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| ADJUDICATION | |
| Complainant: | Mr B |
| Firm: | The Equitable Life Assurance Society ("Equitable Life") |
| Complaint Reference: | |
| Date of Adjudication: | 22 May 2003 |

Complaint

Mr B has complained that he has made a financial loss because of advice given to him in April 2000 by representatives of Equitable Life, to take out a Managed Pension linked to the with-profits fund. Mr B transferred his Managed Pension from Equitable Life into an annuity with the Prudential on 24 January 2001. The policy complained of is therefore not bound by the terms of the Compromise Scheme that became effective on 8 February 2002.

Background

I have been in correspondence with Equitable Life and with Mr B about this complaint. I have considered the documentation which has been submitted and the arguments made. I am now in a position to issue this Adjudication to both parties.

Mr B's complaint about Equitable Life has been agreed as a "lead case" in respect of a "GAR-Related Claim" category. At this stage my aim is to assess whether Equitable Life has liability, insofar as is possible without assessing the amount of any loss that Mr B may have suffered as a result of this matter, which the Financial Ombudsman Service is leaving to a later stage.

The following views are intended not to be an exhaustive list of the valid causes of complaint that Mr B may have, but are intended to be sufficient to establish liability on the part of Equitable Life.

Investigation and findings

It is not in dispute that Equitable Life's representatives advised Mr B to take out the Managed Pension policy investing 100% in the Society's with profits fund.

I will focus on whether a claim can be established for misrepresentation. In order to establish a claim for misrepresentation the following elements must be present:

There must be a material representation of facts made by Equitable Life to Mr B;

The representation must be untrue;

There must not be proof that Equitable Life had reasonable grounds to believe, and did believe, that the facts represented were true; and

There must be reliance on the representation such that it induced Mr B to enter into the contract.

I consider each of these elements in the circumstances of Mr B's claim further below.

1. Did Equitable Life make a material representation of fact to Mr B?

Mr B wrote in a letter to Equitable Life on 7 August 2000:

"In April of this year I decided to take up an Equitable Managed Pension. This decision was based on your recommendations given both verbally and in writing. At no time did you mention the imminent threat to my pension fund if the House of Lords ruled against you. As my decision to take an income drawdown pension from you may well have been different if this information had been made available, I consider that I was misled".

Mr B wrote in his Complaint Form to us (dated 27 January 2001):

"In April 2000 I decided to draw a pension from my Equitable Life personal pension plan and on 3 April 2000 representatives from the Society visited my home to discuss this matter. ...

Before accepting this advice I raised a number of queries one of which was the effect if the Society was obliged to honour its obligations with regard to guaranteed annuities. There had been much in the Press about the previous High Court judgement and subsequent Court of Appeal ruling. The reply given was along the lines that the Society's finances would not be over stretched if the House of Lords ruled against the Society because payment of guaranteed annuities would be spread out over many years and could easily be absorbed.

I accepted this explanation ...

If they had not given me misleading advice I would have transferred the funds to another provider for my Managed Pension".

He went on:

"I would have preferred to have stayed in a Managed Pension fund and did not want to purchase an annuity at this time but have been forced into doing so from another provider because I have lost all confidence in the Society and this was the only way that I could remove my funds from their care".

He transferred from his Managed Pension with Equitable Life to an annuity with the Prudential on 24 January 2001.

Equitable Life's Financial Planner Mr G had made recommendations to Mr B in June 1998 to take out a Managed Pension, but Mr B did not take up those recommendations at that time. Mr B's 65th birthday was due to fall on 18 June 2000. Equitable Life's representative Ms H conducted the meeting on 3 April 2000, and the other Equitable Life representative present was Mr G. Mr G wrote a "Reason Why" letter on 6 April 2000 that referred to "*your recent meetings with [Ms H]*" (who had visited Mr B again on 4 April 2000 for the completion of paperwork) and used phrases such as "*we agreed ... We established during our discussions ... We discussed staggered vesting and alternative annuities ... I trust that the foregoing accurately reflects our discussions*" that confirm that Mr G as well as Ms H discussed the matter with Mr B at that time.

Mr G has reported:

“The client’s recollection of events is correct in so much as that at the time reassurances were given to the client, we had been told that the liability under the GAR issue was approx £50m and that £200m had been reserved to cover any such liability. It was pointed out to the client that £200m in relation to the Society’s With Profits fund of approx £30b was a relatively small portion and unlikely to have a significant effect on returns over time.

In addition, it was pointed out that the liability under the GAR would crystallise over a long period of time bearing in mind that policies ceased to be sold in 1988, benefits could not be taken until the age of 60 and that the annuity provided under the GAR was on a single life basis, with no guaranteed period of payment or escalation, and therefore unlikely to be of interest to many of our clients. ...

... the information given to the client was purely on the basis of that which was available to all representatives of the Society at that time.”

Equitable Life has questioned whether in June 1998, its clients would have been reassured in the terms above, on the ground that at that time it had given no briefing to its representatives on the GAR issue. I believe that Mr G’s recollections do not reflect the situation as at June 1998 but are in line with the situation as at April 2000 (see below).

