

B E T W E E N:

THE EQUITABLE LIFE ASSURANCE SOCIETY

Claimant

- and -

- (1) ROGER BOWLEY
- (2) PETER DAVIS
- (3) CHRISTOPHER HEADDON
- (4) SHAUN KINNIS
- (5) PETER MARTIN
- (6) ALAN NASH
- (7) JENNIFER PAGE
- (8) DAVID PRICE
- (9) ROY RANSON
- (10) JOHN SCLATER
- (11) PETER SEDGWICK
- (12) JONATHAN TAYLOR
- (13) DAVID THOMAS
- (14) ALAN TRITTON
- (15) DAVID WILSON

- and -

ERNST & YOUNG

Defendants

THIRD DEFENDANT'S
OPENING SKELETON ARGUMENT

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A. Introduction

1. In a large multi-party trial such as this, there will inevitably be a considerable degree of overlap between the defendants' submissions. As a litigant in person I am far less qualified to argue detailed legal points than the represented parties and it is unlikely to assist the Court if I try to do so¹. Accordingly, in this skeleton argument, whilst naturally dealing with many of the specifics of the claims against me, I have also tried to put the case in its proper broader commercial context. My perspective on that is likely to be rather different from that of some counsel and, accordingly, I hope my submissions will be of assistance in putting matters in their proper commercial, rather than purely legal, context. If I have mixed evidence with advocacy of my own case, I hope I will be forgiven since, for a litigant in person, the two are sometimes indistinguishable. If I do not deal with a particular point in this skeleton argument, that is not because I am abandoning the point – I continue to rely on all the defences which are raised in my Defence, and I require the Society to prove all aspects of its claim against me.

2. I have studied the Society's Opening Skeleton ("SOS") and will refer to parts of it in detail in this skeleton argument. I have, however, addressed the claims against me in what, I

¹ As a layman I am clearly at a disadvantage in terms of citing relevant case law but hope the Court will allow me to adopt any relevant authorities referred to by other parties in support of my submissions.

hope, is a logical sequence which does not necessarily follow the order of the SOS, dealing, as it does, with the claims against all director defendants and Ernst & Young. I will cross-refer to the SOS by using the abbreviation 'SOS number' to refer to a paragraph in the SOS – e.g. 'SOS 199' means paragraph 199 of the SOS. Other documents are cited by reference to their trial bundle numbering apart from inter-partes correspondence, where the bundle has not yet been produced² and, accordingly, I provide details in foot-notes.

3. The first 70 pages of the SOS are devoted to background matters, which the Society has previously referred to (in the context of the allocation of time for oral openings) as 'uncontentious'. Although quite a lot of the material is, indeed, properly so described, there are also significant defects. That part of the SOS contains a number of factual inaccuracies, misleading statements, comments which use language which is not objective, and engenders some confusion between remarks which apply to life offices generally and those which are specific to the Equitable. I have briefly set out my comments on a number of such points in Appendix 1 to this skeleton argument which I hope will assist the Court.
4. In Appendix 2 to this skeleton argument I give a 'sources and destinations' analysis so that the paragraphs of this skeleton argument which are relevant to a number of the allegations in the SOS can be readily identified.
5. I have also noted the letter of 11 March 2005 to Mr Justice Langley from counsel for the Society. I observe that the SOS is infected with references to documents where comments are taken out of context or where an attempt is made to give a meaning to comments which are not supported by the full contemporaneous document. The possibility of referring to the source documents is put at a low level in the letter ("you may wish to refer") and SOS 6 suggests that the background should be read "without turning up the documents". In some cases it is, I respectfully suggest, *essential* that reference is made to the underlying documents in order to test the weight that the SOS attempts to put on these documents. I have tried to highlight the most egregious examples of this lawyers' gamesmanship in this skeleton, but naturally I reserve the right to take the Court to these documents during the trial (if and insofar as some other party has not already done so) in order to show the full terms and the proper context of these documents.
6. The Society's 11 March 2005 letter also suggests that the expert evidence and witness statements should not be read in advance of trial. I agree that it would probably be

² Reference to the text of the letter reproduced at Appendix 3 will show that I raised the matter of the content of that bundle in January 2005. On 25 February 2005 Herbert Smith wrote to Allen & Overy saying that they were collating the bundle and would circulate a draft index 'in due course'. That index has still not appeared.

prohibitively time-consuming to attempt to study all the expert evidence at this stage. However, it will come as no surprise to the Court to know that there is a significant dispute between the experts for the various parties both on questions of liability (in respect of which the Defendants' experts are firmly of the view that no liability exists) and on questions of causation/quantum (in respect of which the Defendants' experts are firmly of the view that the Society has suffered no loss). With regard to witness statements, I cannot help feeling that the Society's counsel is attempting to control the agenda by focusing attention on the Society's view of the background and context in advance of trial. I am sure Mr Justice Langley does not need me to alert him to that strategy and I would respectfully suggest that sections 3 to 11 (W3-3.7) of Mr Ranson's first witness statement and sections C-U (W3-1.99), W (W3-1.176), and paragraphs 300-320 (W3-1.202) of my first witness statement are necessary reading in order to provide a helpful alternative (and, I would suggest, more accurate) view of the background as it relates to the director defendants.

B. General issues

7. In this first section, I look at the case from a number of commercial perspectives and then look at my own position in the context of this litigation.

(1) The Society's position in context

8. Many column inches of press comment have been devoted to the position of Equitable and an active and vociferous action group has been successful in keeping matters in the public eye. There is, however, a tendency for those commentators to attribute the experience of policyholders over the last 5 years wholly to the particular circumstances at Equitable and to ignore the broader market context. The reality is that the fall in the stock-market since its peak at the end of 1999³ has led to dramatic and serial reductions in with profits policy values across the industry. Commentators such as action groups have a vested interest in ignoring that context as it maximises their apparent "losses" and thereby aids their claims for compensation. It is a matter of deep regret that, despite an explicit requirement in his terms of reference to have regard to market context, Lord Penrose signally failed to shed any light on this matter⁴.

9. I believe all this is highly relevant to this litigation for the following reason. For the Equitable to succeed against the former directors it needs to prove negligence which is such that the effects of it are not relieved under s727 of the Companies Act 1985. To

³ And, despite recent recovery it is still around 30% below that peak.

⁴ I urged him to analyse the **relative** rather than **absolute** position of Equitable policyholders, saying that otherwise his report would be "built on foundations of sand", but was ignored.

succeed only in proving some negligence which **was** relieved under s727 would be a Pyrrhic victory, as it would effectively have only succeeded against itself. I comment on this matter in more detail later in this skeleton. However, at this point, I observe that to assess 'reasonableness' in the context of the matters raised in SOS 709-712 it is, I submit, highly relevant to look at the effects of the actions of directors in other comparable organisations.

10. In short, if the former directors acted so negligently that this litigation has any point, one would reasonably expect that the Society's policyholders are now in a very much worse position than those in other life offices.
11. The Equitable has not participated in surveys of comparative policy performance since 2001 so it has been difficult to assess the relative position of the Society's policies. However, it is known that the FSA conducts its own confidential surveys and, in October 2004, Mr Strachan, the FSA's director of retail firms and insurance sector leader wrote an article for the magazine Money Management (C70.312)⁵ setting out a summary of the results of their survey conducted a few weeks earlier. The results are anonymous as to the participating offices but the text confirms that the survey covers 98% of with profits funds. The range of results for 6 different specimen policies is set out in Table 2 of the article.
12. Following publication of this article I wrote to Herbert Smith requesting disclosure of the Society's submission to the FSA survey. That request was refused on the grounds that it was "not relevant" to the litigation. I replied explaining why I believed it was very relevant but disclosure was again refused. Accordingly, I used my own knowledge of the construction of the Society's policies, together with the historical bonus rates extracted from the disclosed documents, to produce my own estimates of what the Society's results submitted to the FSA survey would have been. Herbert Smith refused to recognise my note setting out those results as a disclosable document but agreed that it could be included in the inter-partes correspondence bundle. As noted in paragraph 2 above, that bundle does not yet exist so, for ease of reference, the text of the note and my covering letter of 31 January 2005 are reproduced at Appendix 3.
13. My note reproduces Table 2 from the article and adds my conservative (i.e., if anything, understated) estimates of the Society's results. It can be seen that the results are all reasonably close to the 75th percentile point, with the 20 year pension results being somewhat lower than the others. Taking the 6 results in the order they appear in Table 2

⁵ The Society has itself cited this article in support of the argument that there was no systemic 'over-bonusing' during the 1990s – see its note "The Penrose Report – Policy Value Reductions and Alleged 'Over-Bonusing'" (C70.308)

of the article, my estimated results are respectively 11%, 53%, 13%, 10%, 53% and 21% higher than the lowest result for each policy.

14. It is also important to have regard to Table 3 of the article which assesses the average pay-outs relative to underlying asset shares. That table indicates that most offices are still paying out policy values which are some margin above the level supported by the underlying asset values, as they smooth out the effects of the market falls over 2000-2004. That is consistent with recent experience where, despite relatively good stock market returns over 2004, offices have announced significant further reductions in with profits policy values in the early months of 2005. The position is particularly extreme for the 20 year pension results where the average payouts in 2004 are 126% and 118% of asset share. As noted above, those are precisely the results at which the estimated Equitable policy results are relatively lowest.
15. The position of Equitable regarding the relationship of policy values to underlying asset shares is not known but the board paper leading to the July 2001 policy value reductions (C69.130) indicates that, at that time, policy values were reduced to a little **below** asset shares and public comments since indicate that the Society has continued to keep policy values close to asset shares. That is exactly what one would expect to happen for the prudent management of a closed fund with a relatively high level of policy terminations each year. Accordingly, one might expect the Society's relative position in the FSA survey to improve in future as other offices continue to smooth out the excess of their policy values over underlying asset shares.
16. In summary, these results indicate that:
 - (i) compared to the pre-2000 position where the Society's results were typically a little above average, the results are now close to the 75th percentile point;
 - (ii) the Society's current results are shown in a somewhat unfavourable light because the Society has brought policy values into line with underlying asset shares more swiftly and rigorously than the generality of life offices.
17. Such a position represents, I suggest, a relatively modest reduction in policyholders' expectations and provides no support for the allegations of negligence and mismanagement which the Equitable needs to prove for this litigation to have any purpose.
18. It is also relevant to ask why the Equitable is not prepared to disclose its actual submission to the FSA survey in this litigation, let alone publicise that more widely. On any objective view putting such information, showing the relatively modest impact that the events at the Equitable have had on policy results, into the public domain would do much

to rebut the claims made by various parties and dampen down the increasingly hysterical accusations of fraud, Ponzi schemes etc. made by the policyholder action groups. It is difficult to conclude otherwise than that the Equitable realises that doing so would fatally undermine this litigation for precisely the reasons described above.

(2) *Realities of commercial life*

19. It is in the nature of the process of litigation that past events are scrutinised in detail with the benefit of 20/20 hindsight, alternative courses of action are discussed with the benefit of information not available at the time, and edifices of analysis are built on the slender foundations of manuscript notes written in the heat of day-to-day management pressures. I would respectfully encourage the Court to approach these matters with a healthy dose of common-sense reality and keep firmly in mind what it was reasonable for management to do in the circumstances of the time and without the enormous benefit of hindsight.
20. Boards and management have to take decisions based on the partial information available at the time. There has been no suggestion that directors did not act in good faith in what they saw as the best interests of the Society and of policyholders. The fact that, with hindsight, different decisions could arguably have led to different outcomes, does not render the original decisions negligent or unreasonable. All that this demonstrates is that where questions of judgment are concerned (particularly difficult questions of judgment), different views are possible. There are many examples in corporate life of strategies proving to be less than optimal – Sainsburys, M&S, BT - and someone (usually shareholders) will have received lower returns than they had expected as a result. One does not, however, see the directors of those companies being personally sued and commercial life would quickly become impossible if that were to become the standard reaction to any corporate misfortune.
21. A particular example of the use of hindsight arises in relation to the House of Lords' decision in *Hyman*, which is presented as an almost inevitable outcome. This matter is discussed in more detail later in this skeleton but, in relation to these comments, I would note that, in advance of receiving that decision, it was only one of a possible range of outcomes – and, on the basis of the legal advice received was seen as a highly unlikely one until after the hearing in the House of Lords itself. The fact that we prepared for the worst outcome does not mean that we expected it. Thus, for example, the question 'why didn't you explain the implications of the House of Lords' decision?' is more properly formulated as 'why didn't you explain the implications of all the possible outcomes (however likely or unlikely they might be)?'. Put in that way the practicalities of providing

balanced and realistic information⁶, beyond the very extensive information actually given, look very different.

