

ADJUDICATION	
Complainant:	Mr D
Firm:	The Equitable Life Assurance Society ("Equitable Life")
Complaint Reference:	
Date of Adjudication:	22 May 2003

Complaint

Mr D has complained that he has made a financial loss because of advice given to him in March and April 2000 by Mr J, a representative of Equitable Life, to take out a Managed Pension linked to the with-profits fund. Mr D transferred his Managed Pension from Equitable Life into an impaired life annuity with GE Life in late 2001. The policy complained of is therefore not bound by the terms of the Compromise Scheme that became effective on 8 February 2002.

Background

I have been in correspondence with Equitable Life and with Mr D about this complaint. I have considered the documentation which was submitted and the arguments made. I am now in a position to issue this Adjudication to both parties.

Mr D's complaint about Equitable Life has been agreed as a "lead case" in respect of a "GAR-Related Claim" category. At this stage my aim is to assess whether Equitable Life has liability insofar as is possible without assessing the amount of any loss that Mr D may have suffered as a result of this matter, which the Financial Ombudsman Service is leaving to a later stage.

The following views are intended not to be an exhaustive list of the valid causes of complaint that Mr D may have, but are intended to be sufficient to establish liability on the part of Equitable Life.

Investigation and findings

It is not in dispute that Equitable Life's representative Mr J advised Mr D to take out the Managed Pension policy investing 100% in the Society's with profits fund.

I will focus on whether a claim can be established for misrepresentation. In order to establish a claim for misrepresentation the following elements must be present:

There must be a material representation of facts made by Equitable Life to Mr D;

The representation must be untrue;

There must not be proof that Equitable Life had reasonable grounds to believe, and did believe, that the facts represented were true; and

There must be reliance on the representation such that it induced Mr D to enter into the contract.

I consider each of these elements in the circumstances of Mr D's claim further below.

1. Did Equitable Life make a material representation of fact to Mr D?

Mr D wrote in a letter to Equitable Life on 22 December 2000:

"I took my pension last Easter following discussions with Mr J of your Birmingham office. At that time, the legal process was under way and policy holders were aware of the implications. He gave me a specific assurance, presumably on Head Office instructions, that the costs involved and the consequences of any adverse judgement were covered by reserves and would not adversely affect my pension. It can only be said that this advice was recklessly given at best.

... The equitable way to address the matter would have been to ringfence that part of the fund belonging to those with different residual interests".

He transferred from his Managed Pension with Equitable Life into an impaired life annuity with GE Life in late 2001.

Equitable Life's representative Mr J wrote in a report on 24 February 2003, which I quote exactly below:

"All assurances given by me to client re: "sufficient reserves" or "ringfencing" of non GAR assets were in line with company stance explained to me by my BM [Branch Manager, Mr X] + R.M. [Regional Manager, Mr Y]. At the time this business was written we were defending our position to be able to write new business, vigourously, through such explanations. I don't dispute any of clients comments in his letter of complaint concerning comments/explanations put forward by me, other than the term "reckless". I explained what I believed i.e. that the cost of paying the GARs was no more than £50 £200m + affordable to Society".

Mr J felt that Mr D's complaint should be upheld as a procedural, management and/or organisation deficiency.

On 23 January 2000, two days after the judgment of the Court of Appeal, Equitable Life issued to all its Branch Managers Market Briefing Note BMBN2000/12, which included the following paragraphs.

Under the heading "Press coverage and commentary":

- "1 The suggestions that the Society could face a significant cost as a result of the judgment (often quoted at £1.5bn) are wrong (see Judgment highlights, item 2) ...*
- 5 As there are no significant cost implications, the issues of the Society's independence, or need for capital, or need for a partner do not arise".*

Under the heading “Customer questions and answers”:

“5 Q. *I have seen reports that the Society*
- will have to pay £1-1.5bn
- will be bankrupt
- will need to demutualise
- will need to merge/be taken over
Are these reports true?

A. *No. The whole issue is about how the Equitable currently shares out the with-profits “cake”. There is no question of having to pay out “more” benefits. If the House of Lords judgement does not support the Society’s current approach, we will still have the same cake to share out. We may be required to share it out in a different manner in future. However, even counsel for the defendant and the two judges who found against us in the Court of Appeal accept the fact that GAR policyholders would not get “more” money”.*

8 Q. *What happens if the Society loses in the House of Lords?*

Q. *What are the financial implications if the House of Lords uphold the Court of Appeal’s decision?*

A. *See the answer to Q.5 above”.*

The assertions in BMBN2000/12 that the cost of the GAR problem could not increase to a figure of around £1bn or more rather than an insignificant sum, were made without qualification. They were not limited to restricted scenarios such as the House of Lords upholding the Court of Appeal’s decision.

Equitable Life has written to us:

“It is unclear whether the FOS are assuming that the representative concerned would have repeated what was said in that note. We do not think that this is a conclusion that can necessarily be drawn in this case without further evidence. We note that there are certain inconsistencies and differences between what it is alleged the representative said and what the briefing note says”.

I have compared the Equitable Life Briefing Note with the report by Mr J of his recollections.

This clearly shows that the information provided by Mr J, as a representative of Equitable Life, was relying on information provided, authorised and endorsed by Equitable Life. I am unable to find significant inconsistencies or differences between what it is alleged Mr J said and what the briefing note says.

