFR guarantees active members their accrued

entitlements upon winding up, and the government's failure to declare that this would not be the case in some circumstances, maladministrative. It is these matters that render the leaflets sometimes inaccurate, often incomplete, largely inconsistent and potentially misleading. However, the Government in its various responses does not address any of these matters. Nor does it address the misleading statements themselves: its response focuses solely on the brief and supposed exculpatory references to the leaflets not being a complete statement of the law.

(h) Seventh, in any event the Government's contention that there were other sources of information that would inform individuals of the risk is fundamentally mistaken,

(i) Trustees were also misled by and dependent upon Government advice.

(ii) OPRA also published misleading and factually incorrect leaflets, which it sent to nominated trustees and, alongside the information published by DWP information, these "reinforced" the Ombudsman's finding of maladministration against the DWP (see paragraphs 37 ann 41 above).

(iii) Actuarial Certificates for MFR valuations (an issue first raised in the written response of 7 June, at para. 25 [638]), which contained a note that mentioned the risk of under funding on wind-up, did not clearly alert the reader to the risks of the effects of the statutory priority order if the scheme wound up; would not have been issued before the scheme wound up in many cases (as accepted by the Government [written response [649] para. 53]): and, in any case, would not have been seen by scheme members, other than trustees, nor by potential members.

65. Lastly, insofar as the Government's rejection of any causal connection between its leaflets and the losses and other injustices suffered by members is relied

upon to show that the leaflets were not inaccurate, incomplete, inconsistent and misleading such an argument is plainly flawed and irrational.

Response to First Recommendation

The First Recommendation

66. The Ombudsman made a number of recommendations. The First Recommendation was,

> *"First recommendation*
> *6.14. My first recommendation relates to remedying the financial injustice suffered by those who have complained to me and also those in a similar position as those individuals.*
>
> *6.15.* ***I recommend that the Government should consider whether it should make arrangements for the restoration of the core pension and non-core benefits promised to all those whom I have identified above are fully covered by my recommendations – by whichever means is most appropriate, including if necessary by payment from public funds, to replace the full amount lost by those individuals."*** (emphasis added)

67. It is plain that this recommendation did not necessarily envisage a payment from public funds to replace in full the pensions lost by members of wound-up schemes. The Ombudsman recognised that this might be done in a number of ways. What was required to be considered was "restoration" not "compensation". As part of this recommendation the Ombudsman also stated that the Government should consider whether to exercise its "considerable collection and enforcement powers" to reclaim money from other bodies, such as solvent sponsoring companies, that it considered to have a share of responsibility for some of the losses [Report, 6.17].

The Government's response

68. The Government's rejected the Ombudsman's First Recommendation. Its first ground for rejecting it was that it rejected the finding of maladministration. Furthermore, the Government added,

> *"It simply cannot be right that the losses from the schemes that have collapsed should be met by the taxpayer without establishing any causal connection between the actions criticised in the ombudsman's report and*

> *the losses that people have incurred. The report fails to establish that connection.*
>
> *… I do not consider that it would be in the wider public interest for Government to accept that very substantial liability on behalf of taxpayers. We calculate that liability as being in the range of £13 billion and £17 billion in cash terms over the next 60 years. We estimate that the administration costs would be in the region of a further £20 million each year. We do not therefore intend to take the actions recommended by the ombudsman. The taxpayer cannot be asked to accept the responsibility for effectively underwriting the value of private investments in the way the report suggests."*

The Government's rejection of the First Recommendation was flawed and unlawful

69. The Government's rejection of the Ombudsman's First Recommendation was flawed and unlawful, in that:

(a) The Government's assertion that the taxpayer should not be asked to "underwrite" the full value of lost pensions is a material error. The Government has misunderstood the Ombudsman's First Recommendation. The First Recommendation refers to restoration of lost pension rights by a variety of means, not just from payments made out of public funds. For instance, restoration could be partially achieved by pooling and investing unclaimed assets and by pursuing other sources such as solvent sponsoring employers or trustees and other potential sources of funding apart from the tax payer. There is no evidence that the Government has considered any such options.

