The Parliamentary Ombudsman

Parliamentary Commissioner for Administration

Fourth Report for Session 1998–99

THE OSTRICH FARMING CORPORATION LTD

Presented to Parliament Pursuant to Section 10(4) of the Parliamentary Commissioner Act 1967

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The Parliamentary Commissioner Act 1967

I am laying before Parliament under section 10(4) of the Parliamentary Commissioner Act this report, which contains the results of an investigation (C239/98) into the actions of the Department of Trade and Industry (DTI) in respect of The Ostrich Farming Corporation Ltd (the corporation). Over four hundred people complained to me through Members of Parliament that delay by the DTI caused, or made worse, the loss they incurred when the corporation was put into liquidation. My report covers the actions of DTI, and the actions of the Treasury Solicitor's department (TSD), in their dealings with matters concerning the corporation. I did not find maladministration by either DTI or TSD; and I did not consider that the complainant's financial losses should be reimbursed by DTI.

M S BUCKLEY
Parliamentary Commissioner
For Administration

Alleged delay by the Department of Trade and Industry (DTI) before initiating action under the Companies Act against the Ostrich Farming Corporation Ltd (the Corporation) – Case No. C239/98

Summary of case

In March and April 1995 DTI vetted the corporation for possible investigation under section 447 of the Companies Act 1985. They concluded at that stage that good reason for investigation was absent. In September 1995, after the corporation had issued a revised brochure guaranteeing rates of monetary return to investors and after additional information had been received, DTI re-opened their file. On 14 November they initiated a section 447 investigation. DTI concluded their investigation on 5 February 1996 and sought advice from the Treasury Solicitor's department (TSD) on 6 February. On 26 March, after consultation with TSD and leading counsel had been completed, DTI presented a winding up petition to the court, who appointed the Official Receiver as provisional liquidator on 3 April. An order winding up the corporation was made on 17 June. Many of those who had invested in the corporation made large losses.

The Ombudsman found that DTI had not delayed in their section 447 investigation of the corporation, and that DTI's earlier decision in April 1995 not to initiate a section 447 investigation had been a discretionary one taken without maladministration. Losses made by investors in the corporation were not due to any maladministration by DTI.

Full Report

1. The complainant said that DTI delayed unnecessarily before initiating action against the corporation, a company which they investigated under section 447 of the Companies Act 1985, and so failed to protect the interests of investors.

2. My investigation began in April 1998 after I had obtained comments from the Treasury Solicitor and from the Permanent Secretary of DTI following the referral of the complaint by the Member. I have not put into this report every detail investigated by my staff; but I am satisfied that no matter of significance has been overlooked. A glossary of the abbreviations used in this report is at Appendix A.

Legislative background

3. Section 447 of the Companies Act 1985 (the 1985 Act) empowers the Secretary of State, where he thinks there is good reason, to authorise one of his officers to require a company to produce specified documents and to provide an explanation of them. Such examinations, known as section 447 investigations, are conducted by DTI's Companies Investigation Branch (CIB).

4. A DTI booklet 'Investigations How They Work' explains that section 447 investigations are conducted in confidence. That is to allow for any suspicion of misconduct to be looked at without the risk of harming the company under investigation should that suspicion prove to be unfounded. DTI do not announce the opening of section 447 investigations; nor do they respond to questions about whether or not a particular company is under investigation.

5. Internal guidance used by CIB officers vetting cases referred to them by CIB's pre-vetting section to see whether a section 447 investigation would be warranted explains that there is no statutory definition of the term 'good reason' used in section 447 of the 1985 Act, but that DTI interpret the phrase by reference to criteria set out in section 432(2) of the 1985 Act, which deals with other types of investigation. The guidance also says that those criteria should not be seen as exhaustive. The criteria set out in that section are that there are circumstances suggesting:-

(a) that the company's affairs are being or have been conducted with intent to defraud its creditors or the creditors of any other person, or otherwise for a fraudulent or unlawful purpose, or in a manner which is unfairly prejudicial to some part of its members, or

(b) that any actual or proposed act or omission of the company (including an act or omission on its behalf) is or would be so prejudicial, or that the company was formed for any such fraudulent or unlawful purpose, or

(c) that persons concerned with the company's formation or the management of its affairs have in connection therewith been guilty of fraud, misfeasance or other misconduct towards it or towards its members, or

(d) that the company's members have not been given all the information with respect to its affairs which they might reasonably expect.

6. The internal guidance also says that the purpose of a section 447 investigation is to obtain 'more *facts* and *explanations* (DTI's emphasis) of the matters that give cause for concern'. It is not necessary to identify criminal offences in order to establish 'good reason'. The Secretary of State retains a discretion whether or not to initiate a section 447 investigation even where 'good reason' is established. The internal guidance also says that the general principle behind authorising a section 447 investigation should be that a reasonable prospect is seen of something positive resulting that realistically could not be achieved by other means. That 'something' might be a prosecution, winding-up, disqualification of one or more directors, or obtaining information for disclosure to other regulators.

7. Section 124A of the Insolvency Act 1986 (the 1986 Act) says that a winding-up petition may be presented by the Secretary of State where, following a report or information obtained under part XIV of the 1985 Act (which includes section 447 of that Act), it appears to him that that is in the public interest. Section 135 of the 1986 Act provides that in England and Wales the appointment of a provisional liquidator may be made by the court at any time after the presentation of a winding-up petition and either the Official Receiver, or any other fit person, may be so appointed.

Background to the corporation

8. The corporation was incorporated on 22 December 1994. From January 1995 it started to trade in the sale of ostriches to individuals and companies. On incorporation the corporation had two directors, to whom I refer as Mr Q and Mr R, both of whom had previously been directors of another company which had also traded in ostriches.

9. Promotional brochures produced by the corporation set out the terms and conditions under which investors could purchase ostriches, and gave information about the yields which, the corporation claimed, could be made from such investments. The brochures indicated that investors would own particular birds.

10. Copies of two brochures, which collectively I refer to as brochure 1A, were obtained by CIB in late February 1995 (see paragraph 14). Brochure 1A, and another brochure which I refer to as brochure 1B, were largely superseded after 30 June 1995 by a further brochure, which I refer to as brochure 2. That latter brochure was then used by the corporation, in conjunction with a promotional video, until the time when trading eventually ceased. (DTI only had brochure 1A before them in March/April 1995 – see paragraphs 14 to 16 – they obtained a copy of brochure 1B during the course of the section 447 investigation, and a copy of brochure 2 was obtained from a DTI regional office in October 1995 – see paragraph 17.) In brochure 1A a British farmer, who was said to be one of the first to have farmed ostriches in the United Kingdom and to possess one of the largest ostrich herds in the country, was said to be the corporation's farming director. In brochure 1B the corporation's European facilities were said to

include the largest ostrich farm in Europe, as well as a British facility for rearing ostrich chicks. In brochure 2 it was claimed that the corporation's farmers had been successful in breeding and rearing ostriches since 1983 and that their farms were the largest and most technically advanced in Europe. The person described as responsible for the breeding centres was called Europe's most authoritative wild life breeding expert.

