FINAL DECISION	
complainant	Ms E
firm:	The Equitable Life Assurance Society (“Equitable Life”)
complaint reference:	Ms E – lead case
date of final decision:	22 March 2005

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introduction

This case, and over a thousand others that lie for determination with it, concerns the circumstances of a set of former members of Equitable Life. Their claims, to the extent that they are successful, will fall to be paid out of the fund that belongs to the remaining members. Nearly everyone who is or has recently been a member of Equitable Life may have cause for feeling aggrieved at the way their financial affairs have turned out. Determining whether any of the grievances that have given rise to the complaints under consideration were attributable to wrongs for which redress should be given, and if so how that redress should be assessed, has not been easy. The factual issues are complicated by many problems of assigning causation to the particular events alleged to have contributed to the losses complained of. And it is also the great misfortune of those affected by this case that even if the facts were clear, the law is not. The law relating to the assessment of redress for financial losses following negligent advice or misrepresentations is in a lamentably uncertain state. Leading members of the Bar have been unable to agree on some fairly basic aspects. Some have admitted that the only matter of which they can be sure is that some of the issues are "arguable".

Most of the complaints received by the Financial Ombudsman Service are to be determined on the basis of what in the opinion of the ombudsman would be fair and reasonable in all the circumstances of the case (section 228 of the Financial Services and Markets Act 2000 – "FSMA"). That normally involves not only looking at the legal rights of the parties, but also making an overall assessment of whether a purely legal outcome would serve the justice of the case. Some examination of the respective culpability of the parties is often called for. This complaint, however, was lodged before the commencement of FSMA with the Personal Investment Authority ombudsman (PIAOB) whose terms of reference were somewhat narrower than the Financial Ombudsman Service's and required complaints to be decided on the basis of the legal position. As result, as inheritor of the PIAOB's jurisdiction, I am obliged to determine this case by reference to the legal position, difficult though this may be.

In some respects this is a relief. In terms of culpability, the directors and management of Equitable Life are entirely different now from those who were in post at the time of the matters complained of. Indeed, so far distanced are they that the current directors have, on behalf of Equitable Life, brought legal action against their

predecessor directors. Weighing the moral deserts of the two groups represented in this case – the former members who claim compensation and the current members on whom the loss would fall – would be a thankless task. Both have suffered losses – judged at least against their expectations. It would be impossible to say which group could be regarded as the more deserving of sympathy, and thank goodness this is not what I have to do. I can largely confine myself to a legal analysis. I have studied carefully all the submissions made to me including a number of legal opinions. I have taken my own advice from leading counsel and from my own team of in-house lawyers.

I have tried to ensure that I and my colleagues who have had the carriage of these cases have followed a process that has been fair to the parties. Fairness in this context means ensuring that the parties have had a proper chance to make relevant points so that they could be taken into account before a final determination. An initial view was issued in November 2002, an adjudication in May 2003, a summary of our view on redress in July 2003 and a provisional decision in July 2004. Each was followed by sometimes very extensive representations from Equitable Life. It now asserts that it has been denied a proper opportunity for due process. The ombudsman process is more in the nature of an inquisitorial rather than adversarial procedure – in that it is for the ombudsman to offer a provisional view of the outcome, to drive the timetable, to ensure that parties have a fair chance to put points they believe to be relevant.

Throughout this case Equitable Life has regularly sought, and been granted, extensions of time to make representations. Following a case-by-case assessment, it has made without prejudice offers to some complainants, some of which have been accepted. No doubt the passage of time since the ombudsman process started has prompted some complainants to accept offers rather than wait for my decision. It can be argued, indeed some complainants have made this point forcefully, that it is in Equitable Life's interest that as much time as possible should pass before my decision is reached.

If delay will favour one party rather than another, the ombudsman must be alert to the possibility that calls for more time by the party thought to benefit from delay are merely tactical. On the other hand the ombudsman must be even more careful not to reject a justified request for more time from such a party merely because the request might coincide with its interest.

I have considered carefully whether any injustice would be done to Equitable Life by now concluding the process and proceeding to a final determination, and I am satisfied that none would be. Equitable Life has had many occasions and much time in which to make further submissions. It has been in receipt of advice from its own in-house solicitor, a leading firm of solicitors, and two senior counsel. I find it hard to accept that it is lack of imagination or ingenuity in how to frame further submissions that has resulted in its failure to make more representations when invited to do so. The process of issuing more preliminary or provisional decisions, followed by the opportunity for yet more representations, cannot be allowed to go on for ever. I have concluded that the process has been fair to the parties and I should proceed.

The Act under which our scheme is provided for envisages that we should be resolving disputes "quickly and with minimum formality" (sect 225 FSMA). The resolution of this case can hardly be described as having taken place quickly, and some of the representations made to me are far from informal. I am mindful that a case in which there are wider implications is likely to call for much greater care and deliberation. This was the position in the decision by one of my colleagues in a case involving the Norwich and Peterborough Building Society which was considered on a judicial review of the decision. Mr Justice Ouseley commented that although our aim is the inexpensive and quick resolution of complaints, a qualification was appropriate where there are many complainants at one institution or at many institutions, and where the circumstances of those who will have to bear the cost of the compensation should be considered. "Such decisions call for careful consideration and reasoning," he said, "a cheap and cheerful robustness may be inadequate, missing important points, internally contradictory or ill-expressed for the weight the ombudsman expects it to bear".

I have sought to give this case the most careful consideration over not just a number of months, but over the more than two years in which I have been able to reflect on the various aspects of it. The parties, and other commentators, have made their points robustly. Sometimes they have been tempted to express themselves in language inappropriate to the business, to make accusations that are unwarranted, or to ascribe to me or to others motives or traits of character that I hope are not merited. In the end this decision is mine and mine alone.

executive summary

In this section I explain what the guaranteed annuity rate or "GAR" issue is, and summarise the key facts and the conclusions I have reached.

the GAR issue

Between 1957 and 1988 Equitable Life sold a number of with-profits pension policies that included the right to convert the accumulated fund into an annuity using a Guaranteed Annuity Rate (GAR) set out in the policy. These GAR rights would be valuable to the policyholder and costly to Equitable Life's with-profits fund if the GAR exceeded normal market annuity rates, an eventuality thought unlikely at the time the policies were sold.

But when by the beginning of 1994 normal market annuity rates did fall below the guaranteed rates, Equitable Life decided to run its with-profits fund in a way that negated the value of the GAR rights to those who held them so the GAR rights were not costly to it. In July 2000 the House of Lords ruled that this approach was not permissible.

The House of Lords' decision was costly for Equitable Life, and the effect on Equitable Life and its with-profits policyholders, whose policies shared in the fortunes of the with-profits fund, was profound.

As soon as the decision was announced, the board of directors of Equitable Life resolved to put Equitable Life up for sale and to remove bonuses in respect of the first seven months of 2000. On 8 December 2000 Equitable Life announced that it had found no buyer and closed to new business. Further bonus cuts followed as well as increases to the "financial adjustment" made to policies' values if policyholders surrendered them or moved them away from Equitable Life. This financial adjustment is also often referred to colloquially as a market value adjuster or MVA, though it was not necessarily only made due to market circumstances. The mix of investments held in the with-profits fund was also changed with a decrease in the holding of equity investments and an increase in the holding of fixed interest investments, which

are considered to be less volatile than, but to have less potential for growth than, equity investments.

complaints about the GAR issue: “GAR-related complaints”

Many policyholders who did not hold GARs complained to the Financial Ombudsman Service that they did not realise that the value of their policies could be affected by potentially costly liabilities to those who held GARs and that if they had realised they would have invested their money elsewhere and not with Equitable Life. We call complaints of this kind “GAR-related complaints”.

which GAR-related complaints are we not considering?

On 8 February 2002 the High Court, following a vote by Equitable Life members, approved a “compromise scheme” the effect of which was, broadly speaking, to settle GAR-related complaints if the complaint was about policy funds that were still invested in Equitable Life’s with-profits fund on that date. The Financial Ombudsman Service cannot deal with complaints that were settled by the compromise scheme in this way. The GAR-related complaints we are considering are generally complaints made about policy funds that were surrendered or moved away from Equitable Life’s with-profits fund before 8 February 2002.

what are the GAR-related complaints we are considering about in general?

In most of the GAR-related complaints I am considering, the policyholders were given financial advice by a financial adviser employed by and representing Equitable Life, and on the advice and recommendation of the Equitable Life adviser the policyholder committed to paying money into Equitable Life’s with-profits fund either as a lump sum or as a series of regular or ad hoc payments (or as a mixture of all three payment methods).

In some cases the policyholders have said that they did not know there was any GAR issue and have complained that the Equitable Life adviser failed to tell them that there was any GAR issue that might affect the return on their policies. In other cases

the policyholders have said that they had heard about the GAR issue and asked about it and have complained that the Equitable Life adviser told them that this would not affect the value of their policies.

what complaint is this particular decision about?

This decision is about a GAR-related complaint referred to us by Ms E. Ms E received financial advice from an Equitable Life adviser. On his advice and recommendation she took out a Personal Pension Plan invested in the with-profits fund. She agreed with the adviser that her employer would pay a lump sum into the policy immediately and pay regular monthly contributions into the policy.

Ms E had not heard about any GAR issue and did not ask about it. She complains that she should have been told about it. Her complaint is not one where a policyholder asked about the GAR issue and was told by the Equitable Life adviser that this would not affect the return on the policy. However that situation is similar.

Why does this decision discuss both the situation where the policyholder was told that the GAR issue would not affect them (which I have analysed as 'misrepresentation' cases) and the situation where the policyholder did not even know there was any GAR issue to ask about (which I have analysed as 'breach of duty of care' cases)?

The two situations are discussed for the following reasons:

- Ms E's complaint has been selected as a "lead case" to establish key principles applicable to the resolution of other similar cases, of which we have received over a thousand. It is therefore sensible to explain the reasons for my approach in this case, and to discuss the submissions I have received about my approach generally, as fully as possible.

- I have analysed Ms E's complaint as being a complaint based on a breach of duty of care. I have also had to consider a number of other lead cases which I have analysed as being claims in misrepresentation. In making their submissions to me, Equitable Life has dealt with both types of case together.

- The submissions Equitable Life has made about my approach include arguments that do not apply to Ms E's situation but may still be relevant because they are criticisms of my approach in general.

- Equitable Life's submissions about my approach also include arguments that it considers are applicable to both situations.

- I have therefore set out in this final decision, in addition to my views and conclusions on the law applicable to Ms E's case, my present views on the misrepresentation issues relevant to those similar but distinct cases. In doing so, I do not purport to decide any misrepresentation case or issue. Neither do I seek to make my decision on Ms E's case rest on any present views relevant only to the misrepresentation cases.

- My view on the correct compensation in misrepresentation cases is that the compensation would be the same if those cases had been analysed as a breach of duty of care case. The law therefore reflects my view of what would be a just solution to these similar fact cases.

what did the firm do wrong in this case?

When Ms E took out the Personal Pension Plan, Equitable Life had already been warned by its legal advisers that the courts might decide that the way it was running its with-profits fund to negate the value of the GAR rights was not permissible. If this happened it would make the GAR rights costly for Equitable Life. Equitable Life therefore had knowledge that the GAR issue could affect the return on the policy that it recommended to Ms E but it did not tell Ms E about this. I find that it should have done. The advice Equitable Life gave Ms E did not meet the standards that Ms E was entitled to expect from Equitable Life's financial adviser.

what difference did the firm's wrong make in this case?

If the advice Equitable Life gave to Ms E had met the standards she was entitled to expect, I am satisfied that she would not have put money into a policy with Equitable Life and she would have put her money into a policy with a different firm instead.

how have I assessed the compensation due?

The compensation due to Ms E should put her in the position she would have been in if she had not invested with Equitable Life. The value of her funds, like those of nearly all funds invested in the stock market, fell during this period. But it would be unfair to order Equitable Life to compensate Ms E for losses due to falls in the stock market that would have affected all with-profits funds and which she would have suffered if she had invested with a different firm instead of with Equitable Life. Therefore compensation is to be assessed by comparing the return Ms E received on the money she put into a with-profits pension with Equitable Life and the return she would have received from a similar product with an alternative provider. Since I have been unable to identify which particular alternative provider Ms E would have chosen, I have decided that the comparison should be made with the average return achieved by comparable with-profits funds. I have also decided that Ms E's loss should include the reduction (or MVA) her funds suffered when she transferred them from Equitable Life and an allowance for the costs she paid to set up a new policy with another firm because she would not have suffered the reduction or paid those costs if she had not invested with Equitable Life. If there is a loss, interest is to be added to the sum due at the normal judgment rate used by the courts of 8% per year simple from the date the loss arose to the date of my award (and if payment is not made within 28 days of Equitable Life receiving Ms E's acceptance of my award, further interest on my award is to be added at the rate of 8% per year simple from the date of my award to the date of payment). The compensation is to be paid into Ms E's pension fund and the interest on the compensation is to be paid directly to Ms E.

when should this comparison be made?

