ADJUDICATION	
Complainant:	Mr O
Firm:	The Equitable Life Assurance Society
Date of Adjudication:	28 August 2003

Complaint

Mr O has complained that he has made a financial loss because of advice given to him between June and early December 2000 by Mr P, a representative of Equitable Life, to use the fund available from an Equitable Life Personal Pension Plan to take out a Managed Pension linked to Equitable Life's with-profits fund. Mr O transferred his Managed Pension from Equitable Life to Friends Provident on 14 January 2002. 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 considered the documentation, which was submitted, and the arguments made. I am now in a position to issue this Adjudication to both parties.

Investigation and findings

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

Mr O maintains that Equitable Life had both a common law and contractual (by way of implied terms) obligation to provide him with *"an informed and objectively fair overview"*. Further, Mr O maintains that Equitable Life made a misrepresentation to him. 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 O;
- 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 O to enter into the contract.

Mr O has also complained that Equitable Life failed to disclose the financial adjustment in the key features documentation.

Misrepresentation

Mr O received a letter that Mr Nash, Managing Director of Equitable Life, sent on behalf of Equitable Life to with-profits policyholders including Mr O on 2 August 2000. The letter referred to the House of Lords ruling of 20 July 2000 in the *Hyman* case and stated in the second paragraph under "Sale of the business":

> *"As well as the direct impact on policy benefits described above, the ruling increases the Society's statutory reserves and that will diminish its capital strength and reduce its investment freedom. In the circumstances and despite the Society's long commitment to mutuality, the Board has concluded that members' interests will now best be served by the sale of the Society. This will provide additional funding needed for the restoration of policy values in due course and it will preserve the investment freedom of the with-profits fund for the future".*

The letter referred to the prospects of such a sale in a positive tenor but gave no guarantee that the sale of the Society would prove to be possible. It wrote only that: "*The process is likely to mean*" the sale of the Society and that:

> *"we expect to have identified a suitable purchaser before the end of this year, with the sale process being completed by next summer. Our principal aim in selecting a purchaser will be to maximise the value obtained and, in particular, to restore benefits as described above …*
>
> *However, working with a strong parent organisation will now not only further the interests of all members but will also encourage the development of the business in new ways. The Equitable remains an excellent business and members will continue to benefit from its many underlying strengths".*

Mr O took out the Managed Pension policy and Equitable Life wrote to him on 21 November 2000 explaining his "right to cancel" within 14 days. Mr O received this letter on 22 November 2000, so that his "right to cancel" expired on 6 December 2000. In the event this timing proved to be particularly unfortunate, because Equitable Life made the following announcement on 8 December 2000:

> *"Those policyholders who have effected policies within the preceding 14 days, and are therefore within the statutory cooling off period, have the option of cancelling their new policies. The Society will extend this period to 22 December 2000 to allow such policyholders time for proper consideration of the impact of this announcement on them".*

Mr P wrote to Mr O on 4 December 2000 enclosing a copy of Equitable Life's leaflet 45J035. Mr O received this letter on 5 December, which was the day before the expiry of his 14-day right to cancel the policy and three days before Equitable Life announced on 8 December that it had been unable to find a buyer for the Society as a whole. This leaflet, entitled "Membership of the Society", was dated October 2000 and Mr O has drawn attention to the following passage in it:

> *"The House of Lords' judgment and the Society's intention to demutualise were both announced on 20 July 2000. All members of the Society will benefit from the increased investment freedom that the sale is expected to bring to the with-profits fund. It is also expected that the sale proceeds will enable bonuses applying to with-profits policies which were in force on 19 July 2000 and which continue to*

the date of the sale to be restored (to reverse the effect of the reduction in final bonus rates for the first seven months of 2000)".