11. Brochure 1A included an example price list which indicated the prices at which the corporation were prepared to sell ostriches to investors. Those prices increased, depending on the age of the bird concerned, from £1,000 to £10,000 in nine stages. Two examples of potential returns were also given. One postulated a £3,000 return, after deduction of all costs, after 21 months on an investment of £1,000 in a three months old chick; the second postulated a £120,000 asset in the form of breeding offspring after two to three years, based on an investment of between £6,000 and £10,000 in a breeding bird. The return on the chick was based on an estimate of its increase in value with age; the second example was based on an estimate of the value of the breeding bird's progeny. Brochure 1A included what was termed a 'Statutory Warning', which said that investors should make sure they understood what was being offered and were not misled by claims that high earnings were easily achieved, and that it was advisable to take independent advice before signing a contract. There was also a disclaimer which said that the figures quoted or implied were for guidance and should not be taken as a guarantee, though all had been prepared with a conservative bias. In brochure 1B examples were given of financial returns similar to those identified in brochure 1A. Additionally, however, brochure 1B purported to guarantee investors who purchased birds of two years of age or older an annual nett production of at least two three months old chicks. Those investors who agreed to purchase an older (and more expensive) bird would have a greater guaranteed entitlement to chicks. Brochure 1B also said that the ownership of 50% of the chicks hatched from an investor's bird would be retained by the corporation. (There was a reference in brochure 1A to 'a shared revenue of all chicks produced', while in brochure 2 the reference was to 'some' of the offspring being retained by the corporation.) Brochure 1B included the disclaimer that the figures quoted or implied within it were only for guidance and were not guaranteed.

12. Brochure 2 showed five different values for birds, depending on their breeding status. A breeder chick's value was shown at £1,400 and a mature breeder bird's value at £14,000. Brochure 2 gave examples of what were claimed to be 'minimum returns' on each type of bird. Those returns ranged between £2,500 (or 41% of the initial outlay) in the second year, after an outlay of £6,000 on a young breeder, and £5,000 (or 357% of the initial outlay) after five years on an outlay of £1,400 on a breeder chick. Those monetary returns, unlike those identified in brochure 1A or 1B, were referred to as guaranteed. There was said to be a guaranteed 'buy back option' under which investors, who were to have a specified number of chicks allocated to them at specified times (regardless of the actual progeny of their own bird), could sell chicks they had been allocated back to the corporation for £500 each or retain them. Brochures 1A and 1 B described a tariff of livery charges for looking after investors' birds. Brochure 2 offered what was described as a 'complete care package', under which the purchase price for an ostrich was to include all livery charges for the bird through its commercial life, and for its chicks through to their 'buy back' age (12 months). All the brochures said that an investor could become a member of a club called the Ostrich Owners Club (the club). According to brochure 1A a fee was payable for that, but a full member of the club could earn commission by acting as an agent of the corporation. Brochure 1B also referred to a fee for club membership but made no reference to potential commission earnings. Brochure 2, which also did not mention any opportunity for commission to be earned, said that membership of the club was automatic and free to investors.

Jurisdiction

13. Paragraph 6 of Schedule 3 to the Parliamentary Commissioner Act 1967 debars me from investigating the commencement or conduct of civil or criminal proceedings before any court of law. Section 12(3) of the 1967 Act precludes me from questioning the merits of a discretionary decision, taken without maladministration, by a body within my jurisdiction.

Investigation

14. **1995** An officer from DTI was given a copy of brochure 1A in late February during an investigation into an unrelated company. A head of branch at CIB doubted the claim that ostriches could be bred in the United Kingdom. The brochure was sent to CIB's pre-vetting section with the query about ostrich breeding in the United Kingdom noted on its front cover. A CIB pre-vetting officer noted down three other matters under the heading "Note for Vetter". They were whether the corporation was 'just another network marketing/money generating scheme'; secondly, a claim made in brochure 1A that one of the directors (Mr Q) had had an unidentified company successfully floated on the stock market; and thirdly, whether 'The Ostrich Owners Club needs to be considered separately'.

15. On 3 March a file was opened and on 22 March a CIB officer whom I call vetting officer A contacted the Animal Health Division of the Ministry of Agriculture, Fisheries and Food (MAFF) to find out whether ostriches could be bred in the United Kingdom. MAFF put that officer in contact with a reputable association of ostrich breeders who confirmed that their members were breeding ostriches successfully in the United Kingdom. They said that their association had been in existence for two and a half years; that ostriches were being bred throughout the United Kingdom up to the far north of Scotland; that they had 108 members; and that about 20 of their members had twelve or more birds.

16. Vetting officer A recommended on 6 April that no section 447 investigation of the corporation then needed to be undertaken, as the necessary 'good reason' (paragraph 3) for an investigation appeared to be absent. He gave as his reasons the fact that the corporation had no known connection with the company on whose premises the copy of their brochure 1A had been found; that there had been no complaints about the corporation; that there appeared to be nothing suspicious about the network marketing element of the corporation's business, nor was there anything obviously suspicious about other aspects of the corporation's business as described in brochure 1A. That decision was endorsed on 7 April by the vetting supervisor who commented 'I hope members of the club are not burying their heads in the sand over the likely returns they can earn'. The file was then put away.

17. There matters rested for a while, as far as CIB were concerned, though over the following months the corporation advertised quite extensively in the press. On 20 September CIB received an anonymous telephone call from a caller who said that the corporation was really being run by one man, whom I shall call Mr S, and who was known to DTI for his involvement in another company (which I refer to as company M) which had been closed down as a result of DTI's action, and a second man, who had served a sentence for fraud. The CIB's pre-vetting section recalled the file which had been put away in April. On 28 September the same pre-vetting officer as before sent a note and the file to vetting officer B. That note referred to the previous decision not to open a section 447 investigation, and suggested that it would be worth having a second look, because the rates of return being offered were extravagant and, probably, unrealistic. A new file was opened on 3 October. On 9 October a regional office of DTI told CIB that one of the corporation's directors, Mr Q, had also been involved with company M. On 19 October vetting officer B asked the regional office to send her the version they held of the corporation's brochure (brochure 2). The regional office also told vetting officer B that the corporation were about to undertake a DTI-supported export mission. Vetting officer B confirmed that DTI's export team should not reveal CIB's interest in the corporation, because of

the confidential nature of section 447 investigations. The export mission to the Middle East went ahead on 28 October with the corporation's participation.