After a certain point policyholders such as Ms E had been given sufficient information by Equitable Life, or gained it from elsewhere, such that it is reasonable to conclude that the consequences of decisions they made about their policies were their

responsibility rather than that of Equitable Life. After that point they were exercising a choice as to how to deal with the situation which confronted them as a result of the firm's wrong, and they were entitled to the benefit of any gain on their policies but could not blame the firm's wrong for any further loss they suffered. That point arrived when they knew enough about the situation they found themselves in as a result of Equitable Life's wrong to be able to understand that they needed to decide what to do about it and after they had had a reasonable opportunity to consider, reflect and seek advice on the situation with which they were presented. That is the latest point at which the comparison should be made. If a policyholder transferred her policy away from Equitable Life before that point (as Ms E did), the comparison should be made at the point the policyholder transferred.

compensation for any inconvenience or distress caused

I have considered whether Ms E should receive an additional sum for the inconvenience and any distress caused to her by the firm's conduct. Any such sum would fall to be paid by the remaining members of Equitable Life's with-profits fund. This would include those who had GAR-related complaints settled by the compromise scheme and who therefore may have suffered inconvenience or distress in exactly the same way and resulting from exactly the same cause as the policyholders to whom they would be making the payments. I have decided that to require those remaining members of Equitable Life to contribute to an award of this kind would not be right. In general, those who have brought their complaints to the Financial Ombudsman Service differ from the remaining members only in that they transferred their policies away from Equitable Life.

our powers

This section sets out the technical rules that govern how the merits of this complaint must be decided. In summary, I must observe the law and take into account any applicable industry rules or standards of good practice, and I must give precedence to the latter if the former would require Ms E to be treated less favourably.

The Financial Ombudsman Service is a single Ombudsman Scheme replacing a number of former schemes that serviced various sectors of the financial services community.

The Financial Ombudsman Service was established under the provisions of the Financial Services and Markets Act 2000 (FSMA) which came into force on 1 December 2001 (commencement). Part XVI of FSMA makes provisions for the establishment of an Ombudsman Scheme and Schedule 17 makes further provisions for the establishment of that Scheme. The Financial Ombudsman Service is also governed by the terms of the Financial Services and Markets Act 2000 (Transitional Provisions) (Ombudsman Scheme and Complaints Scheme) Order 2001 ("the Transitional Provisions") in connection with partly completed complaints under former schemes ("relevant existing complaints") and complaints made at commencement about acts or omissions which occurred before commencement and which were covered by the former scheme ("relevant new complaints"). The Transitional Provisions, made by HM Treasury under sections 426-428 of FSMA (Statutory Instrument No. 2326 dated 27 June 2001), make specific provision for the handling of such complaints and for the basis on which the Ombudsman should make his determination in those cases.

Since commencement, all complaints under the "compulsory jurisdiction" established by FSMA have been dealt with by the Financial Ombudsman Service in accordance with the rules set out in the FSA Handbook (Complaints Sourcebook) (DISP Module). DISP 2 sets out provisions relating to the jurisdiction of the Financial Ombudsman Service. DISP 3 sets out the procedure which the Financial Ombudsman Service must follow in handling complaints. DISP 2 and 3 apply to the Financial Ombudsman Service in respect of relevant existing complaints also except as stated in Appendix 1 of the DISP Module (DISP App 1) that sets out certain specific provisions for the

handling of such complaints. DISP transitional provision paragraph 4 R provides that firms are subject to DISP App 1 in relation to relevant existing complaints.

DISP App1 1.6 "Criteria for determining complaints" explains at 1.6.1 that Article 6(2) of the Transitional Provisions provides that a relevant existing complaint is to be determined (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 in question immediately before commencement.

Immediately before commencement the Personal Investment Authority ('PIA') regulated Equitable Life and the PIAOB dealt with complaints against PIA-regulated financial firms.

The GAR-related complaints, including that of Ms E, are about something that happened before commencement, and were made to the PIAOB before commencement so they are "relevant existing complaints" under the Transitional Provisions with the PIAOB being the former scheme to which the complaint was referred.

Consequently, Ms E's complaint "*is to be determined (so far as practicable) by reference to such criteria as would have applied to the determination of the complaint by*" the PIAOB. The criteria applied by the PIAOB were set out in the PIAOB's Terms of Reference. In particular, PIAOB Term of Reference 5.1 provides that in making any award or recommendation the Ombudsman shall:

"*(a) except to the extent that they are inconsistent with the express provisions hereof, observe any applicable enactment, rule of law or relevant judicial authority; (b) have regard to such statements of general principles of good insurance, investment or marketing practice, rules, codes and guidance as were relevant to the firm's business at the time of the events which gave rise to the subject matter of the complaint;*
(c) have regard to any relevant standards of redress as issued by PIA or by any other SRO as may be relevant to the firm in question."

PIAOB Term of Reference 5.2 provides that where such general principles, rules, codes, guidance and standards are inconsistent with any enactment, rule of law or judicial authority which would require the complainant to be treated less favourably, the said principles, rules, codes, guidance and standards shall prevail.

did the publication by the FSA of a legal opinion by Ian Glick QC and Richard Snowden constitute a "regulatory standard", thus limiting my powers to determine this complaint?

This section explains my view of the status of a legal opinion provided to the regulator.

On 20 September 2001 the Financial Services Authority (FSA) published a legal opinion of Ian Glick QC and Richard Snowden that Equitable Life says is relevant having regard to PIA Term of Reference 5.1 (c) (which provides that I must *"have regard to any relevant standards of redress as issued by PIA or by any other SRO as may be relevant to the firm in question"*). In effect Equitable Life is saying that I should have special regard for that legal opinion, and in particular for paragraph 248, which says that Equitable Life:

"…should only be liable to the extent to which the losses of a policyholder are attributable to features of the non-GAR policy which should have been disclosed, but were not disclosed, namely the GAR risk. We believe that the courts would probably not hold the Society liable for all the consequences of a non-GAR policyholder having bought the policy. We recognise, however, that the contrary view is arguable."

Equitable Life has submitted that in a letter dated 20 September 2001 to firms the FSA stated: *"The FSA considers that the principle for assessing the amount of a policyholder's reasonable loss as set out in the Opinion of Ian Glick QC and Richard Snowden are likely to be applicable in other similar cases and so does not at this stage think it necessary to give detailed guidance on the steps which a firm should undertake to assess its potential liabilities to policyholders."*

In my view the legal opinion Equitable Life refers to is quite clearly not a regulatory standard of redress issued by the FSA as understood in the context of PIAOB Term of Reference 5.1 but simply a legal opinion provided to the FSA. This is also apparent from a further passage in the September 2001 letter, which said *"…the Opinion has been given on a preliminary basis and should not be taken as pre-judging any matter in relation to the Equitable or any individual"* (the letter was published at www.fsa.gov.uk/pubs/other/Equitable_Tiner.pdf on the FSA's website). A great many legal opinions have been produced in connection with this matter. In reaching my determination of this complaint I have considered that opinion, as I have

considered the other legal opinions. Even if this opinion were a regulatory standard, PIAOB Term of Reference 5.2 provides that where any enactment, rule of law or judicial authority by which I would otherwise be bound requires the complainant to be treated less favourably than would be the case were a relevant regulatory standard of redress applied, the latter shall prevail. It seems improbable that this opinion, and in particular the part quoted above, would be more generous to complainants than the law as I discern it to be.

For these reasons my view is that it would only be open to me to adopt the views set out in this particular opinion if I were satisfied that it correctly reflected the law. The fact that the opinion formed the basis for calculating the uplifts to be given to non-GAR policyholders under the Compromise Scheme (a point which Equitable Life has made in its submissions) is of little assistance in this context. That scheme required the approval of the court, but in deciding whether the court should sanction the Scheme the questions before Mr Justice Lloyd were of a quite different kind to those with which I am concerned, and they did not require him to define the legal measure for the compensation due to those being asked to give up their mis-selling claims.

the industry rules that Equitable Life should have followed

In this section I set out some of the rules that the firm was supposed to follow in its dealings with its customers. In particular I explain the rules that reinforced its duties in situations in which it gave advice to customers or potential customers.

PIA (Lautro) Adopted Rules included a Code of Conduct set out in Schedule L: 2. The Code of Conduct said:

> *"L1 (1) This Code of Conduct is made for the purpose of ensuring that Members and their company representatives and introducers, in the course of carrying on any relevant business -*
>
> *(a) comply with the Principles and generally maintain high standards of integrity and fair dealing, in particular in relation to investors;*
>
> *(b) exercise due skill, care and diligence in providing any services in the course of that business; and*
>
> *(c) generally take proper account of the interests of investors; and this Code shall be so construed as to give effect to that purpose."*

The "Principles" referred to in L1(1) (a) above are the Statements of Principle made by the Securities and Investment Board. The Principles were intended to form a universal statement of the standards expected, but a breach of the Principles could not give rise to actions for damages.

The Code of Conduct provided for a "General principle of fair dealing" as follows: *"A company representative shall exercise due skill, care and diligence in his business dealings and shall deal fairly with investors."* It also provided:

> *"Best advice to be given*
>
> *L6. A company representative who, in the course of any relevant business, has dealings with an investor–*

(a) shall give the investor all information relevant to those dealings and that information shall in particular include the information referred to in paragraph 6A below;

(aa) shall use his best endeavours to enable the investor to understand the nature of any risks involved;

L7. A company representative shall not advise an investor on the purchase of any investment contract unless he is authorised by the Member to sell that contract or on any matter unless he is competent to advise on that matter.

L8. (1) A company representative shall, in advising an investor as to the suitability for that investor of any investment contract, have regard, in particular, to the investor's financial position generally, to any rights he may have under an occupational pension scheme or the State earnings-related pension scheme, (if such rights are relevant in the particular case) and to all other relevant circumstances; and he shall use his best endeavours to ensure –

(a) that he recommends only that contract or those contracts which are suited to that investor; and

(b) that there is no other contract available from the Member, or, if the Member belongs to a marketing group, from any member of that group, which would secure the investor's objectives more advantageously."

(Sub-paragraphs (a) and (b) did not apply where L13(4)(b) applied, which set out certain circumstances in which the adviser was permitted to refer the investor to an Independent Financial Adviser.)

These industry rules reinforced the legal duties to which Equitable Life was subject in its dealings with prospective and existing policyholders.

our procedures

In this section I refer to the rules that govern how the Financial Ombudsman Service is to go about investigating and then deciding complaints. I explain the process we have followed in this case and respond to criticisms Equitable Life has made of that process.

Part XVI of FSMA (section 225 (1)) makes provision for the establishment of an Ombudsman Scheme *"under which certain disputes may be resolved quickly and with minimum formality by an independent person."* Our complaint-handling procedures are set out in section DISP 3 of the FSA's Handbook of Rules and Guidance for financial firms.

Equitable Life's procedural criticisms are, in summary:

- That it considers that I have not considered the relevant issues and have instead overly relied on the legal analysis of the barrister whose opinion I sought, Jonathan Hirst QC.

- That my provisional decision and Mr Hirst's legal advice did not address the points made in the joint opinion of 30 September 2003 prepared for Equitable Life by Gabriel Moss QC and Christopher Carr QC and that this means the Financial Ombudsman Service approach to these issues is incomplete.

- That in its view, Mr Hirst's analysis relies upon the legal opinion of Mr Glick and Mr Snowden and that this opinion does not support Mr Hirst's analysis and, further, that Mr Hirst's opinion fails to expressly address Mr Glick and Mr Snowden's view of how the compensation due to policyholders should be limited.

- That Mr Hirst's analysis, my Provisional Decision and this decision (in so far as it follows the earlier analysis) is substantially wrong for the reasons given by Mr Carr and Mr Moss.

- That it has pointed out practical difficulties in calculating compensation as I have proposed and I have not adequately addressed these difficulties. I explain this point in greater detail below.

In view of these points Equitable Life says that I should not issue a final decision at this stage and it has purported to reserve its right to make further representations until I have responded to the points it has raised. In particular, it has said that I should allow it a further opportunity to put forward arguments in relation to interest and the possibility of an award for distress and inconvenience. In response, I invited Equitable Life to make any further submissions it wished to make.

We issued a provisional view on redress in July 2003 and a provisional decision in June 2004 (having already issued views on liability alone). These explained the approach I proposed to take and the reasons for it. Equitable Life did not agree with my proposed approach and at each stage it raised a number of objections and made substantial submissions. I do not see that there was any obstacle to it making any further submissions it wished to make, including further submissions on the matters of interest or distress and inconvenience. It has been in receipt of legal advice and I do not accept that it is lack of imagination or ingenuity in how to frame further submissions that has resulted in Equitable Life's failure to make more representations when invited to do so prior to my final decision being reached and issued on this complaint. On the contrary, I am satisfied that both parties have had a fair opportunity and sufficient time to make submissions. A party is entitled to a reasonable opportunity to know the substance of the case it has to meet and in my view Equitable Life has had that opportunity.

The decision as to when to draw to a close the period for further submissions is never straightforward. This is particularly so where, as I have acknowledged is the case here, there are areas where the law is arguable. But the points of difference are well delineated. I do not consider that further exchanges of legal opinions would bring a consensus closer. It would certainly bring further delay. Having regard for the statutory functions of the Financial Ombudsman Service under section 225 (1) of FSMA, my judgment is that no injustice would be done by proceeding to my final decision and so I should now issue my final decision.

