

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

Complaint

Ms E has complained that she has made a financial loss because of advice given to her on or about 7 October 1999 by Mr L, a representative of Equitable Life, to take out a Personal Pension Plan, which she did. Ms E transferred her Personal Pension Plan from Equitable Life by September 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 Ms E 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.

Ms E'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 Ms E 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 Ms E may have, but are intended to be sufficient to establish liability on the part of Equitable Life.

Investigation and findings

I have concluded that Equitable Life had an obligation to provide full and proper advice to Ms E as to her proposed investment. I am satisfied on the evidence (to which I refer below) that Equitable Life failed to exercise due skill and care in advising Ms E of the risks associated with her investment. In particular, in breach of its duties to Ms E, Equitable Life failed to advise her of the risks to the Society of failing in the Hyman litigation.

Equitable Life has questioned whether the Society, through Mr L assumed any such duty to advise Ms E. It has suggested that it may be possible to conclude that information rather than advice was given and thus Equitable Life had no responsibility to advise Ms E of the risk associated with Guaranteed Annuity Rates (GARs).

I will deal with this issue as a preliminary matter. It is a question of fact to be decided in each case whether the Equitable Life representative assumed a duty to provide information or a duty to advise generally. I am satisfied on the facts of this case that the duty of care assumed by Equitable Life is properly characterised as a duty to advise.

It is clear that Mr L believed he was providing advice, rather than simply passing on information. Further my view is supported by the commercial realities and inherent probabilities in the relationship between Mr L, as the Equitable Life representative, and Ms E. The evidence supports this conclusion.

Mr L has written a report in which he wrote:

“The client is only unhappy due to the ELAS situation – not the advice given (unless she is inferring that I had prior knowledge of the ELAS situation, which I did not!)

The advice to set up a PPP was correct ...”

Mr L indicated in his report that he believed that Ms E’s complaint should be upheld as a procedural, management and/or organisation deficiency.

Mr L recalls that he advised Ms E to take out the PPP policy. This agrees with Ms E’s recollections (written on 24 September 2001), where she wrote (apparently making a slight error in the date):

“I was advised by one of their representatives on the 9th October 1999 to take out a personal pension with them, when they must have been well aware of the serious problems that are now obvious to everyone.

I was not made aware of any problems, only the benefits of placing my pension with Equitable Life. I feel that I was badly misled on this issue”.

A letter has also been produced from Mr L to Ms E dated 7 October 1999 which began by referring to their “recent meeting”, went on to a heading “BASIS OF ADVICE” and then gave his recommendations, such as:

“I recommended that you take out a Personal Pension Plan ...

Looking at investment risk with regard to pension, we agreed that, whilst you appreciate the growth potential of investing in real assets, it is important to you to minimise fluctuations in the value of your investment. As an investment link for your pension plan I recommended that you invest 100% in the Society’s with profits fund, which balances the degree of risk with the potential reward that you agreed was acceptable”.

The fact find that Mr L completed stated:

“Client wishes to take a cautious investment route with little volatility. Recommended with profits”.

As is shown by the recollections mentioned above, by Mr L’s letter to Ms E of 7 October 1999 and by the fact find, Equitable Life gave advice to Ms E and disclosed several material facts to her. For example, there was a discussion of SERPS and of attitude to risk. On both these issues Mr L offered his opinions as to what course of action would be most appropriate for Ms E. It is my view that Equitable Life assumed a duty to provide Ms E with full and proper advice and to disclose all the material risks and benefits of the proposed course of action. Equitable Life failed to discharge that duty with reasonable care. In particular, Equitable Life did not disclose to Ms E the matters referred to below, namely the risks to her as a non GAR policyholder of the litigation which was proceeding through the courts and about which

Equitable Life had been in receipt of relevant advice. It is my view that such failure to disclose amounted to a breach of duty of care.

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 Ms E.

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)].

In relation to the period up till 7 October 1999 that is relevant to Ms E's complaint, the evidence for this is contained in paragraphs 28 to 45, covering a period starting on 8 September 1998 when the Society received written advice from Denton Hall, up to 15 July 1999. Subsequently the Vice-Chancellor gave judgment in the High Court on 9 September 1999, and this was appealed. In my view, the Vice-Chancellor's judgment was not sufficient to nullify the advice previously given by Denton Hall on these matters. The risks to Equitable Life remained current pending the outcome of the House of Lords' hearing of the appeal.

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.

It is my view that these documents show that Equitable Life was aware of a significant risk to the Society when Ms E was advised to enter into her PPP.

Further, I believe it would be highly artificial to suggest that had Ms E been made aware of the risks, she would have proceeded to make her investment with Equitable Life. I say this taking into account the evidence in the fact find and the letter of 7 October 1999 to the effect that Ms E's employer was prepared to make contributions to any personal pension provider selected by Ms E. She was in no way circumscribed to pursue matters with Equitable Life.

Conclusions

I believe that Ms E would not have entered into her with-profits Personal Pension Plan with Equitable Life had she been made aware of the salient facts. I believe that in failing to disclose this information, Equitable Life failed to take reasonable care in the provision of advice to Ms E and is liable to compensate Ms E for any loss.

[Adjudicator]