18. Meanwhile on 20 October the then Securities and Investment Board (SIB) – now part of the Financial Services Authority – had written to CIB. They said they had considered whether the corporation might be operating an unauthorised collective investment scheme, but had found no evidence of that. SIB questioned the corporation's high outlay on advertisements and the high returns it was promising (51.6% according to press advertisements), and suggested that enquiries might be called for. Vetting officer B made enquiries within DTI to see whether the directors of the corporation were connected with company M or another company, but no connection was established. She obtained records for four companies of which Mr Q had been a director, and discovered that, in each case, the company concerned had failed and that a recommendation had been made that Mr Q's conduct was 'unfitted' for a director. Vetting officer B spoke to the disqualification unit of the Insolvency Service on 30 October and was told that disqualification proceedings against Mr Q had been started about a month earlier, in connection with the most recent company failure.

19. On the same day vetting officer B recommended that the case should be accepted for a section 447 investigation. Officer B said that there was 'good reason' for that and that a section 447 investigation would be in the public interest. Drawing on material from brochure 2, officer B gave as reasons for that the fact that it was not evident that the guaranteed returns could be sustained; the uncertainties of the unproven market for ostrich products; and the suspicion that the corporation's activities were a front for a money-making scheme which relied on new money from investors to sustain it. Officer B mentioned as particular areas of concern the high level of investments then being made (by that stage £2 million a month); that the minimum investment required started at a high level (£1,400); that no returns to investors were promised until the end of the second year; her doubts that the ostriches existed; and Mr Q's past record of conduct as a director. The vetting supervisor gave his approval to an enquiry on 3 November, when he noted his concern at, in particular, the extraordinarily high levels of income being promised by the corporation. On 7 November vetting officer B notified SIB (in response to their letter of 20 October – paragraph 18) and others that CIB intended to carry out a section 447 investigation of the corporation.

20. A CIB officer, whom I call officer D, minuted on 14 November that authorisation for a section 447 investigation had been given that day. Two CIB officers (whom I call officers E and F) visited the corporation's premises in the East Midlands on 16 and 17 November. Officers E and F were authorised to require the corporation to produce such documents as they might specify. They visited the corporation's premises again on 21 and 22 November, and obtained documents and information, among which were details of members of the club (paragraph 12) and some information relating to the ownership and supply of ostriches. A case conference involving an internal DTI legal adviser and officers D, E and F took place on 23 November. The initial conclusion from the documents and information obtained by that stage was that there appeared to be a shortfall in the number of ostriches in the possession of the corporation; that there was doubt whether the corporation could meet their 'buy back' obligations (paragraph 12); that the commercial basis for payments made by the corporation in connection with the purchase of ostriches was questionable; and that DTI needed to undertake a speedy section 447 investigation.

21. On 4 December the internal legal adviser gave advice to officer D on the legal relationship between the corporation and the investors, the status and the role of the club (paragraph 12), and the significance of various agreements entered into by the corporation. On the same day officer D established from MAFF that there was an expert on ostrich farming (whom I call Mr Z) in what

was then MAFF's Agricultural Development Advisory Service. On 6 December CIB asked Mr Z to consider brochure 2 and, subsequently, the corporation's promotional video. Mr Z was asked to report on the size of the United Kingdom and European markets for ostrich products; the size and price of ostriches at the time of their commercial slaughter; the age and price of breeding ostriches; and, in northern Europe, the rate of egg production and chick survival. Mr Z was asked to observe strict confidentiality. No delivery date for his report was specified. On 11 December the internal legal adviser gave CIB advice on various legal measures which DTI might be able to pursue against the corporation: after considering the options in some detail he concluded that the presentation of a winding-up petition to the court would be the best option. Also on 11 December the corporation's auditors sent officer E draft accounts for the corporation for the period from 22 December 1994 to 30 September 1995. The partner who sent the draft accounts said that he did not anticipate any changes to them.

22. Officers E and F interviewed the corporation's directors, Mr Q and Mr R, in the presence of their solicitor on 13 and 14 December. During the course of that interview Mr Q provided a version of a list of ostriches purchased by the corporation and their progeny. Officer E asked for further information from Mr Q and also asked him to obtain from the corporation's auditors their working papers to support the corporation's draft accounts (that was so that the adequacy of the corporation's provision to meet their obligations under the 'buy back' scheme could be considered). She sought information about the commercial relationship of the corporation to four other companies. They were a Belgian company responsible for the provision of ostrich raising facilities there; a company (which I refer to as company X) from which the corporation had purchased ostriches; and two other companies (which I refer to as company Y and company W), both of which had provided sales personnel to the corporation. Officer E later stated in an affidavit that she had been told by Mr Q that 50% of the chicks hatched to ostriches which had been sold to investors were retained by the corporation and given to the Belgian company. She had also been told that some investors had been allocated male birds. A male bird would be kept with two females; and the owner of the male bird would receive one third of the eggs from the breeding trio. However, brochures 1B and 2 had given the misleading impression that investors would be allocated only female birds. She also said that Mr Q had told her on 14 December that the corporation's records of ostrich progeny were at the Belgian facilities.

23. On 22 December CIB received from the corporation a different version of a progeny list. On the same day the corporation's auditors sent officer E schedules from their working papers relating to the provisions in the corporation's draft accounts in respect of the corporation's obligations under the 'buy back' scheme (paragraph 12). Officer E was told by Mr Q on 13 December 1995 that Mr S and members of his family were involved with companies W and Y. Although both companies were said by Mr Q to have contracts governing their commercial relationship with the corporation the corporation did not provide officer E with written evidence of that, merely reporting that oral contracts had been made. Officer E saw the connection between the corporation and Mr S as significant, because of Mr S's previous involvement with two companies, company M and its parent company, both of which had been wound up by the court following petitions submitted by DTI on the basis that they were involved with a money circulation scheme. The corporation had made payments totalling £456,716 to company Y; had been invoiced for a total of £24,750 by company W; and had paid Mr S £100,000 for the termination of their contract with company W.

24. **1996** On 3 January officer E, who had reviewed the documents and information provided by the corporation during and after the interviews on 13 and 14 December (paragraph 22), asked Mr Q for some items which had not yet been provided. On 4 January CIB reminded Mr Z that they were awaiting his

report (paragraph 21). On the same day CIB received some of the outstanding documents from Mr Q. Two other CIB officers were authorised on 8 January to conduct section 447 investigations of company X and a yet further company, both of which were suspected of having received large payments from the corporation.

25. Officer E wrote to Mr Q on 17 January because she had identified six items of information which were still outstanding. Included in her request for information were a sight of all those invoices and account statements which the corporation had received from company X and which had not yet been provided. Mr Z faxed an interim report to CIB on 18 January. He gave figures for the value and breeding rate of ostriches which were at odds with the claims in brochure 2 – parts of which he said were misleading. On 31 January the findings of the section 447 investigations into company X and the further company were reported to officer D. On 2 February CIB received additional invoices which had been issued by company X; and on that day officer E asked Mr Q to explain why, from CIB's analysis of the company X invoices and of the corporation's records, the corporation had paid company X substantially more than the invoiced amounts. (Officer E subsequently stated in an affidavit that Mr Q had given no explanation.)

