

John Arthur Newman
First
20.11.07
Equitable Members Action Group

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION

Case No.6352 of 2007

**IN THE MATTER OF
EQUITABLE LIFE ASSURANCE SOCIETY**

- and -

**THE PRUDENTIAL ASSURANCE
COMPANY LIMITED**

WITNESS STATEMENT OF JOHN ARTHUR NEWMAN

Introduction

1. I am a Fellow of the Institute of Chartered Accountants in England and Wales and hold a practising certificate from that body. I have been in public practice for nearly 40 years, mainly in the area of international and UK taxation. Latterly I was a general partner in Smith & Williamson and, on their incorporation, a director of Smith & Williamson Limited until 30 April 2004. I have been an elected member of the Council of the Institute and also a member of the Council of the Association of Accounting Technicians and then its President.
2. I held various policies with the Equitable Life Assurance Society of which two were “with profits” retirement annuity policies. For policy R0196556 I exercised the open market option in January 2007, but for policy R0196553 I remain a member of the with profits fund although it is, by value, not a large amount.
3. I have been a director of the Equitable Members Action Group Limited (“EMAG”) from its formation in 2005 and I have been its Chairman since 2006. Originally established in 2000 as an unincorporated association, EMAG was incorporated on 3 June 2005, the principal object of the company being:

“To further the interests of the members and former members of the Equitable Life Assurance Society or persons having or formerly having had interests in its with-profits policies.”

4. EMAG now has 10,621 members. We do not hold data on the nature of each member's policy or past policies, but we estimate that approximately 6,000 are current policyholders and 4,000 are With Profit Annuitants ("WPAs") who are or may be adversely affected by proposed transfer ("the Scheme") of the Equitable Life Assurance Society's ("the Equitable") with profit annuities to the Prudential Assurance Company Limited ("Prudential"). EMAG has been asked to represent the interests of those members in these proceedings and I make this statement on their behalf.
5. EMAG has sought to further its principal object by disseminating information to the public and parliament, lobbying, commissioning reports and using the available mechanisms for redress. I mention only two areas of EMAG's recent activity.
6. First, in 2005, EMAG presented a petition to the European Parliament requesting that it launch an inquiry into the Equitable debacle. The Parliament acceded to this request on 18 January 2006 and established a Committee of Inquiry to which EMAG presented evidence. This included a detailed report from Lord Neill of Bladen Q.C. concerning the operation of the Financial Ombudsman Service. The Committee also took oral evidence from, among others: Clive Maxwell, Director for Financial Services at HM Treasury; David Strachan, Director for the insurance sector at the Financial Services Authority("FSA"); Christopher Daykin, Government Actuary, Head of the Government Actuary's Department; Charles Thomson, Chief Executive Officer, Equitable Life; Charlie McReevy, European Commissioner for the Internal Market. The report of the Committee including 47 recommendations was finalised on 8 May 2007 and then was the subject of a Plenary debate on 19 June 2007. The Report and all its recommendations were adopted by the

European Parliament by 602 votes in favour with 13 votes against and 64 abstentions. It includes a damning indictment of the failure by the Government Actuary's Department, the Treasury and the Financial Services Authority to regulate the Equitable life and a recommendation that compensation be paid to policyholders for the failure.

7. Secondly, EMAG was critical of an initial restricted report prepared by the Parliamentary Ombudsman in 2003. In 2003 and 2004 EMAG applied for judicial review of the Parliamentary Ombudsman's report, following which she undertook a second investigation, which covered a lengthier period of ten years to December 2001 and included the actions of the Government Actuary's Department. EMAG has been in liaison with the Parliamentary Ombudsman to assist her in the investigation of the many complaints she has received about the failure by Government to regulate the Equitable adequately. Publication of the report has been much delayed while the Treasury considers the draft which she has submitted to them for Maxwellisation. EMAG considers that there is clear evidence of maladministration and as a result expects the Parliamentary Ombudsman to recommend compensation for policyholders.