(b) The Government has also failed to consider whether an ex gratia payment from public funds is appropriate where individuals can show that they have relied on the various publications to their detriment, for instance in remaining in employment when they could have retired, or transferring monies from another scheme, or leaving accrued rights in the scheme of a former employer, rather than transferring out. The Government's contention that the Ombudsman's report does not establish a causal connection betrays a lack of understanding of the evidence presented in the Ombudsman's report, which explains the causal connection with examples of cases where there was a direct causal link. is no basis for rejecting compensation even where such a causal

connection can be shown. Such an argument is irrational and/or disproportionate in that it applies a reason applicable only to cases where no reliance on the leaflets can be shown to justify a refusal to pay any compensation at all.

(c) In the Defendant's response to the letter before claim, it was suggested that individuals who could show that they had suffered loss as a result of maladministration would be entitled to compensation under the Government's pre-existing ex gratia scheme. The letter does not explain how an individual scheme member is to achieve this task, given the Government's overall rejection of the finding of maladministration. However, insofar as the response amounts to an admission by the Government that, if it accepted that maladministration was established, individual scheme members who have suffered losses as a result are entitled to compensation, the Claimants acknowledge and rely on that admission.

(d) Furthermore, in ruling out any restoration, the Government has failed to consider the range of options open to it.

(e) Furthermore, the Government's reliance on the '£15bn figure' was irrational and/or misleading and/or lacked the cogency required to justify a rejection of the Ombudsman's recommendations and/or was based on a manifestly flawed factual assumption, in that:

(i) It referred to £15bn in "cash terms". The significance of this only became apparent when the Government published its annex to its full written response of June 2006. In the Annex at page 46 the vast disparity between the cash figure and the net present value figure is clear. The net present value figure is £2.9bn-£3.7bn.

(ii) Furthermore, in order to reach the £15bn figure the Government has 'found' an additional 50,000 scheme members. Page 38 of the full written response states,

> *"The 380 schemes on which data were collected have around 70,000 non-pensioners in total. In addition, DWP estimate that a few hundred more schemes, including a further 50,000 or so non-pensioner members, could have suffered losses. This estimate is based on DWP's data collection exercise and data from Pension Schemes registry, maintained by the Pensions regulator (formerly OPRA). DWP estimate that only around 5,000 pensioners would be eligible for payment as, because they are higher up the priority order, their pensions are already more highly protected than non-pension members and thus they are less likely to experience significant losses in their benefits".*

(iii) A request has been made for the information on which this assumption is based. No evidence has so far been produced by the Defendant to support the assumption that an additional 50,000 scheme members, over an above those already identified, have been affected. If no such evidence, or inadequate evidence, is produced to support the assumption, it follows that the £15 billion figure relied on by the Government cannot be sustained.

(iv) Further and in the alternative, the mere fact that remedying injustices caused by maladministration may require a substantial payment is not a good reason for refusing to accept an ombudsman's recommendation. A report by the Ombudsman published on 15 March 2000 found the Government guilty of maladministration for issuing leaflets which failed to warn members of SERPS that the SERPS pensions for their surviving spouses would be cut in future. The cost of remedying this injustice by postponing the relevant changes to the SERPS rules was estimated at £13 billion, but the Government nevertheless agreed to accept the liability. The leaflets in question in the SERPS case contained similar disclaimers to those relied on by the Government in this case.

Breach of Article 1 Protocol 1 of the European Convention on Human Rights

70. The Government' refusal to restore the pension entitlements of members of wound-up occupational pension schemes is contrary to Article 1 of the First

Protocol of the European Convention on Human Rights. The DWP is therefore in breach of section 6 of the Human Rights Act 1998.

71. The grounds on which the Claimants rely are as followers,

(a) A pension entitlement under an occupational pension scheme, and the contributions made under such a scheme, constitutes a property right under Article 1 of the First Protocol.

(b) The Government owed members of occupational pension schemes a positive duty to take reasonable and appropriate steps to protect individuals from loss of those pension rights. This positive duty arose in particular from the facts and matters set out in paragraphs (18-52 above) which show that,

(i) The DWP knew or ought to have known of a real risk to occupational pensions.

(ii) The DWP created that risk and/or had special knowledge about it.