26. Officers E and F concluded their investigation into the corporation on 5 February (although they had not at that stage received all the information and documents they had sought). Officer E reported to officer D that they had been unable to establish a true market value for ostriches, but that the indications from Mr Z's report were that the values quoted by the corporation were unrealistic, as were the corporation's claims for the breeding potential of ostriches in the northern hemisphere. She concluded that investors had been promised an unsustainable rate of return, and that on that view the corporation's trading was fraudulent. She recommended that winding-up of the corporation should be considered.

27. On 6 February CIB asked the Treasury Solicitor's department (TSD) to seek counsel's advice because of what was seen as a major 'public-at-risk element' in the case. An internal DTI referral sheet dated 6 February set out a timetable, agreed in principle by DTI and TSD, that winding-up proceedings should be initiated by 7 March.

28. TSD asked CIB on 12 February to seek further advice from Mr Z on the prospective cost to the corporation of importing ostrich eggs and bringing the resultant chicks up to age to make good any shortfall in the guaranteed allocation of chicks promised to investors. TSD and CIB subsequently exchanged minutes on the content and form of draft affidavits to be completed by DTI officers and by Mr Z. After a case conference involving TSD, Mr Z, the internal DTI legal adviser and leading counsel on 11 March CIB noted the next day that certain elements of the case needed to be strengthened; on the same day they again sent Mr Z the promotional video to review. Mr Z gave CIB his further comments on 22 March. TSD noted on 25 March that counsel's advice was to apply to the court for the appointment of a provisional liquidator 'on notice' to the corporation and that, although that action would reduce the prospects of recovering funds for investors, those prospects had not been good anyway.

29. On 26 March DTI presented a petition to the court for the corporation to be wound up under the 1986 Act (paragraph 7). On 28 March the court heard the application and made an order giving the corporation until 1 April to produce their evidence. The court appointed the Official Receiver as the corporation's provisional liquidator on 3 April. CIB and TSD liaised with the Official Receiver thereafter, and continued to refine the evidence needed to support their application to have the corporation wound up. On 28 May the corporation's solicitors told CIB that, for commercial reasons, the corporation had decided not

to oppose the winding up application. The order winding-up the corporation was eventually made by the court on 17 June. The Official Receiver became liquidator on 18 June, and subsequently, following a meeting of creditors of the corporation, joint liquidators were appointed on 25 July.

The complainant's contentions

30. The complainant, who like all other investors, was not aware of CIB's vetting of the corporation in March 1995, based his complaint to me on advice from the joint liquidator (who had been appointed in succession to the Official Receiver in July 1996) that by 14 December 1995 officer E had uncovered sufficient information to justify the Secretary of State petitioning the court for the corporation to be wound up at that stage rather than in March 1996 as had actually happened. Had that action been taken then, in the joint liquidator's view, at least those investors who had purchased birds after 1 January 1996 would have been spared their losses. The corporation's sales in the period 1 January 1996 to 3 April 1996, when the provisional liquidator was appointed, totalled £14.58 million. In the event, at the time of liquidation the corporation's liabilities had totalled in the region of £70 million, and the dividend to creditors was not expected to exceed one penny in the pound. A fuller description of the joint liquidator's specific contentions is contained in the extracts from a report to investors which he produced in February 1998, reproduced at Appendix B.

TSD's comments on the complaint

31. The Treasury Solicitor referred me to the report on the Barlow Clowes affair made by Sir Godfrey Le Quesne QC in which Sir Godfrey had said:-

'Presentation of a winding-up petition is a drastic step. In the case of an investment company the mere presentation of the petition is likely to shake investors' confidence and cause a run on the company. Application for the appointment of a provisional liquidator makes the proceeding even more drastic, for upon appointment the provisional liquidator may seize the company's assets and close the business down.

The Court will not make orders leading to such consequences without strong evidence of the need to do so. It has generally been thought necessary, and was thought necessary in the [Barlow Clowes] case, to adduce evidence not merely of irregularity, but of some very serious circumstance such as the insolvency of the company, or the carrying on of business in breach of fiduciary duties to clients or creditors, or diversion of clients' money to purposes other than those for which it was received.

Before an application can be made to the Court for winding-up and the appointment of a provisional liquidator, the evidence has to be prepared. In the [Barlow Clowes] case the application was in the end unopposed, but it is always necessary to assume that it will be opposed and the evidence will be tested and challenged. Great care has therefore to be taken over the preparations. The relevant information contained in a report of enquiries under section 447 of the Companies Act or an investigation under section 105 of the Financial Services Act has all to be put into the form of affidavits. The report itself is never put before the Court, for two reasons: it is important to maintain the confidential status of such reports, so that investigators are not inhibited in expressing their views, and the reports are likely to contain some material (eg discussion of suspicions entertained but not established) which cannot be used as evidence.'

32. The Treasury Solicitor said that what Sir Godfrey had said still held good today, save that DTI investigators' reports are now produced on discovery. They are still never used as primary evidence. DTI had sent TSD instructions on 6 February 1996. The corporation had been given notice of DTI's intention to apply to the court for the appointment of a provisional liquidator; and that application had come before the judge on 28 March. The judge had appointed a provisional liquidator on 3 April. That had led to the closure of the business. The corporation had been finally wound up on 17 June. Accordingly, the crucial

period in relation to TSD's involvement had been from 6 February to 28 March 1996 – a period of some seven and a half weeks. The Treasury Solicitor said that during that time a great deal of work had been required from the two lawyers principally involved, as the case had not been an 'open and shut' one. After considering DTI's submission of 6 February, TSD had given advice on 12 February on the merits of initiating winding-up proceedings, and advice on the further evidence required from Mr Z. Much time had been taken up in preparing the extensive affidavit eventually made by officer E. A full set of papers had had to be prepared for counsel. They had been made available to counsel on 7 March, and a conference had followed on 11 March. Counsel had advised on the merits of the case and the further research and evidence required. The work required had taken until 21 March, when there had been a further consultation with counsel. Preparations had then been made for the evidence to be finalised and sworn, with the matter coming before the judge on 28 March. DTI could not have been reasonably sure of success until the work required by TSD and by counsel had been completed. The corporation had been a substantial company carrying out a large volume of business. It would have been irresponsible for DTI and TSD to have sought to have such a company wound up without proper preparation.

