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

O P I N I O N

---

1. I am asked to advise the Financial Ombudsman Service in relation to the financial relief that should be awarded to the lead complainants against the Equitable Life Assurance Society ("Equitable"). I am not and never have been a member of Equitable.

The Financial Ombudsman Service

2. The Financial Ombudsman Service ("FOS") was established by the Financial Services and Markets Act 2000 to replace six former schemes operating in various sectors of the financial services industry. The former schemes were merged on 1 December 2001 and, since that date, all complaints under the compulsory jurisdiction have been dealt with by FOS in accordance with the rules in the FSA Handbook (Complaints Sourcebook) ("DISP").

3. The position, as regards partially completed complaints under the former schemes (so called "relevant existing complaints") and complaints made after the commencement of FOS but about acts or omissions which

occurred before commencement (so called "relevant new complaints"), is dealt with under the Financial Services and Markets Act 2000 (Transitional Provisions) (Ombudsman Scheme and Complaints Scheme) Order 2001. Essentially, these complaints can be dealt with under the FOS scheme but:

a. as regards relevant existing complaints, the FOS must determine the complaint "(so far as practicable) by reference to such criteria as would have applied to the determination of the complaint by the former ombudsman under the former scheme"[1];
b. as regards relevant new complaints, in determining what is fair and reasonable in all the circumstances of the case and what amount (if any) constitutes fair compensation, the FOS "is to take into account what determination the former ombudsman might have been expected to reach, and what amount (if any) might have been expected to be awarded by way of compensation"[2].

These provisions are reflected in the various DISP modules.

4. The relevant former ombudsman scheme in the case of the Equitable complainants is the Personal Investment Authority scheme operated by the PIA Ombudsman Bureau Ltd. This scheme required the ombudsman "except to the extent that they are inconsistent with the express provisions hereof, [to] observe any applicable enactment, rule of law or relevant judicial authority".

5. So in the case of relevant existing complaints decided in accordance with the PIA criteria, the overall effect is that FOS must observe any applicable statute or case law. In the case of relevant new complaints the FOS must take account of any applicable statute or case law.

6. The procedure adopted by FOS is as follows. When received, a complaint is reviewed initially in order to establish that it falls within FOS's

[1] Article 6 of the Order
[2] Article 7 of the Order.

jurisdiction. Assuming that it does, it is then considered to see if mediation would be appropriate to achieve an early disposal of the dispute. If not, or if mediation fails, the case is passed to a caseworker for investigation. The caseworker corresponds with either or both of the parties as necessary and, if the case is still not resolved, may prepare an "provisional assessment" which is sent to the parties for their comments. If either party indicates disagreement, the matter proceeds for determination by an Ombudsman. Subject to what is set out above as regards relevant existing and new complaints:

> "(1) The Ombudsman will determine a complaint by reference to what is, in his opinion, fair and reasonable, in all the circumstances of the case.
> (2) In considering what is fair and reasonable in all the circumstances of the case, the Ombudsman will take into account the relevant law, regulations, regulators' rules and guidance and standards, relevant codes of practice, and, where appropriate, what he considers to have been good industry practice at the relevant time."[3]

The maximum monetary award that FOS can make is £100,000[4]. Additionally, FOS can specify that reasonable interest is to be paid[5].

The Equitable Complaints

7. FOS has received a significant number of complaints relating to the selling activities of Equitable. As at 23 May 2003, FOS had some 2,725 complaints remaining outstanding.

8. The background to these complaints is by now notorious. Between 1957 and 1988 Equitable granted some "with profits" policy-holders the option of taking an annuity at maturity at a guaranteed rate ("GARs"). GAR rates were increased in 1975. At the time they were granted, GAR rates were substantially below current market rates ("CARs") and this remained so for most of the period up to 1988. However, from about mid-1994 CARs fell below GARs for post-1975 policies. Equitable thought it could even

[3] DISP 3 para 3.8.1
[4] DISP 3 para. 3.9.5
[5] DISP 3.9.7 and 3.9.8

out the position between GAR holders and non-GAR holders by imposing a differential bonus scheme which more or less cancelled out the benefit of having a GAR.

9. This differential bonus scheme led to complaints. Equitable promoted a test case, *Equitable Life Assurance Society v. Hyman*, to establish whether the scheme was correct. At first instance, on 9 September 1999, Sir Richard Scott V.-C. upheld Equitable's arguments, but the Court of Appeal (in January 2000) and the House of Lords[6] (in July 2000) held that Equitable could not exercise their discretion under Article 65, so as to award differential bonuses designed to eliminate the substantial value of the GARs. The practical consequence of this decision was that the cost of funding the GARs has fallen on the non-GAR policy holders. The decision of the House of Lords and its practical consequences have proved to be highly controversial; many non-GAR holders bitterly resent the fact that they effectively have to bear the cost of providing GAR benefits.

10. Following the House of Lords decision, the Board of Equitable resolved to put Equitable up for sale. No buyer could be found for Equitable as a whole, and on 8 December 2000, Equitable closed for new business. In November 2001, it petitioned the Court to sanction a scheme of arrangement under section 425 of the Companies Act 1985. At a series of meetings, the proposed scheme was overwhelmingly approved and on 8 February 2002 Lloyd J. approved the scheme.

11. The result is that all existing policy holders have settled their disputes with Equitable under the terms of the scheme approved by the Court. But the scheme does not bind those policy holders who surrendered their policies and transferred their investments out of Equitable's "with profits" fund prior to 8 February 2002, as many did. Those policy holders can still maintain claims against Equitable. The complaints are typically either that the investors were not told about the extra potential costs to non-GAR

[6] [2002] 1 AC 408

policyholders of funding GARs when they bought their non-GAR policies, or that Equitable gave investors incorrect assurances about the potential costs of funding GARs. Many of the complaints involve so called late joiners, who joined Equitable after September 1998

The lead cases

12. In order to facilitate the efficient handling of complaints FOS divided the complaints into a number of categories and identified in each of these categories one or more lead cases. The lead claimants were informed that their cases had been so designated, and the other claimants were told that the completion of their cases would await the decision in the lead cases.

13. The five test cases were all relevant existing complaints which had to be dealt with under the transitional provisions, as explained above. In late 2002, FOS wrote to Equitable indicating its provisional assessment as to liability in these cases. Having considered Equitable's comments, FOS has issued adjudications finding that liability lies with Equitable in each case, but leaving open the question as to the appropriate remedy to be awarded to the claimant. Equitable have raised a numbers of points in response to these adjudications and the Ombudsman will shortly reach a decision. The following comments are subject to the outcome of that process.