Purpose of this statement

8. I should make clear at the outset that EMAG does not make this intervention on behalf of its members in order to invite the Court to withhold its sanction for the Scheme, for which approval is sought pursuant to section 107 of the Financial Services and Markets Act 2000 ("the Act"). Rather it is our purpose to draw the court's attention to certain procedural issues of general importance and two matters of financial importance, both of which concern the protection of policyholders in the approval of transfers of business. We do not invite the Court to make criticisms of what has happened in relation to the procedural issues in this particular case, but we hope that in the light of the experience of policyholders in relation to this case, the Court might be able to give guidance as to the manner in which such transactions should be conducted in future, for

the benefit of the parties to such transfers, independent experts and the FSA. We also request that the Court's order sanctioning the Scheme should make provision to deal with the two financial matters which we raise: see paragraph below.

9. On behalf of EMAG members, I have corresponded with the Equitable, Prudential, the FSA and with Steve Sarjant, the Independent Expert appointed to make a scheme report pursuant to section 109 of the Act. Members of EMAG's board, together with our legal adviser, held a meeting with FSA on 11 October 2007. I now produce marked "JAN 1" a bundle of the correspondence and an agreed note of the main points of the meeting with the FSA.

10. Although the correspondence raises various matters relating to the substantive merits of the Scheme, the issues which I wish to draw to the Court's attention are concerns relating to the procedure which has been followed and to two financial matters. These are of concern to the Court, which must consider that "in all the circumstances, it is appropriate to sanction the scheme": section 111(3) of the Act. Those circumstances include the extent to which policyholders have been made aware of the merits of the Scheme and their interests safeguarded. These may be described as questions of public awareness and the protection of consumers, matters which are among the FSA's regulatory objectives set out in section 2(2) of the Act. Although these objectives are addressed to the FSA, they represent the clear policy of the Act and the public interest, and it is right that they should apply to the process of schemes of transfer such as the Scheme.
 - a. By section 4 of the Act the public awareness objective is promoting public understanding of the financial system, and it includes, in particular (a) promoting awareness of the benefits and risks associated with different kinds of investment or other financial dealing; and (b) the provision of appropriate information and advice.

 - b. By section 5 of the Act, the protection of consumers objective is securing the appropriate degree of protection for consumers, having regard to, among other matters, the needs that consumers have for advice and accurate information, and the general principle that consumers should take responsibility for their decisions.

Background

11. It is important to bear in mind the nature of the group of policyholders who are affected by the Scheme, the importance of the transaction to them, the complexity of the Scheme and the recent history of the Equitable. The group of policyholders who, it is proposed, will be transferred to the Prudential are With Profits Annuitants or WPAs. They are a group of predominantly older people (with an average age probably around 74 according to a clarificatory note written at the time of the approval of a scheme relating to the Equitable and Canada Life Limited in February 2007), only a few of whom will have experience of financial matters and particularly complex insurance matters. For many, investment in a pension has been the most important and substantial financial transaction which they have entered into apart from the purchase of a home. Having accumulated savings in terms of a pension pot (in the form of a retirement annuity, a personal pension or a pension scheme) they have then some six or seven years ago, or earlier, made a decision to draw from that pot in the form of a with profits annuity. This was an action that from its very nature could only have been made once and was irrevocable. For the vast majority of WPAs it was made whilst the Equitable seemed to be in good health and before it was closed to new business by the FSA in December 2000. It was a decision that they could not review. All they have been able to do since 2000 is to watch their annuities decline in value. The average decline since 2000 has been some 40% or more due to the financial performance of the Equitable. They are therefore a group which is very concerned about security, unable to arrest the decline in their income by obtaining employment, and not necessarily very knowledgeable about financial matters.
12. Almost all WPAs will have had no access to independent financial advice before taking out the policy and will not necessarily know how to set about obtaining such advice. Their inclination is to take no action in relation to the vote in respect of approval of the Scheme, or to mandate the Chairman to exercise a proxy vote on their behalf. This is indeed what has happened: at the Extraordinary General Meeting (“EGM”) on 26 October 2007, around 417,000 votes were cast. This represented about 10% of the total number of eligible votes. Of those cast, it is believed that a significant proportion were cast in favour of the Scheme by the Chairman using his proxies. The exact proportion was not disclosed, and in my letter of 2 November to the Equitable’s solicitors,

I asked that the Court will be informed of the number of votes which were cast by the Chairman's proxy. In their letter of 19 November 2007, the Equitable's solicitors have given the total number of proxy votes in favour but they have not responded to the request to identify the number of votes at the Chairman's discretion.