DTI's comments on the complaint

33. The Permanent Secretary said that after the section 447 investigation had been authorised on 14 November 1995 (paragraph 20) production of documents by the corporation had been both slow and incomplete. There had been no-one in the regulatory field who had experience of the corporation's unusual area of business. Following internal discussion, DTI had recognised the need for expert advice on ostrich farming. Mr Z, the only known available authority, had been commissioned as the expert on 6 December 1995, but had not always been contactable. DTI had received Mr Z's report on 18 January 1996 at a time when other related enquiries were still under way. Although DTI had not received all the information sought from the corporation (significantly, company documents relating to the breeding and allocation of ostriches remained to be supplied) it had been decided that DTI should conclude the investigation and submit a report to TSD. That had been done on 6 February, and had led to a conference with TSD and counsel on 11 March. The vital importance of Mr Z's evidence had been emphasised in that discussion; further evidence had been sought from him and, shortly after it was received, DTI's petition for the corporation to be wound up had been presented to the court on 26 March.

34. The Permanent Secretary said that when presenting petitions to the court, or applying for the appointment of a provisional liquidator, DTI were assiduous to ensure that the court had the fullest information, and that the prospect in any particular case of a winding-up order being made was exceedingly high. The courts were said to have been concerned to ensure that that standard was adhered to: the court would not rubber-stamp applications. Counsel's advice, even on 11 March, had been that the evidence then to hand was insufficient to apply ex parte for a provisional liquidator to be appointed. That was why Mr Z had been asked to expand his evidence. The Permanent Secretary said that in all cases where DTI sought to wind up a business in the public interest there would always, unfortunately, be people who had paid money, or delivered goods, to the company concerned in the period between the commencement of a section 447 investigation and the business being brought to an end. The affidavits required in the winding-up proceedings and in the application for the appointment of a provisional liquidator had been voluminous and detailed. Many exhibits had had to be produced. At the hearing of the application for the appointment of a provisional liquidator, the judge had been satisfied that a winding-up order could be made and had considered the non-production of the breeding documents by the corporation as particularly important. The Permanent Secretary saw it as a mistaken presumption that DTI had been in a position to petition the court immediately after officers E and F had interviewed the directors of the

corporation on 14 December 1995 (paragraph 22). Such a view did not take proper account of the other enquiries that DTI had been obliged to make (paragraphs 23 and 25) before they were in a position to present a petition.

Further investigation

35. DTI told my staff that the vetting process conducted by CIB leading to the discretionary decision whether or not to begin a section 447 investigation was not a precise art. There was no model procedure; but vetting usually involved a two-stage process. First, a 'pre-vetting' phase filtered out, from the approximately 3,500 referrals DTI received each year, those cases where there appeared to be no public interest issue, those cases which did not fall to be dealt with by DTI, and those cases for which there was a more appropriate regulator or other body to deal with the matter. The remaining cases (approximately 900 a year) proceeded to formal vetting. Typically, each year, after that formal vetting, about 300 of them were taken up for a section 447 investigation.

36. DTI also said that the background to CIB's vetting of the corporation which had concluded in April 1995 (paragraph 16) had been unusual in that no public complaint had then been made. Brochure 1A had been handed to CIB by a DTI colleague. Vetting officer A had made enquiries to ascertain whether it was possible to breed ostriches in the United Kingdom and, on discovering that it was, in the light of his other findings he had recommended closing the file. Vetting officer A told my staff that he had considered the figures quoted in brochure 1A, but had concluded that they were not obviously absurd. Though he had thought that ostrich feathers must be 'worth their weight in gold' if the claims of the corporation were correct, he had been aware that a great deal of money had been made by South African ostrich farmers over many years. The vetting supervisor told my staff that he too had considered the returns suggested by brochure 1A, but had seen no reason why, on the face of it, such returns should necessarily not be possible.

37. My staff asked why, given that vetting officer B had discovered that Mr Q had been a director of four failed companies (paragraph 18), that information had not come to light when vetting officer A had vetted the corporation in April 1995. DTI said in reply that it was not a matter of vetting officer A having been unable to obtain information about Mr Q's record as a director of other companies – presumably he could have obtained it. It was rather that the vetting process in April 1995 had primarily addressed what was seen as the key question of whether or not ostriches could be bred in this country.

38. My staff made calculations which showed that returns referred to in brochure 1A, when put in percentage terms, appeared to indicate in one case a net return of 163.2% per annum while the return offered by the corporation in the press advertisements which had caused concern to SIB, and which had been a factor in the October 1995 vetting, had only been 51.6% (paragraph 18). They asked DTI to comment on that. DTI explained that there was no set or established figure, or level of claimed return, which would necessarily trigger a section 447 investigation. It would be a matter of judgement and of assessing whether the claimed levels were very high compared with expected levels for comparable business ventures – an assessment which had not been possible at the time of the April vet because of the novelty of the concept. The figures given in brochure 1A were seen as illustrative (not guaranteed, as the return promised in brochure 2 was) and merely advertising 'puff'.

Findings

39. Four events preceded the opening of the section 447 investigation in November 1995 which distinguished the vet carried out by CIB in October/November from their earlier vet in March/April. They were the anonymous telephone call which CIB had received on 20 September 1995, the information forwarded by DTI's regional office on 9 October, the concerns expressed on 20 October by SIB (paragraph 18), and the receipt of brochure 2 with 'guaranteed' rates of monetary return (paragraph 12). CIB opened a new file

on 3 October, and considered for a second time whether a section 447 investigation into the corporation was warranted. Vetting officer B recommended an investigation on 30 October because of various factors, including the level of guaranteed returns then being promised; the uncertainties surrounding new markets for ostrich products on which those returns were based; the high level of investments then being made in the corporation; the high minimum level for those investments; the suspicion that the corporation was merely a front for a money-making scheme which relied on new investors coming forward to sustain it; and doubts that the ostriches concerned actually existed (paragraph 19). On 3 November the vetting supervisor approved vetting officer B's recommendation that a section 447 investigation be initiated. Given the nature of the issues needing to be considered, I do not consider that vetting officer B or the vetting supervisor delayed unnecessarily in their tasks, or that there was any maladministration on their part.

40. On 14 November authorisation for a section 447 investigation was given (paragraph 20), and prompt action then ensued. On 16 and 17 November officers E and F visited the corporation's premises; they were authorised to require the corporation to produce such documents as they might specify. After a further visit to the corporation on 21 and 22 November a case conference was held on 23 November, with an internal DTI legal adviser, which reviewed the documents and information obtained thus far. On 13 and 14 December, after further legal advice had been given on two occasions by the internal legal adviser, officers E and F interviewed Mr Q and Mr R in the presence of their solicitor (paragraph 22). That was an important interview, and one for which officers E and F needed to be fully prepared. I see it as commendable that they were able to undertake it within a month of authorisation for the section 447 investigation having been granted. I do not see it as maladministrative that it took DTI eleven days from the date of the vetting supervisor's approval to grant that authorisation, given the potential seriousness of a section 447 investigation for the corporation and others.