14. In four cases the FOS's finding is that the claimants were induced by misrepresentations to purchase the investment, pension plan or managed pension. The cases all involve investors who made their investments at a time when the GAR problems facing Equitable were widely reported in the media. In each case (in broad terms), the complainant asked what the consequence would be if Equitable was forced to honour its obligations with regard to GARs. The answer given was along the lines that Equitable's finances would not be over-stretched and that sufficient reserves had been set aside. The answer given by salesmen was probably founded on briefing notes issued to branch managers. In the adjudications, FOS states that the statements made were clear statements of fact properly

characterised as misrepresentations. FOS further concludes that Equitable has failed to show that it had reasonable grounds to believe that the statements made were true.

15. In the fifth case the conclusion is that Equitable had a duty to provide the complainant with full and proper advice and that Equitable failed to discharge that duty with reasonable care. Equitable gave advice to her and explained a number of "benefits of placing my pension with Equitable", but failed to explain the risk to her as a non-GAR policy holder of the litigation going through the Courts and particularly the potential costs of losing the litigation.

The issues on remedy and compensation

16. FOS has not reached or formulated a view on the quantum or method of compensation which would be appropriate in the five lead cases. FOS has been provided with several lengthy opinions. Many of these opinions cover much wider issues but they all include advice on the appropriate remedies to be awarded. The opinions provided included the following:

    a. Joint opinions by Nicholas Warren QC and Thomas Lowe dated 10 May 2001 and 12 September 2001 prepared on the instructions of Equitable;
    b. A joint opinion of Gabriel Moss QC, David Richards QC, Martin Moore and Barry Isaacs dated 19 September 2001 also prepared on the instructions of Equitable;
    c. A joint opinion of Ian Glick QC and Richard Snowden dated 19 September 2001, prepared for the Financial Services Authority;
    d. A joint opinion of Christopher Carr QC and Gabriel Moss QC dated 19 September 2002 prepared on the instructions of Equitable;
    e. An advice and commentary by Clarke Willmott & Clarke acting for some 40 investors.

    I have considered all these opinions and advices carefully. I have not referred to them extensively in this opinion, because it would make an already lengthy opinion excessively long.

17. FOS does not subscribe to any of the views expressed in these opinions and wishes to obtain its own independent counsel's opinion on the appropriate form and level of remedy in the five lead cases. In those circumstances I have been asked to advise FOS on this issue and generally on the issues arising with reference to the principles of remoteness, causation and the appropriate method and date of valuation and heads of loss.

ADVICE

Misrepresentation Claims

18. The potential remedies for misrepresentation are

    a. Rescission, by which the contract is effectively undone and the claimant is refunded the original price/premium/consideration in full, typically with interest in addition.

    b. Damages in lieu of rescission under section 2(2) of the Misrepresentation Act 1967 where the Court concludes that, although the claimant would be entitled to rescission, nevertheless the Court should declare the contract subsisting and award damages in lieu of rescission, because it is of the opinion that it would be equitable to do so having regard to the nature of the misrepresentation and the loss that would be caused by upholding the contract, and by rescission.

    c. Damages under section 2(1) of the 1967 Act which provides:

> "Where a person has entered into a contract after a misrepresentation has been made to him by another party thereto and as a result thereof he has suffered loss, then, if the person making the misrepresentation would be liable to damages in respect thereof had the misrepresentation been made fraudulently, that person shall be so liable notwithstanding that the misrepresentation was not made fraudulently, unless he proves that he had reasonable ground to believe and did believe up to the time the contract was made that the facts represented were true."

Rescission

19. Although many claimants have not formally claimed rescission, some have. In any event, FOS will want to adopt a pro-active role, and consider

in all cases whether this is the most appropriate form of relief, given that it is the most favourable for the claimants – they get their money back plus interest, against the background of large market falls affecting all stock-market related investments. However, there might well be tax consequences for the claimants if rescission is granted, given that they will almost certainly have received tax credits for the amount of their original pension contributions.

20. Rescission is a discretionary remedy. Even where the misrepresentation was fraudulent, no claimant has an absolute right to rescind. However, it may well be a material factor in the decision whether the misrepresentation was fraudulent. The Court will be less ready to "pull a transaction to pieces where the defendant is innocent, whereas in the case of fraud the court will exercise its jurisdiction to the full in order, if possible, to prevent the defendant from enjoying the benefit of his fraud at the expense of the innocent plaintiff" [7] – that approach is scarcely surprising. As I understand FOS's findings they do not involve any finding of fraud on the part of Equitable[8].

21. The purpose of rescission is to put the parties back where they were before the contract was made. As was said by Crompton J in *Clarke v. Dickson* (1858) E.B.&E. 148, 154 when a party "exercises his option to rescind the contract, he must be in a state to rescind; that is he must be in such a situation as to be able to put the parties into their original state before the contract". It is sometimes said that the parties must be in a position to make "*restitutio in integrum*".

22. However, the law is not so inflexible as to require precise as opposed to substantial restitution. The Court looks to "do what is practically just, though it cannot restore the parties precisely to the state they were in

[7] Per Lord Wright in *Spence v. Crawford* (HL) 1939 3 All ER 271, 288. See also Lord Steyn in *Smith New Court* (*infra*) at pp.279-280.

[8] It is apparent that some individuals are alleging fraud on the part of Equitable and its senior management. It need hardly be said that these are most serious allegations of actual dishonesty which would have to be proved to a high standard close to, if not quite identical, to the criminal standard.

before the contract"[9]. The fact that the value of the property to be restored has fallen in value through no fault of the claimant is not a bar to rescission[10], although it may be a relevant factor in the exercise of the discretion.

23. The test claimants have all left Equitable by surrendering their policies, and they have transferred their investments to other institutions[11]. The contracts made in consequence of the misrepresentations are no longer in existence. In those circumstances, it seems to me to be utterly artificial to seek to rescind the contract – the contracts are no longer in existence and cannot as a matter of common sense be rescinded. Restitution is no longer possible; the claimants have nothing to give back because they have already realised it. Section 1 of the 1967 Act preserves the right to rescind after the contract has been performed, but this seems very different. The contract has not been performed; it has already been terminated.

24. The position is analogous to one where the buyer of shares has sold them. In *Smith New Court Securities Ltd v. Scrimgeour Vickers* [1994] 1 WLR 1271, 1281, the Court of Appeal considered that the sale of the shares meant that the right to rescission was lost. In the House of Lords, Lord Browne-Wilkinson [1997] AC 254 at 262E queried whether this was right with quoted shares which can be purchased on the market. Both these comments were *obiter* – the Plaintiffs did not seek rescission. I rather prefer the Court of Appeal's approach, but I do not think it ultimately matters. This is not a case involving quoted shares, but (in most cases) an investment in a pension fund where the Claimant has exercised rights under the contract to terminate it and to transfer the funds to another institution.

25. Even if there was a contract which was still capable of rescission, it would be open to FOS to decide that rescission was an inappropriate remedy.

[9] Per Lord Blackburn in *Erlanger v. New Sombrero Phosphate Co.* [1878] 3 App Cas 1218, 1278-79.
[10] *Armstrong v. Jackson* [1917] 2 KB 822
[11] In one case, the complainant used his managed pension fund to buy an annuity.

