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Case No: CH/2009/APP/0232

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 07/12/2009

Before :

MR JUSTICE LEWISON

Between:

ARJO WIGGINS LIMITED
- and -
HENRY THOMAS RALPH

Appellant

Respondent

Geoffrey Topham (instructed by **Eversheds**) for the **Appellant**
The **Respondent** did not appear and was not represented
Javan Herberg instructed by the **Pensions Ombudsman** (intervening)

Hearing dates: 24th November 2009

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

Mr Justice Lewison:

Introduction

1. Mr Henry Ralph worked for Wiggins Teape Ltd (now Arjo Wiggins Ltd) between 1959 and January 1986 when he was made redundant. He was a member of the Wiggins Teape pension scheme which was a defined benefits scheme. Shortly before he left he decided to transfer his pension to an insurance company which predicted greater benefits than those that could be expected from the Wiggins Teape scheme. Unfortunately those expectations were falsified by events. In April 2006 (more than twenty years after he had left) Mr Ralph made a complaint to Wiggins Teape. That complaint was not resolved to his satisfaction and he complained again, this time to the Pensions Ombudsman. His complaint to the Pensions Ombudsman was made on 15 July 2007. He said that he had been given negligent advice by Wiggins Teape pensions department in 1986; and that if he had been given proper advice he would not have transferred his pension but would have remained a member of the Wiggins Teape scheme. The Pension Ombudsman upheld the complaint. He directed Arjo Wiggins to pay the cost of restoring Mr Ralph to the scheme or to pay for equivalent benefits.
2. On this appeal from the decision of the Pensions Ombudsman Arjo Wiggins argue that he should not have determined the complaint in the way that he did so long after the events that gave rise to it. With the permission of Morgan J, the Pensions Ombudsman has intervened to deal with this point which is one of general importance. If Arjo Wiggins fail on this point, they nevertheless argue that the Pensions Ombudsman's decision is legally flawed on the facts of this particular case. The Pensions Ombudsman does not seek to make any submissions on the particular case; and Mr Ralph did not do so either. I will deal first with the general point. It is put in three ways. First, it is argued that the Pensions Ombudsman cannot entertain a complaint which would have been statute barred if the same complaint had been made in court proceedings. Second it is argued that even if he can, then he should not do so as a matter of discretion. Third, it is argued that if the Pensions Ombudsman has a discretion to investigate a complaint and does so, he cannot make an award or give substantive directions in a case where a court could not do so because the claim would have been statute barred. The first and third ways of putting the case go the extent of the Pensions Ombudsman's jurisdiction. The second concerns the exercise of a discretion.

The legal framework

3. The Pensions Ombudsman has no inherent jurisdiction. His powers are to be found in the Pension Schemes Act 1993 and regulations made under it. The relevant parts of the 1993 Act are set out in the Appendix to this judgment.
4. The Pension Ombudsman's office was created by section 145 of the 1993 Act, and that of Deputy Pensions Ombudsman by section 145A of the same Act (added by amendment in 2004). His primary functions are set out in section 146. They are to investigate and determine complaints and disputes. There are four broad categories of matters that the Pension Ombudsman may investigate and determine: complaints of

maladministration which have caused injustice; disputes of fact; disputes of law, and other disputes. The matters may arise as between beneficiaries and employers; beneficiaries and managers; managers and managers, and trustees and trustees or former trustees. Where the complainant is a member or former member of a scheme a complaint that he has sustained injustice as a consequence of maladministration will be made under section 146 (1) (a); and he may also refer a dispute under section 146 (1) (c).