41. More contentiously, it then took DTI just under a further eight weeks before they sought urgent advice from TSD on 6 February (paragraph 27), a further month before papers were put to counsel, and three weeks more before a winding-up petition was presented to the court on 26 March. The joint liquidator later contended that that last step could, and in his view should, have been taken by early January 1996 at the latest (Appendix B – paragraph 13). The issue I have to decide is whether it was maladministration which meant that the winding-up petition was not presented until late March.

42. What happened in the intervening period? DTI, after considering what Mr Q and Mr R had said at the interview on 13 and 14 December, concluded that further documents and information needed to be obtained from the corporation. Officer E made that request promptly. Other DTI officials on 8 January began related section 447 investigations into company X and another company, also suspected of having received unwarranted payments from the corporation (paragraph 24). DTI had also decided that they needed advice from an expert on ostrich farming; that was Mr Z. Although it would have been better had a deadline been set at the outset for receipt of what turned out to be Mr Z's initial report (paragraph 25), CIB had reminded Mr Z of their need for it on 4 January. When he did report, on 18 January, the investigations into company X and the other company were still in progress. Shortly after those investigations were completed, and after officer E had received some of (but not all) the outstanding documents and information sought from the corporation, officers E and F concluded their section 447 investigation on 5 February 1996. The next day CIB began to consult TSD on how a winding-up petition could best be made and supported. The case that DTI elected to put before the court could not have been constructed in its entirety from what was known before, or came out of, the interviews with Mr Q and Mr R on 13 and 14 December 1995.

43. After further advice had been obtained from Mr Z and draft affidavits which he, officer E, and others might swear had been prepared, TSD referred the papers to leading counsel on 7 March. Leading counsel advised that the proposed affidavits needed strengthening, and Mr Z was asked to augment his input. On 26 March the winding-up petition was presented to the court; and on 3 April the court granted an order to appoint a provisional liquidator. The order winding up the corporation was made on 17 June (paragraph 29).

44. Events after the petition was presented are not matters for me (paragraph 13), but what of the events between January and March 1996? Were all the steps that were taken during that period necessary, or at least steps which DTI and TSD might reasonably conclude were necessary? And if they were, were they taken without avoidable delay? Notwithstanding the joint liquidator's views, I find in favour of DTI in all these respects. In my view, it was reasonable for DTI and TSD to conclude that the actions they were taking were necessary actions if they were to have the necessary confidence that matters would be brought to an appropriate conclusion. DTI and TSD reached their conclusions conscious of the end in view and of the implications that could arise were that end to be delayed avoidably on the one hand, or pursued unsuccessfully on the other. It was not a matter of events being allowed to drift by default. Instead, discretionary decisions reached without maladministration were taken and, that being so, the Parliamentary Commissioner Act 1967 says explicitly that it is not for me to question their merits (paragraph 13). So I say only this. It is undeniable that a winding-up petition *could* have been presented to the court earlier than it was; but it does not follow from that, given the extent of DTI's knowledge and aims, that it *should* have been or, if it had, that it would have been successful. When the petition could best have been presented was a matter for DTI's (and TSD's) discretionary judgement; they were entitled to reach the decisions they did reach on those matters.

45. What of events before October 1995? Whether or not to conduct a section 447 investigation is also a discretionary decision taken on behalf of the Secretary of State (paragraph 3). It is not for me to question the merits of that decision unless there was maladministration in its making. The information on the corporation available to DTI in April 1995 was that contained in brochure 1A (paragraph 10), plus whatever emerged from the internal enquiries that vetting officer A then judged to be necessary – itself also a discretionary decision. I am satisfied that at that stage DTI had no other evidence to hand. Moreover, despite later suggestions in the press to the contrary, neither SIB nor members of the public had brought concerns about the corporation to CIB's attention at that time or earlier.

46. When brochure 1A was referred to him, vetting officer A looked at whether it was possible to breed ostriches in the United Kingdom and found that it was. The note from the pre-vetting officer (paragraph 14) had identified three other issues, namely whether the corporation was 'just another network marketing/money making' scheme, the claim that Mr Q had had another company successfully floated, and whether the club should be considered separately. There is little in vetting officer A's submission to the vetting supervisor to show how deeply he delved into those issues. A conclusion can be drawn from his comment that there appeared to be nothing suspicious about the network element, or obviously suspicious about other aspects of the corporation's business as described, that he was satisfied in his own mind that at that stage at least not only no section 447 investigation but also no further enquiries on his own part were then required. His recommendation was endorsed by the vetting supervisor, the same one as it happened who later agreed there should be a section 447 investigation following the October vetting. The judgements reached in April 1995 were different from those reached later; but that of itself does not make them maladministrative.

47. Both vetting officer A and his supervisor have said that they took into account the level of returns being indicated in brochure 1A (paragraph 36). The figures in brochure 1A are said to have been seen at the time as 'puff', part of the process of trying to attract investors. At first blush, that view is not easy to reconcile with the emphasis later placed by the vetting supervisor on the essentially similar rates of return referred to in brochure 2 when he advocated a section 447 investigation in November 1995. However, enough other things had changed to make a distinction tenable. That vetting officer A *could* have done more to probe the implications of the rates of return referred to in brochure 1A is undeniable. But how far he took his probing was a matter for his discretion. I see no maladministration in his deciding not to take the matter further than he did at that stage; and, that being so, it is not for me to question the merits of the view that he reached.

48. The same is true of the action taken to check out the reference in brochure 1A to Mr Q having had another company floated successfully. Brochure 1A did not identify the company in question (paragraph 14), and its identity could not readily have been established. (It was not established at the time of the second vet.) The information about Mr Q which vetting officer B later unearthed did not emerge as a result of an attempt to check whether or not Mr Q had been involved in a successful flotation. It emerged as a result of enquiry of the Insolvency Service disqualification unit (paragraph 18). So even if officer A had sought to pursue further an enquiry about the flotation in which Mr Q was said to have been involved there are no grounds to suppose that at that stage information would have been forthcoming to change the view then reached. Officer A could have made an enquiry of the Insolvency Service at the time of the first vet, but he did not have the grounds that officer B later had (paragraph 17) to make such an enquiry. Moreover, even if officer A had decided to contact the Insolvency Service in March/April 1995 he would not have learned that disqualification proceedings against Mr Q had been initiated – that decision was only reached in September 1995 (paragraph 18).

49. In short, even if in April 1995 vetting officer A had decided to research some matters further, it is unlikely that that would have resulted in a significantly earlier decision to initiate a section 447 investigation. Neither the corporation's circumstances in April 1995, nor CIB's knowledge of what the corporation were saying, were the same as they were in October. In April the corporation had yet to issue brochure 2 (paragraph 10), while even in July and August the volume of its trading (as later reported by the joint liquidator – Appendix B, paragraph 6.3) was relatively modest. CIB had not then received either the information they later received from DTI's regional office or that from SIB; nor had they received any complaints from members of the public.