13. Policyholders do not have access to the underlying financial projections and analyses. In particular the Annual Accounts, whilst prepared in accordance with the Companies Acts, contain no real analysis by class of policyholder. The report of the Independent Expert, although of some length, contains no such analysis by number or value. Further, it contains no actual projection by such classes of policyholder of their withdrawals from the fund, no projection and no division of future expenses. It is hard for them, or their advisers for those who have them, to judge whether the terms are fair to all concerned. Policyholders are therefore largely reliant upon the fact that the transfer itself must be an arm's length deal between the Equitable and Prudential and upon the judgement of the Independent Expert.

14. It is also important to bear in mind the history of the Equitable and its relations with its policyholders. The information given to WPAs before they made the irrevocable decision to take their pension in the form of a WPA was defective: the bonuses declared were excessive and based on the under-provision of liabilities for guarantees. This led to an across the board policy value reduction in July 2001 and then a scheme and a hearing under section 425 of the Companies Act. The documentation for this was voluminous but after the scheme was approved there was another policy reduction and the WPAs faced further reductions in their annuities spread over the next few years. Policyholders are therefore wary about the effects of any changes to their pensions with the Equitable.

EMAG's concerns

15. EMAG has the following concerns about the procedure for securing approval of the Scheme, about the information made available to policyholders and finally two financial matters:

- a. Insufficient time for policyholders to consider information
- b. Insufficient information for policyholders

- c. Publication of FSA's opinion only after the EGM
- d. Lack of transparency regarding the instructions to and agreement with the Independent Actuary
- e. Failure to recognise and approach the interests of different classes separately
- f. Failure to deal equitably with any amounts that may arise from the possible sale of the remaining business of Equitable
- g. Failure to include in the Scheme documentation any reference to compensation which might arise.

I explain these matters in more detail in the following paragraphs.

a. Insufficient time for members to consider information

16. By any standards, this is a very complicated transaction, but particularly so for a group of policyholders, the WPAs, having the characteristics described in paragraph above. It is a transaction which will affect their income for the rest of their natural lives. EMAG were therefore concerned that policyholders should have been given sufficient time to consider material relating to the Scheme and, if necessary, seek advice on it.
17. In fact, the time allowed to them to consider it has been, quite simply, inadequate. The Scheme was originally announced on 15 March 2007, and the Independent Expert's Report is dated 30 August. Although the Policyholder Circular is dated 14 September, policyholders actually received the documentation only over the weekend of the 29/30 September. Votes had to be with the Equitable by 24 October. This gave policyholders about three weeks in which to study several hundred pages of documents - or instruct financial advisers to do so - before making up their minds and posting their voters. In this particular case, this lack of adequate notice was exacerbated by the postal strike.
18. The Equitable's solicitors, Lovells, responded on this matter in their letter of 7 November. I do not regard their response as answering the reservation EMAG has expressed: given the length of time that the Scheme has been in preparation, three weeks for consideration of this information by this group of policyholders is inadequate. It is in my submission no answer to say that the information was delivered eight weeks before the sanctions hearing: as I

explain below, for most policyholders, the crucial decision in relation to this transaction will be how to vote, not whether to appear in court to oppose the Scheme.

19. We therefore suggest that, particularly when a scheme is dealing with policyholders of the kind involved in this case, the arrangements made for taking a vote should ensure that policyholders have enough time to consider the scheme.