Rescission is a discretionary remedy; it is also a potentially drastic one. Section 2(2) requires the Court considering ordering rescission to have regard to:

a. The nature of the misrepresentation and its importance in relation to the transaction. Here FOS may conclude that the misrepresentations were important and serious;
b. The loss that would be caused by the misrepresentation if the contract was upheld. Of course, the section presumes that if the contract is upheld, the loss will be compensated by an award of damages under section 2(2);
c. The loss that rescission would cause to the defendant.

Ultimately the discretion is a broad one, to do what is equitable[12].

26. Here I consider that the critical feature is the effect of delay. A distinction must be drawn between cases:

a. Where the claimant has delayed after becoming aware of his/her right to rescind[13]. In those cases, the claimant may be taken to have affirmed the contract and rescission cannot be ordered. In cases involving investments, a very short delay may be held to be fatal to a claim for rescission[14]:
b. Where there has been delay which does not amount to affirmation, because for instance the claimant is unaware of the true facts. In those cases there is no bar to rescission but, particularly in non-fraud cases, delay is an important factor for the Court to consider when deciding whether to grant the discretionary remedy of rescission. If market movements over the intervening period would result in the claimant gaining a substantial windfall as a result of rescission, which would be at the expense of the defendant, that is a strong argument against ordering rescission.

[12] See Hoffman LJ's judgment in *Wm. Sindall Plc v. Cambridgeshire CC* [1994] 1 WLR 1016, 1036-7.
[13] Affirmation requires knowledge not only of the true facts but of the right to rescind: *Peyman v. Lanjani* [1985] Ch 457.
[14] See the cases cited in Chitty §6-123 fn.91

27. Therefore, FOS may well conclude that, even if rescission was an available remedy, as a matter of discretion it would be inappropriate to order it in the Equitable cases.

Damages

28. There is considerable divergence on the authorities as to whether it is open to a Court to exercise the power to award damages in lieu of rescission under section 2(2) of the 1967 Act, where rescission is no longer possible, because (for instance) full restitution is not possible[15]. However this divergence only matters where a claimant cannot recover damages under section 2(1) because the defendant can show that he had reasonable ground to believe and did believe up to the time the contract was made that the facts represented were true. As I understand FOS's findings, Equitable have failed to show that they had reasonable grounds to believe that the facts represented were true. On that basis, the claimants are entitled to recover damages under section 2(1) and it is of no significance whether they could also recover damages under section 2(2)[16].

29. Damages under section 2(1) are to compensate for a tortious misrepresentation[17] and, in assessing damages in tort, the starting point must be as stated by Lord Blackburn in *Livingstone v. Rawyards Coal Co.* (1880) 5 App. Cas. 25, 29:

> I do not think there is any difference of opinion as to its being a general rule that, where any injury is to be compensated by damages, in settling the sum of money to be given for reparation of damages you should as nearly as possible get at that sum of money which will put the party who has been injured, or who has suffered, in the same position as he would have been in if he had not sustained the wrong for which he is now getting his compensation or reparation.

---

[15] Compare *Thomas Witter Ltd v. TBP Industries Ltd* [1996] 2 All ER 573 with *Floods of Queensferry Ltd v. Shand Construction* [2000] Building LR 81 and *Zanzibar v. British Aerospace (Lancaster House) Ltd* The Times March 28, 2000.

[16] Section 2(3) of the Act recognises that damages may be awarded under both sub-sections. It prevents a double recovery.

[17] *Chesneau v. Interhome Ltd* (CA) (1983) N.L.J. 341; *Royscot Trust Limited v. Rogerson* [1991] 2 QB 297

30. The second starting point must surely be this: but for the misrepresentation none of the claimants would have entered into the contract with Equitable – that is clear from FOS's findings. What the claimants would have done with their money may be less certain. FOS may make findings on that. I expect in many cases, FOS will conclude that the claimant would probably have taken out a "with profits" pension policy with another financial institution, but, save in some special cases, it may be quite unrealistic to reach a conclusion as to which institution would have been chosen. In other cases, FOS may conclude that the claimant would have placed the sums into a deposit style account.

31. If FOS's conclusion is that the claimant would have taken out another with profits pension policy, it would follow that the claimant would have been exposed to market movements of the kind that have been seen in recent years, but would not have been exposed to any particular extra movements that have been sustained by investors in Equitable.

Measure of damages under section 2(1) of the 1967 Act

32. Section 2(1) of the 1967 Act provides that "where a person has entered into a contract after a misrepresentation has been made to him by another party thereto and as a result thereof he has suffered loss, then, if the person making the misrepresentation would be liable to damages in respect thereof had the misrepresentation been made fraudulently, that person shall be so liable notwithstanding that the misrepresentation was not made fraudulently."

33. In *Royscot Trust Limited v. Rogerson* [1991] 2 QB 297, the Court of Appeal held, following a number of first instance judgments to the same effect, that the measure of damages under section 2(1) is the same measure as for fraud. The point was fully argued before the Court.

Balcombe[18] and Ralph Gibson[19] LJJ both thought this was the plain meaning of the words used in the statute.

34. The decision of the Court of Appeal has been heavily criticised by Richard Hooley in an article in the Law Quarterly Review[20]. He argues that section 2(1) should be read as meaning "that person shall be liable in damages notwithstanding that at common law damages were only available for misrepresentations proved to be fraudulent". In *Smith New Court* (*supra*) at p. 283, Lord Steyn queried whether "the rather loose wording of the statute compels the court to treat a person who was morally innocent as if he were guilty of fraud when it comes to the measure of damages". However he expressed no concluded view[21].

35. Although the case has been criticised, it is binding authority in all courts short of the House of Lords and it has been followed in many cases: e.g. most recently *Avon Insurance Plc v. Swire Fraser Ltd* [2000] Lloyd's Rep IR 535. It is not easy to predict what the House of Lords would do should a case challenging the correctness of *Royscot* reach the House; inevitably when the issue concerns a matter of statutory construction, there is room for a considerable degree of speculation. Moreover, the particular constitution of the House of Lords panel hearing an appeal can make a difference. What can be said is:

a. The natural meaning of the words of the statute accords with the Court of Appeal's interpretation. It has to be said that Mr Hooley's construction stretches the language considerably;
b. It can be harsh to apply the fraud measure to someone guilty of negligence;
c. The House of Lords in *Smith New Court* plainly had doubts about the correctness of the decision.

[18] At p.306H
[19] At p.309A
[20] (1991) 107 LQR 547
[21] Nor did Lord Browne-Wilkinson: p.267F.

36. My view is that the House of Lords, if given the opportunity, would probably overrule *Royscot*, but there is absolutely no certainty that this would be so[22]. Until it is overruled, *Royscot* holds sway[23] and must be treated as being the law. It follows in my view that FOS is bound to apply the fraud measure of damages to claims under section 2(1) of the 1967 Act. However, as I explain at the end of this opinion, I do not consider that it makes any real difference on the facts of these cases.