22. The Society's pleadings and expert evidence seem conveniently to ignore the fact that every action has a range of consequences and scant regard is paid to the full implications of what they suggest should have been done⁷. This is particularly acute in the case of adjustments to policy values, where there is a failure to keep firmly in mind that all decisions affect actual payments to actual individual policyholders. Although the legal distinction between the Society and its members is appreciated, the economic reality is that the assets of the Society at any time are owned by the then current members. A decision to reduce payments to a particular generation of policyholders 'to strengthen the Society's finances' is, in fact, a decision to pay less to current maturing policies so that more can be paid to some future generation. Real flesh and blood individuals therefore suffer. Viewed in that way, the Society's assertions about prudent financial management measures look very different.
23. To take just one example at this point, at SOS 352(j) the Society says "*any money which it could have saved would have been useful*". This raises the immediate question 'useful to whom?'. The comment is actually saying that the appropriate course was to deprive current maturing policyholders of some element of the values that were actually paid in order to enrich succeeding generations. But no argument is advanced as to why that course was fair or reasonable in the circumstances of the time. Underlying many of the Society's arguments is an implicit thesis that it is **always** appropriate to manage matters so as to enrich future generations at the expense of those currently leaving the fund. Carried to its logical conclusion such action would build up a large 'estate' of assets which, from the point the fund closed, would be distributed to those policyholders who were fortunate enough to happen to be members at that time, as their policies matured, so providing them with policy benefits very materially in excess of what had been generated by their own invested premiums. Such an approach lacks natural justice and is entirely contrary to the principles on which the Society had operated, and which it had publicly espoused, over many years.
24. It is also unrealistic to suggest that management should report every detail of what is happening in the business to a 2 hour monthly board meeting. In the real world choices have to be made as to what seems important at the time. With hindsight priorities can

⁶ It would, of course, have been possible to provide **unbalanced** information spelling out the 'worst case' consequences without context. Had that been done, and the House of Lords' decision had been as our legal advisers expected, we would no doubt now be being sued for having recklessly wrecked the Society and destroyed its goodwill.

⁷ See, for example, the casual reference to abandoning the DTBP at SOS 359(c). Such an action would have had significant administrative cost implications and disadvantaged retiring GAR policyholders not wanting GAR benefits, at a time when leading counsel was confidently advising that the House of Lords would confirm the High Court judgment in a few months' time.

look very different, with items assuming a vastly different significance from that which they appeared to have at the time. Again it is not negligence or unreasonable behaviour not to have anticipated the future significance, in very different circumstances, of such items.

(3) *The GAR liability*

25. I deal with the matter of the level of provisions in my detailed comments on the Reporting Actuary allegations against me later in this skeleton. I should like, however, to make a few preliminary observations on a theme which runs throughout the Society's case and elsewhere, namely that there was a liability which was in some way 'missed'.
26. It is, I believe, common ground that holders of GAR policies were entitled, at retirement, to receive a pension calculated as $GFV \times GAR$, if they so chose⁸. It is also agreed that at times when the corresponding CAR was below GAR, the value of that pension was greater than GFV. That was an intrinsic feature of the GAR contracts and I do not believe there has been any dispute regarding that.
27. The Society chooses to describe the additional value of the pension, i.e. $GFV \times (GAR/CAR - 1)$ as a 'real' liability and tries to create the impression that it was in some way overlooked by the then actuarial management of the Society (e.g. SOS 602). Mr Whitworth takes a similar line in his expert evidence (e.g. E3-1.202, paragraph 4.1.1) and Mr Wilson, in his contributory negligence allegation (P2-6.84, paragraph 86A(1)), says the Actuarial Management "*failed to recognise....the additional GAR liability*".
28. These comments are patently without substance. The contractual benefits were known and understood and the very existence of the DTBP demonstrates that. All contractual policy benefits are liabilities of the issuing office and adding the adjective 'real' is otiose.
29. What is being done, by using loaded terminology such as 'real liability', 'overlooked' and 'missed', is an attempt to create an impression in the Court's mind that there was something out of the ordinary about this policy feature which **necessarily** led to a certain reserving or provisioning treatment. That is not correct. The opportunity for GAR policyholders to take benefits in guaranteed annuity form was a fully understood feature of the GAR contracts and that feature fell to be reflected in reserves and provisions by applying an appropriate actuarial approach in just the same way as for any other policies the Society had sold. It is clear from the range of expert evidence on this topic that there is scope for a range of professional views on what that appropriate approach should be.

⁸ Adopting the terminology of the SOS (see, for example, SOS 455). That is, where the guaranteed fund value (GFV) includes any previously allotted declared reversionary bonuses.

However, it adds nothing to that debate, and is positively misleading, to use loaded terminology in an attempt to subvert the issue by trying to attribute some special characteristic to the liability to provide a GAR annuity.

(4) Some comments on this litigation

30. I believe some insight into the lack of intrinsic merit in the Society's claims can be obtained by looking at the history of this litigation.

31. Despite all defendants producing extensive responses to the letters before action issued in late 2001, proceedings were issued very soon after service of the responses, giving the impression that only lip-service was being paid to the process of sending letters before action and that there had been a prior decision already made to issue claims regardless of what the responses actually said. Significant elements of the original claims were vague, poorly articulated and internally inconsistent. The 'overpaid bonuses' claim was for amounts in the region of £1.5bn and appeared wholly disproportionate to the actual payments made to policyholders in the relevant period.

32. The 'lost sale' claim (which, at that stage, was in fact two alternative claims for a 'lost sale' and a 'lost chance of sale') was for a full demutualisation of the Society and, again, was for amounts in the region of £1.5bn. The 'lost sale' claims were made in respect of 1999 and 2000 despite being based on the wholly unreal and illogical allegation of a failure to take legal advice on the validity of the DTBP at a time when the Society was engaged in the *Hyman* litigation to verify just that.

33. These claims enabled the Society to generate headlines that it was suing the auditors and former directors for £3bn (see, for example, C70.245, C70.248 and C70.250).

34. The defects in the claims were pointed out in defences but, despite the claims being amended one or more times for reasons associated with the Society's varying fortunes in the various summary judgment applications in the interim, the defects went unchanged for over two years. In May 2004 the Society served its expert evidence which disagreed in fundamental respects with the basis of the claims as originally constructed. Consequently, further amendments to the claims were made (after at least two iterations of drafts) which changed the nature of the claims in very significant ways, so as to effect a forced alignment of those claims to the expert evidence.

35. The changes were particularly significant in my case, in that the total illogicality of a 'lost chance of sale' claim for 1999 or 2000 was at last recognised, with the result that such claims against me were dropped in their entirety for 2 out of the 3 years to which they

originally applied and the claim was significantly reduced for the remaining year. The 'overpaid bonuses' claim was more than halved in quantum. As a consequence, the totality of claims against me, ignoring unquantified 'mis-selling' claims have been reduced from £3.3bn⁹ to £1.154bn¹⁰ - an astounding reduction of **65%**. They are now reduced yet further by the re-working of some aspects of the claim in the SOS.

36. As examined later in this submission, there remain major illogicalities under both of the main heads of claim. Attempts to seek clarification in correspondence have met with no proper answer or, in some cases, no answer at all. Additionally, the Society has recently taken a blunderbuss approach to the 'overpaid bonuses' claim by adopting any variation of the claim which any of its and Mr Wilson's expert have suggested, together with further new variants introduced for the first time in the SOS (as acknowledged in the letter dated 17 March 2005 from Mr Milligan to Mr Justice Langley). This would appear to be a tactical device to create the impression that, although there may be uncertainty as to quantum, there must be **some** loss, however one looks at the matter. I am sure that the Court will be alert to such tactics and will look through the smoke-screen of alternative cases to the underlying (lack of) merit. The position which the Society has adopted has become so convoluted that it has even served to confuse itself. For example, at SOS 327(a) it argues 4 different levels of loss in respect of the 1997 resolution by reference to its own expert evidence which, in fact, refers to the same alleged basis of loss in respect of 1997 (E1-1.131 para 296), 1998 (para 298), 1999 (para 300) and 2000 (para 302)¹¹.
37. If the Society was convinced that it had a valid claim against former directors, how is it possible, having been advised by Herbert Smith and leading counsel¹², for its case to have had such a chequered history and still to arrive at trial with major unresolved issues about some parts of the claims and entirely new, unpleaded, material? I suggest that the answer is that there has never been a clear valid claim and that the whole exercise was originated as a political sop to policyholder activists, laced with a degree of vindictiveness towards the former board members. The Society has relied on its massively superior resources (both legal and PR) in the hope that the director defendants would be cowed into early capitulation before the deep flaws in its claims became apparent. When that did not happen there have been repeated and increasingly desperate attempts to patch up the claims, particularly in the face of the major problems presented by the Society's own unsupportive expert evidence.

⁹ The sum of the figures at sub-paragraphs (1) and (2) on page 50 of the original Particulars of Claim.

¹⁰ The sum of the figures at sub-paragraphs (1) and (2) on page 42 of the Re-Amended Particulars of Claim (P2-1.230).

¹¹ A similar lack of familiarity with its own evidence infects SOS 331(a) and SOS 351.

¹² Indeed Vanni Treves and Charles Thomson have repeatedly claimed that they are only pursuing this litigation because their lawyers have advised them that they have no other choice.

38. Two further points will need to be addressed at trial. First, how Mr Thomson felt able to sign statements of truth on versions of claims of such widely varying nature and quantum. The view as to what was a realistic basis of claim seems to have altered remarkably from time to time and Herbert Smith have refused to answer the direct question as to whether or not any independent expert evidence was used at the letters before action/original Particulars of Claim stage. I suggest that subsequent events indicate that it was not.
39. Second, why the Society has found it necessary to spend the grotesque sum of **£8.8m** on expert fees to the date of the 4 February 2005 CMC with a further **£2.6m** expected to be spent by the end of trial (both sums including VAT). It would seem either that a large number of potential experts did significant amounts of work which proved to be of no assistance to the Society, or that the production of the evidence actually published has been enormously time-consuming and laborious. The total number of pages in bundle E1 is around 850 which includes appendices and pro forma material such as experts' declarations. Even including such pages, the total cost of the Society's expert evidence works out at over **£13000 per page**¹³. Again one must ask the common-sense question, if the directors' negligence is so obvious and apparent as to justify this litigation, why has it been necessary to spend such eye-watering sums in an attempt to shore up the Society's case? The only answer to this question is, I would suggest, that given in paragraph 37 above.
40. The Court will of course form its own views on proportionality and the conduct of this litigation. It must be recognised that the lives of people who (it is acknowledged) acted honestly and with good intent, have been ruined for a protracted period, irrespective of the outcome at trial. In my own case I shall very soon have been conducting this litigation for longer than the period of office during which the alleged negligence is said to have occurred.
41. It is also relevant to note that the Society's position bears no resemblance whatsoever to an Enron-type situation where, apparently, directors enjoyed very material personal enrichment. Leaving aside the negative effects of this litigation, the personal consequences of the events at the Society were themselves entirely negative in terms of vastly increased workloads, disruption to personal life for prolonged periods, reductions in the value of non-GAR policies held with the Society as a result of the House of Lords decision in *Hyman*, and premature termination of careers. The Society maintained a remuneration approach for senior staff and directors which was exceptionally modest for

¹³ And these are just the fees for the experts involved – clearly there would have been significant input of time from the lawyers too, which makes the total figure per page even more obscene.

a financial services company of its size¹⁴ and I suspect that the aggregate career earnings of all 15 defendants (both executive and non-executive) would amount to only a fraction, and probably quite a small fraction, of the Society's costs in pursuing this litigation. The position if one looked only at the period relevant to this litigation would be a *fortiori*. It has been reported that some non-executive directors are "very wealthy men". I have no knowledge as to the truth of that assertion beyond what is in the public domain but, even if true, it must be for reasons entirely unconnected with service to the Equitable, as the most cursory glance at the level of directors' fees will demonstrate.

(5) My roles and position in the Society

42. In my short term of office as chief executive of the Society, I had a high profile public role representing the Society before the Treasury Committee, speaking to the media, and leading the negotiation of the deal with the Halifax. Because of that I have tended to be associated with the history of the issues and there appears to be a perception in some quarters that I was a significantly more influential figure over a prolonged period than was, in fact, the case.

43. I only became a director on 1 July 1999. Mr Jonathan Dawson was appointed a director only a few months later in January 2000. After being served with a letter before action along with the current defendants in late 2001, the Equitable announced that they had been advised that he had no case to answer (C70.247, note 2). However, the only decision for which I am alleged to have been in breach of duty as a director is the bonus decision of February 2000, at which time Mr Dawson was also a director. Furthermore, when the previous board decided to take legal advice on the personal liability of current or past directors, the original proposal was that Mr Dawson and I should form a sub-committee to investigate that, on the grounds that we were the only two directors where there could not possibly be any liability¹⁵. Although it was subsequently decided that my involvement in the issues other than as a director made that inappropriate and Mr Dawson formed the sub-committee on his own, that was not a reflection on my involvement as a director.

44. Accordingly, if my only involvement with the Society had been as a director, I submit that I would be in the same position as Mr Dawson and the Equitable would have been advised that I too had no case to answer. My position is clearly shown in the diagram at SOS Appendix 7.

