Dear Paul

Equitable Life Rectification Scheme

EMAG has kindly asked me to advise it at short notice on an issue which has arisen in connection with the Equitable's Rectification Scheme ("The Scheme"). I am very grateful to these members who have sent me details of their own positions to enable me to understand the concerns.

Perhaps, for the sake of good order, I should confirm that nothing in this letter can be taken as specific advice to any particular member. As you know, my position in relation to all Equitable cases (and indeed, all financial services malpractice cases) is that each must be considered individually after a full investigation of the client's circumstances.

Background

Following its defeat in the House of Lords and subsequent closure for new business in December 2000, the Equitable published The Scheme. It came in the form of two documents, an introductory brochure and a set of rules. Put shortly, it seeks to put certain present and former policyholders back into the position they would have been in had Equitable not had an unlawful bonus declaration policy. The policyholders are defined as "Relevant Policyholders" in Rule 6 of The Scheme. They are divided into three groups in the brochure, Group 1, Group 2 and Group 3.

A number of members of EMAG have applied for redress under The scheme, and concern has been expressed about responses they have now been sent.

More recently, Equitable has commenced a "Managed Pension Review". I have not, for the purposes of this letter, looked into the terms of that scheme. It is another scheme for compensating the victims of Equitable's malpractice in relation to that particular product.

The question put to me

The responses to applications for redress under The Scheme with which I have been supplied with have some common features: -

- They all been sent to policyholders who took benefits under GAR policies through a managed pension
- They all refuse redress in the absence of further evidence
- They all ask for further evidence to be supplied
- They all (but one) invite an application to the Managed Pension Review.

I have been asked to review whether Equitable are entitled to do this, and generally what members of EMAG in this position should do.

The status of The Scheme

I think it is helpful to consider in general terms if The Scheme is binding at all on Equitable.

Rule 26 states emphatically that The Scheme is not an offer or an invitation to enter into a legally binding commitment. However, this sits ill with the position of the Independent Assessor (of whom more below) whose decision is said to be binding on both parties.

Probably many of those seeking redress from The Scheme will have lost their opportunity to sue in the civil courts by the operation of The Scheme under Section 425 of the Companies Act, or by the passage of time. Probably they will have done so in reliance on The Scheme being operated in a reasonable and fair manner. To the extent that they have changed their position by forbearing to sue in reliance on The Scheme, Equitable is bound to operate it as written and fairly.

Furthermore, the Financial Ombudsman Service will have jurisdiction, in effect, to act as an appellate court from the decision of the Independent Assessor. So I take the (admittedly preliminary) view that once Equitable has accepted a case for review within the Scheme it is bound to carry out the procedure it has set out fairly and reasonably.

I have not considered if members who are in The Scheme are bound to follow the procedures through to the finish before taking the matter to court or the Financial Ombudsman. I think that is a matter for advice in individual cases. I cannot see any general reason to abandon The Scheme, unless a limitation period is about to run out, and a member wishes to start legal proceedings to keep alive a right to sue which would otherwise be lost.

None of this alters my view of the fundamental nature of The Scheme which is that it is an internal, and voluntary, dispute resolution procedure. All financial institutions operating under FSA rules have to have a complaints procedure. The Scheme is just a specialised such procedure. If it is more than that, it could be a trust of the funds allocated to it in the Equitable's accounts. I would need to spend much more time with this to come to a definite view on that issue, and the result might not add much, if anything to this enquiry.

The Scheme's procedures

Very little is said in the rules of The Scheme as to procedure. There is an Independent Assessor, who will be a lawyer independent of Equitable. We can be reasonably confident that he or she will act in a quasi-judicial way, roughly in accordance with what lawyers call "The Rules of Natural Justice". The Independent Assessor's role is said to be "To assist Relevant Policyholders with queries and claims" but later his/her decision is said to be final and binding in respect of queries and claims referred to him/her by the policyholder.

The identity of the Independent Assessor is, I am told, being kept secret to avoid premature referrals! I find this odd.
The reality is that the Equitable will decide on applications, and there is a right of appeal to the Independent Assessor.

Internal dispute resolution procedures such as this are not unusual. What EMAG members must understand is that none of the apparatus is there to help them make their cases. It is up to the members to present evidence and arguments to persuade the staff at Equitable, or the Independent Assessor, to grant the redress sought. No one at Equitable is going to do that for them.

The independent assessor is said to be an expert and not an arbitrator (Rule 22(d)). The use of this terminology is designed to exclude the possibility of appeal to the High Court which is available in the case of arbitrations.

That Rule 22(d) goes on to say that the independent assessor's decision is "final and binding upon the Society and the relevant policyholder". That is also designed to exclude any further appeal from the Independent Assessor, although Equitable, I believe, accepts that the Financial Ombudsman Service can receive an application following an unsatisfactory decision by the Independent Assessor. However, how the Financial Ombudsman Service treats a decision from an independent lawyer to whose jurisdiction the policyholder has voluntarily submitted is uncertain. Depending on their personal circumstances, some EMAG members may be better served by legal proceedings than by staying in The Scheme. That must be a matter for personal decision.

Before I move on to the letters EMAG members have sent to me, I must mention the Specified Condition. This applies only to those Relevant Policyholders who took benefits with another pension provider (Group 3 policyholders). They must satisfy the Equitable or the Independent Assessor that they would have taken GAR benefits if the New Bonus Resolution had been in force. The Special Condition also applies to to Group 2 policyholders (those who took non GAR benefits with Equitable). However, these do not have the same burden of proof as the Group 3's. Group 2's are deemed to satisfy the Special Condition if they elect to convert existing benefits (presumably to GAR benefits) without further proof.