Damages for fraud

37. Where the fraud measure of damages applies, losses may be recoverable even though they were not of a foreseeable kind and compensation can include consequential losses including compensation for falls in value of the property acquired which were unrelated to the fraudulent statement: *Doyle v. Olby (Ironmongers) Ltd* [1969] 2 QB 158; *Smith New Court* (*supra*). The basic rule was explained by Lord Denning MR in *Doyle* (at p.167):

> "In contract, the damages are limited to what may reasonably be supposed to have been in the contemplation of the parties. In fraud, they are not so limited. The defendant is bound to make reparation for all the actual damages directly flowing from the fraudulent inducement. The person who has been defrauded is entitled to say:
>
> > "I would not have entered into this bargain at all but for your representation. Owing to your fraud, I have not only lost all the money I paid you, but, what is more, I have been put to a large amount of extra expense as well and suffered this or that extra damages."
>
> All such damages can be recovered: and it does not lie in the mouth of the fraudulent person to say that they could not reasonably have been foreseen."

38. The position was summarised by Lord Steyn in *Smith New Court* as follows (at pp.281-282):

> "The logic of the decision in *Doyle v. Olby (Ironmongers) Ltd.* justifies the following propositions. (1) The plaintiff in an action for deceit is not entitled to be compensated in accordance with the

[22] I share the surprise recorded in the Warren/Lowe 2nd opinion at §154 at the degree of certainty expressed by some that *Royscot* will be reversed.
[23] To use the words of Rix LJ in *HIH Casualty and General Insurance Ltd and others v Chase Manhattan Bank and others* [2000] 2 Lloyd's Rep 483, 513 at §162.

contractual measure of damage, i.e. the benefit of the bargain measure. He is not entitled to be protected in respect of his positive interest in the bargain. (2) The plaintiff in an action for deceit is, however, entitled to be compensated in respect of his negative interest. The aim is to put the plaintiff into the position he would have been in if no false representation had been made. (3) The practical difference between the two measures was lucidly explained in a contemporary case note on *Doyle v. Olby (Ironmongers) Ltd.:*
G. H. Treitel, "Damages for Deceit" (1969) 32 M.L.R. 556, 558-559.
The author said:

> "If the plaintiff's bargain would have been a bad one, even on the assumption that the representation was true, he will do best under the tortious measure. If, on the assumption that the representation was true, his bargain would have been a good one, he will do best under the first contractual measure (under which he may recover something even if the actual value of what he has recovered is greater than the price)."

… (5) The dicta in all three judgments, as well as the actual calculation of damages in *Doyle v. Olby (Ironmongers) Ltd.,* make clear that the victim of the fraud is entitled to compensation for all the actual loss directly flowing from the transaction induced by the wrongdoer. That includes heads of consequential loss. (6) Significantly in the present context the rule in the previous paragraph is not tied to any process of valuation at the date of the transaction. It is squarely based on the overriding compensatory principle, widened in view of the fraud to cover all direct consequences. The legal measure is to compare the position of the plaintiff as it was before the fraudulent statement was made to him with his position as it became as a result of his reliance on the fraudulent statement."

The bad bargain and market losses

39. It is clear from *Doyle* and *Smith New Court* that a claimant who makes a bargain which, quite apart from the misrepresentation, turns out to be a bad one does well out of the tortious measure of damages. He suffers no reduction in the damages recoverable on account of the fact that the bargain was a bad one. It follows in my opinion that, insofar as Equitable under-performed the market, the claimants' damages will not be reduced on that account.

40. The more difficult question, as I see it, is whether the loss recoverable would exclude general market losses. If the assessment of loss ignores the reality (assuming that is what the FOS finds) that the claimant would in all probability have invested the money in another similar fund and

sustained general market losses, this will give the claimant a windfall. He will not just avoid the loss arising from the fact that Equitable underperformed the market (if it did), which could not be fairly characterised as a windfall, but the general market decline, which can be so characterised.

41. Even as against a fraudster, it is necessary to keep the liability within practical and sensible limits[24] – this is achieved through the rules of causation, remoteness and mitigation. The point was made by Lord Hoffman in *South Australia Asset Management Corporation v. York Montague Ltd* [1997] AC 191, at p.216C:

> My second observation is that even if the maker of the fraudulent misrepresentation is liable for all the consequences of the plaintiff having entered into the transaction, the identification of those consequences may involve difficult questions of causation. The defendant is clearly not liable for losses which the plaintiff would have suffered even if he had not entered into the transaction or for losses attributable to causes which negative the causal effect of the misrepresentation.

42. Here I consider that, in common sense terms[25] it cannot be said that the market loss which the claimant would have suffered anyway was caused by the misrepresentation or by the transaction entered into as a result of misrepresentation.

43. In cases where damages are not being assessed as at the date of the misrepresentation (as to which see below) it may be particularly inappropriate to ignore what is happening in the market[26]. In *Smith New Court*, Lord Browne-Wilkinson was careful to distinguish the "case of the difficult kind" where depreciation in the asset acquired is due to factors affecting the market after the date of the fraud[27]. He acknowledged that one of the difficulties of either valuing the asset at a

[24] Lord Steyn in *Smith New Court* at p.284.
[25] Which is an important consideration in issues of causation: Lord Steyn in *Smith New Court* at p.285.
[26] A point made by Simon Browne LJ in *Clef Aquitaine SARL v. Laporte Materials (Barrow) Limited* [2001] QB 488 at p.500F
[27] At p.267H

later date or treating the actual receipt on realisation as being the value obtained was that difficult questions of causation were bound to arise.

44. At the end of the day the overriding consideration – or the overriding compensatory rule as Lord Browne-Wilkinson described it in *Smith New Court* – is that the Court is seeking to place the claimant in the same position he would have been had the tort been not committed. In my opinion, to ignore market movements would be to put the claimant in a significantly better position than he would have been but for the misrepresentation.

45. For these reasons, I conclude that if FOS is satisfied that the claimant would have invested in an alternative but similar "with profits" investment, FOS should have regard to the market loss that the claimant would have sustained anyway.

46. How is that to be done in cases where the claimant cannot say what alternative investment would have been made? In my opinion, where the conclusion is that the claimant would have invested in an alternative equity based investment, the right comparison is with what an average "with profits" comparator fund, based on a range of other "with profits" funds[28], would have achieved. Warren and Lowe in their second opinion at §114 seem to suggest that a wider selection might be made including unit trusts. I disagree. The claimants decided to invest in a "with profits" fund. I think it wholly inappropriate to make the comparison with other different types of investment. First, it fails to compare like with like. Second to include other types of investments will confuse the allowance for general market losses. The Moss/Richards/Moore/Isaacs opinion suggests that the comparison "will be exceptionally difficult"[29]. I do not see why, if a degree of common sense is applied. I understand that it is quite possible to work out the

[28] Which I will call an "average" fund hereafter.
[29] §24.

average performance of "with profits" funds. In my view that average should be used.