b. Insufficient information for policyholders

20. The Prudential's with profit fund is invested upon traditional lines, with about 50% in equity shares, about 20% in other growth assets (mostly property) and about 30% in fixed interest investments and cash. This is very different from the existing Equitable Life portfolio, of which about 85% is invested in fixed interest and cash. This investment profile gives the Prudential policyholders a much better chance of medium to long term growth than can be obtained with the Equitable. However it does make the Prudential fund more volatile. The Scheme documentation does not provide a history of the past performance of the Prudential with profit investment returns or of bonus rates (other than one percentage figure for 2006 only and contained in the 15 March documentation). This is regrettable since its fund is highly regarded in the industry and reckoned to have performed well during the falling markets of the early 2000s.
21. Further it is disappointing that no attempt whatsoever has been made to explain in simple numerical form what a transferring WPA should expect under the new regime of the Prudential. While I recognise that the circumstances of each WPA almost inevitably differ because of the number of factors that vary their annuities, some worked examples should have been given under a variety of circumstances. These should have included a startlingly good performance by the Prudential of a 20% return and the converse of a 20% decline in markets. The reason we ask for this is that even if the performance is taken as an industry average, the calculations we have done indicate that the average WPA will experience a continuing and inexorable decline in his or her income. The protagonists of the transfer should make them aware of this.
22. EMAG therefore suggests that it would be helpful to policyholders in future if information were provided about the performance history of the transferee and

if worked examples of possible returns might be provided. We do not ask for “speculative numbers” as referred to in Lovells’ letter of 7 November; what we are asking for is simply an illustration of the results of various returns. It is for the policyholder to speculate whether past performance is or is not any guide for the future. Their speculation will be imbued with considerable caution due to their experiences over the last 7 years.

c. Publication of FSA’s opinion only after the EGM

23. Given the problems of shortage of time and lack of information, many policyholders would be inclined to set great store by the views of the FSA when making up their minds whether to vote in favour of the Scheme. Regrettably, the FSA did not make its views available before the EGM, let alone at a time when policyholders might have been able to take account of that view before posting their votes.

24. In the case of the *Canada Life* transaction, the FSA gave the certificates required by the Act and indicated that it found that scheme satisfactory (see paragraph 10 of the judgment of Mr Justice Evans-Lombe dated 14 February 2007). In that case, the FSA approved the appointment of the Independent Expert on the 12 July 2006 and then sent letters on the 5 and 9 October 2006 approving the form of the Independent Expert’s Report, the Notice and the policyholder statements. This chronology was made plain to policyholders so that they were aware that the FSA approved that transaction three months before the hearing on 1 February 2007. No vote was needed for that scheme, but policyholders were able to take this information into account when deciding whether to make representations to the court. The final document that was presented to the court was a witness statement from the Head of the Retail Firms Department of the FSA on 26 January 2007

25. In the present case, the FSA indicated in its letter of 13 July 2007 that it intended

“...to lodge with the Court, at the final Sanctions Hearing, a report which will set out the major issues considered by the FSA in reaching its decision to object or non-object to the proposed transfer”

In its letter of 6 August 2007, the FSA indicated that it would “report to the Court on the most significant issues the FSA considered in relation to the Scheme, and on the basis of which we concluded that we should object or not object to it going ahead”. It was only in its letter of 17 September that the FSA

indicated that this report would “be available to policyholders in good time before the final hearing of the application before the court which we understand the firms are hoping to schedule for late November 2007”. In my email of 3 October I represented to the FSA that it should make its report public as soon as possible, so that policyholders could take it into account when deciding how to vote. On 5 October the FSA responded that the FSA would “lodge its report with the Court once it has completed its review of the Scheme, and whilst we hope that this will be in advance of the Society’s EGM, we cannot be certain that this will be the case. It is the timetable for the Part VII application, and not that for the EGM, which ultimately governs our response”.

26. As Mr Justice Hoffmann said in *re Axa Equity and Life Assurance plc* [2001] 2 BCLC 447 at 452:

“The FSA by reason of its regulatory powers can also be expected to have the necessary material and expertise to express an informed opinion on whether policyholders are likely to be adversely affected. Again, the Court will play close attention to any views expressed by the FSA.