5. “Maladministration” is a broad concept which goes further than a violation of legal rights. There can be maladministration even if a person’s legal rights are not infringed. I will call this “pure maladministration”. This kind of maladministration will cover bias, neglect, inattention, delay, incompetence, ineptitude, perversity, turpitude, arbitrariness and so on; covering the manner in which a decision is reached or discretion is exercised; but not the merits of the decision itself: *R v Local Commissioner for Administration for the North and East Area of England, ex p Bradford Metropolitan City Council* [1979] Q.B. 287, 311 (per Lord Denning MR). On the other hand, many of the categories of matter within the Pensions Ombudsman’s remit will involve allegations that legal rights have been infringed. Even if a complaint of maladministration causing injustice is made to the Pensions Ombudsman, the resolution of that complaint may also involve determining the legal rights and liabilities of the parties to the complaint. Whether this is called a “complaint” or a “dispute” does not (or does not necessarily) affect the substance of the matters that the Pensions Ombudsman must decide. In general I will use the word “complaint” except where it is necessary to refer to “dispute” as well.
6. So a determination by the Pensions Ombudsman might involve questions of breach of contract; breach of the terms of a pension trust deed; breach of trust; misrepresentation, poor advice or negligence. These kinds of issue might involve difficult questions of law. Section 150 (7) enables the Pensions Ombudsman to “refer any question of law arising for determination in connection with a complaint or dispute to the High Court”; and section 151 (4) provides that an appeal “on a point of law” lies to the High Court from the determination of the Pensions Ombudsman.
7. The existence of the Pensions Ombudsman and his ability to determine complaints does not oust the jurisdiction of the courts. On the contrary, if court proceedings have already been started, the Pensions Ombudsman is precluded from investigating the self-same matters: section 146 (6) (a). If the court determines those proceedings, then the Pensions Ombudsman can never investigate the matter. The only circumstance in which he can investigate a matter which has been the subject of court proceedings is where those proceedings have been discontinued (other than as part of a binding compromise). Conversely, if a complaint has been made or a dispute referred to the Pension Ombudsman, and court proceedings are subsequently started, the court may stay its proceedings in order to allow the Pensions Ombudsman to go ahead: section 148 (2), (4). Where, therefore, the complaint involves the determination of legal rights and liabilities, the courts and the Pensions Ombudsman share jurisdiction. On the other hand, if the complaint is a complaint of injustice suffered as a result of pure maladministration without infringement of anyone’s legal rights, then because the court can only give effect to *legal* rights and liabilities, the Pensions Ombudsman is the only person who may investigate and determine the complaint.

8. Once the Pensions Ombudsman has determined a complaint, he may exercise his remedial powers under section 151 (2) of the 1993 Act. Those powers apply both to the determination of complaints (including complaints of pure maladministration) and to the determination of disputes. On the face of it, his powers are extremely wide (“he may direct any person responsible for the management of the scheme ... to take, or refrain from taking, such steps as he may specify...”). However, as we will see, the courts have read down the apparent width of these powers.
9. In the case of court proceedings, limitation periods are prescribed by the Limitation Act 1980. The Limitation Act 1980 applies to “actions”; which section 38 (1) of the 1980 Act defines as “any proceeding in a court of law”. In the case of an action in tort, no action may be brought more than six years after the cause of action has accrued (section 2). The cause of action will not accrue until damage has been sustained. The date at which damage is sustained may be simultaneous with the breach of duty alleged; but this is not inevitable. Where the cause of action is based on negligent advice leading to a change in pension arrangements, the cause of action will normally accrue when the pension arrangements are made, even though it is not then known that the advice was negligent: *Shore v Sedgwick Financial Services Ltd* [2008] PNLR 37. In the case of breach of contract, no action may be brought more than six years after the cause of action has accrued (section 5), which will be when the breach takes place, whether or not it causes loss at the time. If the contract sued upon is a deed (or, in the language of the 1980 Act, a “specialty”) the limitation period is twelve years (section 8). In the case of breach of trust, the limitation is six years (section 21 (3)); unless the breach is fraudulent, in which case no limitation period applies (section 21 (1)).
10. The 1980 Act also contains provision for extending time limits. There are general extensions in cases of fraud or concealment (section 32 (1)) and more specific extensions in cases where the claim is in negligence and the claimant does not have knowledge of the relevant facts (section 14A). In the latter case there is an overriding limit of fifteen years after the commission of the act or omission alleged to amount to negligence (section 14B). There are also specifically tailored provisions to deal with overriding or extending limitation periods in the case of actions in respect of death or personal injury (section 33).
11. If the court were called upon to decide a dispute between a member or former member of a pension scheme and his employer or former employer it is clear that the court would have to give effect to any defence based on the Limitation Act 1980. It is true that a defence of limitation needs to be pleaded, but neither Mr Topham, appearing for Arjo Wiggins, nor Mr Herberg, appearing for the Pensions Ombudsman, suggested that anything turned on this point of pleading. Both accepted that a limitation defence was part of the substantive law.
12. It is common ground that the Limitation Act 1980 does not directly apply to matters referred to the Pensions Ombudsman for investigation and determination. He does not decide “actions” as defined by that Act. Sometimes, however, the Limitation Act 1980 is expressly applied to proceedings which are not “actions” as so defined (e.g. Arbitration Act 1996 section 13). That has not been done in the case of complaints investigated and determined by the Pensions Ombudsman. But there are time limits for references to the Pensions Ombudsman which are contained in regulation 5 of the Occupational Pension Schemes (Pensions Ombudsman) Regulations 1996, made