¹⁴ An approach not continued by the present board. The 2003 Report & Accounts (RA-3.92) show Mr Thomson's earnings at £508113 which is over double Mr Nash's remuneration of £253646 for 1998 (the last full year for a chief executive under the previous board) reported in the 1998 Report & Accounts (RA-2.84). The 2003 Report & Accounts also report aggregate remuneration of £3.4m to an average of 12 employees. That equates to £283000 per employee – a higher figure than anyone in the company earned in 1998.

¹⁵ See minutes of 8 November 2000 board meeting at C58.160.

45. Prior to 1997 I was one of several middle managers within the Society and was not particularly influential. I covered this in some detail in paragraphs 11-15 of my first witness statement (W3-1.93). A list of board committees and senior management groups in the mid-1990s has been disclosed (C1.18) and it is noteworthy that I was not a member of a single group on that listing. I also note that there were some discussions on succession planning in 1996 prior to Mr Ranson's retirement and Mr Sclater's notes of those discussions (C11.40) state that I was "*Good for AA but not more.*" which indicates the view taken of me by the board at that time. That is as someone technically competent to undertake the Appointed Actuary position but not then considered suited to a wider management role.

46. The claim against me thus essentially centres on my role as Appointed Actuary and Reporting Actuary from 1 August 1997. The scope of the duties associated with those roles is examined in more detail below. It is, however, important not to confuse those duties with any broader management tasks which were delegated to me during that period. In particular, advising the board on bonus matters was the responsibility of the Actuary under the Articles, not the Appointed Actuary, as I described in paragraph 59 of my first witness statement (W3-1.110).

C. The claim against me as a director

(1) Nature of the claim

47. The claim against me as a director has 2 elements:

- (i) A claim of breach of fiduciary duty in respect of the 16 February 2000 bonus resolution (SOS 412)
- (ii) Want of care during *Hyman* in respect of that same bonus resolution.

(2) Liability

48. As noted in paragraph 44 above, the Society's position against me as a director is inconsistent with its conclusion that Mr Dawson had no case to answer, given that he and I participated in precisely the same bonus resolutions.

49. As to the breach of fiduciary duty claim, for the only bonus declaration at issue the Society was acting on the best possible legal advice as to its powers and conduct. Even if, due to the legal fiction that the position discovered by the House of Lords was always the law (despite the surprising and obscure nature of that discovery as various

commentators have noted), there was a technical breach of the Society's Articles, such a breach was one which any reasonable director acting responsibly could have committed. When consulted in November 2000 Terence Mowchenson QC said that it was 'absolutely inconceivable' that any liability would not be relieved under s727 (C60.183, paragraph 9).

50. As to the reasons why liability should not be relieved under s727 advanced by the Society at SOS 266-8:

- (a) SOS 266 does not apply to the 16 February 2000 decision. The Society acknowledges the relevance of taking legal advice at SOS 255(b).
- (b) Although there is a possibility that any decision of a board might be 'improper', the directors' understanding of their powers under the Articles¹⁶ was reasonable and not capricious as is evidenced by the strong advice from leading counsel and the judgments of the Vice-Chancellor, now Lord Scott and Lord Justice Morritt, himself now Vice-Chancellor. This comment also ignores the fact that any other decision would also have had consequences for the Society. It was not open to the directors to sit on their hands and do nothing until the House of Lords had delivered their view of the law.
- (c) The argument at SOS 268 is effectively saying that directors should continually be exposed to personal liability for any loss arising from a retrospective interpretation of the law, regardless of the degree of care, diligence and responsibility with which they discharged their duties. In this particular instance, the position is *a fortiori* as the board was acting on the advice of some of the most eminent lawyers in the land. Put in that way the argument is clearly unsustainable. If not, no sensible man or woman would be prepared to incur a potentially huge personal liability from events entirely outwith their control and the structure of corporate governance in this country would disintegrate.

51. The Society's case on want of care is based on an alleged failure to reduce growth rates (SOS 357) but the justification given is infected with considerable confusion as to whether the Society is hypothesising a situation in which the DTBP had been abandoned¹⁷ or one where it continued to operate. A similar confusion is apparent in its expert evidence (see paragraph 56 of my second witness statement (W3.5.17)) which prolonged correspondence has failed to elucidate.

52. For example, SOS 359(a) asserts "*Having appreciated that they would not be able to recover any sums wrongly overpaid (C38.29), it was unreasonable to decide to carry on overpaying them in the light of an adverse judgment.*" However, a full reference to the

¹⁶ I note that, in relation to the comments at SOS 255(d), in its regulatory returns the current board states that the Society's Articles give the directors "*absolute discretion as to the timing and nature of bonus declarations*" (RR-10.256 paragraph 14(1)(a)).

¹⁷ SOS 352(b) contains the telling phrase "*the Society does not contend (in this context) that the directors ought to have abandoned the DTBP*" (my emphasis)

document cited makes it clear that the comment about overpayment was entirely by reference to the situation where the Society continued to operate the DTBP and it was subsequently found to be unlawful (as was indeed eventually the case). The comment has no relevance to the overall level of policy values and the growth rate allocated. The view that any element of such values were “wrongly overpaid” is a contention by the Society, not objective fact. That such a contention is wrong is argued at paragraphs 57 to 59 below.

53. The specific grounds on which the Society alleges want of care in respect of the 2000 resolution are set out in SOS 355-6. My response to those grounds is as follows:
- (a) SOS 355(a) confirms the confident advice that was being given by leading counsel. It is not alleged that the Society should have abandoned the DTBP at that time.
 - (b) Although the board had decided to change one of its leading counsel (per SOS 355(b)) I do not agree that that was because “he had never properly understood the issues”. The advice and written opinions given by Lord Grabiner QC had been impressive and compelling and, indeed, had been a significant influence on the decision to commence the *Hyman* litigation. I believe that the concerns were around his grasp of the detailed documentation, of which Mr Sumption (counsel for Mr Hyman) had shown considerable mastery and the document references cited support that position (C38.126, C38.147).
 - (c) It is accepted that the board were aware that success in the litigation could not be guaranteed and that had been the case throughout. The relevance of the points regarding ‘ring-fencing’ at SOS 355(c) is unclear, since it is not alleged that the DTBP should have been abandoned at that time.
 - (d) No-one has tried to suggest that the board was blindly confident of success. The documents cited in SOS 355(d) and SOS 356 do no more than reveal a normal and responsible attitude to litigation risk. However, in the real world the board had to take a practical decision in the light of the advice available to it at the time.
 - (e) The point about ‘overpayment’ in SOS 355(e) was in relation to the DTBP, not the general level of policy results – see paragraph 52 above.
 - (f) The only documentation cited in support of the allegation in SOS 355(f) is correspondence between Mr Martin and Mr Nash and myself. I provided a detailed numerical example to explain the point in one of the letters cited (C39.84). Since that letter is dated 10 February 2000 – i.e. nearly a week **before** the declaration of bonus, the allegation in the second sentence is factually clearly wrong. Whatever is alleged about the understanding of, and explanations sought, by other board members, it is presumably not alleged that I failed to understand the implications of the various possible outcomes of the litigation.

(g) The contingency planning conducted by Schroders and referred to in SOS 355(g) was of a general nature regarding the Society's continued mutual status and had no direct relevance to the detailed bonus decisions.

(h) The relevance of the commercial non-viability of a hedge (SOS 355(h)) to the bonus decision is unclear.

(i) Regarding SOS 355(i), the significant wording in the quotation is "may". Clearly, there were circumstances where a different approach to bonuses would have been required – for example, if the Court of Appeal had decided unanimously on the 'scenario 5' position and leave to appeal had been refused. However, such circumstances did not, in fact, exist for the very reasons set out in SOS 355(a) and there was, accordingly, no need to change the recommendations.

54. The additional points raised against me at SOS 421 are dealt with in the sections below relating to the Appointed Actuary and Reporting Actuary claims.

(3) Causation

55. The Society's alleged reductions in growth rates would have reduced payments to those policyholders whose policies terminated during the currency of the *Hyman* litigation so there were slightly larger funds to distribute amongst the membership at the point of the House of Lords' decision. That is, it represents a redistribution (in this case a relatively trivial one) between different generations of policyholders – see paragraph 22 above. As such, there is no loss to the Society itself.

56. Even if that were not so, the Society could still not prove loss in respect of its allegation that the alleged want of care led to a failure to cut growth rates in order to bring policy values "*back into line with asset values*" (SOS 357). There are a number of things to be said about this.

57. First, in the SOS the Society appears to invest the alignment of policy values with assets with some sort of mystic significance as if were a 'gold standard' of financial management. In fact, the management of a with profits fund is fundamentally about the smoothing of underlying experience and such an alignment is merely an occasional occurrence at various points on the smoothing cycle. Elsewhere the Society has espoused a very different view of this matter (C70.308) saying "*an excess of policy values over assets is not itself necessarily significant*" (paragraph 4.1) and "*The Society also takes issue with the assumption which appears to be made by Lord Penrose that **any** amounts paid in excess of an aggregate policy value to asset value ratio of 100% constitute an unreasonable 'over-payment'*" (paragraph 4.3, Society's emphasis).

58. Second, the Society quotes the amount of the saving at SOS 358 by cross-reference to Mr Arnold's expert evidence rather than to its pleadings. This creates the misleading impression that the alleged reduction in growth rates was determined on the basis of expert evidence. That is not so. Mr Arnold's instructions were merely to compute the amount of bonus saving that would have arisen from the reduction in growth rates **specified by the Society**. This position is not clear from the face of the expert evidence and was only teased out from the Society by persistent correspondence as described at paragraph 127A of my Re-Amended Defence (P2-1.326). Elsewhere the experts have acknowledged that the determination of the appropriate level of growth rates is a matter of subjective judgment and one where "*there is a range of acceptable professional views*" (paragraph 5.3.3 of Mr Whitworth's Supplementary Report (E3-1.202)). Indeed the Society has implicitly accepted that that is the case by adopting a range of alternative 'overpaid bonus' claims.

59. Third the alleged alignment of policy values to assets is by reference to a particular measure of the assets attributable to the with profits policyholders. As explained at paragraphs 60 and 61 of my second witness statement (W3-5.18), if a more realistic view was taken of the assets properly attributable to the with profits policyholders, then policy values were already below assets at the end of 1999 (and 1998) and no reduction in growth rates was needed to achieve the Society's stated objective of alignment. Thus no cause of loss arises for 2000.

(4) The 'overpaid bonuses' claim - quantum

60. SOS 358 quotes an alleged saving of £43m which, from the cross-reference to Mr Arnold's report can be seen to comprise a reduction in claim payments of £42m and interest of £1m. The derivation of the £42m is not, however, immediately obvious.

61. The calculation of the figure is, in fact, made in the following steps (all paragraph references refer to Mr Arnold's report (E1-1.132)):

- (a) Total claim payments in 2000 of £2323.7m (paragraph 241)
- (b) Reduced by 5% to exclude other than with-profit business (paragraph 242) giving £2207.5m
- (c) Multiplied by the assumed growth rate reduction of 2.4% (paragraph 294) to give £53m
- (d) Scaled down to allow for the new rates only taking effect from 1 March to give £42m.

62. It is immediately obvious that the calculations assume savings in claim payments up to 31 December 2000. However, the Society alleges that the growth rate reduction should have been made for precautionary reasons **while** the *Hyman* litigation was continuing.

Paragraph 124 of the claim against me (P2-1.225) is clear on that point, saying “*whilst the test action was ongoing*” and Mr Arnold’s report (E1-1.132) refers to “*whilst the test case was ongoing*” (paragraph 288(a)ii) and taking “*precautions against the risk of losing the Hyman test case, by reducing bonuses*” (paragraph 288(b)). By comparison SOS 357 glosses over the point.

63. However, in July 2000 the outcome of *Hyman* was known and final bonuses were reduced to reflect that outcome. It makes no sense for the Society’s calculations to continue beyond the date of the *Hyman* decision and such calculations are in conflict with the plain wording of the claims. Mr Arnold has also patently failed to carry out his calculations in accordance with his instructions which he quotes. I have attempted to clarify this anomaly in correspondence¹⁸ but the Society has failed to provide any explanation, its final reply merely referring to its attempts to rationalise its approach at SOS 311. A new variant of the claim based on this approach also appears at SOS 319(b).
64. The new argument set out in SOS 311, and on which SOS 319(b) is based, would seem to be another example of the claims not being founded on any coherent view. If the Society wishes to advance a case that there was something defective in the July 2000 changes to final bonuses, it should do so explicitly rather than by attempting to achieve such a result by an unwarranted extension of the calculation of quantum for its pleaded case. In the case of earlier years, the argument seems nothing more than an edifice of conjecture – the alleged losses being based on the hypothesised initiation of a test case, resulting in an hypothesised outcome, leading to the need to make an hypothesised change in final bonuses (the nature and quantum of which has not been pleaded), with that change now hypothesised to be defective in some way.
65. If the loss for 2000 had been properly calculated by Mr Arnold on the stated basis the figure would have been around £20m (i.e. 4.5 months proportion of the whole year figure of £53m) instead of £42m. Such a sum would have been well under 1% of the claim payments in 2000, again illustrating the lack of realism in trying to assert a loss based on such small differences in discretionary decisions. Furthermore, the Society has conceded¹⁹ that, in practice, their alleged growth rate reductions would not necessarily be implemented directly but that the implementation would be “*subject to smoothing*”. It is clear that only the most minimal degree of smoothing would be needed in order to eliminate the alleged loss for 2000.