50. Before CIB received the anonymous telephone call on 20 September (paragraph 17) it is by no means clear that they would necessarily have made any connection between Mr Q and Mr S (and company M with which Mr S was involved). (Officer E later saw that connection as significant (paragraph 23) because of the indication it gave that the corporation was involved with money circulation schemes.) Unlike brochure 2, brochure 1A, which was the only brochure before CIB in April, did not make claims which included a 'buy back option' (paragraph 12); in contrast, it included both a 'Statutory Warning' and a disclaimer (paragraph 11).

51. In the event matters moved very quickly in November 1995 when DTI did initiate a section 447 investigation. They committed resources to that investigation and then more resources to the related section 447 investigation of company X and the further company (paragraph 24). In November DTI were aware that the level of investment into the corporation had reached £2 million a month (paragraph 19). I do not doubt that that awareness influenced both the resources committed and the urgency with which they were applied.

52. Central to this complaint is the contention that had a successful petition been presented earlier some of those who chose to invest in the corporation in the later stages of its life, and so made losses, might have been spared those losses. I do not take the view that even if that argument were accepted it would follow, in the circumstances of this case, that I should recommend that the taxpayer rather than those who chose to invest should bear the burden. Those who invested in the corporation in the later stages of its life did so at a time when it was much clearer what the corporation were purporting to offer by way of guarantees and allowances than it was from the information available at the time when CIB were carrying out their March/April 1995 vet. The investors were under no compulsion to put funds into what, on any reasonable view, was a high-risk venture: not only was there a risk that the corporation's forecasts of profit would prove to be unrealistic, but the guaranteed 'buy back option' (paragraph 12) significantly increased the risk that the corporation would become insolvent. Unlike the Barlow Clowes case referred to earlier, the corporation was not a company licensed by DTI, nor one in respect of which it could fairly be said, notwithstanding the corporation's participation in an export mission (paragraph 17) at a date before the section 447 investigation was recommended and authorised, that DTI had given assurances or any indications of assurances to potential investors. I do not see in the circumstances of this case cause for recommending that the investors' losses should be reimbursed.

Conclusion

53. I have not found that DTI or TSD delayed unnecessarily from the beginning of the section 447 investigation before presenting a winding-up petition to the court. They were heedful of the interests of the investors, but also of the evidence that might be required by the court. DTI had taken a discretionary decision in April 1995 not to initiate a section 447 investigation at that stage but I did not find maladministration accompanying that. Nor in the circumstances of the case do I consider that the complainant's unfortunate financial losses should be reimbursed by DTI.

APPENDIX A

GLOSSARY OF ABBREVIATIONS AND REFERENCES

MAFF	Ministry of Agriculture Fisheries and Food
CIB	Companies Investigation Branch of DTI
DTI	Department of Trade and Industry
SIB	Securities and Investment Board
TSD	Treasury Solicitor's department
The corporation	the Ostrich Farming Corporation Ltd
The club	the Ostrich Owners Club
company M	a company closed down by DTI's actions
company X	a company from whom the corporation purchased ostriches
company Y	a company which provided sales support to the corporation
company W	another company which provided sales support to the corporation
Mr Q	one of the corporation's directors
Mr R	another of the corporation's directors
Mr S	a director of company M
vetting officer A	the officer who carried out the March/April 1995 vet
vetting officer B	the officer who carried out the October/ November vet
officer D	a supervisor in CIB
officer E and officer F	the CIB officers who carried out the section 447 investigation
Mr Z	the expert on ostriches recommended by MAFF
The 1967 Act	the Parliamentary Commissioner Act 1967
The 1985 Act	the Companies Act 1985
The 1986 Act	the Insolvency Act 1986

APPENDIX B

EDITED EXTRACTS FROM A REPORT TO CREDITORS DATED 13 FEBRUARY 1998 MADE BY THE JOINT LIQUIDATOR

(Original paragraph references have been retained)

6. Risk of delay

6.3 The corporation's turnover from the sale of ostriches had been steadily increasing towards the end of 1995, from £358,000 and £510,000 in July and August 1995, to £1.997 million and £1.555 million in November and December 1995. The corporation's turnover from the sale of ostriches between January and April 1996 when the corporation ceased trading was £14.595 million.

10 DTI Investigation and Evidence

10.1 Officer E was the senior examiner in CIB who conducted the investigation into the affairs of the corporation. On 26 March 1996 she swore an affidavit in support of the petition presented by DTI for a winding-up order against the corporation. The majority of the facts and matters upon which I rely in this report are derived from her affidavit and exhibits. In preparing this report I have made reference to the principal facts and matters that support my conclusion.

10.2 Officer E visited the corporation's premises on many occasions between 16 November 1995 and 26 February 1996 and interviewed Mr Q inter alia on 17 and 21 November, 13 and 14 December. Officer E cites ten reasons in her affidavit in support of her view that the corporation had not been run by its directors with proper commercial probity and that it was therefore in the public interest that it should be wound up. I shall now refer briefly to each of the principal factors indicating when, by reference to the comments made by her in her affidavit, she obtained the necessary evidence to support them.

11. The principal factors supporting the claim by DTI that it was in the public interest and just and equitable that the corporation should be wound up by the Court and the dates when the evidence supporting these claims was obtained by CIB

11.1 Misleading advertising material and misrepresentations to potential investors

In November 1995 the corporation had two brochures in circulation, was advertising in the press and provided a free video to potential investors. CIB obtained the relevant documents during November and raised a number of enquiries with Mr Q on 17 and 21 November. They concluded (after taking advice from Mr Z, a qualified expert on the subject of ostrich farming and a senior Livestock Consultant for ADAS, an agency of the Ministry of Agriculture, Fisheries and Food) that the brochures published by the corporation contained misleading information that misrepresented the investment value of the ostriches to potential investors and improperly persuaded them to pay money for the purchase of ostriches and to participate in one of the corporation's schemes. For example:

11.1.1 the commercial breeding life of a female ostrich was exaggerated:

11.1.2 purchasers were promised an income from chicks born to their ostriches on the basis that far more chicks would survive to slaughter age than could reasonably have been expected;

11.1.3 values given for ostriches at certain ages did not reflect the true market value for the bird but the price at which the corporation would seek to sell ostriches to its own clients, a price that was considerably in excess of the true market value;

11.1.4 it was not properly explained to purchasers that half the chicks born as offspring to each ostrich would be taken by the Belgian company and not be available for attribution to the owners of the birds. Purchasers were guaranteed an allocation of chicks which greatly exceeded the number of viable chicks that could be reasonably expected and promised a rate of return on capital that could not in practice be achieved through breeding ostriches;

11.1.5 information provided to purchasers implied an unrealistically high price for the market value of a slaughtered ostrich.