under the rule-making power contained in section 146 (6) (c) of the 1993 Act. Regulation 5 says:

“(1) Subject to paragraphs (2) and (3) below, the Pensions Ombudsman shall not investigate a complaint or dispute if the act or omission which is the subject thereof occurred more than 3 years before the date on which the complaint or dispute was received by him in writing.

(2) Where, at the date of its occurrence, the person by or in respect of whom the complaint is made or the dispute is referred was, in the opinion of the Pensions Ombudsman, unaware of the act or omission referred to in paragraph (1) above, the period of 3 years shall begin on the earliest date on which that person knew or ought reasonably to have known of its occurrence.

(3) Where, in the opinion of the Pensions Ombudsman, it was reasonable for a complaint not to be made or a dispute not to be referred before the end of the period allowed under paragraphs (1) and (2) above, the Pensions Ombudsman may investigate and determine that complaint or dispute if it is received by him in writing within such further period as he considers reasonable.”

13. It is now well settled that, in principle, the Pensions Ombudsman must decide disputes in accordance with established legal principles rather than by reference to what he himself considers to be fair and reasonable (*Henderson v Stephenson Harwood* [2005] Pens LR 209 (§ 12)). There are a number of reasons for this:
- i) Pension funds must operate within the law and there should not be a different answer to the question “are you legally liable to repay this sum” according to the tribunal to which resort is had so that the answer is: ‘If I am sued in court, No, but if a complaint is made to the Pensions Ombudsman, Yes.’: *Hillsdown Holdings plc v Pensions Ombudsman* [1997] 1 All ER 862, 899;
 - ii) The Pensions Ombudsman cannot investigate a complaint if before the complaint is made proceedings have been begun in court in respect of the matters which would be the subject of the investigation. The two are intended to be mutually exclusive alternatives and it would be strange if it was contemplated that the alternatives would or might produce different results as to the substance of the dispute: *Hillsdown Holdings plc v Pensions Ombudsman*, 899;
 - iii) The power to refer a question of law to the High Court and the right of appeal on a point of law both recognise that the general legislative purpose does not in itself empower the Ombudsman to act otherwise than in accordance with legal principles: *Wakelin v Read* [2000] Pens LR 319.
14. Accordingly, the courts have held that the Pension Ombudsman does not have power to make an order that the court could not make:

- i) “The Pensions Ombudsman has no power, in my judgment, to direct remedial steps to be taken that are not steps that a court of law could properly have directed to be taken”: *Edge v Pensions Ombudsman* [1998] Ch 512, 520 (Sir Richard Scott V-C);
 - ii) “The Pensions Ombudsman cannot make an order which the court could not make”: *Wakelin v Read* (Mummery LJ); *Legal & General Assurance Society Ltd v CCA Stationery Ltd* [2004] Pens LR 157 (Laddie J); although the Pensions Ombudsman is not tied to the precise form of relief that a court would grant (*Henderson v Stephenson Harwood* (Park J § 43);
 - iii) It is not right that there should be a different answer as to the substance of the dispute according to whether the dispute was decided by a court or by the Ombudsman: *Wakelin v Read* (Mummery LJ, approving *Hillsdown Holdings plc v Pensions Ombudsman*).
15. There is one qualification to this, as Park J pointed out in *Henderson v Stephenson Harwood* (§ 14). Since pure maladministration and consequential injustice (without infringement of legal rights) is not actionable in court then the Pensions Ombudsman can grant a measure of relief which the court could not. Precisely what relief the Pensions Ombudsman can grant in such circumstances is not entirely clear. It seems probable that the Pensions Ombudsman could direct a written apology to be sent (see *Westminster City Council v Haywood* [1998] Ch 377, 395F per Robert Walker J); and it may also be that he has the power to award a modest sum as compensation for distress or inconvenience (see *Westminster City Council v Haywood*, 397H; *Henderson v Stephenson Harwood* § 14).