(iii) The DWP assumed responsibility for providing impartial information to members, trustees and potential members of occupational pension schemes. It also actively encouraged people to join and remain in such schemes.

(iv) The DWP created a legitimate expectation that non-pensioner members would be able to recover all accrued benefits if schemes wound-up and/or that the accrued pension entitlements of members in schemes funded to the MFR were guaranteed. There was a direct link between this expectation and ability of scheme members to have effective use of their possessions.

(c) The Government failed to comply with this positive duty by,

(i) Publishing information that was sometimes inaccurate, incomplete, often inconsistent and misleading as to the risk of members losing their occupational pensions.

(ii) Failing to warn of the risk that if the scheme wound up there would only be a 50% chance of non-pensioner members recovering accrued entitlements even where the scheme was fully funded to the MFR level.

(d) Accordingly, the Government was under a duty to provide proportionate compensation for those who have lost their pension entitlements.

(e) The Government has failed to provide proportionate compensation, in that:

(i) By its decision of 16 March 2006 the DWP refused to provide pension scheme members with any compensation.

(ii) The Claimants have not received any compensation.

(f) The Defendant has suggested in its Full Response that the Financial Assistance Scheme ("FAS") (established by SI 2005/1986) was established to provide some assistance to members of occupational pension schemes who have lost their pensions. However the FAS is manifestly inadequate and/or disproportionate and/or discriminatory, in that:

(i) It only applies to schemes where the sponsoring employer has become insolvent.

(ii) It is capped at £12,000 per year.

(iii) The £12,000 cap is not inflation-linked.

(iv) The benefits payable under the FAS are not inflation-linked, whereas the benefits payable under a final salary pension scheme are.

(v) The FAS does not include any tax-free lump sum.

(vi) The FAS does not provide more than 50% spouse benefit, even if the scheme benefits were higher.

(vii) Benefits are paid from aged 65, even in cases where scheme pension age was much lower, such as age 60.

(viii) The FAS only pays benefits at the level specified in the Government's response to the Ombudsman's report when the scheme has actually finished winding up. This may be long after a member has reached the age of 65.

(ix) At page 33 of its Full Response, the DWP states that eligibility for the FAS has now been extended to people within fifteen years of their scheme pension age. It says that this involves a taper from 80% of "expected pension" for those within 7 years of their scheme pension age to 50% of "expected pension" for those between 12 and 15 years. This statement is factually incorrect/irrational/fails to take into account relevant considerations. Specifically, it ignores the fact that an "expected pension" (1) is not capped at £12,000, (2) will invariably benefit from a tax-free lump sum payment upon retirement, (3) is calculated based on the basis that it will increase with inflation, and (4) is payable from scheme pension age rather than age 65.

CONCLUSION

72. For the reasons set out above, the Claimants submit that the decision of the Defendant, on behalf of the Government, to reject the Ombudsman's First Finding and First Recommendation should be quashed, and the matter remitted for reconsideration.

Application for adjournment

73. Following publication of the Report, the Ombudsman exercised her power under section 10(3), PCA to lay it before both Houses of Parliament on the basis that she had found injustice "which the Government does not propose to remedy" [Report, 7.139].

74. The Public Administration Select Committee ("PASC") has now commenced hearings in which it is examining the Government's response to the Ombudsman's report. PASC expects in due course to report to Parliament its findings on the Government's response. Although the PASC report does not provide any formal alternative remedy, the Claimants submit that it is appropriate in this case, and consistent with the approach advocated by the Court of Appeal in *R (Cowl) v Plymouth City Council* [2002] 1 WLR 803, for these proceedings to be adjourned pending the report of PASC, which may resolve or limit the scope of the dispute between the parties.

75. Accordingly, the Claimants apply for a general adjournment of these proceedings pending the publication of the PASC report.

DINAH ROSE

TOM HICKMAN

14 June 2006

IN THE HIGH COURT OF JUSTICE

QUEEN'S BENCH DIVISION

ADMINISTRATIVE COURT

B E T W E E N :

Claimants

- and -

THE SECRETARY OF STATE FOR WORK AND PENSIONS

Defendant

CLAIMANT'S STATEMENT OF GROUNDS