In addition to what it has said about its opportunity to make submissions, Equitable Life has cited practical difficulties associated with implementing redress as reasons

why I should not issue a final decision at this stage. It provided a submission, including a technical report, commenting on the method of redress proposed in the ombudsman's initial view on redress and Mr Hirst's legal opinion. The report was not about the appropriateness or correctness of the method of compensation. It was about how that method could be carried out. Following its receipt of the provisional decisions, Equitable Life submitted that no proper consideration had been given to the points raised in its technical report. It submitted that it had been seeking clarification on the points raised, that they had not been addressed at "an appropriate stage" and so had caused "further delay and cost". A further technical report was provided by Equitable Life commenting on the method of redress proposed in the provisional decisions. Equitable Life has submitted that I should have regard for the "very real difficulties in implementing" the method of compensation I propose and that I should "provide a full and reasoned response on the issues raised in its technical reports" if I proposed to "adopt the Hirst approach". In the main, the issues identified in the technical reports relate to the method of constructing a measure for the "average return" of with-profits funds over the period.

I have considered the practical difficulties to which Equitable Life says my approach to redress gives rise and I am satisfied that these are not reasons for delaying the issue of a final decision in this case. As mentioned above, I do not consider that Equitable Life has been denied an opportunity to make further submissions or has been required to make them in ignorance of the case to which it is responding. Additionally, the Financial Ombudsman Service does not calculate the actual redress due to complainants as a matter of course. It is often sufficient to decide the principles that should govern the calculation of redress and require the firm to apply those principles fairly and in accordance with good industry practice. I have decided that in this case it would be inappropriate at this stage to give detailed guidance on every point of the calculation of the "average return". Different fair minded answers may reasonably be given to the practical questions that arise. In the interests of avoiding any undue delay in the provision of redress, we will, of course, be willing to provide guidance in relation to any genuine difficulties Equitable Life encounters in formulating the calculation, but, ultimately, it is the firm's responsibility to implement my award. I am not persuaded that further discussion of the issues raised by Equitable Life is necessary prior to reaching my final decision or that it is impractical to require it to calculate an average return. Indeed the offers it has made to certain policyholders with GAR-related mis-selling claims say: "In making this offer we have compared the payout you received with the mean payouts of the Society's peer

group competitors in similar circumstances". However, in this decision I have addressed, as far as I consider is appropriate, the substantive points raised in the firm's technical submissions.

In deciding this complaint my task includes discerning the law and how it should be applied. Equitable Life has criticised the way I have gone about this and the conclusions I have reached and it has cited this as a further reason why I should not issue a final decision at this stage. In reaching my decision, I have taken into account a number of legal opinions (a list of opinions, which were prepared across a considerable span of time, is set out in the appendix). To further satisfy myself that I have given full and proper consideration to the legal issues I obtained my own independent leading counsel's advice from Mr Hirst, including a written opinion and a note of further advice. It is apparent from Mr Hirst's opinion that he considered the Carr/ Moss and Glick/ Snowden opinions.

I have not reached my conclusions without careful consideration of the relevant issues and the objections Equitable Life has raised, nor have I adopted Mr Hirst's analysis uncritically. But having given careful consideration to the issues and the opinions expressed on them, I have concluded that, where I find that it is due, Mr Hirst's analysis substantially reflects the approach I should take to determining the compensation due in these cases. My conclusions are my own and based on my own view, formed in the light of the opinions I have considered and the advice I have sought, of how the law stands and how it should be applied to the GAR-related complaints we have received.

I have taken both parties' submissions into account and discussed them in my decision, particularly where my conclusions were not altered by them. I have set out the reasons for my determination in this decision in accordance with Section 228 of FSMA.

the sequence of events

Here I explain our 'lead case' process, and give details of the recent events at Equitable Life relevant to the GAR-related complaints and our handling of those complaints.

At the ombudsman service we decide each case on the basis of its own circumstances. But if we receive a substantial volume of cases that appear to involve essentially similar issues, we may choose a few apparently typical cases as "lead cases". Focusing initially on the investigation of these lead cases helps us to establish the key general principles and saves duplicated effort for all concerned.

Equitable Life sold with-profits pension policies that included the right to GARs until 30 June 1988, when Retirement Annuity Contracts ceased to be sold and legislation covering new-style Personal Pensions came into force.

By the start of 1994 GARs had begun to exceed current annuity rates. Equitable Life then introduced a differential terminal bonus rate which differentiated between GAR policyholders who chose to exercise their guaranteed annuity option and those who did not. Some GAR policyholders believed that this was illegal and complained to Equitable Life and then to the PIA Ombudsman Bureau. As a result, Equitable Life agreed to fund a test case brought by a policyholder, Mr Hyman. In September 1999, the High Court's judgment was that Equitable Life had acted properly regarding the allocation of bonuses, but leave was given to appeal. In January 2000 the Court of Appeal overturned that in a majority decision. Equitable Life appealed to the House of Lords and the House of Lords' judgment was issued on 20 July 2000. In its judgment, the House of Lords held that the differential terminal bonus rate which Equitable Life had applied was unlawful. It also held that "ring-fencing" was not a permissible way to deal with the problem. As soon as the decision of the House of Lords was announced, the board of directors of Equitable Life resolved to put Equitable Life up for sale and to remove bonuses in respect of the first seven months of 2000. On 8 December 2000, Equitable Life announced that it had found no buyer and closed to new business.

In November 2001 Equitable Life applied to the High Court in connection with a Compromise Scheme pursuant to Section 425 of the Companies Act 1985. As a matter of policy, we decided not to determine GAR-related cases while policyholders were being invited to consider adopting the scheme.

The Compromise Scheme was approved by the High Court on 8 February 2002 and certain policies in force on that date are subject to the provisions of the Scheme. The effect of this is that, in general, no "GAR-Related" complaint can be brought to the Financial Ombudsman Service in respect of policies covered by the Scheme because such complaints were dealt with by the Scheme, which provided for increases to be made to the values of those policies in settlement of such claims. On 15 April 2002, Equitable Life published its Particulars of Claim against 15 former Directors. The particulars contained previously unpublished extracts from the legal advice Equitable Life had received from September 1998 onwards.

Between June and July 2002, we discussed possible lead cases with Equitable Life. Ms E's complaint was agreed and selected to be a "lead case" for complaints involving advice given by Equitable Life between September 1998 and July 2000.

On 30 September 2002 Equitable Life announced that it was considering a second "Compromise Scheme" and was discussing it with the FSA. We did not consider that our investigations should be suspended because of this announcement. Equitable Life published a report by Deloitte and an opinion by Gabriel Moss QC and Christopher Carr QC in connection with the proposed scheme, but in the event it did not proceed with it. On 29 November 2002 we wrote to Equitable Life with our views on liability for certain lead cases, including Ms E's. The view in each case was that Equitable Life was liable. On 17 January 2003 Equitable Life wrote to us with arguments on each of the cases, asserting in each case that it was not liable.

Separately from our consideration of complaints, on 31 March 2003 Equitable Life announced that it would be carrying out a case-by-case assessment of GAR-related complaints from former policyholders. From August 2003 this case-by-case assessment led to Equitable Life sending out offers of redress where it considered it appropriate. In accordance with our normal procedure where a firm makes such offers, we decided to send on to the complainants concerned any offers of redress that Equitable Life might make in relation to complaints already lodged with the Financial Ombudsman Service. Complainants were then free to decide whether to

accept or reject Equitable Life's offer. If they chose to reject the offer, we continued our consideration of their case.

In May 2003 we issued “adjudications” on a number of "lead cases" on "GAR-related claims", each case involving advice given by Equitable Life between September 1998 and the date of the House of Lords' judgment on the "Hyman case" on 20 July 2000. We published the adjudications on our website. The adjudications contain the findings the adjudicator has made on a case, and these are binding only if both parties accept them. Either party can reject the findings, in which case the matter is referred to an ombudsman for a formal review and decision. Equitable Life did not accept the findings in the adjudications and asked that they be referred to an ombudsman. As part of the consideration of these cases, the ombudsman sought a legal opinion from Jonathan Hirst QC on how compensation should be calculated. The ombudsman sent a copy of this legal opinion (dated July 2003), together with an initial view on redress, to the parties involved, for their comments. We also published this opinion on our website.

We received a substantial amount of information in response to Jonathan Hirst QC's legal opinion of July 2003 and the ombudsman's initial view on redress. This information included a second legal opinion, dated September 2003, that Equitable Life sought from Christopher Carr QC and Gabriel Moss QC, commenting on Jonathan Hirst's opinion. We published the further Carr/Moss opinion on our website.

On 17 December 2003 we wrote to Equitable Life and to three of the complainants with a proposed procedure for progressing the “lead cases” further. Between February and April 2004 we researched data for other major firms’ with-profits fund performance.

On 8 March 2004 Lord Penrose published his Report of the Equitable Life Inquiry. We studied the report to see whether it included any relevant new information.

In June 2004 Jonathan Hirst QC provided the Financial Ombudsman Service with a further legal opinion we had requested from him. We published this opinion on our website.

The ombudsman issued provisional decisions in July 2004 and copies were made available upon request to those with GAR-related complaints. We also wrote to

inform those complainants that the provisional decisions had been issued and that they could obtain copies of them from us. Equitable Life made further comments and representations on 14 September 2004 in response to these provisional decisions.

We have written to those who have GAR-related complaints with us, at intervals of not normally more than two months, to keep them up-to-date and to advise them of documents with which we would supply them on request. We have also maintained and updated a section on our website of frequently-Asked-questions (FAQs) about Equitable Life, at www.financial-ombudsman.org.uk/faq/equitable.htm. We sent hard copies of the documents published on our website to complainants who asked for them.

the state of knowledge of Equitable Life's senior management

This section sets out factual information about Equitable Life's knowledge of, and the advice it was given about, the GAR issue.

Factual evidence of the state of knowledge of Equitable Life at the relevant time is given in information from Board Minutes and other documents that Equitable Life quoted in the Particulars of Claim that it issued against certain former Directors in April 2002. This is not an endorsement or comment on the validity or otherwise of the claims against former Directors set out in those Particulars of Claim.

I set out below the text of paragraphs 28 to 55 of the Particulars of Claim against Christopher Headdon (one of the former directors) in so far as they contain information about the legal advice that Equitable Life received. Other passages in the Particulars of Claim which consist of claims made by Equitable Life against Mr Headdon or other information are omitted. The Particulars of Claim have since been amended. Paragraphs 37A-37B are taken from the Amended Particulars of Claim dated 7 November 2003. Paragraphs 28 to 45 refer to the timescale relevant to the complaint by Ms E. Amplified accounts of some of these facts have also appeared in the Penrose Report and elsewhere.

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

> *"28. On 8th September 1998 the Society received written advice from Denton Hall, to the effect that:-*
>
> *(a) the directors had a wide discretion under article 65, but there was a risk that a policyholder could argue that he had been led to believe that the same bonuses would be applied to all policyholders; and*
>
> *(b) the Society might face claims at common law or in misrepresentation as a result of its marketing literature, or under the Financial Services Act 1986.*

29. On 9th September 1998 a meeting of the board of directors of the Society took place. The purpose of the meeting was said to be to brief the directors in relation to GAR policies. At that meeting:-

(a) The directors were informed by Mr Headdon that if the Society was not entitled to adopt its differential bonus policy, the maximum potential cost to the Society was £1.5 billion.

(b) The directors were advised by Denton Hall that in their opinion article 65 did entitle the board to declare differential bonuses. However, Denton Hall cautioned the directors that there was nothing in the GAR policy conditions which would lead a policyholder to believe that a differential approach would be applied, and this could be the basis of an argument that policyholders were led to believe that the same bonuses would be applied.

(c) It was agreed that Denton Hall would seek Counsel's opinion as to the strength of the legal position of the Society's differential bonus policy.

30. On 17th September 1998 the Society was advised by Counsel that the directors were entitled to award differential terminal bonuses under article 65 of the Society's articles of association, but that the Society's case would be more difficult because of the way in which bonuses had been presented to policyholders.

31. On 18th September 1998 the Society's managing director produced a written report which was sent to the directors, saying that the Society had orally been advised by Counsel:-

"… that the directors have acted within the powers conferred on them by the Articles and have not breached the terms of the relevant policies with guarantees in the way in which they have. However, and as we are aware, there have been a number of shortcomings in the way in which we have explained and presented the situation to clients".

32. At a meeting on 25th November 1998 Denton Hall orally advised the Society that a Court might hold that the directors had not exercised their discretion properly, or had exercised it in the wrong way or for the wrong reasons.

…

36. At a meeting on 26th January 1999 Denton Hall orally advised the Society:-

(a) of the risk that the Court might not hold that the differential bonus practice was lawful, and that the Judge might find against the Society having formed the view that it was giving with one hand and taking away with the other; and

(b) that it might not be possible to confine the cost of GAR provisions to GAR policyholders.

37. Further, at that meeting, or about that time, Denton Hall orally advised the Society that there was risk in any litigation, and that the Court might find against the Society "simply because the Judge had got out of bed on the wrong side".

37A. On 28th January 1999 Dentons advised the Society in writing that if the Society lost the Hyman litigation there was a real risk that ring-fencing would not be permitted.

