

FINAL DECISION – SUMMARY

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

introduction & executive summary

This 10-page document contains the introduction and executive summary from the full 79-page decision on Ms E's lead case.

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

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.