Jurisdictional questions

16. The cases cited above were all concerned with the substantive remedies that the Pensions Ombudsman could award. They were not concerned with the question of limitation; and there is some doubt in the profession whether the same principle applies. In *NHS Pensions Agency v Beechinor* [1997] PLR 95 Lightman J said (§ 1):

“I find it difficult to believe that Parliament intended that the Ombudsman's jurisdiction to grant relief in respect of maladministration should extend to tort claims of this character and to override defences of limitation to such claims and that the respondent to the complaint should be deprived of the substantive and procedural safeguards of a trial before a judge.”

17. However, since the question did not arise for decision on the facts of that case, his remarks are *obiter*. In *Legal & General Assurance Society Ltd v CCA Stationery Ltd* Laddie J, having referred to *Edge v Pensions Ombudsman* (which concerned breach of trust), said (§ 77):

“Although that case was concerned with breach of trust, there is nothing to suggest that the limitation on the Pensions Ombudsman's powers was limited to such cases. The reasons for limiting the powers so that they do not exceed those of the courts are set out in *Hillsdown*. They apply generally.”

18. Although Laddie J's final sentence is unqualified, it seems to me that Mummery LJ was more nuanced in *Wakelin*. He said:

“The power to refer a question of law to the High Court and the right of appeal on a point of law both recognise that the general legislative purpose ... does not in itself empower the Ombudsman to act otherwise than in accordance with legal principles. His determinations of disputes and his directions must be according to law. This means that, *unless he has clear statutory authority to disregard established principles of private or public law*, he must correctly apply them to the determination of the dispute.” (Emphasis added)

19. As I see it, therefore, the heart of the question before me is whether regulation 5 is that “clear statutory authority”.
20. As mentioned, Mr Topham's first argument is it is inherent in the legislative scheme that the Pensions Ombudsman does not have jurisdiction to investigate or determine a claim that would be statute barred under the Limitation Act 1980 if brought by way of court proceedings. He must not entertain the complaint at all. If this argument is right, then it must apply to the whole of regulation 5, and not just to regulation 5 (3). It will be recalled that under regulation 5 (2) the three year period within which a claim must be brought may be postponed. The postponement applies where the complainant was unaware of the act or omission complained of at the date of its occurrence. In such a case the three year period does not start to run until the earliest date on which that person knew or ought reasonably to have known of its occurrence. It is not difficult to think of cases which would be statute barred under the Limitation Act 1980 if brought before a court, but which would fall squarely within the terms of regulation 5 (2). Suppose, for instance, that the trustees of a scheme had made an investment which was negligent or outside their powers of investment and which the complainant did not know about at the time. By the time his pension is a pension in payment, the negligence or non-fraudulent breach of trust has caused the fund to be in deficit. That might be far more than fifteen years after the investment was made (and thus barred by Limitation Act section 14B) or far more than six years after the non-fraudulent breach of trust (and thus barred by Limitation Act section 21 (3)). Yet if the complaint is made within three years after the complainant finds out (or ought reasonably to have found out) about the act or omission complained of, then regulation 5 (2) does not preclude the Pensions Ombudsman from investigating and determining the complaint. In the course of his oral submissions Mr Topham accepted that in these circumstances the Pensions Ombudsman would be able to investigate and determine the complaint. If this is the case in relation to regulation 5 (2), it must follow, as it seems to me, that it is also the case in relation to regulation 5 (3). In addition regulation 5 applies to complaints and disputes without differentiation. A complaint of pure maladministration, which is not actionable in court, is not subject to any limitation period. In relation to a complaint of pure maladministration, both regulation 5 (2) and regulation 5 (3) must take effect according to their terms. There is no limitation period to apply either by implication or analogy. But since regulation 5 does not differentiate between complaints and disputes (and since some complaints will also involve the determination of legal rights and liabilities) there is no warrant for reading down regulation 5 in the manner that Mr Topham suggests. It is also the

case that regulation 5 treats alike both the investigation of a complaint or dispute and also its determination. If a limitation defence is raised, even in relation to a dispute involving the infringement of legal rights, the Pensions Ombudsman will at least have to investigate the dispute in order to see whether the defence is well founded. If he decides that the respondent has a good limitation defence, and declines to award relief on that ground, why has he not determined the dispute? In my judgment he has. I do not, therefore, accept the first way in which Mr Topham put his case. In my judgment the Pensions Ombudsman has jurisdiction to investigate and determine a complaint or dispute even where the comparable cause of action would have been dismissed on the ground that it was statute barred.