¹⁸ Letter of 30 December 2004 from Third Defendant to Herbert Smith, reply dated 27 January 2005, further letter dated 2 February 2005, further reply dated 17 March 2005.

¹⁹ Paragraph 2(6) of letter dated 24 November 2004 from Herbert Smith to solicitors for the Fourth Defendant in response to an information request dated 6 September 2004. (Despite being an information request this exchange does not appear in bundle P so I assume it will be included in the inter-partes correspondence bundle.)

66. In any event, however, there was no loss for the reasons set out in paragraph 59 above.

(5) Alleged breach of fiduciary duty – quantum

67. Paragraph 127B(a) of the Re-Amended Claim against me (P2-1.226) states the alleged loss as £43m. However, SOS 257 introduces a revised (and unpleaded) basis for this claim, the details of which are set out in SOS Appendix 6. Since the alleged breach is in respect of the February 2000 decision, effective from 1 April 2000, it would appear that the revised quantum is the 2000 figure in column (J) of SOS Appendix 6, namely £22.5m. Whether or not the alternative ‘rectification costs’ claim at 127B(a) in the amount of £36.6m survives in the light of the SOS is unclear, although from the comment at SOS 259(d) it appears that it does not.

D. The claims against me as Appointed Actuary

(1) Nature of the claim

68. The Re-Amended Particulars of Claim against me (P2-1.189) make various allegations of breach of duty in my role as Appointed Actuary from 1 August 1997.

69. In respect of the bonus decision taken in February 1998 it is alleged that my recommendations as to bonus, which included continuation of the DTBP on the relevant classes, failed to take account of a number of factors. However, the Society seems to have significantly recast these allegations in SOS 415-8. The allegations in the claim with, where appropriate, the cross-reference to the SOS are as follows:

- (a) the risks of the DTBP to which I should have been alerted by some internal correspondence soon after it had been introduced (SOS 416(c) alleges I should have explained that the ‘lawfulness of the DTBP was uncertain’)
- (b) a ‘real risk’ that it was inconsistent with PRE (not in SOS but see paragraph 73 below) and
- (c) the Society’s alleged ‘unusually high risk exposure’ (not in SOS).

70. Additionally the SOS alleges that I should have advised the board that: (1) if the DTBP were unlawful, substantial cuts in growth rates would be required (SOS 416(d)); (2) that aggregate policy values were still significantly in excess of aggregate asset shares (SOS 416(e)); (3) that, therefore, I should have recommended lower growth rates ‘to strengthen the Society’s resilience to shocks’ and as a ‘precaution’ against the DTBP being found unlawful (SOS 416(f)); and (4) that I should have advised the board about ‘the additional GAR liability’ (SOS 417).

71. The allegations contained in SOS 415 and SOS 416 (a) and (b) relate to the Reporting Actuary allegations and are dealt with in section E below.
72. In respect of the bonus decision taken in February 1999 it is additionally alleged in the Re-Amended Particulars of Claim (paragraph 80, P2-1.212) that my recommendations failed to take proper account of:
- (a) the legal advice received that there was a risk of losing *Hyman* and that, if that happened, it may not be possible to 'ring-fence' the GAR business and
 - (b) if that happened, there was a potential cost to the Society of £1.5bn.
73. Point 72(a) above is broadly replicated at SOS 421(b). Point 72(b) is not referred to in the SOS, which is hardly surprising since the SOS now admits in terms that the transfer of value following the House of Lords decision was **not** a cost to the Society (SOS 112). SOS 421(c) alleges that it was incumbent on me to 'protect PRE' (without explaining what exactly that is said to entail) and, to that extent, bears some similarity to the claim, as set out at 69(b).
74. In respect of the February 2000 decision the allegations are similar to those for 1999 and show considerable overlap with the want of care alleged as in my role as a director. Accordingly the Appointed Actuary allegations in respect of the 2000 bonus resolution have been largely dealt with in section C above. To the extent that there are additional points which need to be made, those are covered below by my comments in respect of 1999.

(2) Liability

75. The first, over-arching, point to be made is that the Society adopts a cavalier approach to the extent of the duties and responsibilities of the Appointed Actuary. In particular, as noted at paragraph 46 above, recommendations as to bonus rates were the responsibility of the Actuary under the Articles and not the Appointed Actuary. Although offering advice to the board on bonus matters was, in practice, delegated to me, that did not remove the responsibility from the Actuary. The scope of the duties of the Appointed Actuary was explained to the board shortly after my appointment (C13.161) and the directors at that time included all those at subsequent bonus declarations²⁰. There should, therefore, have been no doubt as to the position. Furthermore, as noted at paragraph 59 of my first witness statement (W3-1.110) the President was assiduous in checking that the recommendations set out in my board papers were endorsed by the Actuary.

²⁰ Apart from Mr Dawson in the case of the 2000 decision.

76. Even in respect of the matters which were properly the responsibility of the Appointed Actuary, the extent of any duty was at most to exercise such skill and care as would ordinarily be exercised by a reasonably competent and prudent Appointed Actuary. The duties were not absolute, and the approach which I (and Mr Ranson before me) adopted is supported by the independent expert evidence of Mr McBride (E3-1.54, in particular section E).
77. In any event, the account in sub-section (1) above shows the chaotic state of the Society's claims in this area. The original claim is poorly articulated, with, for example, the factors alleged to give rise to the 'unusually high risk exposure' being no more than a litany of features of the Society's business - some somewhat unusual, other less so, some merely a feature of any mutual life office – with no clarity as to what I (or Mr Ranson before me) should or should not have done differently from what we did in fact do. It now appears from the SOS that the allegation (whatever it was) has been abandoned.
78. It is noteworthy that the Society has not attempted to advance any expert evidence in support of its Appointed Actuary allegations. Solicitors for Mr Ranson (for whom these claims are very similar, absent matters related to *Hyman*) challenged Herbert Smith properly to set out their claims as to negligence as Appointed Actuary or abandon that part of the claim against him²¹. Herbert Smith replied on 17 March 2005, making the somewhat surprising assertion that *"we remain of the view that the duties alleged in section I, and the breaches alleged in section H, do not require expert actuarial evidence to support them, and we will be so submitting to the court. To the extent that the Judge disagrees with us, and believes that he might be assisted by hearing Mr Arnold's views, you will of course be free to ask Mr Arnold what he thinks"*.
79. I am, of course, a layman in court procedure but this suggestion, conjuring up, as it does, a picture of the Defendants cross-examining the Claimant's expert witness to elicit the expert evidence which the judge feels might assist him in assessing the merits of the Claimant's allegations of professional negligence, strikes me as bizarre. In any event, it is unclear why Mr Arnold should be the choice of expert since he appears not to have been retained on these matters. As noted above, Mr Ranson and I have already adduced expert evidence on this subject from Mr McBride and Mr Dumbreck's experience indicates that he might be better qualified to assist the Court in these matters than Mr Arnold, if some ad hoc arrangement of the type suggested by Herbert Smith is, indeed, to be followed.

²¹ Letter from Baker & McKenzie to Herbert Smith dated 21 February 2005.

80. Despite the comments above as to the confused and incoherent position on the Appointed Actuary allegations, I will comment briefly on those elements of this section of the claim which appear to survive in the SOS.
81. Regarding the allegation (SOS 416(c)) that I should have advised the board in February 1998 that the DTBP might be unlawful, I do not accept that it was a responsibility of the Appointed Actuary to advise the directors on their legal powers under the Articles. Any such accusation should more properly be directed at the Company Secretary who is not a party in this litigation²² or to Dentons. In any event, by then the DTBP was an established feature of the Society's bonus system, had already been approved in 4 preceding years, appeared wholly consistent with the very broad discretion given to the directors under Article 65, and was fully consistent with PRE (see paragraph 83 below).
82. Moving on to the *Hyman* period, the Society's argument that I did not "*explain the financial implications of the GARs and the consequences if the DTBP was unlawful*" (SOS 421(b)) is, I submit, unsustainable. In its claim against me the Society stated (at paragraph 29(a) (P2-1.196) that on 9 September 1998 I had briefed directors that "*if the Society was not entitled to adopt its differential bonus policy, the potential cost to the Society was £1.5bn*". The SOS is rather reticent on this point, merely giving a reference to the relevant meeting notes at SOS 344(d)²³. Additionally, the Society confirms that the board received extensive advice on contingency plans (SOS 344(l)).
83. As noted above, the comments about PRE at SOS 421(c) are poorly articulated and it is unclear whether the comment about the DTBP being possibly inconsistent with PRE is being pursued. I accept that advising the board on PRE was a responsibility of the Appointed Actuary. However:
- (a) The Society had a clearly articulated approach to PRE on which I had advised the board regularly (see, for example, paragraphs 6 to 12 of my paper at C15.30 and C15.31) and which had been consistently described to policyholders in letters sent with bonus notices (e.g. C3.302), With-Profits guides (e.g.SP2-3.67), and other documents.
 - (b) The DTBP, far from 'being possibly inconsistent' with PRE was in fact the approach to setting final bonuses on GAR policies which was *most* consistent with that PRE – see paragraph 72 of my first witness statement (W3-1.114) for a fuller explanation of why that was so.

²² And, indeed, continues in that role today, demonstrating the Society's capricious approach to litigation targets.

²³ Again indicating the confused and muddled approach to this litigation. The point appears to be downplayed against me so I can be accused of not briefing the board but held against the other directors so they can be accused of acting despite having had such a briefing. In any event, the Society has now accepted that the transfer of value arising from the House of Lords' decision was not a loss to the Society – see paragraph 73 above.

(c) The *Hyman* litigation can be viewed as an attempt to confirm the operation of a system which implemented the PRE of the GAR policyholders while also upholding the PRE of the non-GAR policyholders²⁴.

84. In any event, nothing flows from the Society's PRE allegations, whatever they are supposed to mean. No indication is given as to what measures should allegedly have been taken to 'protect PRE' (SOS 421(c)).

85. Although it is not clear from the SOS whether it is intended to be a PRE point, I should also comment on the references to 'ring-fencing' at SOS 344(c). The characterisation of ring-fencing as potentially providing "*a solution to the problem*" fundamentally misrepresents the position. The principle of ring-fencing – that is that, within the with profits fund, each class of business should receive bonuses which reflect the experience of that class – is a basic tenet of the operation of with profits business. That is, ring-fencing is what one naturally expects to happen, rather than being a "device" or "solution to a problem". This explains why, in contingency planning, if *Hyman* were lost, 'scenario 5' was the expected outcome. At various times in discussion with Dentons and counsel the fact that a 'scenario 6' outcome would cut across the whole basis of with profits business was recognised²⁵, which partly explains why it was thought so unlikely. Similarly, in the Court of Appeal judgment, when Waller LJ set out the 'scenario 5' outcome that was seen as his appreciation of the logical consequence of the DTBP being invalid.

86. In connection with PRE I have also noted that, in his first witness statement, Mr Wilson makes reference to an analogy he drew between GAR policies and purchase of a motor car (W3-4.147, paragraph 43). I do not now recall him making the point at the time and think it must have been in the nature of an aside. He clearly, however, now attaches some significance to the point and I think it is important to be clear that the analogy is only relevant in a very limited sense not intended by Mr Wilson and is, otherwise, an inaccurate and misleading one.

87. The strict sense in which it is accurate is that, of course, GAR policyholders **did** gain some additional benefit relative to other policyholders - that is, an entitlement to an annuity of GFV x GAR which could be higher than the comparable annuity which their cash fund benefit could secure at CAR. However, Mr Wilson's comment was clearly not

²⁴ Something to which the House of Lords appeared to attach no weight whatsoever, despite Elizabeth Gloster QC presenting the case as being fundamentally about the fair division of assets in a mutual fund.

²⁵ The actuarial profession in its submission to the Treasury Committee commented (R2.172) that the House of Lords' judgment "*differed in important respects from what had become the accepted wisdom.....It is also accepted practice that groups of participating policyholders are appropriately and equitably distinguished when making a distribution of bonus.*"

meant as an affirmation of the DTBP but as meaning that a more substantial benefit could reasonably have been expected from the existence of the GAR.

