IN THE MATTER OF
THE FINANCIAL SERVICES AND MARKETS ACT 2000

AND IN THE MATTER OF COMPLAINTS BY FORMER MEMBERS OF THE EQUITABLE LIFE ASSURANCE SOCIETY

F U R T H E R   A D V I C E

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1. I signed off my Opinion on 10 July 2003. A copy was sent to Equitable and they have responded with another lengthy Opinion written by Christopher Carr QC and Gabriel Moss QC and dated 30 September 2003. It was accompanied by a letter from Lovells also dated 30 September 2003. I have read the Opinion and letter carefully.

2. Also, since I wrote my Opinion, Lord Penrose has produced an immensely long and detailed report. The findings in the Report do not persuade me to reverse my initial findings on redress.

3. I am asked to prepare a note of advice following our Consultation at FOS's offices on 10 May 2004. I understand that FOS does not require a full response to the Carr/Moss Opinion. Substantial parts of the Lovells' letter seem to be designed to try and persuade FOS to reach a different view on the facts: e.g. that investors may have stayed in Equitable in the hope of receiving

demutualization windfalls[1] and that it was unnecessary for investors to leave Equitable.

4. Having considered the Carr/Moss opinion carefully and the letter from Lovells, I remain of the view that, on balance, the methods of assessing compensation I recommended in my opinion are right. I would be the first to concede that the issues raised are by no means straightforward. There is, I think, room for differing views.

Misrepresentation

5. Many of the late joiners cases involve allegations of misrepresentation. In one of the test cases, Mr D's, FOS is minded to provisionally decide that he was induced to contract with Equitable as a result of misrepresentations. A crucial difference between the Carr/Moss Opinion and my own is as to whether, as the law currently stands, damages are to be assessed under section 2(1) of the Misrepresentation Act 1967 on the same basis as in cases of fraud. In *Royscot Trust Limited v. Rogerson* [1991] QB 297, the Court of Appeal held that the measure of damages under section 2(1) is the same as in fraud. The point was fully argued and the Lords Justices concluded that this was the plain meaning of the words used in the statute.

6. Carr and Moss go so far as to describe this case as an aberration[2], but that is to take the argument much too far. Short of the House of Lords, it is binding authority and it has consistently been treated as such in subsequent cases – as Rix LJ observed in *HIH Casualty and General Insurance Ltd and others v Chase Manhattan Bank and others* [2001] 2 Lloyd's Rep 483, 513 at §162 unless and until *Royscot* is overruled it "holds sway"". Contrary to the Carr/Moss opinion[3], I really do not think it is open to FOS (any more than it would be for the Court of Appeal) to proceed on the basis that *Royscot* was wrongly decided and should not be followed

[1] §11.7
[2] §52
[3] §74

7. I would add that it is interesting to see how this issue is dealt with in the latest edition of *Chitty on Contracts*[4], the leading practitioners' textbook edited by a very distinguished team led by Professor Beale, at §6-068[5]:

> "… it is now settled that the measure of damages under the subsection is the same as the measure of damages in fraud[6]. This follows from the wording of the subsection. In any event it would be highly anomalous if the measure of damages for negligent misrepresentation under the Act were different from the normal measure of damages for common law negligent misrepresentation. This means that generally damages will be awarded to put the representee in the position in which he would have been if he had never entered into the contract and not to put him in the position in which he would have been if the misrepresentation had been true".

8. The real bone of contention between my Opinion and the Carr/Moss opinion is whether the compensation should be narrowly confined to the GAR loss (as they argue) or whether, as I think, the Claimants must be compensated on the basis that they would not have entered into the contract. The approach endorsed by Chitty is I think fully consistent with my views. It is worth noting that Ian Glick QC and Richard Snowden, advising the FSA, were also of the opinion that as the law stands the compensation payable by Equitable includes loss from general underperformance of Equitable's with-profits fund, as compared with other companies' with-profits funds[7].

9. Indeed, some Claimants will no doubt argue that FOS should go further than it proposes and ignore the fact that the Claimants would have suffered general market losses had they invested in another with-profits pension scheme. I think, as I have already advised, that that would be to over-compensate a Claimant who, but for the misrepresentation, would still have invested in a with-profits pension scheme, albeit it is really impossible to say which, and would therefore have been exposed to movements in the market.[8].

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[4] 29th ed. published in 2004
[5] I should add that the previous edition at §6-069 said the same.
[6] *Royscott* is cited.
[7] Summary of his Opinion §§7-8.
[8] §§39-45.

10. I remain convinced that the best approach in these cases is to look to the average performance of a representative selection of other with-profits funds[9]. Of course, it means that theoretically some Claimants are over-compensated, and some under-compensated but this is, I stress, an entirely theoretical point because in these cases it is impossible now to say which fund an investor would have chosen some years ago. To require FOS to identify the fund that the investor would have chosen seems to me to be an utterly artificial and absurd exercise. I see no alternative to choosing the average performance. I observe that for other purposes Carr/Moss also thought that the average performance of other funds was a useful yardstick[10]. Importantly by taking an average performance (as opposed to identifying a particular fund in each case), it seems highly unlikely that Equitable will be adversely affected overall, unless one assumes that a preponderance of investors would have chosen funds with a below-average performance, which seems unlikely.