21. Like Mr Herberg, I think that logically the next question is whether the Pensions Ombudsman has power to direct substantive relief in circumstances where the court would be bound to give effect to a limitation defence and dismiss an action. Mr Herberg's argument is that regulation 5 amounts to clear statutory authority to disregard or override a limitation defence. Regulation 5 not only gives the Pensions Ombudsman power to investigate a complaint or dispute, it also gives him power to determine it. The power of determination means that the Pensions Ombudsman is able to use his powers under section 151 (2). Thus the full range of discretionary powers is available to him. If there is any potential hardship to a respondent in dealing with a stale claim (such as the loss of evidence) that can be dealt with by the Pension Ombudsman's exercise of discretion under regulation 5 (3). It would be an unlawful fetter on the discretion given to the Pensions Ombudsman under regulation 5 (3) if he had a blanket policy of declining to exercise that discretion in a case in which a claim would have been statute barred if begun in court.
22. I do not consider that reliance on the discretion of the Pensions Ombudsman provides any real answer to the conundrum; not least because it does not address the position under regulation 5 (2). If the complainant was unaware of the act or omission of which he complains he is entitled as of right to bring his complaint within three years of the date on which he first knew or ought to have known of the act or omission. There is no question of discretion involved. I should mention here that Mr Herberg submitted that regulation 5 (2) was equivalent to a latent damage extension and should be interpreted to give effect to that purpose. Thus when regulation 5 (2) speaks of the complainant being "unaware of the act or omission" which is the subject of the complaint what it meant was that he was unaware that the act or omission had caused loss. I do not agree. The words of regulation 5 (2) are straightforward. They do not refer to awareness of the damage or of any other facts (unlike section 14A (6), (7) and (8) of the Limitation Act); they refer only to unawareness of the act or omission which is the subject of the complaint. I do not consider that there is any warrant for reading words of this kind into regulation 5 (2).
23. I conclude, therefore, that the Pensions Ombudsman is empowered to investigate a complaint that would be statute barred if brought by action in court; and is entitled to exercise his powers under section 151 (2) in relation to such a complaint. That leads to the key question: what are those powers? As I have said the apparent width of the powers given to the Pension Ombudsman under section 151 (2) have been read down by a series of decisions of the courts. The most instructive (and the one that binds me) is the decision of the Court of Appeal in *Wakelin v Read*. Of particular importance is the following passage from the judgment of Mummery LJ:

“A point has been raised by the Trustees on the width of the Ombudsman's discretion to give directions under s.151(2) of the 1993 Act. Mr Simmonds QC sought on behalf of the Trustees to uphold the decision of the Ombudsman to decline to direct the Trustees to pay the benefits on the ground that Mr Read did not come with clean hands. He submitted that the subsection confers the widest possible discretion both as to the nature of the remedy granted and as to whether he should grant any remedy at all. He was not limited to those courses of action which would be open to a court in litigation.

I am unable to accept this submission.”

24. It was in this context that Mummery LJ approved the previous statement of Knox J in *Hillsdown Holdings plc v Pensions Ombudsman* in the following terms:

“... he [i.e. Knox J] repeated that it was trite law that “pension funds must operate within the law” with the result that, on a question of legal liability to refund payments improperly made from a scheme, it was not right that there should be a different answer as to the substance of the dispute according to whether the dispute was decided by a court or by the Ombudsman.

I agree.”

25. Although dissenting on one point Pill LJ said:

“Not only was Mr Read entitled to an application of principles of law, he was entitled to the same procedural safeguards in a claim referred to the Pensions Ombudsman as if it had been made to a court.”