37B. On 1st February 1999 the FSA wrote to Mr Nash (the letter subsequently being copied to the rest of the board) saying that: (i) in the absence of a robust insurance treaty it would not consider it prudent for the Society to declare a bonus for 1998; and (ii) even if a reinsurance treaty could be agreed the society should consider carefully whether to declare any bonuses, because of (a) the potential costs of losing the Hyman litigation and (b) the risk of the reinsurance being cancelled if the Society lost the Hyman litigation or otherwise had to change its bonus policy.

38. On 3rd February 1999 Denton Hall sent instructions to Counsel noting that while the Society's directors were greatly comforted by Leading Counsel's optimistic forecast for the future, they were nevertheless well aware of the unpredictability of litigation.

39. On 16th February 1999 the Society received oral advice from Counsel to the effect that, whilst in Counsel's opinion the directors were entitled to award differential bonuses under article 65, the Society needed a Judge who would adopt an intellectually rigorous approach.

40. On 18th February 1999 Mr Headdon produced a note headed "GARs – Contingency Plan should ELAS lose the Court Case", which stated that whilst the Society was confident that its approach would be endorsed by the Court: "when embarking on legal action one can never be totally certain of the outcome. It is, therefore, sensible and prudent to consider the implications of losing, however unlikely that might be …"

…

43. By letter dated 12th March 1999 Denton Hall advised the Society that the Court might rule that reducing final bonuses on GAR policies but not on non-GAR policies ("ring-fencing") was improper and unfairly discriminating.

44. At a meeting on 13th July 1999 (following the hearing of the preliminary issue before the Vice-Chancellor, but prior to judgment having been given), Denton Hall advised the Society that "the result was too close to call on the contract issue", and "it should by no means be taken for granted that the Society has succeeded".

45. By letter to the society dated 15th July 1999 Denton Hall advised if there was an adverse decision the Society might well not be able to keep the additional costs within the GAR policy class.

…

51. On 21st January 2000, a meeting of the board of directors of the Society took place, attended by Mr Headdon, at which the Court of appeal judgment was reported to the directors. Denton Hall said that Counsel's advice was that the judgments could be attacked, the Society should appeal, and "the Society's Counsel were confident of success in the House of Lords, although no guarantee could be given".

52. The minutes of the board meeting of 21st January 2000 record that the "Directors … discussed whether the Society should appeal to the House of Lords. It was accepted that further arguments might be put by the other side. There were risks that the House of Lords could be critical of the Society and could adopt a different more unsatisfactory approach to the action taken by the Society …".

…

55. On 16th February 2000 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."

Ms E's Complaint

This section contains brief extracts of what Ms E said when she complained to us and the dates relevant to how she came to take out her policy.

Ms E has complained that she has made a financial loss because Equitable Life failed to disclose to her the existence of GAR Rights and their potential cost to its with-profits fund when it gave her advice in October 1999 through its representative to take out a Personal Pension Plan. She wrote in a letter to the Financial Ombudsman Service on 24 September 2001:

"*I was advised by one of their representatives on the 9th October 1999* [in my Provisional Decision I noted the apparent error in the date, Equitable Life's adviser's letter summarising the meeting being dated 7 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".

Equitable Life's adviser appears to have met Ms E in September 1999, which is the date given on his "fact find" notes of his contact with Ms E. According to his letter to Ms E, dated 7 October 1999, his contact with Ms E was the result of an enquiry about pension planning made by her to Equitable Life. According to his letter to Ms E, Equitable Life's adviser recommended that she take out a Personal Pension Plan. The policy appears to have come into force shortly after the date of that letter in October 1999. Ms E's Personal Pension Plan is not subject to the provisions of the Compromise Scheme because it was not in force on 8 February 2002, having been transferred from Equitable Life in August 2001.

This complaint was agreed by the Financial Ombudsman Service and by Equitable Life as a "lead case" in respect of a "GAR-Related Claim" category.

Ms E's Circumstances

This section contains extracts of the letters sent to Ms E by the Equitable Life adviser that detail her circumstances and the advice she was given.

Equitable Life's adviser wrote to Ms E on 7 October 1999. He referred to their "*recent meeting*" and continued:

> *"BASIS OF ADVICE*
>
> > *Our discussion resulted from your enquiry to the Society. You had enquired about pension planning and my advice has been restricted to that area. You provided me with full information in relation to your enquiry for pensions".*

A section "FINANCIAL OBJECTIVES AND RECOMMENDATIONS" began:

> *"Concerning your income in retirement, you were interested in effecting a Personal Pension Plan to receive contributions that your employer is willing to make to a Personal Pension Plan of your choice.*
>
> *You wish to take advantage of the favourable tax reliefs available from pensions. You have no current pension provision. You recognise the need to take action now.*
>
> *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 Equitable Life's adviser completed stated:

> *"Client wishes to take a cautious investment route with little volatility. Recommended with-profits",*

and again:

> *"...Client is seeking a cautious, consistent return without any volatility. With-profits was recommended as the investment route."*

findings on liability

I set out here what it was that the firm did wrong in this case and why Ms E would not have invested with Equitable Life if it had not acted wrongly.

If Equitable Life knew that its approach to GAR rates was potentially impermissible, that was a crucial fact that, in the light of its legal duties and its regulatory duties to which have referred to above, it should have told Ms E.

In the light of the consequences of the GAR test case litigation, which was proceeding through the courts at the time of Ms E's meeting with Equitable Life's adviser, it is apparent that that litigation posed risks to Ms E as a potential non-GAR policyholder that were significant and material. The particulars of claim, to which I have referred above, demonstrate that at the time its representative met Ms E Equitable Life, through its directors and senior managers, was aware that it was facing significant risks as a result of the GAR test case litigation. In my view Equitable Life, in accordance with its obligations towards Ms E, should have disclosed these risks to Ms E when its representative advised her to take out an Equitable Life Personal Pension Plan. Given that he gave leave to appeal on the same day, the Vice-Chancellor's judgment of 9 September 1999 was not sufficient to remove the risks, or justify Equitable Life in not disclosing them to Ms E. Equitable Life was still aware, through its directors and senior managers, that the risks of which it had been advised continued pending the outcome of the appeal process, notwithstanding success in the High Court.

I consider it to be apparent from the circumstances outlined above that Ms E approached Equitable Life with a view to taking out a personal pension plan, that Equitable Life's adviser undertook to advise Ms E about pension planning and that his advice was that she should take out an Equitable Life Personal Pension Plan. The fact that advice was given when Equitable Life's representative recommended that Ms E take out an Equitable Life Personal Pension Plan is in my view consistent with the commercial realities and inherent probabilities in the relationship between Equitable Life's professional representative and a consumer and potential client such as Ms E. That Equitable Life's representative believed he was providing advice to Ms E is further evidence for this conclusion.

Based on the evidence described above, I conclude that Equitable Life's representative drew Ms E's attention to benefits of taking out the Personal Pension with Equitable Life but did not draw her attention to the risks posed by the GAR litigation, which was a significant risk. In saying this, I am not blaming the particular representative who advised Ms E. The knowledge that the senior management of Equitable Life had was not passed on to its sales representatives.

In advising Ms E, Equitable Life had a duty to advise in accordance with the law and the regulatory rules applicable at the time. This meant that Equitable Life assumed a duty to advise Ms E in the area of pension planning with reasonable skill and care and to disclose to her all the material risks of the course of action it recommended to her. In my judgment Equitable Life's advice was given in breach of those obligations. Also it is clear to me that Ms E acted upon that advice by taking out an Equitable Life Personal Pension Plan.

Ms E's employer had a policy of making contributions to a Personal Pension Plan of the individual's choice. Therefore she was in no way obliged or limited to pursuing matters with Equitable Life. In the circumstances I am satisfied that she would not have made her investment with Equitable Life had it made her fully aware of the risks of doing so. Had she been properly advised I find that Ms E would not have chosen to invest in Equitable Life's with-profits Personal Pension Plan but would instead have invested in another reputable firm's with-profits pension fund which was not subject to similar risks.

outline of the method by which Ms E is to be compensated

In this section I explain the position that we should be seeking to put policyholders in where a complaint is upheld because Equitable Life did not tell the policyholder about the GAR issue and I outline the method of compensation that should be used to achieve this. I explain my view that policyholders should not be compensated for losses caused by any general decline in investment markets but should be compensated for any investment underperformance specific to Equitable Life. I also explain why it is appropriate to look at the performance of an average with-profits fund if I cannot identify exactly the with-profits fund that the policyholder would have invested in had they not invested with Equitable Life.

In my "findings on liability" I have explained that had Ms E received full and proper advice from Equitable Life in October 1999 my finding is that she would not have invested with Equitable Life but would instead have invested in another reputable firm's with-profits pension fund which was not subject to similar risks.

In reaching my decision as to the appropriate method for redress in Ms E's case, I have had regard to the facts of the case and the legal position. In particular I have sought to bear in mind the general compensatory principle. In other words I have looked to see how Ms E can best be put back into the position she would have been in had Equitable not acted in breach of its duty of care to her.

The position Ms E would have been in had she not invested with Equitable Life would have been to receive a return on her premiums in the form and of the amount arising from an alternative with-profits pension investment. That return would not have been positive throughout but would have reflected investment losses resulting from the fall in the stock market that would have inevitably affected the returns available from all with-profits funds through the indirect mechanism of the bonus policy decisions made by the managers of those funds.

Therefore in my view the method of calculating Ms E's loss should exclude losses caused by any general decline in investment markets that would have affected all with-profits pension fund investments and which, in accordance with my findings on liability, Ms E would in all probability have suffered wherever she had invested over

the period. I do not consider that such losses can be said to have been caused by Equitable's breach of duty. In my view the law prevents Ms E from recovering losses that she would have suffered due to falls in the stock market even if she had not invested with Equitable Life. As Lord Hoffman said in *South Australia Asset Management Corporation v York Montague Ltd [1997] AC 191("SAAMCO")*: *"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"*.

However, my view remains that, in the light of my findings on liability, any investment underperformance suffered by Ms E compared to that which she would have suffered had she invested in a policy with an alternative provider, having made that investment with Equitable Life rather than the other provider as a result of Equitable Life's wrong, is a loss directly flowing from Equitable Life's wrong. The method of assessing compensation therefore does not need to seek to exclude market losses suffered by Ms E's Equitable Life policy over and above those market losses she would have suffered had she invested elsewhere. I use the term underperformance rather than performance because, due to the market movements referred to above that affected all with-profits investments, the return achieved by the alternative provider over the relevant period would not have been positive throughout as would be the case with, for example, a capital and interest return.

I do not consider there to be any inconsistency between my view that investment losses that Ms E would have sustained anyway are not recoverable and the view I have reached on the recoverability of losses arising from any extra investment underperformance by her Equitable Life investment compared to the alternative investment she would have taken out but for Equitable Life's wrong.

The financial adjuster suffered upon transfer and the policy value cut suffered on 16 July 2001 reflected the particular performance of Ms E's Equitable Life investment and in so far as she suffered losses consequent upon the relative underperformance of her investment, those policy value reductions are recoverable, subject to my consideration below of further relevant legal principles.

In the light of my findings on liability, my view is that the method by which Ms E should be compensated for the loss caused to her by Equitable Life's wrong is to compare on one hand the value of the benefit she received as a result of investing

her money with Equitable Life and, on the other hand, the value of the benefit she would have received as a result of investing that money in an alternative with-profits pension fund.

There will be instances where it is possible to decide that the alternative policy that would have been chosen by a particular investor would have been a particular policy with a particular firm. However I do not consider that it would be appropriate to have particular regard to the performance of a particular alternative firm unless there is evidence from which it can be concluded, on the balance of probabilities, that that particular firm would have been selected. In August 2001 Ms E transferred her investments to Norwich Union. However, I cannot simply conclude from this that Ms E would have invested in Norwich Union in October 1999 if she had received full and frank advice from Equitable Life's adviser in October 1999. It is at least equally possible in my view that Ms E would have invested with one of the many other providers of with-profits pension policies that were available at the time. I therefore do not consider that the comparison should be made with a Norwich Union pension investment and neither Equitable Life nor Ms E has sought to persuade me otherwise since I expressed this view in my Provisional Decision.

It remains my view therefore that in assessing the financial position Ms E would have been in had she not invested with Equitable Life, it is appropriate to arrive at the value she might have received as a result of investing that money in an alternative with-profits pension fund by using an average return over the relevant period for with-profits pension investments, rather than simply looking at the Norwich Union position. In my view this will most fairly reflect the return that would most likely have been achieved by an alternative investment that Ms E would have taken out.

The use of the average fund is therefore a practical response in the factual situation as I find it to the problem of placing Ms E in the financial position she should be in. Since the performance of the average with-profits fund is merely a "proxy" for the performance of the investment Ms E would have taken out but for Equitable Life's wrong, I consider that whether any decline in value suffered by her Equitable Life investment over its course is greater or less than that average fund is *prima facie* the difference between the position she would have been in but for Equitable Life's wrong and the position in which she in fact finds herself as a result of that wrong.

It seems to me that Ms E does not have grounds to argue that she would have selected a provider that performed better than average nor could Equitable Life fairly object to this approach being taken since there is no proof her alternative investment would have performed worse than average.