For the same reasons, the FSA’s informed opinion is of immense value to policyholders when deciding how to vote on the Scheme. While the FSA’s function is to produce its report for the benefit of the Court when making its decision, it is clearly desirable that it should be available to policyholders when making theirs. To say that it will be available to them “in good time before the final hearing” misses the point. The Court will only hear persons who would be adversely affected by the carrying out of the scheme (section 110(b) of the Act). Few policyholders would be inclined to apply to be heard by the Court, even if they were able to conclude that they would be adversely affected. It is much more likely that their participation in the process will be limited to voting at the EGM. If the FSA’s opinion is published only after that stage, it will be too late. I refer back to the regulatory objectives set out in paragraph above. The FSA must, so far as is reasonably possible, act in a way which is compatible with those objectives. In relation to timely publication of its report, I draw particular attention to the need to secure the appropriate degree of protection for consumers, having regard to, among other matters, the needs that consumers have for advice and accurate information, and the general principle that consumers should take responsibility for their decisions. The taking of responsibility requires advice and accurate information. Where the FSA is in a

position to provide advice and information, by the expression of its informed opinion, it is clearly desirable that it should do so at a time when it will inform a decision for which consumers must take responsibility.

27. EMAG therefore submits that the FSA should ensure, so far as it is possible to do so, that its opinion on a proposed scheme should be available in good time for policyholders to take it into account before they are called upon to cast their votes at an EGM.

d. Lack of transparency regarding the instructions to and agreement with the Independent Actuary

28. Because of the difficulties described above, policyholders will have to rely upon the good offices of those who are supposed to be representing them, the Independent Expert and the FSA. While we have no reason to doubt the professional competence or integrity of the Independent Expert in respect of this transfer, it is important that his independence should be demonstrated, and that the terms of his instructions should be disclosed. When court approval was given to the 2001 compromise, which was an arrangement with creditors under section 425 Companies Act 1985, there was no third party involved. But the terms of the arrangements made with the Independent Expert were made available. In this way, Equitable policyholders learned that the Independent Actuary owed no duty of care to policyholders, could not be sued by them and indeed was indemnified by the Equitable directors with policyholders' money. If these or similar terms apply to the Independent Expert acting in the Prudential Scheme, then policyholders (who are paying for his services) should be told about it.

29. The Independent Expert's instructions and terms of engagement are not included in the scheme documentation and it is not indicated that they will be made available for inspection. EMAG invited the FSA to require disclosure of the terms of engagement and the substance of all material instructions given to the Independent Expert. The FSA took the view that this is a matter of commercial confidentiality, which could not be made public without the consent of the parties to the contract.

30. I therefore invited the Independent Expert, in my letter of 24 September, to disclose his terms of engagement, in order to demonstrate clearly his independence. In his letters of 4 October and 2 November, Mr Sarjant sought to

assure me of his independence, while at the same time indicating that it was not his company's practice "to publish the terms and conditions upon which it does business with individual clients since these terms are private and confidential between the parties and can be commercially sensitive" (see his letter of 2 November).

31. While I recognise the requirements of commercial confidentiality where one is dealing with a private transaction, when preparing a scheme report the expert is carrying out a public function, under section 109 of the Act. In addition, the Independent Expert must be either appointed by the FSA or his appointment must be approved by the FSA. At the very least, therefore, the FSA ought to satisfy itself that his instructions and the financial terms governing his appointment are such as to guarantee his independence. Whilst it is reassuring to learn that the Independent Expert has no success or incentive fee, the silence over indemnities and the rate of charge provides no comfort of financial independence.

32. EMAG therefore submits that in relation to future transactions the terms of appointment of an Independent Expert and all material instructions should be published in order that his or her complete independence may be demonstrated.

e. Failure to recognise and approach the interests of different classes separately.

33. As Mr Justice Hoffmann made clear in his judgment in the *Axa Equity* case, the "fundamental question is whether the Scheme as a whole is fair as between the interests of the different classes of persons affected". This rightly recognises the importance of identifying as distinct classes of policyholder who may be differently affected. In order to exercise its overriding discretion under section 111, the Court therefore needs to be aware of all the circumstances relating to those distinct classes. These include a breakdown of votes as between the classes and the distinct substantive interests of different classes. I briefly deal with each of these below.

34. Voting arrangements: The Equitable's rules relating to voting provide that every policyholder with policies worth £10,000 or more has 10 votes; only those with policies worth less than £10,000 have their voting rights scaled down. Annuities are valued for this purpose at 10 times the annual payment (excluding

bonuses). A simple majority is required to approve the transfer to the Prudential.

