

IN THE HIGH COURT OF JUSTICE

2002 Folio No 406

QUEEN'S BENCH DIVISION

COMMERCIAL COURT

B E T W E E N:

THE EQUITABLE LIFE ASSURANCE SOCIETY

Claimant

-and-

BOWLEY and others

Defendants

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**SKELETON OPENING**

**ON BEHALF OF THE NINTH DEFENDANT**

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## INTRODUCTION

1. This is the opening skeleton of the Ninth Defendant, Mr Ranson, for the trial of the above action, which commences on 11 April 2005.

### About Mr Ranson

2. Mr Ranson's involvement with the Society, so far as is material to the claims made against him (which are summarised in the following section), was as follows:
  - (1) Between 1 January 1982 and 1997 he was the Appointed Actuary to the Society pursuant to s.19 of the Insurance Companies Act 1982 ("ICA 1982");<sup>1</sup>
  - (2) Between 1 January 1985 and 1997 he was a member of the Society's board of directors ("the Board"); and
  - (3) Between 1991 and 1997 he was the Society's "Managing Director and Actuary", an executive (not actuarial) position equivalent to that of Chief Executive.
3. Mr Ranson joined the Society as an actuarial clerk in December 1953, working initially in the Valuation Department of the Society's office in Aylesbury. He qualified as a Fellow of the Institute of Actuaries in 1963 and was shortly thereafter promoted to the position of Assistant Actuary. In 1972 he became Deputy Actuary and then, on 1 January 1982, Joint Actuary and the Society's Appointed Actuary (succeeding E.B.O. Sherlock in the latter capacity). His appointment to the Board came on 1 January 1985 and he succeeded Mr Sherlock as the Society's Managing Director and Actuary in 1991.

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<sup>1</sup> The roles and responsibilities of Mr Ranson in this capacity are described in the Section headed "Want of Care as Appointed Actuary" below.

4. Mr Ranson retired from all positions held with the Society with effect from 31 July 1997, having, a year before that, been awarded the CBE for his services to the life insurance industry.

### **The Society's claims against Mr Ranson**

5. These can be summarised as follows:<sup>2</sup>
  - (1) A claim that Mr Ranson failed to show due care and skill in his capacity (a) as a director and (b) as the Society's Appointed Actuary, in concurring in / advising the Board upon the declaration of what came to be known as differential terminal bonuses (that is, terminal bonuses which were recalculated so that the benefits of policyholders who elected to take them at the Guaranteed Annuity Rates ("GARs") in their policies would be, as far as there was a margin of terminal bonus available to this end, equal to the benefits of those who took them at Current Annuity Rates ("CARs")) without first taking legal advice upon the scope of the Board's discretion to do so under Article 65 of the Society's Articles of Association;
  - (2) A claim that, simply by virtue of the decision of the House of Lords in the *Hyman* litigation about the scope of the Board's discretion to declare bonuses in that way,<sup>3</sup> Mr Ranson concurred in resolutions to announce terminal bonuses which were (a) in breach of the Society's Articles and (b) for an improper purpose.
6. In the former case it is said that, had the Board taken legal advice about its policy of announcing differential terminal bonuses (the so-called Differential Terminal Bonus Policy, or "DTBP"), it would have been advised in such a way as to prompt the Society to initiate a test action, which action would have reached the same outcome as the *Hyman* litigation in approximately the same

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<sup>2</sup> The Re-Re-Amended Particulars of Claim against Mr Ranson ("RRAPOC") are at P2-3.224.

<sup>3</sup> *Equitable Life Assurance Society v Hyman* (H3.196).

time, albeit one or two years earlier than in fact it did. The loss said to flow from that is pleaded in terms of (a) the bonus cuts which it is said the Board would have implemented as a precaution against the risk of losing the test action and/or (b) the loss of a chance to sell the Society's business or parts thereof earlier, and for greater value, than in fact the Society did after the *Hyman* decision. There is also a third head of loss, alternative to (a), introduced in the Society's skeleton opening (paragraph 319): that even if bonuses had not been cut during the hypothetical test action, they would nevertheless have been cut at its conclusion and thus earlier than they were after *Hyman*; or, at least, that the Society would not have overpaid its non-GAR policyholders in the period following the outcome of the hypothetical test action to the extent that it claims it has done as a result of the unlawfulness of the differential bonus resolutions.