88. If one is buying a new car then, subject to confirming that it is of a certain specification and has the standard warranties, one knows precisely what one is buying. One can, accordingly, compare prices directly and, if a particular garage is offering a special discount or some additional benefit (such as free servicing), one can be confident that that is the better deal. Purchase of a with profits policy is completely different. There is no tangible good that is acquired. The Society had consistently described its approach to with profits as trying to return to each policyholder their fair share of the fund on termination of their policy and terminal bonus as the tool by which the guaranteed policy benefits were lifted to that fair share. The guaranteed policy benefits and the approach to bonuses were the 'package' offered by the Society and there is nothing in that description which would lead one to expect that some element of the guaranteed benefits conferred some substantial additional benefit at no cost.
89. Furthermore, in Mr Wilson's analogy the guarantee on the motor car is some separate added extra which could be 'bolted on' or not to the item being acquired, at the purchaser's choice. By contrast, the guarantees which formed part of the Society's GAR policies were a fundamental part of the package being acquired and over which there was no choice. For these reasons, Mr Wilson's analogy, except in a very narrow sense which he clearly did not intend, is a false and misleading one.
90. As to the points mentioned in paragraph 70 above, I comment briefly as follows:
- (a) It was obvious to directors from the time of the 9 September 1998 briefing that, if the eventual House of Lords' decision were to apply, the transfer of additional benefits to GAR policyholders could only come from a reduction in bonuses for other business. Indeed, the principal reason why the executive advised that the Society should not voluntarily adopt such a course, was the "*major inequity*" it would visit upon non-GAR policyholders (C18.197). In any event, there was no reason to anticipate such an outcome in setting current growth rates when, on the basis of advice, it was considered highly unlikely.
 - (b) As noted in paragraph 59 above, on a realistic measure of the assets properly attributable to the with profits policyholders, policy values were already below assets at the end of 1998 and only marginally above at the end of 1997. In any event, I regularly advised the board of the evolving smoothing position in my bonus papers each year (C15.30, C21.136, C36.82).
 - (c) The alleged failure to advise lower bonuses on 'precautionary' grounds is dealt with at length above – see in particular paragraphs 22 and 23. In any event, responsibility for bonus recommendations was not mine.

- (d) The ‘additional GAR liability’ is dealt with at paragraphs 26 to 29 above. The point at SOS 417 is simply wrong. Provided that, in the example stated, there was already accrued final bonus of £1.5bn on the GAR business which would “absorb” the effect of the fall in CARs within the existing policy values of the class²⁶, there would be no effect on the realistic financial position of the fund. The implication that, in some way, the £1.5bn needs to be deducted from the £2bn before making bonus decisions would seem to demonstrate that either: (1) the Society does not understand the position; or (2) it is being deliberately disingenuous in an attempt to paper over the chasms in its case.

(3) Causation

91. In the light of the above comments I submit that the Society has made out no case on causation specific to the duties of the Appointed Actuary. The allegations are no more than a slight variant on the ‘want of care’ allegations against the directors and fail to take account of the limited scope of the duties associated with the role in relation to the matters alleged.
92. To the extent, if any, that (contrary to these submissions) the Court feels there is any case to be answered in respect of those duties with regard to the ‘overpaid bonuses’ claim, then the points made in section C above apply.
93. The ‘lost chance of sale’ claim applies in respect of the February 1998 alleged breach only and, as submitted above, the Society has made no case on causation. In any event, even for the directors in that year (of which I was not one) the chain of causation looks weak. Other defendants faced with that allegation for 1998 and earlier years will no doubt deal with this more fully and I will make just 3 observations:
- (a) It is by no means clear that in the different conditions of the earlier years (smaller GAR/CAR ratio, less interventionist consumerism amongst policyholders, less interventionist PIA Ombudsman, reduced scope for policyholder groups to organise campaigns due to much lower penetration of the internet) counsel would have changed his views to recommend initiation of a test case in the way he did in late 1998 so quickly, or at all.
 - (b) The Society was fortunate in achieving very early hearings at all 3 stages through the courts. At different times, with different pressures on the courts and a possibly lower profile to the test case, the progress through the courts could easily have been extended by several months.

²⁶ The Society has not, any time, challenged the realism of the £50m of projected additional value above their normal policy values the GAR classes would enjoy if the DTBP had continued to apply. The modest size of that realistic impact demonstrates that the vast majority of the “additional GAR liability” was covered by the notional accrued final bonuses on the GAR classes, as assumed in this paragraph.

(c) Although the Society says it is not open to the directors to contend that the outcome could have been different (SOS 321), it gives no basis for that assertion. In any event, the assertion is a surprising one, given the strong judgments in favour of the DTBP of such eminent judges as Sir Richard Scott V-C (as he then was) and Morritt LJ (as he then was), the significant criticism within the legal profession of the House of Lords' decision, and the reported views of Mr Sumption that the case was thought to be unwinnable from his client's point of view²⁷.

94. At the very least, therefore, in my submission the Society's case on timescales is highly speculative and weak.

(4) The 1998 'lost chance of sale' claim - quantum

95. The claim that, absent, the alleged breaches in February 1998, the Society would have achieved a sale on its VSS structure for a sum considerably in excess of the amount realised in the transaction with Halifax, suffers from (among other things) a fatal flaw as to timing. Even on the Society's hypotheses, the sale would have only concluded in late 2000, a mere few weeks before the Halifax transaction itself. Given the point above (at paragraph 93(b)) about the uncertainties of the timescale for the hypothesised legal process and the vagaries of any sale process, there is a strong possibility that, even if initiated in February 1998, the Society's whole hypothesised chain of events would have ended no earlier than in early 2001, which is when the actual Halifax transaction was in fact effected.

96. In any event, there is a deep implausibility in the contention that a buyer would have paid a very substantially higher sum than the Halifax in a similar transaction concluded only a few weeks earlier. In short, the 1998 'lost chance of sale' claim is only marginally less plausible than the wholly irrational original such claims for 1999 and 2000 (see paragraph 32 above). Like them, it should have been abandoned when the claims were amended.

97. Other defendants against whom the 'lost chance of sale' claim is alleged for 1996 and 1997 (where there is at least a plausible temporal separation from the Halifax transaction) will no doubt argue the claims in more detail than I need to. However, even though I do not need to go that far in respect of 1998, I make the following brief comments on this head of claim in the hope that they might assist the Court:

(a) The expert evidence (some of which is rehearsed at SOS 320) is very heavily weighted against the Society. (This may explain why the Society appears to be so conspicuously reluctant for the Court to consider that expert evidence at the

²⁷ The Times - Law, Tuesday 6 November 2001: "**Q. What has been your most memorable experience?** A. Winning a case the consensus thought unwinnable is always very satisfying. Equitable Life was a case like that".

opening of the trial.) Mr Dumbreck makes the very telling point that he has looked at valuation from the perspective of what a potential purchaser would be prepared to pay, whereas the Society has constructed the whole edifice of its assumed losses under this head on the foundation of aspirational valuations of what the seller hoped to achieve (E2-2.1, paragraphs 5.2-5.4). Mr Dumbreck's approach is clearly the right one.

- (b) The Society and Mr Cryan persist in maintaining that there is a difference between the VSS and the Halifax transaction, in that, under the VSS, the Society remains open to new business. Mr Cryan devotes a whole section of his supplementary report (E1-3.131, Section 2) in an attempt to explain what he means but the point remains obscure. In particular he fails to address: (1) what staying open for business means once the sales infrastructure has been sold (and he admits at 2.2, apparently against his own contention, that after such a sale the Society would have been *de facto* closed to new business); and (2) if the Society did remain open for business (whatever that might mean in the circumstances) it would be competing with the acquirer, at least for incremental business from existing policyholders, which means that the acquirer could be expected to pay **less** rather than more under the VSS than under the Halifax transaction. Mr Cryan admits (at 2.3) that, if he is wrong, he "*would be inclined to concur with many criticisms of the structure*".
- (c) There has been a persistent and inexplicable refusal on the part of the Society to accept that, under the Halifax transaction, up to £500m was payable for the franchise value despite the plain wording of the formal offer letter dated 28 January 2001 from Halifax (HX1.4, paragraph 6) and, even if Mr Cryan's figures were realistic, they should be reduced by that sum in order to arrive at the alleged losses. Mr Cryan's attempt to rationalise the Halifax transaction in some other way in section 6 of his supplementary report (E1-3.131) is wholly unconvincing for the reasons described at paragraphs 73-80 of my second witness statement (W3-5.22) and section 6 of Mr Franklin's supplementary report²⁸.
- (d) Indeed, Mr Cryan's attempt to link part of the Halifax payments to a wholly misinterpreted view of the arrangements with Halifax for ongoing policyholder administration raises an aspect of the Halifax transaction to which I believe he has given insufficient weight in his expert report. Despite some comment from the policyholder action groups that the Halifax deal 'saddled' policyholders with an expensive administration arrangement, the reality is, in fact, completely the opposite. The Society gains two very material advantages from the 'share of costs' arrangement for policyholder administration: (1) the services are provided at cost without profit margin; and (2) because the Halifax intends progressively to use the Aylesbury platform also to service other business within its group, the costs should not suffer from the diseconomies of reducing scale which would otherwise be

²⁸ Dated 18 February 2005 but not yet in trial bundle index.

experienced in a closed fund. These arrangements were considerably more attractive than those offered by other bidders in the 2001 sale process, all of whom wanted a profit margin on administration services (see, for example, C67.149). To some extent, this represents a 'hidden benefit' of the Halifax deal which it is unclear would necessarily be reproduced under the VSS.

- (e) At the 4 February 2005 PTR/CMC, counsel for the Society announced, in connection with the 'lost chance of sale' claim against Ernst & Young, that the Society would not claim a loss in respect of any component of the value under the alleged sales which the Court judged would have been paid on an 'earn-out' basis. I checked with Mr Milligan QC immediately after the hearing that the same position applied in relation to the claim against the directors. He expressly confirmed that it did but, despite my writing to Herbert Smith on 7 February 2005 asking for that important point to be confirmed in writing to all parties (particularly since representation amongst the directors was somewhat thin in the afternoon of 4 February), they have not done so. Neither is the concession admitted in the SOS. In the light of Mr Milligan's assurance to me and in the light of his concession concerning the claim against Ernst & Young, I respectfully submit that Mr Milligan is now not permitted to go back on that assurance, should he seek to do so.

(5) *Other matters*

98. Although it does not form part of the claim against me, I cannot let the misrepresentation of my advice to the board at SOS 566 pass unchallenged. The purported comments are portrayed as criticisms of financial reinsurance which "*nonetheless*" the Society subsequently effected (SOS 567). If, however, reference is made to the source documents it will be seen that:

- (a) The quotation from C13.173 is partial, the point made merely being that the value of a financial reinsurance arrangement might need to be deducted in the 'future profits' calculation (as was, in fact, done when the Society subsequently effected such an arrangement) so there was some degree of trade-off between the two ways of improving the statutory solvency position.
- (b) The concerns reported at C15.38 were only a warning that there could be future changes in accounting treatment which could dilute the benefit of such an arrangement.

99. I submit that these comments were wholly consistent with giving the board proper and responsible advice on those matters and I note that the Society does not allege otherwise. One does, however, begin to wonder if there is **any** advice I could have given which the Society is not capable of misrepresenting through selective partial quotation.

100. At SOS 589-601 the Society takes issue with some of the comments in my second witness statement (W3-5.1). The substantive issues are dealt with elsewhere in this skeleton argument but I comment on a few detailed points briefly as follows:

- (a) The point at SOS 590 that there was “*little opportunity*” to reduce declared bonus rates is wrong. The addition to liabilities from declared bonuses was 1997: £508m, 1998: £363m, and 1999: £423m (Table A.4 at back of R6). Those amounts did not include the effect of the GIR.
- (b) SOS 591 misrepresents the point made at W3-5.13 paragraph 44 which was, in fact, that the working capital position was more directly assessed from the regulatory return than the Companies Act. Mr Arnold seems to disagree with my characterisation of a need which lasts for the first 8 or 9 years of a long-term contract as ‘temporary’ (as opposed to ‘permanent’)
- (c) SOS 596 encapsulates the confusion in Mr Arnold’s approach whereby he asserts that he is not assuming that the DTBP is abandoned but reduces policy values by the same amount as would be needed if it were abandoned “*as a precaution against that possibility*”.
- (d) The phrase ‘achieved with hindsight’ in SOS 597 is misleading. The point made in the papers cited was that smoothing over a cycle could only be fully assessed retrospectively. At the time the board has to set rates based on what it expects to happen and then adjust as actual experience evolves. There is nothing unusual or profound about that – it is a necessary fact of life in the management of a with profits fund.

E. The claims against me as Reporting Actuary

(1) Nature of the claim

101. The Reporting Actuary claims are comparatively straightforward – i.e. that the provisions established in the Companies Act accounts were inadequate for each of 1997, 1998 and 1999 and that, if they had instead had been as the Society alleges, the directors would have taken different decisions with allegedly more favourable financial consequences for the Society (SOS 415, 416(a), 416(b) and 421(a)). The claim is very similar to the part of the claim against Ernst & Young which alleges that their audit of the Society’s accounts was deficient because of the failure to include an additional provision at the levels contended.