26. It seems to me, therefore, that whether a limitation defence is regarded as part of “the substance of the dispute” or as a “procedural safeguard” the Pensions Ombudsman is bound to give effect to it. Otherwise he would be deciding the legal rights and obligations of the parties according to a unique system of law, rather than according to the law of England and Wales (or, for that matter, Scotland where he also has jurisdiction). The result of a dispute would therefore differ according to whether it was decided by the court or by the Pensions Ombudsman, and the courts have consistently set their face against that result. In my judgment therefore, in determining a complaint the Pensions Ombudsman must give effect to a valid limitation defence. To give effect to a valid limitation defence is to determine the dispute. It is determining it in accordance with the law. Accordingly, although I consider that regulation 5 gives the Pensions Ombudsman power to investigate and determine a complaint that would be dismissed on the ground of limitation if brought in court, I do not consider that regulation 5 is clear statutory authority enabling him, in the course of determining the dispute, to refuse to give effect to a valid defence in law. On the contrary, the determination of a complaint in accordance with the law is itself a determination. However, as mentioned, in the case of pure maladministration, there is no applicable limitation period, with the result that the Pensions Ombudsman can award whatever remedy is appropriate for pure maladministration even if the claim is

stale, although the staleness of the claim will no doubt be relevant to the exercise of his discretion.

27. In considering this question I should say that I did not find the decision of Goldring LJ in *R v Financial Ombudsman Service* [2009] EWCA Civ 593 of any assistance (even assuming that, as a decision on an application for permission to appeal, it is properly citable as authority: see *Practice Direction (Citation of Authorities)* [2001] 1 WLR 1001). Goldring LJ was considering the scope of the ombudsman scheme under the Financial Services and Markets Act 2000. That is a very different scheme, for at least four reasons. First, section 228 provides that a complaint is to be determined by reference to what is, in the ombudsman's opinion "fair and reasonable in all the circumstances of the case". In other words, he does not have to decide the dispute in accordance with the law. Second, the ombudsman's powers, under section 229 (2) (b) include the giving of "a direction that the respondent take such steps in relation to the complainant as the ombudsman considers just and appropriate (whether or not a court could order those steps to be taken)." So the ombudsman's powers under that scheme are unambiguously stated to be wider than the court's. Third, there is no appeal to the court from the ombudsman's decision on the merits, including the legal merits. The only control that the court has is by way of judicial review. Fourth, the ombudsman's power to make monetary awards is capped, unlike the jurisdiction of the Pensions Ombudsman. To be fair, although this case was referred to in Mr Herberg's skeleton argument, he did not rely on it in oral submissions, in my judgment rightly.

Discretion

28. My conclusions on the jurisdictional issues make the challenge to the Pension Ombudsman's exercise of his discretion to investigate and determine the complaint largely academic. In the present case, the limitation argument was raised at a very late stage. Indeed it was not raised until after the Pension Ombudsman has issued his provisional determination and invited comments on it. Since the Pension Ombudsman had already investigated the complaint, it was in my judgment too late to ask him not to. But in any event, as I have said, it seems to me that the Pension Ombudsman must investigate and determine a complaint, if only to investigate and determine the validity of any limitation defence. However, the fact that (if I am right) the Pensions Ombudsman must give effect to any limitation defence will be a powerful factor in the future exercise of any discretion.
29. This ground of appeal therefore fails.

This particular case

30. Mr Topham also had detailed criticisms of the Pension Ombudsman's decision in this particular case. In view of my conclusions on the main jurisdictional issues, these, too are largely academic. I can take them shortly.
31. The first criticism is that the Pension Ombudsman wrongly held that Wiggins Teape had given Mr Ralph advice about his pension arrangements rather than having simply provided him with information. Mr Topham said that this was a question of construction of documents; which was a question of law on which the court was just as well placed as the Pensions Ombudsman to reach a decision. I do not agree. In the first place the Pension Ombudsman accepted Mr Ralph's assertion (contained in his

letter dated 22 June 2008) that he was strongly advised during meetings, telephone conversations and correspondence to transfer his pension. This is reflected in paragraphs 25 and 73 of the decision. Second, although the construction of a document is, technically speaking, a question of law, the question is what would the document mean to the reasonable addressee? In the context of a specialised area such as pensions, the Pensions Ombudsman will have far greater experience than the court in evaluating and interpreting such documents. The court ought to give great deference to his view.