7. The Society has also, in its skeleton, made substantial concessions as to the loss said to flow under the second head of claim. The case originally pleaded was that the Society was entitled to restoration of all amounts paid out as a result of the unlawful differential bonus resolutions, including in respect of years subsequent to Mr Ranson's retirement, giving credit only for those amounts which it is said the Society would lawfully have paid out had it cut bonuses according to its case under the want of care heading. It is now said that Mr Ranson's liability is only to restore those amounts paid out in the years in which he concurred in the resolutions (paragraph 396(f)), and that credit should be given for the amounts in fact allocated in respect of those years pursuant to the Board's re-exercise of its discretion in October 2000 (paragraph 257).
8. It will be noted that the claims against Mr Ranson are, given the relevant limitation period (as to which further submissions are made in paragraphs 70 to 73 of this skeleton) and the timing of his retirement, confined to breaches said to have occurred in respect of the terminal bonus announcements made on 14 February 1996<sup>4</sup> (in respect of the year ended 31 December 1995) and 12 February 1997<sup>5</sup> (in respect of the year ended 31 December 1996) only. Further,

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<sup>4</sup> C9.39.

<sup>5</sup> C11.237.

there are no claims against Mr Ranson in terms of (a) mis-selling or (b) the alleged failure to reserve properly for GARs in the Society's Companies Act Accounts.

### **Summary of Mr Ranson's case**

9. In answer to the claims so put, Mr Ranson will say, in summary:
- (1) That the claims against him for want of care as a director and Appointed Actuary are, for limitation reasons, confined to an alleged failure to review and bring before the Board for consideration the need to take legal advice upon the DTBP before the February 1996 and February 1997 bonus resolutions.
  - (2) That, as far as the want of care claims against him as a director are concerned, he had no reason to believe, as at the date of adoption of the DTBP in December 1993, that there was any appreciable risk that the obviously wide terms of the Board's discretion under Article 65 might be constrained as they were subsequently found by the House of Lords in *Hyman* to be. He was entitled to form a view about the ordinary meaning of the Society's Articles and their application to its policies, and the view which he formed was not one which no reasonable director in his position could have formed.
  - (3) That, even if that is wrong, his duty in the years in respect of which a claim is brought (1996 and 1997) was only to take steps to have the lawfulness of the DTBP reviewed if, in light of supervening events, there was, and would have appeared to the reasonable director in his position to have been, good reason to do so. There was no such reason; alternatively, his view that there was no such reason was not one to which no reasonable director in his position could have come. In particular, such complaints as there were about the DTBP in the period up to his retirement in July 1997 were insignificant in number and easily manageable within the Society's

systems for dealing with such matters. The unprecedented policyholder activism and press criticism that ultimately prompted *Hyman* was a phenomenon of later years.

- (4) That the claims against him as Appointed Actuary add little to the claims against him as a director. Save in respect of advice on policyholders' reasonable expectations ("PRE"), the failures which are alleged against him in this capacity are all predicated upon him being unreasonable not to have appreciated a significant risk that the DTBP might be unlawful. Without that, there was nothing in the adoption or continuation of the DTBP that was inconsistent with the sound financial management of the Society. As to PRE, the duty upon him was only to form and advise the Board upon his interpretation of PRE, and the implications for PRE of a "significant change". The DTBP was reasonably viewed by him at the time of its adoption as not being such a change; and, in any event, the view which he formed and advice which he gave as to the consistency of the DTBP with PRE was well within the band of views and advice which a reasonable Appointed Actuary of the Society could have formed and given. Finally, as with the claims against him as a director, the failures which the Society must prove in this capacity are failures to review his previous approach, something which it was only incumbent upon him to do if there was, and would have appeared to the reasonable Appointed Actuary to have been, good reason to do so. There was not, in the two years with which the claims against Mr Ranson are concerned.
- (5) That the want of care allegations against him in both capacities, even if made out, have not caused the Society any loss. There is no sound basis for concluding that, if Mr Ranson had acted as the Society contends he should have done, and if the Board would have taken legal advice in response to him so acting, the Society would have commenced a test action which would have proceeded in exactly the same way as *Hyman*; or that the Board would have decided to cut bonuses during such a test action (quite reasonably not having done so during *Hyman*); or that the prospects of realising value by way of a sale of the Society's business would have

been any greater at the conclusion of such a test action than they were at the conclusion of *Hyman*. In any event, the Society cannot have suffered a loss by the allocation surplus to its participating policyholder members.