(2) Liability

102. This will be a part of the claims which will undoubtedly receive a very detailed treatment at trial, since it lies at the heart of the claims against Ernst & Young. A mass of very detailed expert evidence has been put forward which, in and of itself, demonstrates the wide range of professional views on this issue. It would be inappropriate, and probably impossible, to carry out an exhaustive review of this issue in this skeleton argument. Accordingly, at this stage, I will confine my comments to a few broad themes which may assist the Court in its consideration of this issue. At trial, I would wish to associate myself with all the submissions which Ernst & Young might make on this issue which also apply in respect of the claim against me.
103. I noted in the early part of this submission that some of the terminology used on this issue is designed to advance a highly biased point of view rather than neutral illumination (paragraphs 26 to 29 above) and I do not repeat that material here.
104. It may be helpful to start with the much-used 'X, Y and Z' diagram, reproduced at SOS Appendix 2. This representation is helpful but, like all representations, can only be a simplified version of the underlying reality. In particular, it needs to be borne in mind that:
- (a) Y and Z are just sub-divisions of X, where X happens to be larger than the accrued terminal bonus in the cash policy value alternatively available.
 - (b) The proportion of business in the 'Y + Z' category, and the size of Z, will vary significantly with fluctuations in interest rates. Since policies typically accrue an increasing proportion of final bonus in the policy value as time progresses (particularly so for a class closed to new business several years earlier, as in the case of the GAR business), other things being equal, one would expect the proportion of business in the 'Y + Z' category (and the size of Z) to diminish over time. That is particularly relevant when determining a provision on a policy now, but where the policyholder will be unable to make use of the GAR (e.g. on attaining age 60) for several years into the future.
105. Although Z will have some relevance to the likely behaviour of policyholders, its main importance is in relation to the internal realistic financial assessment of the fund, as it represents the value of benefits which cannot be met from a policy's own resources and, hence, represents a charge on the general surplus of the office (just as in the case of any other guaranteed policy benefit which is not wholly covered by the resources generated by that policy itself).
106. The effective primary benefit under the GAR policies had, for many years, been the cash benefit, encouraged by developments in the legislative framework such as the availability

of open market options and the successor products, personal pensions, written wholly in cash form (SOS 25). When the presentation of with profits business was separated into 'conventional' and 'accumulating' with profits business in the mid-1990s, the Society's GAR business was categorised as 'accumulating with profits', emphasising its primary cash accumulation nature²⁹. The GAR benefit fell to be valued as an alternative, optional benefit. SOS 174 quotes the relevant regulations (relevant to the regulatory return, not the statutory accounts) which require the valuation to 'take into account' options. The dispute between the parties is thus essentially about the appropriate interpretation of 'taking into account' the opportunity to take benefits in GAR form.

107. The Society attempts to convey the impression that, consistent with its 'real liability' contention, it is advocating that whenever the CAR falls below GAR, the whole of 'X' should be included in the long-term business provision (LTBP)³⁰. However, it immediately resiles from that position by introducing a variety of reasons why a lower additional provision is appropriate. The claims appear at first face to be on the basis that a 76% take-up rate of GAR benefits should be assumed, although, in fact, there are then subsequent adjustments which take the effective rate down to around 71%. The Society's other actuarial expert, Mr Parmee, comes up with a rather different figure.

108. The Society and its experts thus accept the principle that there is no need to make provision for the whole of 'X'. The dispute is as to the level of take-up rate which is appropriate. The Society's own position, particularly that of Mr Thomson, is interesting in that regard:

- (a) In April 2001, by which time Mr Thomson had become chief executive of the Society, when commenting on the Treasury Committee's interim report he expressed the view that *"the House of Lords' judgment was not anticipated by the Society and therefore was a large unexpected liability for which it would have been against PRE to reserve in advance"* (C68.196). In reserving terms this comment can only be interpreted as meaning that assuming a high rate of take-up would have been contrary to PRE.
- (b) In the same month the 2000 accounts were issued where he, as Reporting Actuary, established provisions based on a 57.5% take-up rate (RA-2.226), despite the fact that the Society is now alleging in this litigation that, after the House of Lords' decision, the take-up rate would *"tend towards 100%"* (SOS 109(a)).
- (c) In November 2001 he approved letters before action stating that provisions before the House of Lords' decision should have been established assuming a 75% take-up rate.

²⁹ Indeed, we understood at the time that the regulators had deliberately adopted the new 'accumulating with profits' terminology, rather than using the 'unitised with profits' terminology common in the industry for relatively new contracts, specifically in order to include business such as the Society's classes of GAR business.

³⁰ It even goes so far, at SOS 455, as to call $GFV \times (GAR/CAR - 1)$ "the GAR provision"

(d) Subsequently he has certified as true various versions of claims asserting that the appropriate take-up rate should have been 75% and various lower rates.

109. This inexplicable shifting of professional view, particularly during 2001, seems remarkable and will need to be investigated at trial. It does, however, explain why the Society feels unable to assert the 100% level of provision which much of its rhetoric implies.

110. The Society attempts to defend its alleged high rate of take-up by drawing a distinction between situations where a policyholder is taking benefits in cash form for 'genuine' reasons and situations where policyholders only do so because the DTBP means that the GAR benefit is no more valuable. Even accepting the Society's contention (which I do not) that it is inappropriate to allow for the influence of the DTBP on policyholder behaviour, such a distinction, which seems to be founded on a rigid view of the X, Y and Z representation, rather than taking a realistic view, as described in paragraph 104(b) above, does not fit the complexity of the real world.

111. In reality policyholders take decisions for a wide range of financial and non-financial reasons based on their personal circumstances, views and preferences, including, increasingly during the 1990s and continuing today, a significant antipathy for the whole concept of annuities³¹. For example, consider a policyholder aged 59 with a GAR policy, where the benefit in guaranteed annuity form was exactly equal to the cash policy value, and who decided to take a transfer to a personal pension to permit immediate retirement (not possible under the GAR policy until age 60). Did that policyholder make that choice because his personal circumstances made it essential for him to secure an immediate pension, or did he feel that the DTBP meant he was unlikely to achieve a more valuable benefit in GAR form in a year's time, so he might as well go ahead and start his pension? The answer, of course, is that one cannot know and, even if hypothetically one could interview the policyholder, he may not be able to explain his choice in those terms (or indeed he might have some entirely different reason). Still less would policyholders be able to explain the motivation which might drive them to make particular choices some years into the future.

112. At SOS 420 the Society accuses me of being confused between its two alleged neat categories of policyholder behaviour. I say in response that the Society deludes itself by taking an unrealistically simplistic view of the behaviour which it is attempting to model, and then criticising anyone who seeks to disagree with that oversimplification.

³¹ Which explains, in large part, the popularity of 'income drawdown' arrangements where a retirement income can be obtained but purchase of an annuity deferred to age 75.

113. I can see no reason why, in attempting to give a 'true and fair' view of the Society's finances, provisions should not be established by following the usual approach of making a prudent best estimate of what the actual behaviour of policyholders is likely to be. The DTBP was an established feature of the Society's business, wholly consistent with PRE, and it seems to me entirely proper and reasonable that its influence should be taken into account. The expert evidence of Mr Dumbreck, Mr Creedon and Mr McBride all supports that view.

(3) Causation

114. Even if additional GAR provisions had been established at the level alleged necessary by the Society, it would have been open to me as Reporting Actuary to recommend a different approach to the remainder of the provisions so that the overall LTBP was not materially different from that actually published. That could have been achieved by various means including changing from a 'gross premium' to 'net premium' method of valuation, or by changing the gross premium valuation basis itself. I say in my second witness statement (W3-5.9, section G) that I could see nothing wrong in taking such action and explain why I believe that Mr Arnold's purported criticisms of such action is wrong. If I had felt that an unrealistic level of GAR provision was being imposed³², then it would have been an entirely proper, and indeed necessary, professional response to adjust the remainder of the provisions so that, overall, the LTBP was consistent with a true and fair view of the Society's financial position.

115. One can in fact go even further and say that, even if additional GAR provisions had been required to be established at the level alleged necessary by the Society **and** the remainder of the LTBP was left unchanged, there was still no need for the action that the Society now alleges. At the point of change, assets previously held in the FFA are transferred to the LTBP but the economic reality of the business is unchanged. The same assets are held to pay the same benefits to the same policyholders. The Society's attempt to explain why the consequential bonus reductions for which it contends should have been made, is infected by deep confusion as to whether it is assuming the DTBP is abandoned in advance of the alleged test case outcome or not, as described in my second witness statement (W3-5.17, paragraph 56).

116. The Society has tried to advance its contentions by making the apparently 'common-sense' point that, in the situation assumed in paragraph 115 above, there must have been **some** consequence of such an increase in provisions. I submit, however, that the consequences would be **future** ones, in terms of the need to pursue a more cautious

³² For example, through some accounting standard or guidance analogous to the GAD guidance in respect of the regulatory returns (DAA 11 at C24.61)

investment strategy, and not of the immediate nature for which the Society contends. In any event, the implication of those future consequences is that future bonuses might need to be lower than was otherwise the case because the investment strategy followed had produced lower investment earnings. That is not, however, a cause of loss to the Society and, in any event, is not pleaded by the Society.

(4) Quantum

117. The alleged losses arising from the alleged Reporting Actuary breaches are the same as under the heads of claim considered above, and the previous remarks on quantum apply.

F. The ‘mis-selling’ claims

(1) Nature of the claim

118. This head of claim has been articulated only in very general terms in the pleadings with the claimed losses estimated at “*in excess of £200 million*”. At the eleventh hour in the SOS, the claims have at last been specified in more detail and the quantum of loss very considerably reduced. The claims nevertheless, in my submission, remain invalid. According to SOS 362, the losses claimed fall into 3 categories:

- (a) Financial Ombudsman Service (“FOS”) claims – estimated at £15.9m (SOS 368).
- (b) claims compromised as part of the Compromise Scheme – estimated at £11m but accepted that this could be time-apportioned to some lower figure (SOS 373).
- (c) claims under the Society’s own mis-selling review – estimated at £13.85m (being the sum of £4.85m and £9m) but accepted that this could be time-apportioned to some lower figure (SOS 376).

(2) The Compromise Scheme

119. The first point to be made is that the category of claim under the Compromise Scheme is unfounded because there was no loss to the Society. This is clear from an analysis of the actual effect of the Compromise Scheme. Following the House of Lords’ decision, the Society was faced with the position where:

- (a) GAR policyholders had been found to have an entitlement to higher policy benefits than had previously been understood, to the detriment of other policyholders.
- (b) Those other policyholders potentially had grounds for claiming that they had not been warned that the GAR policyholders may be advantaged to their disadvantage.

120. The Society decided to compromise both of those 'entitlements' under the Compromise Scheme, as described in SOS 132. The essence of the scheme was to make some adjustment as between the interests of different groups of members in the face of these entitlements. There is **no difference** in nature between the £1.3bn uplift allocated to GAR policyholders (which the Society says at SOS 112 was **not** a cost to the Society) and the £220m uplift to non-GAR policyholders which, illogically and inconsistently, the Society argues **was** a cost (at SOS 133 and SOS 370).

121. The illogicality of the Society's position can be readily seen by considering what would have happened if the 'entitlement' at paragraph 119(b) had not existed. In that case, the apportionment of the Society's funds would have given a different, presumably, higher uplift to the GAR policies with no different effect on the Society itself. Indeed, the Compromise Scheme documentation itself indicates that compromising possible claims from the non-GAR policyholders was a relatively late development and was done by giving lower uplifts than had originally been intended to the GAR business (CS4.274).

(3) FOS and mis-selling review cases - liability

122. The general comments about the realities of commercial life at paragraphs 19 to 22 above are especially relevant to the mis-selling claims. The directors had to strike a balance between providing appropriate and relevant information and not casually destroying the business at a time when it was receiving such strong legal advice from eminent Leading Counsel as to its chances of succeeding in *Hyman*. The fact that that advice was subsequently proved to be wrong does not mean that it was unreasonable to act upon it at the time.

123. I would particularly emphasise the point at paragraph 21 above. *A priori* the eventual House of Lords' decision was only one possible outcome, and one consistently seen as highly unlikely. It would have been irresponsible to place emphasis on that most adverse outcome, given its highly unlikely nature, when to do so would certainly have caused considerable damage to the Society.

124. Considerable care was taken to provide proportionate and reasonable information as I and other defendants have described in our evidence. In particular:

- (a) A detailed set of questions and answers was maintained and regularly updated to assist the sales force in dealing with current and prospective policyholders. The draft answers and, indeed, the successive versions of the document, were reviewed by Dentons.
- (b) All standard communications with policyholders on the GAR issue were vetted by Dentons.

- (c) Possible questions and answers were prepared in advance of each AGM and those too were reviewed by Dentons.
- (d) Representatives of Dentons attended the frequent 'GAR steering group' meetings at which Mr Weller (general manager for sales and marketing) regularly reported on the position of the sales force.
- (e) As well as the specific roles described above, Dentons were well aware that the matter of the appropriate level and content of information to new and prospective policyholders was being kept under constant review and had ample opportunity to raise any concerns that they had.