The Equitable's letters

The letters to which I have been referred all say

"…..you chose a managed pension, which featured a drawdown facility largely under your own control. It would be normal to choose this option for its flexibility, and investment and estate planning purposes. We conclude in the absence of evidence to the contrary that a GAR annuity would not have been chosen.

If you have evidence to show that you would have chosen a GAR annuity, we would be happy to review that evidence in conjunction with the evidence we have on our file to determine whether the Specified Condition has been met in your case. Please provide details in writing to us, together with any documentary evidence….."

In the first place it is necessary for each policyholder to decide whether he/she is a Group 2 or 3 policyholder. On the strength of the documents I have seen, I would not have considered taking an Equitable Managed pension as a Group 3 case. Rather a managed pension is a Group 2 case, unless, perhaps, there has been a subsequent transfer.

However, proceeding on the assumption that any particular case is a Group 3 case, then I interpret the letter as calling for further evidence.

The letters lead me to assume that up to this point Equitable has only had regard to what is on its own file. Experience tells me that the Equitable did not get its clients to sign factfinds, and so has no reliable record of what went on between member and representative. It therefore seems to me that Equitable is asking for further information.

I took the liberty of speaking to the Rectification Scheme Helpline, and was told (by "Andy") that I was correct in that conclusion. He said the Equitable wanted a "dialogue".

This seems to me an entirely reasonable position to take within the terms of The Scheme. I would advise those members of EMAG who have received such a letter to take it as an opportunity to provide further evidence and argument, provided, of course, that they want to stay with The Scheme.

What kind of evidence?

I do not want to give any specific advice, as each case is individual. However the following general comments may be helpful to your members.

1. A self-written statement of what occurred is evidence. The distinction should be made, however, between evidence and argument.

2. If anyone else was present, his/her written statement is also evidence. In some cases the Equitable representative may still be contactable, and may help, especially if now employed elsewhere.

3. If an IFA or other adviser was consulted, his/her written statement may be corroborative.

4. It will be relevant when you decide what you would have done to have an understanding of the "know your client" and "suitability" rules applicable to Equitable representatives at the time. The Equitable representative should have discussed the options available in the context of your needs and

aspirations. To say now what you would have done may need an understanding of what would have been correct advice.

5. Try to get a copy of Equitable's file on you. It is what they are going on at the moment. It seems to me that, on the grounds of fairness, apart from anything else (such as the Data Protection Act), you are entitled to see, and comment on, the evidence on file on which Equitable has proceeded so far. When obtained, check the accuracy of the fact-find and other records, and be sure to tell Equitable what they have got wrong.

6. Allegations of dishonesty are nearly always counterproductive unless provable, which, in the procedure envisaged by The Scheme, will be impossible.

7. Assume that your case will go on to the Financial Ombudsman if you fail at this stage and with the Independent Assessor. So remember that what you write now may have to serve for future applications. Neat, organised material, paginated and indexed if bulky, makes it easier for your audience to be persuaded your way.

8. Maintain objectivity. If not using professional help, get someone else to look over your work and give you ideas. The experience of the courts is that lawyers are not the only purveyors of skilled advocacy, but litigants in person do not usually help themselves.

What about the Managed Pension Review?

Your members should only fill in the questionnaire if they want to enter this scheme. If they want to stay with The Scheme they should do so, and see it through until satisfied or have an adverse decision from the Independent Assessor.

Professional help

Procedures like The Scheme give the impression that applications are easy. Various tribunals, including the Financial Ombudsman Service, promote the idea that professional help is unnecessary, and even unwelcome.

Typically in such a case the private person is pitched against professionals, often lawyers, and is at a disadvantage. This is the case here. Those at the receiving end of your application are trained. The sums at stake in pension cases are often very large. To take a very simple example, if a GAR policyholder had a 10%GAR is a policy worth £100,000, and through bad advice ends up with an annuity at (say) 7% he has lost £3000 pa. Assuming current annuity rates for him have fallen to 6% his annual loss of £3000 has a current cash value of £50,000.

Your members should consider professional help, ideally from solicitors with an understanding of financial services. If there is a rooted objection to the legal profession, many IFAs have experience of Financial Ombudsman

applications and may be willing to help. Choose one qualified to advise on pensions.

The letters ask for a response within 28 days with the Managed Pension Review Questionnaire, but do not specify a time limit for the evidence requested. To avoid misunderstanding and time wasting, I suggest members tell Equitable now what is their position on the letters. Even if all Equitable is told is "I am seeking professional advice" at least the position is kept open, and papers will not get filed in the wrong department.

Conclusion

To answer the questions

1. The Equitable is, in general terms, entitled to send the letters I have been referred to.

2. A policyholder should not take such a letter as a final refusal of redress. Those who want to persist with the Rectification Scheme, should.

    2.1 Consider if they are correctly designated as Group 2 or 3 policyholders.

    2.2 If so, ask for their files and gather the evidence to satisfy the Specified Condition (as applied to their Group by The Scheme)

    2.3 Ignore the Managed pension questionnaire.

3. Consider professional help.

4. Tell Equitable now what they propose to do.

5. Resolve to see the Recification Scheme procedure through to a decision by the Independent Assessor.

I hope this is helpful

Robert Morfee