- (6) That the breach of fiduciary duty claims made against Mr Ranson are based solely upon the legal fiction that, by virtue of the decision of the House of Lords in *Hyman*, the differential bonus resolutions in 1996 and 1997 have always been unlawful. No one at the time had any reason to expect that that would be so and no want of care or other fault is alleged against Mr Ranson in that respect. In those circumstances, the unlawfulness of the resolutions does not sound in a claim against the directors for restoration of monies paid; and those payments do not, in any event, constitute a loss to the Society as a mutual.
- (7) That if, contrary to all of the above, Mr Ranson is found liable in respect of any of the claims made against him, he acted honestly and reasonably and it is fair in all of the circumstances that he should be relieved from that liability pursuant to s.727 of the Companies Act 1985.

### **The manner in which the claim has been brought**

10. The Society's claims are, for the reasons just summarised and set out more fully below, fundamentally flawed on the merits. However, the Court is urged, when considering what follows, to bear in mind the following aspects of the litigation to date as bearing upon the credibility of the Society's claims. They are matters which, it is submitted, entitle the Court to treat the claims as now put with considerable caution:

- (1) The Society's pleaded case against Mr Ranson is now in its fourth generation of amendment;
- (2) The amendments made to date have not been by way of subtle refinement to the case put, but by way of wholesale revision – indeed abandonment –

of sizeable parts of the claims made (such as the discontinuing of mis-selling claims formerly made against Mr Ranson and the total overhaul of the sale hypothesis upon which the Society's case as to causation and quantum was formerly based);

- (3) Even now, with three amendments behind it and four rounds of expert evidence served, the Society seeks, by way of its skeleton, to make fundamental revisions to way that the case is put (see paragraphs 67, 72, 74, 150-1, and 156-7 below, and the letter from Counsel for the Society of 17 March 2005);
  - (4) As a result of these changes, not only has the very basis of the claims put against Mr Ranson shifted significantly, but the quantum of the Society's damages claim has dropped from £3.9 billion<sup>6</sup> to £1.68 billion<sup>7</sup>. The breach of fiduciary duty claim has dropped from £672 million<sup>8</sup> to (it appears from the Society's skeleton) £19 million.<sup>9</sup>
11. This from a litigant with the resources to spend a projected £26.8 million on the action, £9.8 million of which will have been spent on expert evidence alone.<sup>10</sup> Moreover, questions must inevitably be asked about the Society's motives for doing so in circumstances where:
- (1) It has received advice from leading counsel, on 23 November 2000, to the effect that it is "absolutely inconceivable" that it will succeed in obtaining judgment against the directors, including Mr Ranson;<sup>11</sup> and

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<sup>6</sup> Amended Particulars of Claim as at 14 June 2002, paragraph 63(f).

<sup>7</sup> RRAPOC, paragraph 75(b).

<sup>8</sup> Re-Amended Particulars of Claim as at 7 November 2003, paragraph 68(b).

<sup>9</sup> Appendix 6, being total overpayments for the years 1996 and 1997.

<sup>10</sup> Costs estimate provided by the Society for the PTR on 4 February 2005.

<sup>11</sup> C59.1, referring to the prospect of the directors obtaining relief under s.727 of the Companies Act 1985. The negligence claim against Mr Ranson is described as "conceivable" but "remote".

- (2) It well knows that there is no prospect whatsoever of recovering from Mr Ranson even a fraction of the costs thus far expended on the litigation, let alone anything by way of compensation for the wrongs which it has allegedly suffered at his hands.
12. The Court is therefore invited to maintain a degree of background scepticism in considering the Society's claim, the merits of which the rest of this skeleton now addresses.