125. As to the specific allegations in the SOS, I comment briefly as follows:

- (a) The awareness of a risk of losing (assessed on the basis of detailed legal advice as highly unlikely) as described in SOS 377 does not mean that it was appropriate to place emphasis on that possible outcome.
- (b) The fact that the GAR issue was a subject of "*almost every meeting*" with clients (SOS 378) was why so much care was taken to provide comprehensive questions and answers, reviewed by Dentons, as referred to in paragraph 124(a) above. The quotation in SOS 378 that the field force was "*fully committed to the line the Society is adopting*" is, in any event, patently a reference to the fairness of the DTBP not to the *Hyman* litigation nor to the construction which the Society attempts to place on it at SOS 379³³.
- (c) Regarding the points made about AGMs at SOS 381, 383(c), 384 and 102, on each occasion we discussed the approach which should be taken to speculation about the possible outcomes of the *Hyman* litigation in advance with our advisers and were advised that such speculation was inappropriate. That was particularly so in 2000 when the House of Lords hearing was fairly imminent by the time of the AGM. In any event, since: (1) only a tiny proportion of policyholders were present at the AGM to hear the answers given; and (2) by definition those attending were existing policyholders, not potential new policyholders; the relevance of any oral remarks at the AGM to mis-selling claims seems tenuous.
- (d) The comment by Mr Martin quoted at SOS 383(b) appears to be a rhetorical question and it is unclear what he had in mind when asking it. The transcript at C41.85 is cryptic and unclear to the point of incomprehensibility – a comment attributed to me reads "*easy to get too ambitious in what asking(?) – explanation - +add legal questions + reserving*". Even as the speaker, I cannot now work out what this means, yet the Society is happy to pluck odd phrases out of context if they appear to bear any purported relevance to their argument.

³³ The source paper cited (B36.220) dates from September 1998 – i.e. well before the *Hyman* litigation was contemplated. This is one of many examples throughout the SOS of the Society trying to draw inferences from the source documentation which it does not, in fact, support, as described in paragraph 5 above. It is respectfully submitted that, in the light of this apparent attitude by the Society and in the light of the fact that several of the Defendants are litigants in person or have minimal representation, the Court should be especially careful to verify that documents relied upon by the Society do in fact support the proposition which they are said to support.

- (e) As to Miss Leslie's concerns described at SOS 423(a), a proper reading of C26.26 indicates that (leaving aside a separate concern about solvency not mentioned at SOS 423(a)) her concern was that the projected value of additional benefits to GAR policyholders under the DTBP of £50m did not allow for future premium payments into GAR policies. She was concerned, accordingly, that the £50m could become, say £100m, with a larger (although still relatively small) effect on bonuses for other policies. In fact, she had misunderstood the position and the projection of £50m **did** include an allowance for the effect of future premiums. Indeed, the experience over the next 18 months under the DTBP indicated that £50m was likely to be an overstatement.
- (f) I understood (and still understand) the compensation claims to which Miss Leslie was referring in her 17 June 1999 letter referred to at SOS 423(b) were of a technical nature which would arise from the Courts deciding that the law was other than it had been advised consistently to be. There is no suggestion in the letter that the Society could, or should, have been doing anything differently which would assist to reduce such claims. It defies belief to think that a responsible legal adviser would have written such a letter and not recommended some action if she **did** believe that there was anything that the Society should have been doing differently.
- (g) I have dealt with the 1 February letter and my involvement in it at paragraph 134H(e) of my defence (P2-1.341) and at paragraphs 362-8 of my first witness statement (W3-1.226). As to SOS 423(c) I would hope that all letters issued by the Society were "carefully worded" to convey the intended message, but this does not mean that they were "carefully worded" in some pejorative sense of attempting to convey some half-truth. Regarding the Dentons' file note at C38.149: (1) SOS 423(c) misquotes the note as saying "*..if the Court of Appeal decision was not upheld in the House of Lords*" (Society's emphasis) whereas the note actually says "*if the Court of Appeal decision is not held in the Lords*" (sic); (2) the comment from the file note quoted in (1) above is clearly defective and inconsistent with the content of the draft letter. When the file note was eventually seen by me, the defect in the wording was pointed out by me to Dentons who confirmed that the wording should have been "*was upheld*" (C69.205).

126. The specific allegations against me at SOS 423 all involve a misrepresentation by the Society of the content and import of the underlying documentation, as described in subparagraphs 125(e) – (g) above. The example dealt with at 125(g) is particularly gross and reveals a carelessness regarding the documentation which I, as a litigant in person, should not have to correct when the Society has such extensive and experienced legal representation of its own.

(4) FOS and mis-selling review cases - causation

127. The FOS claims appear effectively to be a subset of the people who would, in any event, be covered by the Society's own review. That is, a group of policyholders who would have been covered by the Society's review in any event but have, instead of, or in pre-emption of, that review, taken their cases to the FOS. Lead Case D has been settled under the Society's review (SOS 364(g)) and it appears that efforts are being made to treat the other cases in the same way. There appears, therefore, to be no material difference between the two groups of cases.
128. As SOS 374-6 make clear, these cases are effectively the same as those compromised under the Compromise Scheme, the difference being that the policies in question had been terminated before the Compromise Scheme became effective and so could not be bound by it. The provisions established by the Society to meet payments under its review (and on FOS cases) will have reduced the bonuses paid to other policyholders. In that regard, these cases are being put in the position in which they would have been, had they not terminated, with the same 'uplift' which they would have enjoyed under the Compromise Scheme, being paid, instead, as cash.
129. Accordingly, the establishment of a provision to make these payments has the same economic effect as if the policies had not terminated and had fallen within the ambit of the Compromise Scheme. That is, it is a re-arrangement of interests as between the members of the fund. The analysis at paragraph 120 above would therefore seem to apply in this case too. That is, there is no loss to the Society.
130. Even if that were not so, any 'loss' the Society might have suffered as a result of the alleged negligence would need to be considered in the light of the negative effects of the actions which the Society alleges should have been taken. In particular:
- (a) Giving very much fuller explanations of all the possible outcomes in *Hyman* than were actually given would have caused a material increase in administration costs.
 - (b) Giving greater emphasis to the potential adverse outcomes of *Hyman* than were actually given would inevitably have led to a reduction in new business volumes. Such a reduction would have increased the propensity of the sales force to leave the Society with a consequent reduction in franchise value. Since on the Society's own case the test case would have taken some 18 months to go through the courts, the cumulative corrosive effect over that timespan is likely to have been significant.
131. In view of the relatively modest quantum of loss claimed under this head, the above effects would almost certainly have been more damaging to the Society than the action actually taken.

G. The contributory negligence allegations

132. At the 4 February 2005 PTR/CMC, Mr Ranson, Mr Nash and I were given permission to submit additional evidence, in the light of the recent announcement by counsel for Mr Wilson that he intended to cross-examine us in respect of Mr Wilson's contributory negligence defence, pleaded at paragraphs 86A and 86B of Mr Wilson's Re-Amended Defence (P2-6.84). I have addressed the issues in my third witness statement dated 14 March 2005³⁴.
133. Since this skeleton argument is being served simultaneously with that on behalf of Mr Wilson, it is impossible for me to know if any new or amended points will be made in connection with Mr Wilson's contributory negligence defence. Accordingly, I have no additional points to make in this skeleton beyond those contained in my third witness statement. I reserve the right, however, to submit a supplementary skeleton argument if any new point does need to be addressed.

H. Section 727

134. I have argued in this skeleton that the Society's claims are unfounded and that it has failed to make a valid case against me. If, however, the Court finds that I am liable for any breach, then I submit that such liability should be excused under section 727. I have already referred to some specific points earlier in this skeleton and, in this section, will briefly summarise the key points relevant to this matter.
135. The Society has accepted, and repeatedly confirmed throughout the SOS and elsewhere, that the Defendants acted honestly.
136. In respect of the alleged breach of fiduciary duty arising from the retrospective effect of the House of Lords' judgement, Terence Mowschenson QC said, when he was consulted in November 2000, that it was "*absolutely inconceivable*" that any liability would not be relieved (paragraph 49 above).
137. As to the other alleged breaches, whether as a director or as Appointed or Reporting Actuary, I have argued throughout this skeleton and pleadings that decisions were taken *bona fide*, with due care and consideration of the relevant facts as they appear at the time, and with the best interests of the Society always in mind. I submit that my actions at

³⁴ Not yet in trial bundle index.

all times were reasonable and, to the extent not covered in this skeleton argument, refer to the matters at paragraph 138 of my defence (P2-1.345).

138. In connection with the 'wider range of factors' mentioned at SOS 710, I would draw the Court's attention to the matters raised at paragraph 372 of my first witness statement (W3-1.230). Furthermore, a simple scan through the trial bundle documentation for the period covered by the allegations will itself demonstrate the very wide range of issues in which I was simultaneously engaged on behalf of the Society, all of which I strove to carry out diligently and carefully. The trial bundle documentation is, of course, only a subset of the contemporaneous documentation and there were many other management activities also being carried out at the time.

139. Although the Society has asserted that ability to pay is not a relevant consideration (e.g. SOS 397(h)), I find it hard to believe that proportionality should not be one of the 'wider factors' to be brought into account. The Society argues against this at SOS 397(g) and says "*otherwise a defendant who caused a small loss would be required to provide full compensation; whilst one who caused a much larger loss, would not*". Such an outcome, I submit, might be entirely reasonable. For example, if an individual caused another individual a loss of £100, which he was well able to pay, it would be entirely reasonable for him to make compensation. If, however, he caused a loss of £100 000 to his employer (a large corporation) through some event where the fault was slight (such as accidental damage caused by some slight carelessness) and would be bankrupted by damages of that size, it would seem wholly disproportionate for that person to be ruined on that account.

140. In the present case where the Society stands no prospect of recovery even of a substantial proportion of its costs, let alone damages, against defendants such as myself, I submit that issues of proportionality are highly relevant. It is difficult to see what credible objective, other than pure vengeance, can make it rational for the Society **at best** to incur a significant loss in order to ruin me. That is particularly so when, as described in paragraphs 8 to 17 above, there is no objective evidence that the Society's policyholders have suffered any material disadvantage compared to their counterparts in many other life offices.

C P Headdon (Third Defendant)
(Litigant in Person)
24 March 2005

APPENDIX 1 – FACTUAL ERRORS AND MISLEADING STATEMENTS IN THE ‘BACKGROUND’ AND ‘REGULATION AND ACCOUNTS’ SECTIONS AND APPENDICES OF THE SOCIETY’S OPENING SKELETON

SOS paragraph reference	Comment
4(e)	Although 7 cases appear to be cited, reference to the documents shows that they only involve 2 settlements (C16.101 and C17.202-3)
4(o)	The characterisation of the FSA’s letter is tendentious.
18(a)	The summary is inaccurate as can be seen from SOS Appendix 7. The correct position is: mid-1994 to early-1995 - 7 NED, 5ED early-1995 to mid-1996 - 8 NED, 5ED mid-1996 to mid-1997 - 9 NED, 5ED mid- 1997 to 30.6.99 - 9 NED, 2ED 1.7.99 to 31.12.99 - 7 NED, 3ED 1.1.00 to early 2001- 8 NED, 3ED
20(a)(iii)	Mr Headdon was Actuary from 7.12.00 to 28.2.01(not 16.1.01)
24	The content of this paragraph refers to the accumulating with-profit pension business (i.e. that at SOS 23(a)(ii)(4), not the whole of SOS 23(a)(ii), as is implied)
31	It was not solely the absence of commission payments which led to relatively low sales costs. There were other offices with direct sales forces which had much higher sales costs.
33	No references are given but it may be helpful to refer to at least one such document (e.g. SP2-3.67) to see how the Society described the management of its with-profits business.
34	The comment in parentheses is misleading. A with-profits pension policy did not lapse on cessation of a stream of regular premiums and patently it could not do so and simultaneously “continue in force”.
41	Where the form of annuity is not of a level payment each year, the description would be more accurately stated as applying to the level of payment in the first year.
42(c)(ii)	Modern published mortality tables for annuitants typically include allowance for future mortality improvements. An actuary will only make further adjustments where he considers that necessary to reflect the circumstances of the particular annuity portfolio.
43(c)	The last sentence is misleading. The small volume of such business which the Society had written mainly dated from the 1960s and 1970s. The sentence could also be interpreted as a statement about the pensions contracts introduced in 1988, which is inaccurate.
45	This is incorrect. Interim bonuses had also been paid from the early 19 th century and article 65(2) expressly dealt with such bonuses. (The Society appears to have misinterpreted the comment cited at R3.20 where ‘reversionary’ is being used in a sense which encompasses interim – i.e. as opposed to terminal – bonuses.)
46	The original ‘final bonus’ adjustment here described was an interim bonus under Article 65(2) not a ‘voluntary’ payment in the implied sense of an ex-gratia payment.
48	The meaning of ‘modern form’ is ambiguous. Although it is correct that the previous system of interim and terminal bonuses was replaced by final bonus in 1987, the current system of growth rates for accumulating classes was not introduced until 1990 (in respect of 1989). (Note the correct document reference is H1-1.34)
51	The meaning of ‘subject to the impact of the GAR’ is ambiguous.