47. Where, however, FOS concludes that the claimant (but for the misrepresentation) would not have made a equity based investment, but kept the money in a deposit style account, in my opinion it would be wrong to have regard to market loss, to which, the claimant can fairly contend, he/she would not have been exposed.

The date of assessment

48. The general rule is that damages are assessed as at the date the wrong was committed – in these cases, that would be the date when the claimant relied on the misrepresentation by taking out the policy. But, as *Smith New Court*[30] makes clear, that is not an absolute rule, and if it would mean that the claimant was prevented from recovering full compensation for the wrong done, damages can be assessed at another date. In cases of fraudulent misrepresentation, there are likely to be many cases where the general rule has to be departed from in order to give adequate compensation. Lord Browne-Wilkinson stated (at p.267):

> "(5) although the circumstances in which the general rule should not apply cannot be comprehensively stated, it will normally not apply where either (a) the misrepresentation has continued to operate after the date of the acquisition of the asset so as to induce the plaintiff to retain the asset or (b) the circumstances of the case are such that the plaintiff is, by reason of the fraud, locked into the property."

49. In these cases, it would seem unjust to assess damages as at the date the investment was made. At that date the claimants did not appreciate that there had been a misrepresentation made and the misrepresentation continued to operate. It is difficult to see why the position should be different where the misrepresentation is negligent but not fraudulent.

50. At what date should the assessment be made? In *Smith New Court* Lord Browne-Wilkinson said:

[30] At pp. 265-67 and 283-4.

> "So long as he is not aware of the fraud, no question of a duty to mitigate can arise. But once the fraud has been discovered, if the plaintiff is not locked into the asset and the fraud has ceased to operate on his mind, a failure to take reasonable steps to sell the property may constitute a failure to mitigate his loss requiring him to bring the value of the property into account as at the date when he discovered the fraud or shortly thereafter."

So the date of assessment is coupled with the duty to take reasonable steps to mitigate the loss. This suggests that the actual date of disposal by the claimant is the starting point, but a failure to take reasonable steps to transfer the fund to another institution once the misrepresentation has been discovered will normally mean that loss should be assessed as at the date the misrepresentation was discovered, or shortly thereafter. What a claimant cannot do, once he knows of the misrepresentation is to wait and see how the market moves before he decides to transfer.

51. It will be important therefore for FOS to form a view as to the date when the claimants knew that a misrepresentation had been made[31]. Claimants may have been influenced by information coming out of Equitable and by the imposition of the increased financial adjuster. Theoretically the date could vary from claimant to claimant, but it is likely that Equitable's reports to the claimants and well publicised information will mean that there will have been a date when all (or at least the vast majority of) claimants must have realised that the representations that had been made were in fact misrepresentations. [Transferring a pension policy is not like selling a quoted share.] The claimants were entitled to take a reasonable time to obtain advice from their financial advisers and then to consider their position, before transferring to another institution. If they delayed beyond that date, it can be said that they have failed to mitigate their loss, and damages

[31] I do not have the information on which to form a view – I draw attention to the Carr/Moss opinion at §29 which suggests that by the end of 2000 the position was sufficiently well-known to claimants.

should be assessed at the earlier date. This will be a decision for FOS to make on the facts of each case.

An alternative approach for pension policies

52. Conventionally the latest date for assessing damages would be the date of sale of the investment. What happened thereafter would not have been caused by the misrepresentation[32]. But a pension policy is unlike a normal investment. Not only is it long term because it will not mature until the investor reaches retirement age, but to a significant degree an investor is locked in to the investment in that he cannot realise it for cash by means of surrender or assignment/transfer. This can be compared with a life assurance policy which can be realised before maturity either by surrender or by assignment, as frequently occurs.

53. The reason an investor is locked in is closely connected to the fiscal advantages that are connected with an investment in a pension policy. Subject to annual limits[33], the investor can deduct the investment from his taxable income. So the investment is tax efficient. The *quid pro quo* with the Inland Revenue is that the investment once made is locked in. Not only can it not be realised before retirement, even when it is realised only a portion can be taken in cash. The remainder must be used to provide a retirement income through purchase of an annuity, although the purchase of the annuity can be deferred until the investor reaches 75.

54. As already discussed, FOS may well conclude that the claimants in these cases were not mis-sold the product. The mis-selling was of the provider, not the product. Had misrepresentations not been made, the conclusion may well be that, in all probability, the claimant would have invested in another "with profits" pension policy issued by another reputable provider. If that is so, the conventional approach is very advantageous to the claimant because it awards a capital sum reflecting a loss calculated as at a

[32] See particularly *Primavera v. Allied Dunbar Assurance plc* (CA) [2002] EWCA Civ 1327; [2002] All ER (D) 54 §§27-28.
[33] Under current legislation these are complex and vary considerably depending on whether the investor is employed or self-employed, the age of the investor and whether he has existing qualifying plans.

particular date plus interest thereafter. In reality, had the claimant invested in another "with profits" fund, far from preserving a capital sum and earning interest, the claimant would have sustained a substantial loss of capital value and earned no interest. This can be illustrated by assuming that damages were assessed as at (say) January 2001. Between then and now the stock market has fallen substantially and these losses have been reflected in "with profits" policy values across the board. Looking across a cross section of other reputable funds, I understand that losses of the order of 30% have been sustained.

55. Because of these very substantial market movements, the advantage a claimant would obtain from an award of damages assessed in January 2001 (plus interest thereafter) is very considerable. It might be said that that is not necessarily so; a pension policy holder can still switch investment and that switch might have been into a very low risk cash fund. But on the assumption that the claimant would have been in a "with profits" fund, that could not be done within the fund. In a "with profits" fund the investor shares in the fortunes of the entire fund; he cannot choose to be exposed to only certain risks, or ask for his portion of the fund to be placed in a particular type of investment. In many unit trust funds, it is possible to switch between types of investment but in order for a "with profits" investor to take advantage of this, he will have to transfer to a unit trust fund. This will involve incurring a financial adjuster, popularly known as an "exit charge". It is distinctly doubtful whether many investors would have adopted this course, had they not been in Equitable and suffered a breakdown in trust.

56. The impression that a claimant was really being over-compensated would always be a matter of concern. It is a matter of acute concern for any Court or tribunal where the reality is that Equitable has no reserves from which to meet the liability, and the cost of the compensation will have to be borne by all the investors who remain with Equitable, particularly by those who do not have even the consolation of a GAR. So for every pound of "generous" compensation awarded to a claimant, other already

disadvantaged members of Equitable suffer. That cannot be a reason for refusing to award the appropriate compensation. It is a reason for being careful not to be over-generous; something that might not assume quite the same degree of concern if compensation was being borne by the true wrongdoer, or out of reserves.