35. This arrangement seems unfair in the context of this deal. There are 50,000 with profit annuitants, representing about 20% of the fund or 23% of the membership. The proposed transfer vitally affects annuitants' interests, but there is no requirement that they should vote in favour as a separate group. Under the 'one man 10 votes' system, any dissenting WPAs will inevitably be hugely outvoted by other policyholders. We suggested to the Equitable some years ago (when the Articles were reviewed) that the £10,000 cap should be brought into line with current values but our representation was ignored.
36. We consider that the Court should be provided with a realistic view of the respective wishes of the WPAs and the ordinary with profits policyholders as separate classes. We raised the matter with the FSA, which informed us in its letters of 13 July and 6 August that voting structures and procedures are a matter for policyholders to address with the Equitable in their capacity as members. The FSA also drew attention to its statutory objective to secure an appropriate degree of protection for policyholders, which it would fulfil by scrutinising the proposed transaction carefully.
37. At our meeting with the FSA on 11 October, we suggested that the FSA approach the Equitable to provide a post-analysis of the voting in order to show:
 - a. The votes cast by the WPAs, and the value of the policies voting, respectively for and against the Scheme;
 - b. The like information for non-WPAs;
 - c. Late votes delayed by postal strikes;
 - d. Votes cast by the Chairman, separated into those cast at his discretion and mandated-by-member votes.

The FSA agreed to consider making an approach to the Equitable, but we have heard nothing further on this. I believe that the relevant information is stored on computer and would be very easy to retrieve.

38. I also put all these matters to the Equitable in my letter of 24 October to its solicitors Lovells; and in my letter to them of 2 November I also asked for

confirmation that the report of votes cast which the Equitable makes to the Court will identify the number of proxy votes cast by the Chairman. In their reply dated 7 November, Lovells replied that the vote was in accordance with the Society's rules and "to have an additional vote such as you suggest would have been expensive and could have jeopardised the timetable for the transfer". This appears to miss my point, i.e. that the Court should be informed of the votes of different classes of policyholder, whose interests might not coincide. It is, in my submission, also no answer to say, as the letter does, that "With-profits annuitants (and any other policyholders) will, of course, have a right to present any issues they have regarding their position to the court at the sanction hearing on 28 November." As I have sought to explain, it is unlikely that individual policyholders will want to be heard by the Court, but the Court should still be provided with sufficient information to enable it to ascertain the views of the different classes as they were expressed in the vote. The "overwhelming support of members for the resolution", to which Lovells also refer, must also be seen in this light.

39. So far, the FSA does not appear to have requested the breakdown of voting at the EGM which I have set out above, and it appears that the Equitable does not intend to supply it to the Court. For the reasons which I have sought to explain, it seems to me that it is desirable that in matters of this nature, the Court should be given sufficient information to enable it ascertain whether each affected group is in favour or against a scheme.
40. Substantive differences between classes: Ascertaining that a scheme is fair as between the interests of the different classes of persons affected also supposes that the separate interests of those classes have been identified, and that they are then dealt with in the scheme documentation and the Independent Expert's report. The Scheme provides a good illustration of this.
41. From our knowledge of the policies and the date of their issue within the WPAs we identify three classes as follows: (i) those possessing a guaranteed investment return of 3.5%, who obtained their policies in the main before 1996; (ii) those possessing a guaranteed investment return of 0%, who obtained their policies after 1996; and lastly (iii) Euro-denominated annuitants, who are in the main German residents and are probably about 10% of WPAs.

42. We consider that a class analysis for the WPAs, allied with reasonable and prudent projections of expenses and examples of future growth would show more clearly the impact of volatility on WPAs in classes (i) and (iii).
43. For the balance of with profit policyholders they divide into two main classes: (i) those with a guaranteed Investment return of 3.5% and (ii) those with no guaranteed investment return. The last class carries the ultimate liabilities and has the most risk. Both are very interested with the level of ongoing charges from HBOS.
44. EMAG therefore submits that (a) an applicant's report on voting on a scheme should separately identify the relevant classes of policyholder and (b) the Independent Expert should ensure that his report clearly identifies and deals with the separate interests of all such classes.

f. Failure to deal equitably with any amounts that may arise from the possible sale of the remaining business of Equitable