The Baird Report published by the FSA gives details of the bid process at section 4.60. It shows that a report was presented to the FSA Board on 19 October 2000 that:

> *"noted that Equitable Life had had three serious offers and the appointed actuary of the Society had indicated to the FSA that the bids currently on the table were high enough to enable with-profits policyholders to gain restitution for the investment growth the Society had lost for the period 1 January 2000 to 31 July 2000 with additional goodwill on top".*

It also states that:

> *"A meeting with Equitable Life was held on 1 December 2000. The meeting had been arranged to obtain an update on the bid process and to discuss reserving issues. According to the note of the meeting prepared on 4 December 2000, Equitable Life confirmed that there remained only two bids, one of which involved a very small offer price with no goodwill element for policyholders and, as regards the second, Equitable Life had real concerns that the bidder was not offering sufficient cash "to allow the Society to proceed with this option in any case" in which case Equitable Life would close to new business and sell the infrastructure and sales force…*
>
> *On 4 December 2000 one of the bidders pulled out. The other (last) bidder told the FSA that it was "increasingly concerned" that acquisition of Equitable Life would not be economic and the aim was that the bid would be considered by its Board on 7 December 2000 and that there was no way of predicting the recommendation which would be made. That bidder decided not to proceed with an acquisition on 7 December 2000."*

Further particulars were published on 1 July 2003 in a report by the Parliamentary Ombudsman, of which I enclose a copy for Mr O. Paragraph 147 refers to an interview with the head of prudential supervision at the FSA ("officer J"):

> *"Asked why the prudential regulator had decided after the House of Lords' ruling not to require Equitable to close to new business, officer J said that this was because to do so would be very damaging to the value of the company, and possibly fatal to the prospects of a sale. A balance had to be struck between the interests of new and existing policyholders, and the prudential regulator had taken the view that the balance was overwhelmingly in favour of allowing Equitable to continue writing new business. If a sale had taken place as expected all policyholders - new and old - would have benefited from it. Furthermore, new policyholders could be compensated if they sustained loss as a result of joining on the basis of misleading information (under the conduct of business rules). If new policyholders had been aware of the risks, then that was a matter for them. Officer J said that it was fair to say that the collapse of the bidding process had occurred quite suddenly and until very shortly beforehand there had remained a realistic hope that a sale would go ahead."*

Paragraph 160 states that the Director of the FSA with responsibility for prudential regulation:

> *"said that the key point in his view was that the final outcome of the combinations of factors leading bidders to withdraw could not have been, and was not, known to FSA any earlier than when the last remaining potential bidder [A] withdrew."*

Paragraphs 155 and 156 state that an FSA managing director said that:

> *"Equitable's decision to sell following the House of Lords' decision had not come as a surprise to FSA and the prospects of a sale were seen as good. All professional opinion at the time was that a sale would generate a sizeable premium; Equitable had appointed a well regarded firm to advise on the sale; and it was known that a number of companies had expressed interest in buying Equitable in recent years.*
>
> *The progress of negotiations was, from FSA's viewpoint, entirely what they would have expected. Although most of the 15 companies expressing an initial interest had dropped out, that was usual, and no more than two or three would be expected to reach the final stages. The managing director added that it was also to be expected that very difficult technical issues would arise at the later stages of negotiation, partly due to the progressively narrowing focus on increasingly specific aspects of transferring the business, and perhaps to apply leverage over the price or to obtain some form of regulatory concession."*

The Parliamentary Ombudsman wrote in paragraph 216:

> *"Should the prudential regulator have required Equitable to put a 'health warning' on their products or advertising once concerns had been raised about Equitable's solvency position (November 1998), and particularly after the House of Lords' judgment?*
>
> *It is quite clear from my investigation that the prudential division took the firm view that it was not reasonable to allow Equitable to continue trading, but then to require them to disclose to potential policyholders that there were concerns about the company's solvency, such that Equitable should not be viewed as a good investment. As they saw it, there was no half-way house; either the company was authorised to conduct insurance business or it was not. I accept that argument; particularly as intervention of the kind suggested, that is a 'health warning' on the product, might of itself have helped to push the company towards the very situation which the regulator was seeking to help them avoid, namely regulatory insolvency. In addition, by discouraging new business, such a warning could impact adversely on the returns that policyholders could otherwise expect. There also seems little doubt that requiring a special disclosure of that nature after Equitable had decided to seek a buyer would have affected the prospects of a sale, or at the very least the price a buyer might be prepared to pay. That in turn would undoubtedly have left the prudential regulator open to accusations of having torpedoed the sales process, and also to legal challenge by Equitable."*

