

## **Commentary on Judicial Review judgment from Colin Slater of Burgess Hodgson**

*The Court decided in EMAG's favour in respect of the earliest and most valuable finding of injustice, that relating to the valuation of the mainstream pension business in respect of return years 1990-1996 inclusive.* This has the effect of moving the start date back from 1 May 1999, the date accepted by the Treasury for the Financial Re-Insurance finding to 1 July 1991, when the 1990 return was filed.

*This is a very big win for EMAG. Hundreds of thousands more policyholders are now eligible for some form of compensation and their relative losses are very much bigger. The PO's start date is reinstated.*

The grounds for the Court's judgement are also important. It rejected the Treasury's technical argument that Equitable had 'abided by the rules' and preferred the findings of the PO, Lord Penrose and the Actuaries' Disciplinary Board that Equitable Life's CEO Roy Ranson had endangered policyholders' reasonable expectations, by means of excessive bonuses in earlier years, which he had then covered up by discounting regulatory liabilities. The Court found the Treasury's actuaries Oliver Wyman 'restricted and unconvincing.'

*As regards the mistaken Standard & Poor's rating, the Court again rejected the Treasury line that the regulators had 'abided by the rules' and took the commonsense view that, having discovered that the Standard & Poor's rating was mistaken, the regulators should have taken appropriate action, as the PO said.*

The Court's 'non-verdicts' on Financial Reinsurance and Misleading FSA Statements Post Closure are effectively EMAG wins. This litigation forced the Treasury to 'clarify' to Sir John Chadwick that its 'observations' are no more than that. He had previously taken them to be binding instructions restricting his terms of reference. *In the case of the Financial Reinsurance this is another big win for EMAG.*

The Treasury won in respect of the GAR. This prevents the start date for the GAR cost provision being moved back to July 1994 (1993 Return) from July 1996 (1995 Return), which the Treasury has already grudgingly accepted. *This 'defeat' for EMAG is much less important than the 'win' on the Pension Liability valuation, which moves the start date back to July 1991 (1990 Return). In the context, it may not matter at all.*

The Treasury 'wins' on its right to set up whatever compensation methodology it thinks fit are not unexpected. *The Court found that this was a matter for Parliament and EMAG can fight that battle there.*

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	<b>Matter</b>	<b>Decision</b>	<b>Comment</b>
Principle	<b>Findings are Binding</b>		No decision required.
Principle	<b>Cogent reasons.</b> Does the Treasury have to show better reasons than the PO, or just different ones?		No decision advanced.
Finding 2 & Finding 4	<b>Valuation Interest Rate - Discounting of main pension business from 1990-1996.</b> Big Money. Starts the misleading Returns theme of the PO's Report. This is the earliest and most valuable finding.	Succeeds	Court rejected Lewis's technical argument that the PO had excluded PRE considerations and interpreted the PO's report as a whole. The Court was not impressed by Oliver Wyman's claim that the ELAS valuation was 'consistent with PRE', nor that it demonstrated how reversionary bonuses could be maintained. It preferred Penrose's and the Actuaries' Disciplinary Board's findings to the contrary.
Finding 3	<b>Intimation of Differential Terminal Bonus Policy</b> (i.e. the GAR Problem). From 1993 on. Big Money. This is the issue that precipitated ELAS's failure. Continues and enhances the theme	Fails	The Court highlights the short timing difference between the parties. The Treasury accepts injustice from the 1995 return onwards. EMAG claims injustice from the 1993 one. The Court view is that moving the start date back two years further than is accepted would rely too much upon hindsight.
Finding 5	<b>Standard &amp; Poor's Mistake 1995 onwards.</b> Many people relied upon S & P's rating. PO's point is that regulators carried on using S&P rating, knowing it to be wrong	Succeeds	The Court agrees with the PO that the regulators had a wider duty of good administration and could not just ignore the mistake because there was no specific rule to cover it.
Finding 6	<b>Financial reinsurance.</b> Govt accepts both maladministration and injustice. Relates to the Treasury's 'observations' on how Chadwick interprets compensation flowing from injustice.	Govt clarified' its position.	Effectively this is a win for EMAG. The Treasury has been forced to 'clarify' that its 'observations' were indeed observations and not 'instructions' as Chadwick said.
Finding 10	<b>Misleading FSA Statements Post Closure.</b> Govt accept both maladministration and injustice. The Treasury is trying to restrict the effect of the findings by 'observations'.	Govt 'clarified' its position.	As for Finding 6, but Compensation is limited (by the PO)
Remedy	Consequential on Findings 2,4 & 5	Succeeds	Follows success on those findings
Remedy	Consequential on Findings 3	Fails	Follows failure on that finding
Remedy	The Response's rejection of the Report's recommendation of a compensation scheme	Fails	A matter for Parliament not the Court
Remedy	Government's proposal for ex gratia payments	Fails	A matter for Parliament not the Court