Equitable Life has expressed the view that statements made by their representatives ought properly to be characterised as statements of belief or opinion. I am not persuaded that this is a correct interpretation. These representations concerned the exposure of Equitable Life should it fail in its proceedings brought by Mr Hyman. The representations were clearly expressions of fact provided by Equitable Life for use by its representatives.

It is my view that the statements made to Mr D by Equitable Life, through its representative, and referred to above, amounted to clear statements of fact properly characterised as misrepresentations.

I believe that it is proved on the balance of probabilities that the representative Mr J made representations to Mr D that the cost to Equitable Life of honouring the guarantees would not be significant.

Mr D has also copied to us the copy that was sent to him of a letter to policyholders of 1 February 2000 from Mr Nash (managing director and actuary of Equitable Life), highlighting the following paragraph:

“Contrary to many of the reports which have appeared in the press, there would be no significant costs imposed on the Society if the Court of Appeal’s decision were upheld in the House of Lords. The speculation regarding financial difficulties and costs to be borne by with-profits policyholders is therefore unfounded. Your Society remains, and will continue to remain, financially secure.”

He commented in his letter of complaint to us:

“The reply I have received to my complaint is completely unsatisfactory in view of the assurance issued by the then Chief Executive on 1 February 2000”.

Mr Nash’s letter of 1 February 2000, which was sent out on behalf of Equitable Life, did refer to the specific scenario that the House of Lords might uphold the Court of Appeal’s decision, but then went on to state:

“The speculation regarding financial difficulties and costs to be borne by with-profits policyholders is therefore unfounded. Your Society remains, and will continue to remain, financially secure.”

These were unqualified and untrue statements. The “speculation” to which Mr Nash referred was not restricted to the scenario that the House of Lords might uphold the Court of Appeal’s decision.

Mr Nash’s letter of 1 February 2000 was sent out on behalf of Equitable Life.

2. Were these statements true, and did Equitable Life have reasonable grounds to believe that these statements were true?

Under the provisions of the Misrepresentation Act 1967, it is for the person making the representation to prove that he had reasonable grounds to believe, and did believe, that the facts represented were true. On the basis of the evidence that I have seen and which is referred to below, I do not believe that Equitable Life can discharge this evidential burden. (I am not claiming that Mr J personally had knowledge of these matters at the time, but he was acting in his capacity as a representative of Equitable Life, and the claim lies against Equitable Life as such.)

The statements were incorrect because Equitable Life’s Board had received legal advice that it might lose the Hyman case, and it knew that if the case was lost the cost of being required to honour GAR pension policies to Equitable Life could be about £1.5 billion.

Evidence on this matter was made public in the Particulars of Claim issued by Equitable Life against certain former Directors in April 2002. There is a substantial overlap between the texts

of these Particulars of Claim, and I have taken the quotations below from those against Mr Headdon. I enclose a copy of them for Mr D.

The Particulars of Claim state that Equitable Life's legal advisers Denton Hall "*repeatedly warned that litigation carried with it the risk of losing*" [para 70(b)(ii)].

The evidence for this is contained in paragraphs 28 to 55, covering a period starting on 8 September 1998 when the Society received written advice from Denton Hall, up to 17 February 2000 when the Society received oral advice from Counsel to the effect that whilst the Society should succeed in its appeal to the House of Lords, the argument was not an easy one.

The Particulars of Claim further state that Mr Headdon informed the Directors of Equitable Life on 9 September 1998 "*that if the Society was not entitled to adopt its differential bonus policy, the maximum potential cost to the Society was £1.5 billion*" [para 29(a)].

The Particulars of Claim assert that in the light of all this and certain other knowledge, Mr Headdon [and other Directors also] "*ought to have concluded ... that the board ought to ensure that new policyholders were made fully aware of the potential costs to the Society of losing the Hyman litigation*" [para 72(c)].

My reference to the Particulars of Claim should not be taken as an endorsement or comment on the validity or otherwise of the claims against former Directors set forth in them. Rather, I have simply taken into account the factual information from Board Minutes and other documents quoted by Equitable Life in those Particulars of Claim.

3. Did Mr D rely on the representations such that they induced him to enter into the contract?

Mr D and the representative Mr J agree that Mr D asked about the uncertainty of the Hyman case. This fact in itself shows that Mr D was concerned about that matter and is evidence. Such enquiry tends to support the view that he would only entered into the contract because he received a misleading reply.

I wrote to Mr D on 6 March 2003 asking him if he was able to give details of what he would have done but for the disputed actions by Equitable Life. He replied:

"In early 2000 I decided to take my pension in the form of drawdown.

Having been with Equitable for a number of years, I approached them and being satisfied with Mr J's advice invested accordingly. At that time I had no intention of taking an annuity, but rather to preserve my Capital by deferring this action until the age of 75.

Had I known of the Society's problems, there is no doubt that I would have contacted another Company, but this did not arise".

He transferred from his Managed Pension with Equitable Life into an impaired life annuity with GE Life in late 2001, for reasons which he gave in the same letter.

I believe that the evidence shows on the balance of probabilities that Mr D did rely on the representations made by Equitable Life such that they induced him to enter into the contract.

Conclusions

I believe that Mr D was induced to enter into the Managed Pension contract having relied on material misrepresentations of fact that Mr J and Mr Nash on behalf of Equitable Life had made to him, and that Equitable Life is liable to compensate Mr D for any loss.

[Adjudicator]