45. In my letters of 2 November to both Lovells and the Independent Expert I raised the issue of the value of the with-profits fund after the proposed transaction with the Prudential has gone through. At the EGM the Chairman stressed that the purpose of the transfer is to provide safety/security for the WPAs on their transfer and also to make the "remaining fund open to strategic measures". He then explained that a data book on the remaining fund was under preparation and there had already been great interest in it. This was due to be launched before Christmas and then whatever was involved in the strategic process would begin.
46. Now EMAG hopes that the transaction envisaged by Chairman, the Chief Executive and the advisers to the Board and the Equitable in preparing the data book will attract Standard Life, HBOS, Pearl, Resolution or whomsoever it may be to pay a large demutualisation premium into the remaining with profits fund. But the strategic transaction envisaged is one on which the Board had already sought and received advice well before the EGM and the hearing before the Court. Hence the preparation of the data book in the form proposed would not have been undertaken unless the advisers had indicated that there was material value to be gained for the remaining fund in some manner.

47. This proposed strategic transaction is so proximate and is only possible, according to the Chairman, because of the success of the WPA transfer to the Prudential. It would seem equitable for 23% of the premium (or whatever is the correct proportion of members who are WPAs) should be due to the WPAs. If alternatively the proposed transfer ends up with a loss being recognised then equally the WPAs should bear 23% of this loss, unless it is recognised in the accounts and figures to 31 December 2007.

48. I could not see any mention of this proposed transaction or the inherent value in the Report of 30 August of the Independent Expert. The response of the Independent Expert in his letter dated 16 November is to quote from the website of the Equitable in respect of the EGM and to agree that his consideration of the scheme was in the knowledge that Equitable contemplated a further transaction as soon as the transfer of the WPAs is complete. However he has not enquired of the Chairman and Chief Executive as to progress on the further transaction or, most importantly, whether a material sum is involved. Whilst there are clearly uncertainties regarding the further transaction, it is unsatisfactory that, at least on Friday 16 November, the Independent Expert had no plans to update his report for events occurring in the period from its date of 30 August in this and other respects.

49. The scheme documentation and the Scheme prepared by Lovells contain no provisions for a payment of part of that value or alternatively the reflection of a deficit specifically in this respect. Commenting on this feature of the Scheme, the Independent Expert states:

“I do not believe the absence of provision in the proposed scheme for a contingent payment in the event of a subsequent transaction means that the proposed Scheme is unfair to any group of policyholders”.

I maintain that it is unfair to WPAs if the future transaction produces a material sum in the near future which I take as, say, a period of one year.

g. Failure to include in the Scheme documentation any reference to compensation which might arise.

50. I mention above the recommendation of the Committee of Inquiry adopted by the European Parliament that compensation be paid to policyholders and also that I expect the Parliamentary Ombudsman in her investigation to find that

there has been maladministration and, as a result, her to recommend compensation for policyholders.

51. My correspondence also dwells on this issue and the intimate knowledge of the FSA itself of the matter since it has been sent the draft report of the Parliamentary Ombudsman for “Maxwellisation”. It appears that they see there is no conflict in this matter.

52. At the EGM on 26 October the Chairman responded to a question on this matter and subsequently the following statement has appeared on the website of the Society:

“We will support in any way we can the fair distribution of any such compensation to policyholders. We have no reason to suppose that the transfer of with-profits annuitants to Prudential will have any effect on their prospects of compensation.

Prudential has also confirmed that it will support the fair distribution of Government compensation to policyholders”.

However, I have searched the Scheme documentation and the Scheme prepared by Lovells and they contain no mention of provisions for payments to be made by the Equitable to the with profits fund of Prudential in respect of the receipt of any compensation which might be received by the Equitable.

53. In order to deal with the two financial matters outlined in paragraphs 45 to 52 above, I request that the Court’s order sanctioning the Scheme should make provision, in accordance with section 112(2)(c) of the Act, to enable appropriate payments to be made by the Equitable in order to take account of the two contingencies of (a) there being a transaction in the remaining with profits business and (b) compensation being received. Both would be subject to normal provisions of mediation.

I believe that the contents of this statement are true

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