11. I also remain of the view that, when assessing the loss sustained by an investor the Market Value Adjusters and Final Bonus reductions ought to be included in the calculation. They are all part and parcel of the assessment as to how the Equitable policy purchased by the Claimant actually performed as compared with the market because (as I understand them) they reflect the real performance of the policy, as opposed to some possible overvalued estimates. There is a fair point made that when considering the comparators, FOS needs to bear in mind that other funds may have adjusted values just outside the period adopted for comparison. I expect that by looking at a longer period for comparison, as FOS proposes, will be likely to avoid these timing/"cut-off" issues.

12. In general, I get the impression that Carr/Moss and Lovells would like to persuade FOS that it is all too difficult to adopt the approach I have suggested. Of course, there is a simpler and traditional approach – to award a capital sum for the loss sustained plus interest. But this would result in over-compensating the Claimants, given the fall in markets, and the fact that had a Claimant taken

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[9] Ian Glick QC also thought so – Opinion §214

[10] See their opinion of 19 September 2002 as explained in §102 of their latest opinion.

out another with-profits policy, he would effectively have been locked into the market – unlike the position with other investments. I am not at all persuaded that it is impossible to make a fair comparison with a basket of other comparable products provided by other companies.

Negligence

13. In other cases, for instance the test case involving Ms E, FOS will make a provisional decision that Equitable ought to have advised her of the risks associated with GARs and that it was negligent in failing to advise her these risks. The provisional finding is that if she had been properly advised, she would not have invested with Equitable but would have taken out a different with-profits policy with another provider, although it is impossible now to say which she would have chosen.

14. Here Carr/Moss express their views with special vehemence; they refer to the "Glick cap" which was not a term I used in my opinion because although it is a useful shorthand, to outsiders reading the opinion it would be an obscure reference.

15. It is right to observe that Ian Glick QC in his thoughtful opinion considered that this "was a difficult and controversial area" and that "the contrary was arguable"[11] although he concluded on balance that the Claimant ought to recover the losses caused to non-GAR holders by the reduction in value of the non-GAR policy in comparison to a similar product from another company, but no more. There are two points worth making:

    (1) On the facts found by FOS, I can see no reason to disallow the element of loss to the with-profits fund (and thus to individual policy-holders) of losses caused by mis-selling non GAR policies to investors other than the claimant. It is clear that the mis-selling all derived from the same failure to recognise the risks posed by the GAR policies and the litigation. FOS is making a positive finding that Equitable ought to

[11] Summary of Opinion §7; see also his full opinion at §237 and 248

have known "the GAR problem" at the time[12]. Glick's advice, of course, was not focussed on the position of the late joiners.

(2) As I understand FOS's findings, it is being concluded that Equitable assumed a duty to advise Ms E in the area of pension planning with reasonable skill and care and also a duty to disclose to her all material risks of investing in Equitable – contrast Glick's assumed facts at §234 of his Opinion.

16. Carr/Moss place the main weight of their views on the "seminal" *SAAMCO* case [1997] AC 191. I think they attribute too much significance to the decision. In the subsequent decision of the House of Lords in *Aneco* [2002] Lloyd's Reps IR 9, Lord Lloyd (with whom Lords Slynn[13] and Browne-Wilkinson[14] agreed) said (at §11) that there was "nothing new" in the *SAAMCO* principle "that a Defendant is not liable in damages in respect of losses of a kind which fall outside the scope of his duty of care". He treated *SAAMCO* as very much applicable to "valuers, and their like, that is to say, those who undertake to provide specific information". They are not generally liable "for all the foreseeable consequences of their negligence, but only for the consequences of the valuation being wrong". Ordinarily however a Defendant will be liable for the foreseeable consequences of his negligence provided such consequences can fairly be said to be within the scope of the Defendant's duty of care. I think Lord Steyn's fuller reasoning adopts the same approach.

17. So, this is not a mere information case but one in which Equitable had a full duty to advise and to disclose all material risks. The scope of Equitable's duty was wider than that of a valuer. FOS's findings are that Ms E would not have invested in Equitable had she been properly advised. On these findings, I think Ms E is entitled to be compensated for the loss she has sustained as a result of entering into the Equitable policy; this includes any loss sustained as a result of Equitable under-performing the rest of the market, a loss that was

[12] Compare Glick §230.
[13] §§1-3
[14] §5

entirely foreseeable. I also think that this is a just result.

18. I understand that this Opinion may be shown to Equitable, and to the claimants, or that it may be posted on the FOS web-site. I, of course, have no objection to that course, but I must stress that I only accept responsibility to my client, FOS.

Jonathan Hirst QC

21 June 2004

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