57. It is with these important considerations in mind that the question arises whether it would not be right to assess compensation as at the date of the award (as nearly as possible – inevitably there has to be an element of approximation). The advantages of doing so are that this approach much more nearly corresponds with the actual position that the claimant would now be in had the misrepresentation not been made, and an alternative "with profits" pension policy had been taken out. The claimant would not have had the benefit of being insulated from market falls;

58. Can this approach be justified in law? Ordinarily, damages would be assessed as at the date of the transaction and, at the latest, as at the date the claimant sold the investment. That is because what happened thereafter was not caused by the tortious conduct. If the claimant makes a good investment with the proceeds, that does not reduce the loss[34]; conversely if the investment is a bad one, the claimant cannot recover an increased sum from the defendant. But, as *Smith New Court* establishes, rules for the assessment of damages should not be applied mechanistically, but flexibly in order to reflect the overriding compensatory rule – see Lord Browne-Wilkinson at pp.265-266:

> Turning for a moment away from damages for deceit, the general rule in other areas of the law has been that damages are to be assessed as at the date the wrong was committed. But recent decisions have emphasised that this is only a general rule: where it is necessary in order adequately to compensate the plaintiff for the damage suffered by reason of the defendant's wrong a different date of assessment can be selected. Thus in the law of contract, the date of breach rule "is not an absolute rule: if to follow it would give rise to injustice, the court has power to fix such other date as may be appropriate in the circumstances:" *per*

[34] Cf *Jamal v. Moolla Dawood & Sons* [1916] AC 175, 179-180; *Primavera v. Allied Dunbar Assurance plc* (CA) [2002] EWCA Civ 1327; [2002] All ER (D) 54.

> Lord Wilberforce in *Johnson v. Agnew* [1980] A.C. 367, 401A. Similar flexibility applies in assessing damages for conversion (*IBL Ltd. v. Coussens* [1991] 2 All E.R. 133) or for negligence (*Dodd Properties (Kent) Ltd. v. Canterbury City Council* [1980] 1 W.L.R.433). As Bingham L.J. said in *County Personnel (Employment Agency) Ltd. v. Alan R. Pulver & Co.,* [1987] 1 W.L.R. 916, 925-926:
>
> > "While the general rule undoubtedly is that damages for tort or breach of contract are assessed at the date of the breach ... this rule also should not be mechanistically applied in circumstances where assessment at another date may more accurately reflect the overriding compensatory rule." [35]

59. So assuming, as I have already advised, that the date of transaction is not an appropriate date on which to calculate damages, the search is to find an appropriate date in all the circumstances on which to assess damages. Once it is accepted that the transaction date is not the appropriate date for assessment, it does not necessarily follow that the search for the appropriate date ceases once the pension fund is transferred. In my opinion, it would be open to the Court to assess damages in these cases as at the date of the award if it concluded that it would most accurately and fairly compensate the claimants for the loss truly suffered by them as a result of the misrepresentation[36]. The following would be powerful arguments for this result:

    a. An investment in a "with profits" pension fund is not like an ordinary realisable investment for the reasons set out above;
    b. To treat the claimants as if they would have been insulated from market movements during the period after they transferred out of Equitable does not accord with the reality of what would have happened;
    c. Because of the lack of transparency in "with profits" fund valuations, a comparison as at the date of transfer, when other funds had yet fully to reflect changes in the value of their investments, may exaggerate the loss really sustained by the claimants.

[35] See also Lord Steyn at pp.283-284
[36] *Ruxley Electronics and Construction Ltd v. Forsyth* [1996] AC 344 per Lord Mustill at 360G, quoted by Lord Steyn in *Smith New Court* at 284E.

Although this approach may be unconventional in the case of investments, it is not at all unusual in other fields, for instance personal injuries[37].

60. If this is the approach adopted by FOS, there remains a tricky question of how the claimant's loss is calculated. One side of the equation is straightforward. FOS will calculate the value of the asset that the claimant would have had by reference to the performance of an average "with profits" fund, unless it is established that, but for the misrepresentation, the claimant would have invested in a particular fund, so that fund's performance can be taken as the comparator. I should add that, in my view, the fact that in, say 2001, a claimant decided to transfer his pension fund to a particular institution does not really assist much, if at all, in forming a view as to the investment that the claimant would originally have made, but for the misrepresentation – inevitably the decision in 2001 was made in different circumstances in the light of fund performance as at that date.

61. The ingredients for the other side of the equation are more difficult. Assuming FOS concludes the Claimant did not act unreasonably in mitigating his loss:

a. Are the transfer proceeds to be assessed taking account of the "exit charge" and other adjustments?
b. What investment is to be assumed thereafter?

The exit charge

62. Equitable's policies gave no guarantee to a "with profits" policyholder as to the transfer value that would be paid on surrender. The guidance notes stated that Equitable would pay such amount as it should in its absolute discretion determine. Each year, Equitable sent an annual

[37] As Lord Hoffman illustrated in his speech in *SAAMCO* [1997] AC 191, at p.220 G-H

statement to its policyholders containing details of premiums paid and bonuses and an illustration of benefits which may be available on retirement. The statement explained that the values of the benefits were those that would be payable on an event such as retirement. If the benefits were taken on transfer, there was no guarantee whatsoever.

63. In practice, on surrender Equitable paid the policy value less a financial adjuster which varied from time to time. The financial adjuster existed to cater for three different types of situation:

a. Because "with profits" policies offer "smoothed returns" there are occasions when the annual statement exaggerates the true value of the policy holder's share in the fund. Unless there is an adjustment, the leaver will be paid too much at the expense of those who remain;
b. Initial selling costs are recouped over the lifetime of a policy. Unless there is an adjustment for those who leave early, selling costs will be borne by those who remain;
c. There may be circumstances where transfers, unless subject to an adjustment, will threaten the solvency of Equitable or the investment freedom of the fund. An adjustment is required to protect the interests of those who remain.

64. Assuming this is how adjustments operated in practice, it is clear that to describe the financial adjuster as an "exit penalty", whilst it is fully understandable, is not actually accurate. In substance, the adjuster exists to ensure that the surrendering member takes out by way of transfer no more than his fair share.

65. The financial adjuster was set at 20% of the terminal bonus in July 2000 when the House of Lords gave its judgment. From 8 December 2000 Equitable altered the adjuster to a percentage of the total policy value, and the percentages deducted in periods prior to 15 April 2002 were as follows:

8 December 2000:	10%
16 March 2001:	15%
16 July 2001:	7.5%
12 September 2001:	10%

As I understand the position, other "with profit" funds have operated similar policies, although their adjustment rates will not mirror Equitable's.

66. The question arises whether in assessing damages the financial adjustment imposed by Equitable should be taken into account or ignored. Equitable have contended strongly that it should be ignored, although the second Warren/Lowe opinion expressed the view[38] that they were recoverable. The Moss/Richards/Moore/Isaacs opinion[39] expresses the opposite view.