32. Mr Topham's second main criticism was that the Pensions Ombudsman was wrong in his conclusion that if Mr Ralph had not been given misleading advice he would not have transferred his pension arrangements. The Pensions Ombudsman recognised that the passage of time made answering this question difficult. He said that there was no evidence of what Mr Ralph would have done "beyond what he actually did, and what he now says he would have done" (§ 88). Although Mr Topham criticised this, he did not say that Mr Ralph's evidence of what he "now says" he would have done was inadmissible. Indeed he accepted that it was. Once the evidence is accepted to be admissible, whether or not it should be accepted is a question for the fact finder alone: in this case the Pensions Ombudsman. Even if the Pensions Ombudsman was wrong in his conclusion it was a factual error, not a legal error. The court has no power to correct it. This ground of appeal also fails.

Result

33. I will allow the appeal on the ground that the Pensions Ombudsman had no power to award substantive relief to a complainant whose complaint would have been defeated by a limitation defence had it been brought by action in court. I invite submissions on the form of the order I should make to give effect to this conclusion.

APPENDIX

“**146 (1)** The Pensions Ombudsman may investigate and determine the following matters—

(a) a complaint made to him by or on behalf of an actual or potential beneficiary of an occupational or personal pension scheme who alleges that he has sustained injustice in consequence of maladministration in connection with any act or omission of a person responsible for the management of the scheme,

(b) a complaint made to him—

(i) by or on behalf of a person responsible for the management of an occupational pension scheme who in connection with any act or omission of another person responsible for the management of the scheme, alleges maladministration of the scheme, or

(ii) by or on behalf of the trustees or managers of an occupational pension scheme who in connection with any act or omission of any trustee or manager of another such scheme, allege maladministration of the other scheme,

and in any case falling within sub-paragraph (ii) references in this Part to the scheme to which the complaint relates are references to the other scheme referred to in that sub-paragraph

(ba) a complaint made to him by or on behalf of an independent trustee of a trust scheme who, in connection with any act or omission which is an act or omission either—

(i) of trustees of the scheme who are not independent trustees, or

(ii) of former trustees of the scheme who were not independent trustees,

alleges maladministration of the scheme,

(c) any dispute of fact or law in relation to an occupational or personal pension scheme between—

(i) a person responsible for the management of the scheme, and

(ii) an actual or potential beneficiary,

(d) any dispute of fact or law between the trustees or managers of an occupational pension scheme and—

(i) another person responsible for the management of the scheme, or

(ii) any trustee or manager of another such scheme,

and in a case falling within sub-paragraph (ii) references in this Part to the scheme to which the reference relates are references to each of the schemes,

(e) any dispute not falling within paragraph (f) between different trustees of the same occupational pension scheme,

(f) any dispute, in relation to a time while section 22 of the Pensions Act 1995 (circumstances in which Regulatory Authority may appoint an independent trustee) applies in relation to an occupational pension scheme, between an independent trustee of the scheme appointed under section 23(1) of that Act and either—

(i) other trustees of the scheme, or

(ii) former trustees of the scheme who were not independent trustees appointed under section 23(1) of that Act, and

(g) any question relating, in the case of an occupational pension scheme with a sole trustee, to the carrying out of the functions of that trustee.”

“**146 (5)** The Pensions Ombudsman may investigate a complaint or dispute notwithstanding that it arose, or relates to a matter which arose, before 1st October 1990 (the date on which the provisions under which his office was constituted came into force).”

“**146 (6)** The Pensions Ombudsman shall not investigate or determine a complaint or dispute—

(a) if, before the making of the complaint or the reference of the dispute—

(i) proceedings in respect of the matters which would be the subject of the investigation have been begun in any court or employment tribunal, and

(ii) those proceedings are proceedings which have not been discontinued or which have been discontinued on the basis of a settlement or compromise binding all the persons by or on whose behalf the complaint or reference is made;

(b) ... ; or

“**151 (4)** An appeal on a point of law shall lie to the High Court ... from a determination or direction of the Pensions Ombudsman...

(5) Any determination or direction of the Pensions Ombudsman shall be enforceable—

(a) in England and Wales, in a county court as if it were a judgment or order of that court,...