Furthermore, it is reasonable to suppose that the overall cost effect, from Equitable Life's point of view, of taking an average where the particular alternative cannot be identified in the GAR-related cases, will be reasonably in line with the position that would have existed had it been possible to identify the actual firms. Since it is not possible to identify all the actual alternative firms in all the GAR-related cases it is also impossible to say what the position would have been had that been possible.

In view of what I have said above, in any particular case in which the exact alternative firm cannot be identified it is not unreasonable in my view to suppose that as a matter of fact the alternative with-profits fund into which the investment would have been made would have performed in line with an average with-profits fund.

The compensation will therefore be the difference between the value of the benefit Ms E received from her Equitable Life investment at the relevant date and the value of the benefit she would have had in the average alternative with-profits investment on the same date. Since Ms E would not have had the benefit of the compensation as cash but rather as an enhanced pension fund value, the compensation should be paid to her by the payment of a sum into her pension fund that is sufficient to increase the value of her fund by an amount equal to the compensation due. This will also prevent the value of the amount due being reduced by any charges that are levied on the payment made into the pension fund. The appendix to Equitable Life's first technical report pointed out that the payment of the compensation into a pension fund will mean that initial charges will be payable on the compensation amount.

points raised in relation to the use of an average fund

I address here a number of points Equitable Life has raised about the practicalities of estimating an average with-profits return and using this as the basis for calculating the compensation due.

Equitable Life's first technical report on the practicalities of my approach reached the following conclusions about the construction of an average fund:

- That many other life companies did not write business comparable with Equitable Life policies because the latter were generally more flexible. To solve this difficulty it said that an allowance for the value of flexibility ought to be made in any comparison between Equitable Life products and those of other firms.

- That due to a limited availability of necessary information, "the exact calculations using the Hirst opinion will not usually be possible".

- That approximations "will not be acceptable" because of the way in which these approximations would need to be reached (many interpolations and extrapolations) and "the comparison is between two hypothetical values".

In a second technical report, Equitable Life submitted that the provisional decision had not been sufficiently specific in a number of areas but provided proposals as to how a calculation might nevertheless be carried out. Those areas were, in particular:

- Whether it was intended that "rolled up" values be used in all of the calculations or whether claim values could be used in some calculations and rolled up values in others.

- How rolled up values were to be calculated, in particular the allowance to be made for expenses and for charges made for guarantees and smoothing.

- When calculating rolled up values, how financial adjustments (MVAs) are to be taken into account given the different ways in which they are applied by different firms.

- What allowance is to be made for the greater flexibility that the B&W Deloitte report of September 2002 submitted Equitable Life policies had.

Equitable Life also submitted that, primarily due to a lack of publicly available information, redress in many individual cases would be unlikely to result in a fair or accurate calculation of the actual loss suffered. It argued that it was not appropriate or reasonable to adopt a formula for compensation that cannot be calculated with any degree of reliability and precision and that the cost of calculating the redress would be unfairly onerous on the Society.

The use of an average fund is necessary in this case only because it has not been possible to identify the exact fund into which the policyholder would have invested had she not invested with Equitable Life. As mentioned above, the average fund is a "proxy" that should be designed to represent the return of an average alternative with-profits investment over the relevant period. It is impossible to say that the estimated return does not match the return Ms E would have received if she had not invested with Equitable Life because the latter is not known. Exact calculations will only be possible if the actual alternative investment is known.

The purpose of constructing an average is not to produce a definitive "average" of all relevant funds, requiring all factors of any significance to be taken exhaustively into account (however small their significance or costly their inclusion). It is necessary only to take into account sufficient factors to produce a constructed return that can fairly be said to fall within the bounds of what could fairly be called an "average return" for the purposes of providing the redress I have awarded. I do not agree that this is unduly onerous or costly for Equitable Life or that this is a reason for not awarding the redress I have decided is due. Equitable Life's submissions do not persuade me that it is impossible to calculate appropriately the compensation I find to be due.

If a complainant accepts my final decision, my award is binding on the firm and it is the firm's responsibility to make arrangements to pay any redress awarded in accordance with the decision. In subsequent cases, Equitable Life, applying fairly the

principles I have set out, may be able to formulate offers that the remaining complainants will see as acceptable applications of the principles. It is necessary and appropriate that a degree of latitude be allowed commensurate with the features presented by individual cases. It is up to Equitable Life, applying not only the principles I have set out, but also its regulatory obligations, to approach this task fairly and responsibly. I have not sought, nor do I consider it to be appropriate, to define in detail each step the firm should take along the way. In this case my award involves factors where an approximation is needed. A balance is to be struck between taking into account sufficient factors for the approximation to be suitable for the purpose for which it is to be used and the cost of taking into account additional factors. If taking into account additional factors will most likely reduce the cost of compensation but increase the cost of its calculation, the balance is one for the firm to strike using its own commercial judgment. If additional factors may strengthen the basis of the calculation having regard for its purpose but it is uncertain as to whether this will lead to a higher or lower compensation figure, the balance is one for the firm to strike having regard to the decision which binds it and its duty to deal with policyholders in a way that is fair and in accordance with its legal and regulatory obligations. Nevertheless, I have addressed below certain matters raised by the firm with the aim of preventing the possibility of any misunderstanding arising in relation to them.

It follows from my decision that the value received by the policyholder from her investment with Equitable Life is not to be compared with the claim value of the alternative investment but with the value that investment would have had on the basis that it was a continuing investment, which in the terms of Equitable Life's actuarial report might be called the "rolled up" value. It follows that no deduction is to be made from the value of the alternative investment (or the compensation due) in respect of any surrender penalties, exit charges, financial adjustments or MVAs. It also follows from my decision that when loss is assessed Ms E is to give credit for the actual benefit she received following her transfer and necessary (due to pensions legislation) reinvestment of her pension fund with another provider. This is an actual sum at an actual point in time. It is not a theoretical value and so there is no basis for the sum to be increased in an effort to take into account the value of any particular features contained by the Equitable Life policy (whether or not contained by other similar policies) policies, that Ms E might have benefited from had she retained the Equitable Life policy.

Finally, the actuarial report suggested basing the average return on the claim values where sufficient information is available and on a “rolled up” value where sufficient information is not available or the policy has been in force for less than five years. The use of claim values in this way appears to me to be unacceptable in view of the anomalies and discontinuities that would appear likely to arise from using two different approaches and so I would favour the use of rolled up values in all instances.

similarity with the situation for misrepresentations cases

I explain here why I would expect policyholders with misrepresentation cases to be treated in a similar way to those policyholders, like Ms E, whose cases concern a breach of a duty of care.

The starting point for calculating compensation is similarly to compare the complainant's actual position (caused by the misrepresentation) with the position they would have been in if they had not entered the transaction. Based on the "GAR-related" complaints the Financial Ombudsman Service has received, and the "lead cases" we have already considered at initial view, adjudication and provisional decision stage, it seems likely generally that my conclusion in misrepresentation cases, as in breach of duty of care cases, will be that if the complainants had not invested with Equitable Life they would have invested in a with-profits policy with another firm. On the face of it, I do not see why the losses recoverable in those cases should be significantly different to those recoverable by Ms E or other policyholders who took out policies because of a breach of the duty of care owed to them. On the contrary, it seems to me that justice demands that the compensation due and the method by which it is calculated should be substantially similar.

legal criticisms of my proposed method of compensation

In this section I set out details of criticisms Equitable Life made, prior to and following my provisional decision, of the legal basis of my view of how policyholders should be compensated.

I have to consider what is appropriate compensation for Ms E in this case. I have had lengthy representations from Equitable Life as to the correct approach to loss in this case. They have provided me with expert actuarial and legal opinions. Ms E has been given an opportunity to make representations. I have also taken my own legal advice.

In my Provisional Decision I set out how I was minded to award compensation in this case. Equitable Life has submitted that the approach I propose is incorrect in law.

In its submissions, Equitable Life has made the following main criticisms of my proposed approach to quantum in this case and the other lead cases:

- Equitable Life submits that it is not right to rely on the case of *Royscot Trust Limited v Rogerson [1991] 2 QB 297("Royscot")* when considering loss as that case was wrongly decided and would, in its view, be overturned if it were to be considered by a higher court in the future. *Royscot* is only applicable to cases based on misrepresentation and therefore has no direct relevance to Ms E's case. My comments on this matter are therefore included here for the sake of completeness.

- Equitable Life says that even if *Royscot* were applicable, a policyholder who successfully mounts a case of fraud against Equitable Life would be unable to recover damages by reference to a decline in value that occurred after the policy was purchased. It has referred to this as the *Twycross* exception to the rule in *Smith New Court*. (The case references are *Twycross v Grant [1877] 2 CPD 469* and *Smith New Court Securities Limited v Scrimgeour Vickers (Asset Management) Ltd [1996] 4 All ER 769).* It says that this means the

compensation I find due to Ms E is more generous than that available in cases of fraudulent misrepresentation.

- Equitable Life says that that the correct approach to compensation is found by applying the test applied by the court in *SAAMCO* requires that attention be paid to the central principle of causation, including a consideration of the scope of the duty that has been broken and the loss which flows from it. Equitable Life has criticised Mr Hirst's legal analysis for failing to give proper consideration to the application of *SAAMCO*, which it considers imposes limitations on recoverable loss such that it is restricted to "the GAR cost".

- Equitable Life submits that the correct approach to *SAAMCO* means that Equitable Life "should only be liable to the extent to which the losses of a policyholder are attributable to features of the non-GAR policy, which should have been disclosed, but were not disclosed, namely the GAR risk…..We recognise however that the contrary view is arguable" (the "Glick Cap"- paragraph 10.2 of Equitable's submissions of 30 September 2003). Equitable Life contends that the correct application of the law means that complainants are not entitled to recover the MVA or the policy value reductions imposed by Equitable in July 2001.

- Finally, Equitable Life has submitted that mitigation arguments are irrelevant to a proper consideration of the MVA and the policy value reductions. It asserts that these aspects are irrecoverable on a correct understanding of the causation position (paragraphs 12.1-12.7 of Equitable's submissions of 30 September 2003).

the Royscot points

This section addresses points Equitable Life has made about the use of a particular legal decision called "Royscot", in my provisional decision's approach to compensation for misrepresentation cases.

Equitable Life has argued that the method of compensation I have proposed in considering misrepresentation issues is incorrect. I have, in part, based the proposed method of compensation for misrepresentation cases on my interpretation of the case of *Royscot*. *Royscot* was a decision of the Court of Appeal in 1991 concerned with the correct measure of damages for innocent misrepresentation. In that case the court held that the correct measure of damages recoverable for innocent misrepresentation under section 2(1) of the Misrepresentation Act 1967 was the measure for fraudulent misrepresentation rather than that for negligence at common law. The effect of this was that the claimant in that case was entitled to recover damages in respect of all losses suffered by it which flowed from the defendant's misrepresentation, including unforeseeable losses, provided they were not otherwise too remote. Equitable Life has taken issue with the Court of Appeal's decision in the case of *Royscot*. It has said, in its submissions, that *"it would be absurd to suggest that Parliament intended the negligent misrepresentor to be liable to the same extent as the intentional and dishonest wrongdoer"*. Equitable Life has submitted that, in its view, and in the view of its legal advisers, *Royscot* was wrongly decided by the Court of Appeal and that it is doubtful if that decision is binding.

Equitable Life has obtained the view of Lord Slynn and has forwarded his views to me as part of its submissions. Lord Slynn commented that the decision in *Royscot "is binding at first instance and in the Court of Appeal, has stood now for 13 years and Parliament has not seen fit to amend the section"*. As I have set out above, I am bound by PIAOB Term of Reference 5.1 to *"observe any applicable enactment, rule of law or relevant judicial authority"*. Unless and until *Royscot* is overruled it is legally binding authority that I must observe. I do not consider that it is open to me to ignore it on the grounds that it might in future be overruled because, however likely or unlikely that may be, it remains a matter of speculation. Equitable Life has also submitted that *Royscot* can be distinguished from the present cases using the

principles of causation. I do not agree with its views on this point and set out below my own conclusions on the issue of causation.

Equitable Life has also argued that, even if the decision in *Royscot* was correct, it was not concerned with the problem that arises when a transaction causes two kinds of damage, one of which is within the scope of the duty which has been broken and the other of which is outside the scope of that duty. It suggests this is the case with the GAR-related complaints and that in these circumstances the recovery of losses should be limited, even in cases of misrepresentation, by the principles that can be derived from *SAAMCO*. I have given particular consideration to their views, expressed by their solicitors, counsel and indeed by Lord Slynn on the subject. The firm's submissions concede that *SAAMCO* may be subject to certain exceptions, such as fraud. I have explained above why I consider that *Royscot* is applicable and, this being the case, I am not persuaded that in misrepresentation cases the recoverable loss should be limited in the way Equitable suggests.