I believe that Equitable Life made it clear in the extract from Mr Nash's letter of 2 August 2000 that I quoted above that if a sale of the Society was not achieved, then the position compared to its pre-20 July 2000 position would be that the Society's capital strength would have been diminished, its investment freedom would have been reduced, no additional funding needed for

the restoration of policy values in due course would have been provided and the investment freedom of the with-profits fund for the future would not have been preserved.

Equitable Life's statement in that letter: "*The Equitable remains an excellent business and members will continue to benefit from its many underlying strengths*" did not occur in isolation but needed to be read in the context of the letter as a whole. It did not say that Equitable Life had no weaknesses as well as strengths; indeed, as Mr O has put it, *"it is self-evident that there were some weaknesses (otherwise it would not have been necessary to terminate the mutual status of the Society and put it up for sale)"*.

On the basis of the evidence that I have seen and which is referred to above, I do not believe that Equitable Life misrepresented the position to Mr O or failed to disclose relevant facts to him. Indeed, the evidence I have seen suggests that Equitable Life had reasonable grounds to believe and did believe that the facts represented were true.

Further, I believe that the nature of the bid process was such that Equitable Life was not under any legal or regulatory obligation to inform Mr O if there was an increasing possibility of an unfavourable outcome in the period before the outcome of the bid process was known.

Implied terms

Mr O maintains that Equitable Life had both a common law and contractual (by way of implied terms) obligation to provide him with *"an informed and objectively fair overview"*. In the light of my conclusions set out above, it is my view that Equitable Life has discharged its responsibilities to act with reasonable skill and care in its dealings with Mr O.

Basis for Equitable Life's application of a financial adjuster

Mr O has also complained that *"the Key Features document makes no mention of financial adjustment"* and that it says:

> *"At any time you may use some or all of the Fund to purchase a pension Annuity with the Society or any other provider of pension Annuities".*

The Key Features document did not envisage transfer to another pension provider without taking an annuity at that time.

Mr O has objected to Equitable Life imposing a financial adjustment for a transfer of the Managed Pension to another provider. If he had taken an annuity at the time of transfer, Equitable Life would have imposed no financial adjustment.

If a policyholder wishes to terminate a pension policy, including termination by transferring the policy to another pension provider or taking benefits at a date, which is not specifically provided for under the terms and conditions of the contract, my understanding of the position is that, such a proposal is regarded as an alteration to the terms of the contract. Such alterations are subject to agreement between the parties to the contract, i.e. the policyholder and the firm providing the policy. The firm is not obliged to offer the same value on such terminations as it would offer if benefits were contractually payable under the policy. This position applies whether or not the policy documents state explicitly that a financial adjustment may be applied for terminations of the policy before the target policy end date. Adjustments are applied to ensure that a policyholder obtains a fair share of the value of the fund invested in when his investment is withdrawn.

The extract from the Key Features document that relates to this pension policy, which I have attached to this adjudication, reflects this general position. This document states that there are *"certain circumstances [where] the full value of the with-profits fund is not guaranteed".* Furthermore it does not state that the transfer of this policy to another pension provider, other than when the transfer is to permit the purchase of an annuity, is a situation when benefits are *"contractually payable"* and therefore would be available without an alteration to the transfer value of the policy.

Conclusions

I consider therefore that the "GAR-Related" aspects of Mr O's claim and his claim about the financial adjustment should not be upheld. This is without prejudice to the outcome of Equitable Life's consideration of the suitability of the sale of this policy under its Managed Pension Review.

[Adjudicator]