SOS paragraph reference	Comment
59	The phrase ‘particularly well or particularly badly’ is inappropriate – the position described is essentially what happens under a unit-linked policy. The real point is that with-profit policyholders are led to expect not to be exposed to such volatility because of the key feature of smoothing of underlying experience.
65	The comment is only true in relation to the particular form of comparison used in R6.
73	If the use of the word “ostensible” is intended to imply that there was some other purpose, that implication is incorrect.
74	The 2 nd sentence appears to carry an implication that there was something inappropriate about that treatment. For the avoidance of doubt it was the standard approach driven by the regulatory requirements.
75	See comment on 65 above. It is also inevitable that this will be the case from time to time if a full distribution policy is followed.
77(b)	The interim growth rate did not consist solely of terminal bonus, it also included any guaranteed growth (e.g. the GIR) within the policy terms
87	Although the board meeting took place on 22 December 1993 the revised final bonus rates were introduced with effect from 1 January 1994
91	The impression created is misleading. If reference is made to H.1.199 para 7.1.4 it actually says <i>“I have been able to identify a number of companies which have adopted a practice which, although not necessarily involving differential bonus rates explicitly, is nevertheless similar in its financial effect on policyholders to that of ELAS.”</i>
95	Since the illustration cited is dated 16.1.84, i.e. nearly a decade before the DTBP was adopted, it is hardly surprising that the illustration did not refer to that explicitly.
96	The purpose of the With Profits Guides was to provide high level information on the main factors influencing bonus rates (see, for example, Introduction at SP2-3.42). It did not provide detailed information on bonus rates for any classes of business, since that was not its purpose.
99	The expression ‘obliquely’ is a value judgment inappropriate in a supposedly factual account. The comment about the 1998 and 1999 statements is particularly surprising, given that the change of wording was expressly as advised by leading counsel.
101(b)	The expression ‘not squarely’ is a value judgment inappropriate in a supposedly factual account. The point is, in any event, surprising given that the DTBP is described explicitly at the 3 rd bullet point in the ‘Issues’ section of the leaflet.
95-102	The account fails to state that the DTBP was explained to the Society’s staff, in particular all members of the sales force, when it was introduced – see internal briefing memo dated 30.12.93 (C5.244)
112	The first sentence is misleading. The value of additional benefits in GAR form as a consequence of the House of Lords’ decision would be a product of: (1) the cash fund benefit at retirement; (2) the GAR/CAR ratio at retirement; and (3) the proportion of benefits taken in GAR form. None of those factors could be predicted with certainty but were projected to require a transfer of value between GAR and non-GAR policyholders of £1.3bn. The general reduction in policy values clearly had an immediate effect on factor (1) but had no impact on factors (2) and (3). It is incorrect that, as a result of the adjustment, <i>“consequence (b) stopped growing”</i> .
133	The uplift to non-GAR policyholders is not correctly described as a cost to the Society for reasons explained in this skeleton argument.
155	Schedule 4 of the regulatory returns is more accurately described as a report on the valuation than as <i>“a report of the valuation surplus”</i>

SOS paragraph reference	Comment
160	Section 29 is essentially concerned with restrictions on proprietary companies transferring surplus from the long-term fund to shareholders. The section has little relevance to a mutual such as the Society.
173	The requirement of regulation 60(1) is mis-stated, the wording actually being <i>"in accordance with generally accepted accounting concepts, bases and policies or other generally accepted methods appropriate for insurance companies"</i> .
174(b)(ii) & (iii)	The comments should be interpreted by reference to an unchanged set of asset conditions, not as absolute statements. A valuation of liabilities at 8%pa when assets were yielding 10%pa would be stronger (and have a larger implicit allowance for PRE) than a valuation at 5%pa when assets were yielding 5.5%pa.
174(c)(vi)(1)	The DAA letters set out the GAD's interpretation of the requirements but it is not mandatory for that interpretation necessarily to be followed.
176	The reference to 'prudent reserves' presumably means those described in 174(c) but that is not standard terminology.
193(d)	The quasi-zillmer adjustment was only made in the changed scenarios assumed in the resilience test conditions, not in the basic subsidiary valuation. Resilience testing was a matter of professional judgment and guidance and was not laid down in regulation.
199	Note that 'regulatory cover ratio' is not a defined term and different commentators (e.g. rating agencies) might use a different definition of 'cover ratio'.
203	The restatement could be considered an unbalanced and inappropriate one in that it retains the resilience reserves within the liabilities but strips out the regulatory measures available on the asset side to compensate for the very conservative approach to the valuation of liabilities.
207	The stated derivation of 'free assets' is inconsistent with the definition at SOS 206, since line 44 of form 9 includes implicit items, whereas the definition in SOS 207 does not.
208	A similar comment as in respect of SOS 199 above applies – there is no standard industry definition of 'free asset ratio'.
218	Even taking the comment at face value, the fall would only 'tend to wipe out the free assets' if those assets happened to be around 6% of the total assets initially. In any event, there is a compensating effect on the liability side as is acknowledged in SOS 219 (but see comment below)
219	It is unclear precisely what is regarded as anomalous. If the comment refers to the position described in the second sentence, then there is nothing anomalous in that position. If a liability is matched by an asset yielding, say 4% pa and discounted at that rate, and interest rates rise to 5% pa, there is nothing 'anomalous' about then discounting the liability at 5% pa because the asset could be sold at its (reduced) market value and the proceeds reinvested in an asset yielding 5% pa which would then match the liability. The position in the last sentence is unlikely to arise in practice but, even if it did, it is unclear why there is anything anomalous about that outcome if it correctly reflects the nature of the assets and liabilities.
222	The comment is potentially misleading. Although it is true that the new business strain may be smaller than on an annual premium contract, the initial reserve is likely to be a large proportion (90%+) of the initial premium.
234(m)	The comment is somewhat self-contradictory since general reserves, such as resilience and closed fund reserves, are part of the reserving basis under the regulatory returns. Accordingly, a basis which excludes those items is not the same as the regulatory reserving basis.

SOS paragraph reference	Comment
238	It is unclear what it is the Society is supposed to have 'adopted'.
246	The trial bundle reference appears incorrect since the paragraph cited deals with monthly financial reporting.
Appendix 3	The change of bonus system attributed to 'October 1989' was actually made in early 1990 in respect of calendar 1989. The board paper cited (C3.287) was discussed at the December 1989 board meeting.
Appendix 3	The board paper ascribed to 11.12.91 (C4.165) is actually the paper for the Special Board meeting in February 1992. In any event, I believe the wording at paragraph 3 of the paper had been used for several previous years and was not a change at that time. (Earlier papers have not been disclosed but the Society's contention is, in any event, inconsistent with its statement at SOS 561 that the board had been so advised " <i>for many years</i> ".)
Appendix 4	For my attendances marked 'SAA' it should be noted that, on those occasions, I would only join the meeting to help present a particular paper. Such attendances were typically for only 10-15 minutes of the meeting.
Appendix 5	David Driscoll was a general manager from 1.8.97 until his retirement. Although involved in risk management he was not 'Head of Risk Management'.
Appendix 5	Barry Sherlock was managing director from 1972 to 1991 and continued as a non-executive director until 1994. He was not, at any time chairman of the Society.
Appendix 5	John Weller was not at any time Operations director of the Society.
Appendix 5	Ken Wills was the marketing director before Mr Kinnis.

**APPENDIX 2 – CROSS-REFERENCES BETWEEN PARAGRAPHS OF THE SOCIETY’S
OPENING SKELETON AND THIS SKELETON ARGUMENT**

SOS paragraph number(s)	Paragraph(s) in this skeleton argument responding to that(those) SOS paragraph(s)
102	125(c)
132	120
133	120
174	106
257	67
259(d)	67
266 - 8	50
311	64
319(b)	64
320	97(a)
321	93(c)
327(a)	36
344(c)	85
344(d)	82
352(j)	23
355 - 6	53
357	56 - 59
358	58, 60 - 65
359	52
362	118
368	118
370	120
373	118
374 - 6	128
376	118
377 - 9	125(a)-(b)
381	125(c)
383(b)	125(d)
383(c)	125(c)
384	125(c)
397(g)-(h)	139
415 - 8	69 - 71, 81
417	90(d)
420	112
421	72 - 73, 82 - 84
423	125(e)-(g), 126
566-7	98
589-601	100
602	27
709-712	9
710	138
Appendix 2	104

APPENDIX 3 – TEXT OF LETTER DATED 31 JANUARY 2005 FROM THIRD DEFENDANT TO HERBERT SMITH AND ENCLOSURE

Dear Sirs

Equitable Life v Bowley & Others: Action No. 2002 F406

Equitable Life v Ernst & Young: Action No. 2002 F339

I refer to recent correspondence regarding the trial bundles.

With reference to your letter of 25 January 2005 under reference 2168/2096/30829410, I am content with your suggested approach to the paper “Penrose Inquiry – Over-Bonusing”.

I am naturally disappointed with your continued refusal to disclose the Society’s response to the recent FSA survey and do not agree with your position. In view of that refusal, as previously indicated, I have produced a note setting out my own estimates and that is attached. Please include this letter and the note in the inter-parties correspondence bundle (i.e. taking the same approach as you have proposed to the Penrose document).

Regarding the inter-parties correspondence bundle, I believe we still await your proposals as to its content – point 20 of your first letter to me of 18 January 2005 refers.

With reference to your letter of 27 January 2005 under reference 2168/4975/30817455, please could you indicate what you expect your ‘reasonable photocopying costs’ for a copy of the complete set of bundles to be and confirm the position regarding the electronic version.

Yours faithfully

C P Headdon

EQUITABLE LIFE 2004 POLICY RESULTS

In 2004 the FSA carried out a survey of policy results for virtually all with profits life offices. The director of retail firms and insurance sector leader at the FSA, David Strachan, then wrote an article setting out the main findings, without identifying individual offices, which was published in the October 2004 edition of Money Management magazine. A copy of that article is included in the trial bundle.

I believe that the results of this survey provide relevant information on the position of Equitable policyholders relative to the with profits market generally. Accordingly I requested disclosure of the Equitable's submission to the FSA survey on 29 November 2004, shortly after I became aware of the Money Management article. Having had no reply, I requested a response on 30 December 2004. On 7 January 2005 Herbert Smith replied refusing disclosure on the grounds that "the information is irrelevant to the proceedings". I replied on 13 January 2005 setting out in some detail why I did not agree with that view and requesting that the position be reconsidered by 21 January 2005, or I would put my own estimates of the position into the trial bundle. On 25 January 2005 a further refusal was received.

Based on my detailed knowledge of the construction of Equitable contracts, together with the past bonus information available from the disclosure, I have calculated what I believe to be accurate estimates of the results that Equitable will have provided to the FSA survey. Where there is any ambiguity in the data, I have taken the more cautious interpretation so, to the extent that there is any error in my estimates, I would expect them to be below, rather than above, the correct figures. The results set out in Table 2 of the Money Management article are reproduced in the tables below to which I have added my estimates of the Equitable results:

Life policies

Product	Life	Life
Premium	Regular	Regular
Term (years)	10	25
Premium	£50 pcm	£50 pcm
Highest	8687	83945
25 th percentile	7004	56251
Mean	6798	52941
Median	6721	52759
75 th percentile	6470	46665
Lowest	5831	30503
ELAS (estimated)	6482	46575

Pension policies

Product	Pension	Pension	Pension	Pension
Premium	Regular	Regular	Single	Single
Term (years)	10	20	10	20
Premium	£200 pcm	£200 pcm	£10000	£10000
Highest	37197	200356	23449	135303
25 th percentile	31451	144463	20416	88683
Mean	29719	137014	18714	82878
Median	29259	130991	18635	81682
75 th percentile	28330	120978	17168	71387
Lowest	25336	101476	10665	55128
ELAS (estimated)	28718	111149	16266	66513

C P Headdon
31 January 2005

**IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
COMMERCIAL COURT**

B E T W E E N:

**THE EQUITABLE LIFE ASSURANCE
SOCIETY**

Claimant

– and –

- (1) ROGER BOWLEY**
- (2) PETER DAVIS**
- (3) CHRISTOPHER P. HEADDON**
- (4) SHAUN KINNIS**
- (5) PETER MARTIN**
- (6) ALAN NASH**
- (7) JENNIFER PAGE**
- (8) DAVID PRICE**
- (9) ROY H. RANSON**
- (10) JOHN SCLATER**
- (11) PETER SEDGWICK**
- (12) JONATHAN TAYLOR**
- (13) DAVID THOMAS**
- (14) ALAN TRITTON**
- (15) DAVID WILSON**

-and –

ERNST & YOUNG

Defendants

**THIRD DEFENDANT'S
OPENING SKELETON ARGUMENT**

**C P Headdon (Third Defendant),
Litigant in Person**