There is a further reason why I do not consider that it follows from the principles that Equitable Life seeks to derive from *SAAMCO* that the loss I have identified as recoverable has been incorrectly identified. This reason arises in relation to the factual situation existing in the complaints referred to the Financial Ombudsman Service where a misrepresentation has been complained of. Where an investor made an investment on the basis of a misrepresentation that misrepresentation was usually made to him in the course of advice given to the investor. So there was not only a duty not to misrepresent. The situation in which the misrepresentation arose is one where the duty concerned was also a duty to advise, and the policyholder was advised by the adviser as to a particular course of action, and the particular course of action advised, and taken, was to invest money with Equitable Life. That situation is not similar to the situation in *SAAMCO* in which the loss recoverable was limited in the manner Equitable Life suggests should apply to the GAR-related cases. I have explained this point more fully in the section headed "*SAAMCO* criticisms".

the Twycross points

This section addresses points raised by Equitable Life relating to a particular legal decision called "Smith New Court ", which discussed a much earlier legal decision called "Twycross v Grant". Equitable Life has submitted that in view of these points the compensation I find due to Ms E is more generous than that available in cases of fraudulent misrepresentation.

Equitable Life has submitted that "*a policyholder who successfully mounts a case of fraud against the Society would be unable to recover damages by reference to a decline in value that occurred after the policy was purchased*". It says that "*the decline in the value of the Society's policies since those policies were purchased is, by definition, a case where the decline in asset value has occurred since the transaction was entered into*" and that if a deterioration in the value of an asset has taken place as a result of factors occurring since the transaction it cannot be recovered. It refers to these conclusions as "*the Twycross exception to the rule in Smith New Court".* Equitable Life says that it follows from this "rule" that the method for calculating compensation I have proposed provides greater compensation than is allowable even under the fraudulent measure of damages for misrepresentation.

The whole of the loss complained of by a claimant with a GAR-related complaint will have been suffered by way of a "decline in value" of their policy subsequent to the 20 July 2000 when the House of Lords ruled that Equitable Life should not have declared lower final bonus rates for policyholders who chose to use the guaranteed annuity rate option provided in their policies. Therefore the whole of their loss was suffered subsequent to their purchase of the policy, whether suffered during the course of their holding the investment or on their transfer of that investment to another provider. In my view in so far as the loss suffered by such complainants are losses caused to them by Equitable Life and recoverable by them, the decline in value of their policies is recoverable. What is significant is the cause of the loss rather than the way in which the loss was suffered.

In my view the complainants' losses, suffered by way of a decline in the value of their policies that took place after the date they were caused by Equitable Life's wrong to take out the policies, are recoverable by them in so far as they were related to the

wrong. Those losses were caused by and were a foreseeable consequence of the wrong. I do not consider that such losses can be characterised as having been caused by a new event or factor which occurred after the provision of advice. The facts of these present cases are not analogous to either the situation described in *Twycross* and referred to by the court in *Smith New Court* or a subsequent fraud as mentioned in *Smith New Court*, which the court in *Smith New Court* anticipated would render a loss irrecoverable. It is therefore my view that the recovery of Ms E's losses, in so far as I consider them to be recoverable, is not precluded in the way Equitable Life suggests.

the SAAMCO points

In this section I address the issue of the application to Ms E's case of a particular legal decision called "SAAMCO". In doing so I consider the factual situation of Ms E's case, which in important respects is common to the GAR-related complaints we have received generally.

Equitable Life and its advisers do not agree with my conclusions concerning the losses caused by Equitable Life's wrong and recoverable by Ms E, and consequently it does not agree with the method I propose to compensate her for those losses. It considers the losses I have identified as having been caused by its wrong are too broad and should be limited further using the principles of causation as applied in the *SAAMCO* case. I have given careful consideration to Equitable Life's views, to those of its solicitors, counsel and Lord Slynn. I believe that the issue between us on this point arises from my conclusions as to the proper characterisation of the scope of the duty of care.

In my view it is clear from *SAAMCO* that the limitation the firm seeks to derive from *SAAMCO* is applicable to situations in which the duty concerned is a duty only to provide information rather than to provide advice. Lord Hoffman said: *"If the duty is to advise someone as to what course of action should be taken, the adviser must take reasonable care to consider all the potential consequences of that course of action. If he is negligent, he will therefore be responsible for all the foreseeable loss which is a consequence of that course of action having been taken"*.

In my view and in accordance with my findings on liability, Ms E's complaint does not concern a mere information case under *SAAMCO*. It concerns the provision of advice on the suitability of the product. In my view, the duty owed by Equitable Life to Ms E and in breach of which it advised her to take out an Equitable Life Personal Pension Plan was a duty to advise. I am satisfied that Equitable Life did not merely undertake to provide information to Ms E about the GAR cost. Thus, applying the same principles of causation, my conclusion is that the loss should not be confined in the way Equitable Life suggests.

In *SAAMCO* valuers wrongly overvalued certain properties, and in reliance on the valuations, a bank lent money which later proved to be irrecoverable. The situation was one where incorrect information was provided and the party providing the information ordinarily had no interest in or benefit from, the details of the course of action the recipient might pursue thereafter. In this situation the duty of care, and the loss that could be said to have been caused by the breach of that duty, was found to be limited.

In contrast, in Ms E's case it is important to note that Ms E provided the adviser with full information in relation to her enquiry about pension planning, including relevant details of her personal and financial circumstances and objectives. The advice given to Ms E was given with the intention of inducing her to take a particular course of action, namely to invest money in a policy of some kind or another with Equitable Life, and Ms E did indeed take the course of action the adviser intended her to take. Equitable Life had a direct financial interest and directly derived a financial benefit from Ms E taking the course of action it recommended. It is my view, therefore, that Equitable Life's responsibility extends to compensating Ms E for all the foreseeable consequences of having advised her to enter into her investment with Equitable Life.

In advising Ms E, Equitable undertook a duty to advise her in accordance with its obligations. Had it done so she would not have taken out the policy with Equitable Life. In my judgment and in the light of my findings on liability, the foreseeable losses Ms E has been caused by the negligent advice she received to place her investment with Equitable Life fall within the scope of Equitable Life's duty and their recovery is not limited by *SAAMCO*.

timing of assessment

In this section I set out when I believe loss should be assessed (subject to certain other relevant considerations such as "mitigation"). I also address the point made by Equitable Life that there would be no need to identify this date if I adopted the method laid out by Ian Glick QC and Richard Snowden.

When, then, is it correct to make this comparison between Ms E's actual investment and the average alternative investment which I refer to above? Considerable efforts have been made by Equitable to persuade me that this question is irrelevant. It argues that by a proper understanding of the principles of causation, assessing the loss by reference to the "Glick cap" becomes the correct approach and thus it is not necessary to do this calculation at all.

The "Glick cap" has been interpreted to mean that "compensation paid to the policyholder should be limited to the lesser of:

(a) the amount he would have received if he had bought an equivalent policy with another insurer less what he actually received; and
(b) the GAR costs attributable to that policyholder's fund".

(Paragraph 10.4 of Equitable Life's submissions of 30 September 2003 and paragraph 125 of the opinion of Carr and Moss dated 30 September 2003). Equitable Life's argument runs that as, on its analysis, asset value movements [attributable to specific or general market movements] are irrelevant, then the significance of the date of the assessment of loss falls away (paragraphs 93 and 132 of Carr and Moss dated 30 September 2003). For the reasons explained in this decision (in particular the sections headed "Outline of the method by which Ms E is to be compensated", "The *Twycross* criticism", "The *SAAMCO* criticisms", "Mitigation and causation issues" and "The MVA and reinvestment costs"), I remain of the view that such movements are relevant and therefore so is the timing of that assessment.

I have given careful consideration to the representations submitted by the parties, their advisers and to the advice of Jonathan Hirst QC on this point. I have concluded that the starting point to assess the correct date to strike this assessment is the date

on which the complainant moved her investment away from Equitable Life to Norwich Union, namely 31 August 2001. This is the date at which loss crystallises. This is the date at which compensation should be calculated by comparing the value of Ms E's actual investment with the value of an average alternative investment.

After the date that Ms E transferred her investment it is no longer possible to argue that Equitable Life's breach of duty caused any further loss.

the facts of Ms E's case relevant to the mitigation and causation issues

This section sets out extracts from letters Equitable Life sent to policyholders about the consequences of the GAR issue as the situation developed after the GAR rights had become costly for the firm. Should Ms E have done more to help herself (to "mitigate" her loss)? I set out here details of the information available to Ms E and her actions during the period.

After the House of Lords delivered its judgment on 20 July 2000, a standard letter was sent out by Equitable to all policyholders explaining the meaning of the Hyman judgment and the action Equitable Life proposed to take. The letter stated:

> *"I am writing to you to explain what the ruling means for you and why your Board has decided that members' interests will best be served by the sale of the Society.…*
> *The ruling means that The Equitable is required to increase benefits for some policies with a corresponding reduction in the benefit of other policies. One of the aims of the sale of the business is to restore reduced benefits to the previous levels.*
> *Final bonus rates were suspended by the Board on 20 July 2000 while the precise implications of the House of Lords' ruling were determined. New final bonus rates were introduced on 26 July 2000 and operate with effect from 20 July 2000.The effect of the new rates is reflected in the details below:*
> *(i) If you have a with-profits policy which does not contain a GAR the growth allocated to you for the year 2000 will be lower than it otherwise would have been. No growth has been allocated for the period 1 January to 31 July 2000. The normal growth rate will resume from 1 August 2000. It is intended that the loss of seven months' growth will be made good from the proceeds of the 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.

Preparations for the sale process are now underway. The process is likely to mean, subject to members' approval at an Extraordinary General Meeting (EGM) in 2001, that the Society will demutualise and will be acquired by another financial institution.

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.

I shall write to you again when a potential purchaser has been identified…

…

…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."

On 8 December 2000, Equitable Life announced that it had found no buyer and closed to new business. It sent a letter to policyholders on 12 December 2000 explaining this in the following terms:

> *"As most policyholders will be aware, on 8 December 2000 the Board announced that it had been unable to find a purchaser for the Society and had decided to stop writing business with immediate effect. I must stress that the Society remains solvent and will continue to pay benefits and accept premiums under existing policies."*

The letter contained the text of a press release, which said:

"What does this mean for policyholders?

- *Closure of the Society to new business leaves the existing with-profits fund and existing unit-linked funds intact. Regrettably, however, the loss*

of growth in with-profits policy values from 1 January to 31 July 2000 is unlikely now to be restored.

- *All policyholders' benefits will continue to be paid out in line with the contractual obligations under their policies*
- *Growth will accrue to with-profits policies in the normal way in line with the investment performance of the with-profits fund. This investment performance is now likely to be impaired by the fact that the with-profits fund will need to be invested to a greater extent in bonds and gilts rather than equities which historically have generated higher returns in the longer term. The with-profits fund will be rebalanced to this effect over an extended period lasting at least several months.*
- *The Board has no reason to change its best estimate of the likely cost of the Guaranteed Annuity Rate ('GAR') liability arising from the House of Lords' decision, however, the actual cost of the GAR liabilities could be more or less depending on a number of factors, most importantly future interest rates. Were the actual GAR liability to exceed the current best estimate, there would need to be a further transfer of value from non-GAR policyholders.*

…

- *Because the Society will not be writing new business, those of its operations involved with new business will be sold or reorganised. These and other measures will, over time, lead to reduced costs for the Society.*
- *Policyholders who are making regular contributions to their policies, or who are entitled to make additional contributions, can continue to do so. However, in the case of with-profits policies, policyholders should consider the impact of the likely lower investment returns on their savings over time."*

The letter went on to give Equitable Life's overview of the failed attempt to sell Equitable Life. Although certain discussions were still ongoing, the letter said:

> *"The Board has concluded that it is unlikely that these or other discussions will result in sale proceeds and/or capital support sufficient to restore the capital strength of the with-profits fund. Without this, the investment freedom of the with-profits fund will be constrained with a consequent impact on long-term performance. In view of this, the Board has decided*

that the Society should stop selling new business. The Board's decision has the full support of the Financial Services Authority.

The Society remains solvent and also continues to satisfy the statutory requirements as to capital strength. The decision to stop selling new business is as a result of the constrained investment freedom referred to above, to avoid the additional financing demands on the with-profits fund which would arise from writing new policies"

Under the heading "Continuing sale process" the letter said:

"…The Board and its advisers will now explore the sale of some of the Society's operations, including its highly regarded sales force and the Permanent Insurance Company, but it is expected that there will be no transfer of the with-profits fund which will be closed to new business and continue on a mutual basis."

A heading "Impact on the with-profits fund" said:

"…In addition to increased reserving for GARs, the recent tightening of regulatory reserving requirements and poor returns in investment markets in the year to date are likely to mean that the capital strength of the with-profits fund at 31 December 2000 will be weakened. As a result, it will be necessary to reduce investment in equities and increase holdings in fixed-interest securities through orderly rebalancing of the investment portfolio over an extended period of time. Policyholders should be aware that bonuses for the current and future years are likely to be lower than in previous years.