11.2 Buy-backs and buy-back obligations

11.2.1 Under Brochure Two in use by the corporation, it committed itself to buying back the progeny of each ostrich purchased at a guaranteed price of £500 thereby guaranteeing part of the return on each purchaser's investment. CIB calculated that the potential liability of the corporation under the buy-back options as at November 1995 should all ostrich owners exercise their right to sell their one year old chicks back to the corporation would be £2.26 million by October 1997.

11.2.2 The corporation had insufficient funds put aside to meet the buy-back obligation. The corporation's auditors provided CIB with draft accounts for the corporation for the period ended 30 September 1995 on 11 December 1995 together with some further supporting information on 22 December 1995. These accounts show £10,452 as 'Other Reserves' in the balance sheet to meet costs of liabilities on the buy-back scheme. Mr Q, when interviewed by CIB in November, insisted that the corporation was bringing in enough money each month to be able to meet these obligations in the future.

11.2.3 In conclusion, officer E stated as follows 'The business of the [corporation] is highly speculative and depends on a considerable expansion in the market for ostrich products which may not happen. It is unrealistic and deceptive to offer guaranteed returns in these circumstances. It seems inevitable that the [corporation] will have insufficient resources to fulfil its guarantees to purchasers under the scheme of Brochure Two unless it continues constantly to expand the numbers of persons joining the scheme (with a consequent constantly expanding flow of money). Quite apart from the inevitable shortage of ostriches that must arise to attribute to purchasers, the scheme is bound to collapse as soon as saturation point is reached and insufficient new members join. The whole scheme of Brochure Two is fundamentally unsound and it is misleading to seek to attract members of the public to participate in it.'

11.3 Improper records

By 14 December 1995, after several requests, the corporation had failed to produce satisfactory information to CIB concerning the records it kept attributing specific ostriches and their chicks to each owner. The absence of satisfactory information gave rise to an assumption that the schemes were not being managed in a proper manner for purchasers.

11.4 Company X – The purchase of ostriches

The corporation had entered into two contracts which enabled it to purchase ostriches. One contract was with company X dated 2 January 1995 and the other contract dated 18 February 1995 was with the Belgian company. All purchases

from February to July 1995 were from the Belgian company and all purchases from 3 July 1995 onwards were from company X. Company X obtained its ostriches from the Belgian company. CIB established in November 1995 that the corporation paid company X £200,000 for the right to act as its distributor and in some cases the corporation paid company X up to £3,500 more per ostrich than the price company X had paid to the Belgian company. At an interview with Mr Q on 21 November 1995, no satisfactory reason was obtained for these transactions. Officer E concluded that company X had simply been interposed in the middle of the chain of supply from the Belgian company to the corporation with the consequence that the corporation paid a premium for its ostriches for no discernible reason.

11.5 Mr Q's suitability to act as a director

In or about September 1995 the Official Receiver commenced proceedings for the disqualification of Mr Q under section 6 of the Company Directors' Disqualification Act 1986 in relation to his involvement in the affairs of another company. CIB therefore formed the view that the corporation was partly under the control of a person who was alleged not fit to be a director of a company.

11.6 Mr S

During their enquiries, CIB discovered that a trading relationship existed between the corporation and company Y which appeared to have provided telephone sales support, charging a commission of 20% of the sale price per ostrich sold by their personnel. Invoices obtained by CIB suggested that £456,716 was paid to company Y by the corporation. On 13 December 1995 Mr Q told CIB that the people behind company Y included Mr S and his brother. It was known to CIB that Mr S and his brother were well known to the DTI because of their previous involvement in 'pyramid selling' schemes run by companies which were wound up by the Court in 1994 on petitions presented by the DTI in the public interest. Among those companies was company M. Mr Q told CIB that he had known Mr S at company M, had known Mr S's family for ten years and first met Mr S eight or nine years earlier. CIB formed the view that money was being siphoned off from the corporation through uncommercial contracts with company Y, company W and another company with which Mr S was involved.

11.7 Directors' remuneration and bonuses

The draft accounts for the corporation for the period from12 December 1994 to 30 September 1995 which were supplied to CIB by the corporation's auditors showed that Mr Q and Mr R received remuneration of £74,000 and £66,397 respectively. Board minutes of 30 June 1995, 22 September 1995 and 25 October 1995 confirm that approval was given for the directors' salary to be increased to £48,000 and then £102,000 and bonuses of £18,500 and £166,500 be paid to each director. In 1995 Mr Q and Mr R received payments of at least £240,500 and £232,897 respectively. CIB concluded that siphoning off money and making payments of excessive remuneration was reckless as the corporation would ultimately be unable to perform its guarantees to purchasers of ostriches under Brochure 2.

11.8 Prospective insolvency

CIB expressed the view that, another cause of prospective insolvency was that having misled members of the public to participate in the schemes, the corporation would either be liable to repay to them moneys advanced and pay compensation or have heavy liabilities under the buy-back provision in Brochure 2.

11.9 Date by which the above conclusions were or should have been reached

All of the above conclusions were or should have been reached by CIB by not later than 14 December 1995 following the meeting between Officer E and Mr Q.

12 The need for action in December 1995

12.1 Officer E mentions in her affidavit that CIB were conscious that the corporation's turnover was 'expanding enormously' at the time of the investigation. Sales between January and August 1995 amounted to a total of £1.84 million whereas the sales for the subsequent months were:

September 1995	£1.168 million
October 1995	£1.30 million
November 1995	£1.99 million
December 1995	£1.55 million
TOTAL	£6.008 million

The sales in 1996 for the period until trading ceased when the Provisional Liquidator was appointed on 3 April 1996 were:

January 1996	£5.79 million
February 1996	£4.14 million
March 1996	£4.05 million
April 1996	£0.6 million
TOTAL	£14.58 million

12.2 Officer E comments in her affidavit that in March 1996 it was likely that as a result of recent advertisements and the trend for increased turnover, a large amount of money would be flowing into the corporation from members of the public. In fact this had already happened. £14.58 million had been received by the corporation from 1 January 1996 in circumstances where DTI had, by not later than mid-December 1995, the necessary facts from which they concluded or should have concluded that members of the public were being induced to invest in a scheme which would not produce the returns represented and would be likely to cause those who invested to incur substantial losses.

13 The Complaint

All of the facts outlined in paragraph 11 above were derived from information or documents given principally by the directors of the corporation to CIB on or before 14 December 1995. In my view, a Secretary of State discharging his responsibility properly should have appreciated the urgency of the matter and presented a petition to wind up the corporation by not later than Friday 29 December 1995 or if this was not feasible, early in the New Year. Given the urgency, this would have provided the Secretary of State and his advisers with a more than adequate period of time to prepare the necessary documents for the application. If this action had been taken then members of the public who invested £14.58 million in connection with the purchase of ostriches from the corporation between January and April 1996 would have avoided the losses they have suffered acquiring ostriches that were worth significantly less than their actual cost upon terms that the corporation was unable to perform.

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