67. I am of the clear opinion that in assessing damages, account must be taken of the financial adjuster. My reasoning is as follows:

a. As is made clear in *Smith New Court*, subject to issues of causation and mitigation, the sum realised on re-sale is a key component of the damages calculation in cases of misrepresentation.
b. The key question is what sum was actually received by the claimant. How that sum was calculated seems to be of no relevance whatever. Here the actual sum received was less the adjuster.
c. There might be cases where it could be said that the claimant acted unreasonably in selling rather than holding on, but they are likely to be quite exceptional. Of course, one factor for the claimant to consider, when deciding whether or not to transfer, was the incidence of the adjuster. I cannot see any basis on which the Equitable claimants could be said to have acted unreasonably in

[38] At §§220-221
[39] At §§34-36

deciding to surrender their policies and to transfer the funds, after application of the adjuster, to another institution. They had been persuaded to invest in Equitable on the basis of representations that the Society had adequate reserves to deal with the GAR problem, should it lose the litigation. On FOS's findings that was a serious misrepresentation. The result (to put it kindly) was a complete mess directly related to the failure to have proper reserves for the GAR liabilities. Claimants were surely entitled to say, as many do, that they had lost all faith in Equitable and also to decide to obtain certainty by crystallising the position, and stem any further loss. This was the advice being given by many financial advisers. I suspect that it has turned out to be the right advice. In short, I think it impossible to criticise those who decided to leave.

d. It is said that if the claimants had been members of a different with-profits fund, they would in all probability have had to bear a financial adjuster if they decided to transfer elsewhere. That may well be so, but there is no reason to think that had they joined another fund, they would have wanted to transfer.

68. However, FOS needs to have in mind the points I have made above about the date on which damages should be assessed. If FOS were to conclude that the claimant transferred at a later date than he should, acting in reasonable mitigation of his loss, so damages are assessed at an earlier date, it will be the adjuster in force at the date of assessment that is the relevant one[40].

Final bonus reductions

69. In July 2001, Equitable decided to reduce final bonuses by 16% for all with profits policies (apart from life assurance policies where the reduction was 14%). The decision was taken, according to Equitable's

[40] To give an example, say FOS concluded that in reasonable mitigation a claimant should have transferred by 31 January 2001 when the adjustment factor was 10%, but the claimant actually transferred in April 2001, when the factor was 15%, it will be the 10% figure that applies.

press release of 16 July 2001, to reflect the fall in stock-markets. Equitable's annual statements took account of projected final bonuses. The purpose of the final bonus is to ensure that the policyholder receives on maturity his fair share of the with profits fund. The result of stock-market falls was that the annual statements were overstating the real value of that "fair share". I understand that other "with profits" funds have been forced to make similar adjustments.

70. The result of the reduction in final bonuses was to reduce the amount available for transfer on surrender although this was to a degree mitigated by a reduction in the financial adjuster imposed.

71. How should these changes be reflected in the compensation awarded to a claimant? In my view, if FOS concludes that the date on which a claimant should in reasonable mitigation have surrendered occurred after 16 July 2001, then the sum received on transfer will reflect the reduction in final bonus and should be included in the damages calculation. If FOS concludes compensation should be assessed at a date prior to 16 July 2001, then the subsequent reduction in final bonuses is irrelevant.

Assumed investment of the proceeds

72. Should FOS take the performance of the fund actually chosen by the claimant for reinvestment of the proceeds, or should a notional average performance be taken? As an immediate reaction, the first approach might seem the more sensible. It looks to the loss actually sustained by the claimant. But further analysis suggests that there are considerable difficulties in adopting this solution. If the fund chosen by the investor has performed poorly, it would seem contrary to general principle that the claimant should be compensated by Equitable for a bad investment decision. It seems equally unsatisfactory that the investor who made a shrewd investment should suffer; moreover Equitable would have the best of both worlds – it would not be liable for poor investment decisions, but could claim the benefit of shrewd ones.

73. Overall, therefore, I think the better course is to take an average performance of "with profits" funds for the period between transfer and assessment. This will achieve the objective of putting the claimant as far as possible into the position he would now be in but for the misrepresentation, but ignore the results of the particular investment decision made by the claimant when he elected to transfer to a particular fund.

Conclusion on misrepresentation cases

74. If FOS decides to adopt the general approach I have outlined above because it concludes that this produces the fair and reasonable result, the figure to be awarded by way of damages in pension transfer cases would be reached by comparing:

    a. The value of the pension fund that the claimant now has based on the reinvestment of the proceeds from the Equitable policy into an averagely performing "with profits" fund; and
    b. The value of the alternative investment that the claimant would now have, assuming the investment had been into an averagely performing "with profits" fund. Where it is unclear what alternative investment the claimant would have made, but it is clear that an alternative investment would have been made, in my view the only sensible course is to look to what an average "with profits" fund would have achieved.

75. If the comparison shows that the claimant has sustained loss, that is the figure that should be awarded. If damages are being assessed as at the date of the award, it would be open to FOS to conclude that it would be inappropriate to award interest.

76. The approach which the Courts would adopt in cases where the claimant realised the value of his pension fund in Equitable and purchased an annuity must be different. For him, the value of the fund as at the date of the purchase of the annuity was critical. What happened to the

financial markets thereafter is irrelevant. In my opinion, his loss must be assessed (at the latest) as at the date of the purchase of the annuity, and it would be normal to award interest on that sum. An alternative remedy, which FOS can achieve (but which a Court cannot) would be to require Equitable to buy for the future an additional annuity from the chosen provider so that the claimant is placed in exactly the same position as he would have been in but for the misrepresentation. Compensation as such would only be payable (with interest) for the reduced cash lump sum and annuity received in the meantime.

Negligence cases

77. FOS's findings involving the fifth lead case are:

a. She took out a personal pension plan with Equitable in October 1999 – i.e. after the decision of the Vice-Chancellor in *Hyman* but before the Court of Appeal hearing;
b. Equitable had a duty to give full and proper advice to her;
c. In advising her, Equitable drew attention to a number of important benefits of placing her pension with Equitable, but they failed to draw attention to the risks posed to non-GAR policy holders by the litigation, which was a significant risk;
d. Equitable failed to take reasonable care in advising her;
e. Had she been properly advised and made aware of the salient facts, she would not have entered into her investment with Equitable.
f. She transferred her pension to another institution on about 31 August 2001 – the exact date is presently unclear.
g. Equitable is liable to compensate her for any loss.

78. So, in common with misrepresentation cases, FOS is dealing with a case where the claimant would not have taken out a pension plan with Equitable had she been properly advised. As with the misrepresentation cases, it seems likely that she would instead have taken out a policy with another institution. Had that been so, she would have been exposed to

market movements of the kind that have been seen in recent years, but would not have been exposed to any particular extra movements that have been sustained by investors in Equitable.

79. The difference between the negligence cases and the misrepresentation cases is that those whose claim lies in negligence only cannot rescind and cannot invoke section 2(1) of the 1967 Act. Therefore, there can be no question of the fraud measure of damages applying in these cases. What difference does that make to the result?