In order to protect the interests of continuing policyholders, the Society has increased the financial adjustment made on with-profits policy transfers and surrenders to 10 per cent of current policy values. The previous financial adjustment represented approximately 5 per cent of policy values…"

A heading "Advice for policyholders" said:

> *"…Policyholders should consider their individual circumstances when considering whether to pay additional premiums under their existing policies…*
>
> *Where policyholders require advice as to what action they should take, they should contact their usual Equitable representative at their local branch… For general information, policyholders should telephone [number given]…"*

A "most frequently asked questions and answers" sheet accompanied the letter. In addition to the information already given, the sheet said:

> *"Future returns will be affected by the Society moving towards a more cautious investment stance on with-profits business. Over time, we expect to reduce the proportion of the fund invested in equities and property from about two-thirds to around a half.*
>
> *There will be an impact on future bonus levels, but it is difficult to say exactly how much they will be reduced because of uncertainties in future economic conditions. If the historic performance of equities versus fixed-interest stocks, bonds, gilts, etc. was repeated in future, investment returns might be around ½ to 1% lower on average than would have been the case without the new investment strategy…*
>
> *On the other hand the Society's annual management charge at ½ % is one of the lowest in the industry and because the with-profits fund will remain a mutual fund there will be no requirement for a distribution to shareholders. Additionally, because we will not be selling new policies the Society's already low expense base may in time be further reduced."*

In relation to the MVA, the sheet said: *"Whilst this [the 10% MVA] is higher than before, Equitable Life's current early surrender and transfer values are in line with others in the industry."* Under a heading "Why have you altered your financial adjustment now?" the sheet said:

"This is to reflect further falls in the level of markets since July 2000 when the previous adjustment was imposed and to protect the interests of continuing policyholders."

A heading "Will there be further adjustments to with-profits benefits?" said:

"The loss of seven months' growth covered our estimate of the cost of giving higher benefits to GAR policies in the future. This is based on our current best estimate regarding future economic conditions, future premiums and the number of policyholders who will exercise their GAR option. The closure to new business has not affected our estimate of the cost. The actual cost of the GAR liability could be more or less than the estimated cost depending on a number of factors, most importantly future interest rates. If the final GAR liability exceeds the current best estimate then policy values would be lower than otherwise would be the case. Conversely, if the GAR liability were lower than the current estimate policy values would be higher."

A heading "Should I take my money away? Should I stop paying premiums?" said:

"There is no need for immediate action. You should take account of your personal circumstances, the particulars of your policy and take appropriate advice. It should also be remembered that taking out a policy with a new provider will mean you paying entry charges with that provider."

The PIA (then the regulatory organisation with responsibility for Equitable Life and most IFAs) issued its "Regulatory Update 82", which said among other things:

"Firms will need to make sure that advisers and representatives have a sufficient understanding of the position arising for Equitable's policyholders if they are to advise on the client's options. ... Any firms or registered individuals found to be failing to meet the standards of advice expected will be considered for disciplinary action, where appropriate."

Following the issue of this Update, many independent financial advisers (IFAs) declined altogether to advise individuals whether or not they should surrender or transfer away from Equitable Life's with-profits products.

The FSA subsequently issued press releases such as FSA/PN/018/2001 of 5 February 2001 and FSA/PN/117/2001 of 20 September 2001. I believe that it would have been far from clear to readers of these Press Releases that it would be to their financial advantage to surrender or transfer away from Equitable Life's with-profits products.

Notwithstanding this, on 15 February 2001 Ms E had a meeting with an IFA. I have seen a letter from the IFA dated 2 March 2001 which says:

> *"Further to our meeting held at the Company's premises on 15 February 2001, I write to summarise our discussions and confirm the decision undertaken as follows:*
> *ii. You only required advice with regard to joining your Employer's Group Personal Pension Scheme and, as such, you signed the Employee Confirmation Form to this effect."*
> *…With regard to your existing pension with Equitable Life you have decided to stop any further contributions due to the financial problems that have befallen the company. I can confirm that you will not be penalised for making the policy paid up. You have asked us to look into transferring your existing fund from the Equitable Life to the Norwich Union Scheme and we will advise you further with regard to this matter once we have received the information we require."*

On 3 October 2004 Ms E wrote to my adjudicator stating:

> *"The last contribution listed on the statement is dated November 14th, 2000. I can't remember at this point in time whether that was the last monthly contribution I made to Equitable Life.*
> *I made the decision to stop making further contributions for fear of financial loss. It was common knowledge well before Equitable Life had not found a buyer and made the decision not to sell new policies that the company was in great financial difficulty.*
> *I enclose a copy of a letter I received from [the IFA] in September 2001 confirming that Norwich Union had received the transfer payment from Equitable Life.*
> *[The IFA] completed their transfer form on my behalf. I was asked to sign and date it only, which I did on 25 July 2001."*

A letter from Julie Houston of Equitable Life dated 14 October 2004 says that the last monthly contribution made to Ms E's policy was £59.38 on 12 March 2001. A letter of the same date was sent by the IFA to cancel Ms E's contracting-out arrangement.

It was to be expected that Equitable Life would decide upon the level of bonus it was to add to policies, although its decision not to apply any growth to policies for the period 1 January to 31 July 2000 was obviously still undesirable from Ms E's point of view. On 16 July 2001 Equitable Life announced that there would also be no growth added to policies for the period from 1 January 2001 to 30 June 2001. It also announced at that time that policy values would be reduced by 14% for life policies and 16% for pension policies. The news that previously quoted values were to be reduced was an event of a different kind to the announcement that no growth would be applied to policies. From a policyholder's point of view, the latter meant that the investment was not going to increase whereas the former illustrated that the values already "accrued" and announced in previous statements could no longer be relied upon. Equitable Life's "Open Letter to Policyholders" acknowledged that this news came as an "unwelcome shock".

Ms E signed a transfer out form on 25 July 2001 to transfer her investments to Norwich Union. The transfer to Norwich Union was confirmed in a letter from Equitable Life dated 31 August 2001.

Ms E wrote in a letter to my adjudicator dated 17 July 2003 that she transferred the policy away from Equitable Life in August 2001 because:

> *"It was becoming very clear that I would not benefit financially by staying with Equitable Life and it was increasingly clear that I could lose even more by not transferring when I did".*

On 20 September 2001 Equitable Life wrote to its policyholders announcing the proposed Compromise Scheme. The covering letter included a section headed "Why do we need a compromise?":

"On top of this, we now have legal advice from Nicholas Warren QC which indicates that non-GAR policyholders may have claims against the Society because they were not warned of the extra potential cost of GARs when they bought their policies. This is a very significant development."

The "Background document" also sent out with it on 20 September 2001 also made references to the possibility of claims by non-GAR policyholders. For example, at page 17 of the document:

"One of the consequences of the legal advice from Nicholas Warren QC and Thomas Lowe is that it is possible that GAR policyholders may have potential claims against the Society arising out of the potential damage caused to the Society by the non-GAR policyholders not being told of the GAR costs and the damages the Society might, as a result, be required to pay."

mitigation and causation issues

Here I explain how in my view the principles of causation and/ or mitigation do not alter my conclusions on the correct date to assess loss.

The principle of causation can be broadly stated: a wrongdoer is only responsible for losses that are caused by him, and once a chain of events leading from the wrong is broken, its responsibility ends. The principle of mitigation is that a person claiming compensation from a wrongdoer cannot stand by watching his losses accumulate assuming that these are the responsibility of the wrongdoer; he should take reasonable steps to mitigate the loss.

In these cases, did there come a point before the date of transfer when Equitable Life's responsibility for the wrong ended and any responsibility for it became that of the claimants? Did they have a duty from that point onwards to take steps to mitigate their loss? Clearly the date on which they actually transferred investments out of the Equitable Life fund meets these criteria. But was there potentially an earlier point? If so, what is that date?

If a person is aware of a loss but unaware that it has been caused by the wrongdoing of another, these principles do not seem to me to bite. One can attribute losses to many causes. They may be seen as simply fortuitous. Knowledge of a wrong is necessary. What of the wrongdoer? If he knows or suspects that he has committed a wrong causing loss to others, what must he do in order to stop any continuing liability for those losses and transfer the responsibility for controlling or mitigating them to those who may seek to make claims from him? The two principles will at this point often merge: the date at which the wrongdoer has successfully shifted the responsibility will normally be the point after which any losses the wronged person fails reasonably to mitigate become irrecoverable.

Equitable has referred me to the case of *Beary v Pall Mall Investments [2004] EWHC 1608 Ch* (paragraphs 3.9-3.13 of its representations dated 14 September 2004) in which an investor sued to recover losses following bad financial advice. The court had to decide the date on which his loss crystallised. The principles in that case are relevant here, but I do not agree with Equitable Life's analysis. Equitable has

submitted that this case means that Ms E should be taken to have had relevant knowledge at an earlier date, not least as a result of her having met her IFA in February 2001. However, Ms E's case is different to *Beary* where the adviser informed the claimant that he had a potential claim in negligence. This was not the case for Ms E. The letter from Ms E's IFA does not go so far as to advise her that she has a potential claim. Bearing in mind the generic facts and surrounding circumstances to which I refer above, I am not satisfied that as a result of that meeting she obtained sufficient knowledge of the facts relating to the purchase of her investment and its nature, amounting to a wrong, such that she was, and knew that she was, free to dispose of the investment. Further and in any event, the *Beary* case makes it clear that there is justification for allowing a claimant an additional reasonable time in which to take financial advice and decide what to do, before setting the date for the crystallisation of the loss.

Equitable has submitted that Ms E could not justifiably adopt a "wait and see" approach. As I understand it, Equitable's argument runs that if Ms E elected to retain her funds with Equitable with knowledge of the actionable wrong, she thereby had a choice as to how to deal with the situation which confronted her as a result of Equitable's breach of duty "*and the speculation from that point on was on his own account" - Primavera v Allied Dunbar Assurance plc [2002] EWCA Civ 1327 ("Primavera").* Although I accept these general principles, I do not agree with Equitable's analysis of how they apply in Ms E's case. I have considered Ms E's comments in her letter of 17 July 2003 and 3 October 2004. I do not interpret those comments as indicating that she was in effect "speculating" her loss by this point. Rather I see her letters as reflecting the difficulties for any investor in identifying what had happened and what, if anything, this meant for them.

What then is the date at which I conclude policyholders had knowledge of the wrong, such that from that point their retention of the investment no longer formed: "*part of a continuous transaction of which [Equitable's negligence] was the inception*"? *(Primavera)*

Equitable Life has suggested that investors should have mitigated their losses by transferring their investments as soon as the House of Lords gave its judgement in July 2000. That argument is scarcely credible. Nothing that Equitable Life has said to its policyholders then or since has suggested that they should transfer their investments out of the fund. Quite the contrary.

Is then the date of the August 2000 letter the right date for concluding that Ms E had the requisite knowledge? In my view it is not. That letter was clearly designed to reassure policyholders that, despite losing the Hyman case, all was not lost for Equitable's with-profits policyholders. It encouraged them to wait until a purchaser could be found (and there was every confidence that a purchaser would be found), after which policyholders could expect "*the restoration of policy values in due course".* The letter did not suggest that the Hyman case would have anything other than a temporary effect on the value of policyholders' funds, nor did it suggest that at the point Ms E had been advised to place her investments with Equitable, Equitable Life had known of this impending risk. The whole tenor of the letter was to reassure.

The next significant event was the announcement on 8 December 2000. On this announcement it was clear that a buyer had not been found. Equitable was to close to new business, at the same time imposing a financial adjuster of 10%. It also gave its estimate of the degree to which future returns might be 'impaired'. However, this announcement and the accompanying documentation also contained a degree of comfort for investors. It spoke of "…*existing with-profits funds and existing unit-linked funds [*remaining*] intact…"* and said that *"benefits will continue to be paid out".* There was no overt or implicit admission that investors might have been the victims of a wrong on the part of Equitable Life and nothing to suggest to the investor that this unfortunate turn of events was anything other than a natural calamity.

My views on this point are strengthened by the surrounding circumstances referred to above, which all, in my view, conspired to obfuscate rather than elucidate what had happened. All these events, or generic facts, indicate to me that it was extremely difficult for even the most financially astute investor to identify that Equitable had acted in breach of its responsibilities towards him and that as a result he had suffered a loss, thus giving rise to a duty to take steps to try and alleviate that loss.

However, I think the position changed in September 2001, when Equitable Life sent out the Compromise Scheme documents (referred to above). These documents made it clear that non GAR with-profits policyholders had potential claims against Equitable Life. It is my conclusion, after considering the particular facts, that by September 2001, such investors, must have had sufficient knowledge to enable them to conclude that the risk which had materialised might be a material risk to the value of their funds, and that there was an arguable case that this was a risk which Equitable should have disclosed at the point of advice. Thus the point at which the

risk transferred (or put another way, the chain of causation ended) and a duty to mitigate arose, was either 20 September 2001, or the date of transfer if earlier.

In relation to Ms E, the facts are that that she in fact transferred her investment away from Equitable Life on 31 August 2001. Having had regard to the issues of mitigation and causation I remain of the view that this is the date on which it is correct to assess Ms E's loss.

the MVA and reinvestment costs

Equitable Life has argued that if compensation should be limited by and assessed according to the method laid out by Ian Glick QC and Richard Snowden, there is no need to work out whether a policyholder acted reasonably by leaving Equitable Life. It has also argued that the decision to leave should be viewed as a new investment decision made by the policyholder, and that any losses associated with that decision are down to the policyholder and not caused by anything Equitable Life did wrong. In this section I set out those arguments. I also explain why I nevertheless consider that the MVA and the reinvestment costs incurred by Ms E are part of the loss that Ms E should be able to recover.

It is Equitable Life's case that mitigation is not relevant because loss should be assessed in terms of the "GAR cost". Notwithstanding this, it has submitted that it is wrong to equate the departure of a policyholder from Equitable Life with mitigation. It has pointed out that a claimant may not increase the losses that he claims by his own unnecessary acts subsequent to the wrong. Equitable Life considers that it was not necessary for the leavers to leave, even if it was reasonable. It further suggests that it may have been reasonable for the leavers to stay to benefit from the provisions of the Compromise Scheme. According to Equitable Life, it follows from this that it was not necessary for Ms E to suffer the MVA (market value adjuster or financial adjustment) and she cannot recover it because it was a self induced loss.

Equitable Life also contends that although if an act is reasonably done in mitigation the expenses incurred in so doing may be recoverable, this is does not apply to the decision to leave Equitable Life because this was a mere voluntary act breaking the sequence of cause and effect. In support of this conclusion it has submitted that the liability in the present case is around 5% of the policy value whereas the financial adjuster incurred upon transfer was much larger than this. The transfer was, according the Equitable Life, simply a new investment decision in which the policyholder calculates that in the long term his or her monies will perform better with a rival provider.

In my view Ms E's loss includes the financial adjustment that would have been applicable to her policy when she transferred on 31 August 2001. When the risk of

continuing with the investment passed to Ms E, she took on the risk of any increase in the adjuster that might be made, and the possible benefit that could be derived from a decrease, but she could not be said to have taken on responsibility for a factor that was already present and about which she could do nothing at that time. The adjuster was applied to ensure that Ms E took out by way of transfer no more than her fair share. To ignore this would therefore be to deprive her of fair value. Had she acted on that date the value she could have realised upon transfer was no more than the value net of the adjuster and it would be unfair and artificial to require her to bring into account on that date an amount that she could not have realised upon transfer. It could be said that Ms E could have avoided the adjuster by not transferring. In my view Ms E cannot be said to have acted unreasonably in deciding to transfer her policy. In the situation in which she found herself as a result of the firm's breach of duty, evidence of the details of which I have discussed above, she was in my view entitled to say that she had lost all faith in Equitable Life and to decide to obtain certainty by crystallising the position, and stem any further loss. Furthermore, transferring away from Equitable Life was the only way that Ms E could be certain of avoiding the probability of a continuing loss in the future given that she had been told that if she remained with Equitable Life she would be left with an investment with impaired future investment performance.

There is no reason to think that had Ms E originally joined another fund she would have wanted to transfer and would thereby incurred an MVA and so I consider that that loss suffered by her (and conversely the benefit retained by Equitable Life) was caused by Equitable Life's breach of duty.

I have in part accepted Equitable Life's contentions in relation to the date of assessment, and it follows from my conclusions that I do not consider there are any grounds for taking into account what may have happened to Ms E's pension policy, Equitable Life's with-profits fund, other with-profits funds or the average with-profits pension policy after the point at which she transferred her policy away from Equitable Life. Equitable Life has said that it assumes that its payment upon transfer or surrender was worse than the industry's because it cut policy values earlier. If Ms E had not transferred but had kept the policy it is Equitable Life's contention that it may be that there would have been no loss now (relative to the performance of an average with-profits fund) having regard to the subsequent falls in average surrender values. Equitable Life's argument is that the method of compensation I propose would therefore have the effect of causing a large loss, that it was the policyholder

who exercised the surrender option and did so at the worst time, and that much of the loss occurs only because other companies were slow to act. I do not agree that responsibility for losses suffered by policyholders by way of either the MVA or policy value reductions should be attributed to the policyholders themselves in this way. Nor do I consider that Equitable Life's submissions on this point are reasons why I should take account the situation after the point at which the firm's wrong ceased to have effect.

Ms E's policy was a pension policy. The Inland Revenue rules relating to pension policies meant that Ms E could not surrender her policy or remove the funds invested as cash. The funds transferred had to be reinvested in another pension policy and so in order to transfer her funds away from Equitable Life Ms E had to set up a new pension policy with another firm to receive the transfer. The costs charged to the sum transferred by the new provider for setting up the new pension policy were therefore inevitably and necessarily incurred by Ms E when she decided to transfer away from Equitable Life. Since there is no reason to suppose that had Ms E originally invested with another provider she would have wanted to transfer, in my view she would not have suffered these costs if she had not originally invested her funds with Equitable Life. I have therefore decided that Ms E should be compensated for the costs charged to the sum she transferred to the new pension policy by the firm providing that pension policy.

interest

In this section I explain the interest that is to attach to my award.

Section 229(8) of FSMA makes provision for interest to be payable on a money award In this case I must follow the law. A court would usually award interest on damages to take into account the period from the date the loss accrued to the date of judgment. As Equitable Life is aware from the many other complaints with which the Financial Ombudsman Service has dealt, it is our practice to award interest at the standard rate of 8% simple on awards. This rate, as well as being the standard interest rate that was used by the PIA Ombudsman, is the court judgment rate.

Having decided that the legal measure of Ms E's recoverable loss crystallised, and is to be assessed, at 31 August 2001, it is appropriate, and in accordance with our published policy and the law, for interest to my award from that date to the date of my award. To take no account of the time between the date upon which Ms E's recoverable loss crystallised and now would unfairly ignore the fact that Ms E has not had the benefit of the sum represented by the award over this period
Therefore, in accordance with our published policy, interest is to be added to that sum from the date it crystallised to the date of this award. If the sum due is not paid within 28 days, interest is to be added to the sum due from the date of the award to the date the sum is paid.

In arriving at the view that 8% simple is the rate at which interest should be added to this award, I have also taken into account the discretion the courts have over the rate at which they award interest. A practice has arisen in the commercial court of awarding 1% over base rates. The types of cases we deal with are not really the same as the commercial court, and we are not bound by the commercial courts' practice. The Court of Appeal held in the case of *Watts v Morrow [1991] 1 WLR 1421* that the use of the judgment rate as a rate of interest to compensate for loss of use of monies was the reasonable exercise of discretion in that case. In the case of *Herbert Black (2) American Iron & Metal Co Inc (3) LITO Trade Inc v Vivian John Davies (2004) EWHC 1464 (QB),* the Queens' Bench Division of the Court confirmed that it had no general jurisdiction to award compound interest on damages payable under a common law judgment for the tort of deceit.

distress and inconvenience

In this section I explain why the unusual circumstances of GAR-related complaints means I do not consider that my award should ordinarily include a sum for the inconvenience or distress caused by what Equitable Life did wrong.

Is Ms E entitled to receive an additional sum for the inconvenience and any distress caused to her by the firm's wrong-doing? As I mentioned at the outset, she, like nearly everyone who has recently invested in Equitable Life, may be said to have suffered very considerable distress, anguish and anxiety. To require an additional sum on this account to be paid to Ms E out of the fund owned by the remaining members of Equitable Life's with-profits fund would in my view be wrong. The remaining Equitable Life members include those who had GAR-related claims settled by the compromise scheme and who therefore may have suffered inconvenience or distress in exactly the same way and resulting from exactly the same cause as the former policyholders to whom they would be making the payments.

decision

In this section I set out what I am ordering Equitable Life to do in order to compensate Ms E.

I order Equitable Life to place Ms E back into the position she would have been in but for its breach of duty in accordance with the findings in this decision. The value of the benefit she received as a result of investing her money in her personal pension plan with Equitable Life should be compared by Equitable Life with the value of the benefit she would have received as a result of investing that money in an average alternative with-profits pension fund. The compensation due is any amount by which the latter exceeds the former. The effective date for the comparison is to be 31 August 2001.

In the case of the Equitable Life policy, the value of the benefit received is to be arrived at by taking the policy value net of the MVA applicable to transfers on the effective date and making a further reduction to the resulting value in respect of the reinvestment costs Ms E incurred to set up a new pension policy with another firm to receive the transfer. That further deduction does not need to be based on the actual initial costs Ms E incurred upon transfer to Norwich Union and may be derived from the assumed expenses of the average alternative with-profits pension fund. Equitable Life should provide Ms E with a reasonable explanation of how it has arrived at this value, including the allowance it has made for initial costs.

In the case of the average alternative with-profits pension fund, the value of the benefit received is to be taken as the fund value, rather than the transfer value, of the average alternative with-profits pension fund on the effective date or, to put it another way, the ongoing policy value on the effective date, which is the value given on the basis that the policy is to continue to maturity (and so does not reflect any reduction a life office might make to recoup its expenses in the event of an earlier surrender or transfer). Equitable Life should provide Ms E with a reasonable explanation of how it has arrived at this value and of how any compensation due has been calculated.

Since Ms E would not have had the benefit of the extra sum as cash but rather as an enhanced pension fund value, I direct that Equitable Life pay the compensation to her by paying a sum into her pension fund that is sufficient to increase the value of her fund by an amount equal to the compensation due.

I order Equitable Life to pay interest to Ms E on the compensation amount. Interest is to be calculated at the normal judgment rate used by the courts of 8% per year simple from the effective date (31 August 2001) to the date of my award. Further interest is to be paid to Ms E on any compensation and interest due at the date of my award but still outstanding 28 days after the date Equitable Life receives Ms E's acceptance of my award. The interest is to be calculated at the rate of 8% per year simple from the date of my award to the date the amounts due are paid. In all cases the interest is to be paid directly to Ms E. Equitable Life should provide Ms E with a reasonable explanation of any interest figure it calculates as being due to her.

Tax is to be deducted from the interest paid if legally deductible and subject to the provision of a certificate of deduction.

Walter Merricks
chief ombudsman

appendix

table of cases

- Royscot: Royscot Trust Limited v Rogerson (1991) 2 QB 297
- Smith New Court: Smith New Court Securites Limited v Scrimgeour Vickers (Asset Management) Ltd (1996) 4 All ER 769
- Twycross: Twycross v Grant (1877) 2 CPD 469
- SAAMCO: South Australia Asset Management Corporation v York Montague Ltd (1997) AC 191
- Primavera: Primavera v Allied Dunbar Assurance plc (2002) EWCA Civ 1327
- Beary: Beary v Pall Mall Investments (2004) EWHC 1608 Ch
- R (Norwich and Peterborough Building Society) v Financial Ombudsman Service (2003) 1 All ER (Comm) 65
- Watts v Morrow (1991) 1 WLR 1421
- Herbert Black (2) American Iron & Metal Co Inc (3) LITO Trade Inc v Vivian John Davies (2004) EWHC 1464 (QB)

glossary of abbreviations

PIA: Personal Investment Authority
PIAOB: Personal Investment Authority Ombudsman Bureau
FSA: Financial Services Authority
SIB: Securities and Investments Board
LAUTRO: Life Assurance and Unit Trust Regulatory Organisation
SRO: self-regulatory organisation
FSMA: Financial Services and Markets Act 2000
IFA: independent financial adviser
GAR: guaranteed annuity rate

Financial adjustment: Adjustment made to policy values if policies surrendered or moved away from Equitable Life. This financial adjustment is also often referred to colloquially as a market value adjuster or MVA, though it was not necessarily made only due to market circumstances.

Compromise Scheme: Scheme of Arrangement sanctioned by the High Court on 8 February 2002 under Section 425 of the Companies Act 1985

GAR related complaint:	A full definition is given in the Scheme of Arrangement. Principally, “GAR-Related Claims” are claims arising out of a failure to disclose, or misrepresentations as to, the existence of GAR Rights and their potential cost to the With-Profits Fund.

legal opinions

The Financial Ombudsman Service has taken all the following legal opinions into account:

- Warren/Lowe Opinion of 10 May 2001 (for Equitable Life/EMAG) – formerly on Equitable Life website, and now at: www.emag.org.uk/documents/nwarren.report.doc
- Warren/Lowe Opinion of 12 September 2001 (for Equitable Life) – formerly on Equitable Life website
- Moss/Richards Opinion of 19 September 2001 (commenting on Warren second Opinion for Equitable Life) – formerly on Equitable Life website
- Glick/Snowden Opinion of 19 September 2001 (for FSA) – on the FSA website at: www.fsa.gov.uk/pubs/other/Equitable_Final_Glick_QC.pdf
- Clarke Willmott Opinion: www.clarkewillmott.com/docs/Equitable%20opinion.pdf
- Carr/Moss Opinion of 19 September 2002 (for Equitable Life) – formerly on Equitable Life website
- Conclusions of the Bompas Opinion of April 2003 (for ELJAG) – at www.elcag.org.uk/dam2.htm
- Hirst Opinion of 10 July 2003 (for the Financial Ombudsman Service) at: www.financial-ombudsman.org.uk/faq/Hirst-Opinion.pdf
- Carr/Moss Opinion of 30 September 2003 (for Equitable Life in response to the Financial Ombudsman Service) at: www.financial-ombudsman.org.uk/faq/equitable-CarrMoss-Sep03.pdf
- Hirst Further Advice of 21 June 2004 (for the Financial Ombudsman Service) at: www.financial-ombudsman.org.uk/faq/Hirst-Opinion-June04.pdf
- Carr/Moss Opinion of 14 September 2004 (for Equitable Life in response to Financial Ombudsman Service)
- Note by Lord Slynn of 14 September 2004 (for Equitable Life)