80. As a whole, it makes no difference. The key advantage to a claimant in a fraud case is that damages are not limited to those which were reasonably foreseeable. So in *Smith New Court*, the Claimant recovered his full loss despite the fact that most of it was caused by the existence of a quite separate fraud which was unknown to the parties. Here there is no suggestion of unforeseeable loss. Further in a fraud case, the court will be much readier to award damages for consequential loss, but as I understand the position, the claims that FOS is considering are not for consequential loss.

81. In a negligence case the same basic rules apply:

a. The Court is seeking as nearly as possible to place the claimant in the same position as she would have been in if she had not sustained the wrong for which she seeks compensation: thus the same "overriding compensatory rule" applies
b. The general rule is that damages are assessed as at the date of the wrong but this "is not an absolute rule: if to follow it would give rise to injustice, the court has power to fix such other date as may be appropriate in the circumstances"[41]. "This rule also should not be mechanistically applied in circumstances where assessment at another date may more accurately reflect the overriding

[41] Per Lord Wilberforce in *Johnson v. Agnew* [1980] AC 367, 401A

compensatory rule[42]". It may be that in fraud cases, the Court would be the more ready to depart from the general rule to do justice, but I doubt it makes any difference where the claimant is unaware of the wrong done to him until much later. I think it inevitable that the Court would decide not to assess damages as at the date the policy was taken out with Equitable and that it would assess them at a later date, the starting point being the date of disposal;

c. The advice I have given that the claimant should not be compensated for market losses applies *a fortiori* in a negligence case;

d. A claimant is under the same duty to take reasonable steps to mitigate his loss once he knows that he has been wrongly advised;

e. In non-fraud cases, the Court may be rather more ready to conclude that the claimant ought to have stayed in with the defendant rather than transferring his investment elsewhere. However, on the facts of the Equitable cases, I think it is impossible to criticise the claimants who decided to get out for the reasons I have already given.

f. It follows that in my view any assessment of compensation should take account of the financial adjuster charged, subject to questions of whether the claimant acted in reasonable mitigation in leaving as late as she did.

82. The key issue is whether in assessing damages for negligent advice, the claimant is entitled to recover loss because Equitable has under-performed the market (assuming it has). A distinction must be drawn between:

a. Under-performance caused by cost of dealing with the GAR problem which is substantially borne by the non-GAR policy holders. This loss is plainly recoverable.

[42] Per Bingham LJ in *County Personnel (Employment Agency) Ltd v. Alan R. Pulver & Co*. [1987] 1 WLR 916, 925-5.

b. Under-performance caused by a less successful investment policy than the market average. If Equitable performed as well as or better than the market then the issue does not arise. I have already advised that the claimant cannot recover compensation for general market decline. If Equitable out-performed the average market performance, the claimant's recovery will be reduced. But there are suggestions in the papers that, quite apart from the GAR problem, Equitable's investment performance was below the average achieved in the market.

83. Some of the opinions – especially the first Carr/Moss opinion[43] – argue that investment under-performance loss is not recoverable because any claim that was attributable to the inferior investment performance of Equitable was not the consequence of misrepresentation or, I think they would argue, the common law negligence. The argument is as follows:

a. On the basis of Lord Hoffman's seminal speech in *SAAMCO* (*supra*) it is necessary to ascertain the scope of the defendant's duty. Where the duty is to take reasonable care to provide information on which the claimant will decide upon a course of action, the defendant is not generally responsible for all the consequences of that course of action. He is only responsible for taking care to ensure that the information is correct and if he is negligent he will be responsible for the foreseeable consequences of the information being wrong, but not beyond. By contrast, where the duty is one to advise someone as to what course to take, the adviser must take reasonable care to consider all the potential consequences and, if negligent, he will be responsible for all the foreseeable loss of that course of action[44].

b. These are "information" cases. The information given was as to the ability of Equitable to deal with the GAR problem should it lose the litigation. It is therefore only responsible for the loss caused as a result of that information being wrong. So the loss

[43] §62
[44] [1997] AC 191, at 214

recoverable is for the damage resulting from the GAR problem, not from general under-performance.

84. The fallacy in this approach is to treat the fifth lead case as a mere "information" case. As I read FOS's findings, this is a case where Equitable undertook an obligation to give full and proper advice as to her investment. So this is a case on the other side of the *SAAMCO* line. The subsequent decision of the House of Lords in *Aneco Reinsurance Underwriting Ltd v. Johnson & Higgins* [2002] Lloyd's Rep IR 90 confirms that the ordinary rule is that where a person agrees to advise generally, he is liable for all the foreseeable consequences of his negligence, including the adverse consequences of entering into the transaction, provided such consequences can fairly be held to fall within the scope of his duty[45]. In *Aneco*, the defendant had assumed a duty to advise. It advised that reinsurance cover was available. As a result Aneco entered into a contract of insurance which it would not have concluded had it been advised correctly that no reinsurance cover was available. It was held that Aneco was entitled to recover its full loss, and not just that part which would have been covered by reinsurance had it been obtained.

85. FOS's finding is that, if the complainant had been properly advised by Equitable, she would not have placed her pension plan with Equitable. Any loss sustained by under-performance by Equitable was entirely foreseeable. In my opinion, given the scope of Equitable's duty to advise, she is entitled to be compensated for the loss sustained as a result of entering into the pension plan with Equitable, including under-performance, but not for the general market loss she would have sustained anyway. This will include the effect of any final bonus reduction, if it occurred before the date when FOS assesses the loss.

[45] Per Lord Lloyd at p.95 §13

86. Assuming FOS adopts this general approach on the basis that it produces the fair and reasonable result, as with the misrepresentation cases, the figure to be awarded by way of damages would be reached by comparing:

a. The value of the pension fund that the claimant now has based on the reinvestment of the proceeds from the Equitable policy into an averagely performing "with profits" fund; and

b. The value of the alternative investment that the claimant would now have, assuming the investment had been into an averagely performing "with profits" fund. Where it is unclear what alternative investment the claimant would have made, but it is clear that an alternative investment would have been made, in my view the only sensible course is to look to what an average "with profits" fund would have achieved.

Misrepresentation cases revisited

87. It follows from this analysis, that if damages were assessed in the misrepresentation cases on the basis of a non-fraud measure, in my opinion the result would be the same. This conclusion assumes that, as with the complainant in the fifth lead case, FOS concludes that Equitable assumed a responsibility to the claimants to give them full and proper advice as to their investments. That seems to be a realistic assumption.

Taxation

88. I have ignored the incidence of taxation on the basis that, as I understand FOS's intention it will be to direct Equitable to use the compensation to top up the pension fund chosen by the claimant on transfer from Equitable.

Conclusion

89. 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

10 July 2003

Brick Court Chambers
7-8 Essex Street
London WC2R 3LD