Ms H has reported:

“Mr B raised the subject of the GAR issue and the ongoing case in the High Court. I informed him of the Society’s stance at the time in offering to pay a GAR only on guaranteed funds and that the Society, at that time, believed that sufficient reserves had been set aside in the 1999 accounts. In hindsight, the Society’s stance and reserving was wrong, but at the time of the meeting Mr B was given the most accurate and up to date information available to me; at no time did I seek to mislead the client”.

On 23 January 2000, two days after the judgment of the Court of Appeal, Equitable Life issued to all its Branch Managers’ Market Briefing Note BMBN2000/12, which included the following paragraphs.

Under the heading *“Press coverage and commentary”*:

“1 The suggestions that the Society could face a significant cost as a result of the judgment (often quoted at £1.5bn) are wrong (see Judgment highlights, item 2) ...

5 As there are no significant cost implications, the issues of the Society’s independence, or need for capital, or need for a partner do not arise”.

Under the heading *“Customer questions and answers”*:

5 Q. I have seen reports that the Society
- will have to pay £1-1.5bn
- will be bankrupt
- will need to demutualise
- will need to merge/be taken over
Are these reports true?

A. *No. The whole issue is about how the Equitable currently shares out the with-profits “cake”. There is no question of having to pay out “more” benefits. If the House of Lords judgement does not support the Society’s current approach, we will still have the same cake to share out. We may be required to share it out in a different manner in future. However, even counsel for the defendant and the two judges who found against us in the Court of Appeal accept the fact that GAR policyholders would not get “more” money”.*

8 Q. *What happens if the Society loses in the House of Lords?*

Q. *What are the financial implications if the House of Lords uphold the Court of Appeal’s decision?*

A. *See the answer to Q.5 above”.*

The assertions in BMBN2000/12 that the cost of the GAR problem could not increase to a figure of around £1bn or more rather than an insignificant sum, were made without qualification. They were not limited to restricted scenarios such as the House of Lords upholding the Court of Appeal’s decision.

Equitable Life has written to me:

“It is unclear whether the FOS are assuming that the representative concerned would have repeated what was said in that note. Her recollections are different to that which is stated in the note in that the comments made by her appear to have been more limited”.

I have compared the Equitable Life Briefing Note with the reports by Ms H and Mr G of their recollections, and I have also taken into account Mr G’s recollection in a further report that:

“any statements that I made regarding the Society’s position was based on the information provided at the time by my employers”.

All this clearly shows that the information provided by Ms H and Mr G, as representatives of Equitable Life, was provided, authorised and endorsed by Equitable Life.

Equitable Life has expressed the view that statements made by their representatives ought properly to be characterised as statements of belief or opinion. I am not persuaded that this is a correct interpretation. These representations concerned the exposure of Equitable Life should it fail in proceedings brought by Mr Hyman. The representations were clearly expressions of fact provided by Equitable Life for use by its representatives.

It is my view that the statements made to Mr B by Equitable Life, through its representatives, and referred to above, amounted to clear statements of fact properly characterised as misrepresentations.

I believe that it is proved on the balance of probabilities that the representative Ms H made representations to Mr B with Mr G making no objection, that the cost to Equitable Life of honouring the guarantees would not be significant.

2. Were these statements true and did Equitable Life have reasonable grounds to believe that these statements were true?

Under the provisions of the Misrepresentation Act 1967, it is for the person making the representation to prove that he had reasonable grounds to believe, and did believe, that the facts represented were true. On the basis of the evidence that I have seen and which is referred to below, I do not believe that Equitable Life can discharge this evidential burden. (I am not claiming that Ms H or Mr G personally had knowledge of these matters at the time, but they were acting in their capacities as representatives of Equitable Life, and the claim lies against Equitable Life as such.)

The statements were incorrect because Equitable Life's Board had received legal advice that it might lose the Hyman case, and it knew that if the case was lost the cost of being required to honour GAR pension policies to Equitable Life could be about £1.5 billion.

Evidence on this matter was made public in the Particulars of Claim issued by Equitable Life against certain former Directors in April 2002. There is a substantial overlap between the texts of these Particulars of Claim, and I have taken the quotations below from those against Mr Headdon. I enclose a copy of them for Mr B.

The Particulars of Claim state that Equitable Life's legal advisers Denton Hall "*repeatedly warned that litigation carried with it the risk of losing*" [para 70(b)(ii)].

The evidence for this is contained in paragraphs 28 to 55, covering a period starting on 8 September 1998 when the Society received written advice from Denton Hall, up to 17 February 2000 when the Society received oral advice from Counsel to the effect that whilst the Society should succeed in its appeal to the House of Lords, the argument was not an easy one.

The Particulars of Claim further state that Mr Headdon informed the Directors of Equitable Life on 9 September 1998 "*that if the Society was not entitled to adopt its differential bonus policy, the maximum potential cost to the Society was £1.5 billion*" [para 29(a)].

The Particulars of Claim assert that in the light of all this and certain other knowledge, Mr Headdon [and other Directors also] "*ought to have concluded ... that the board ought to ensure that new policyholders were made fully aware of the potential costs to the Society of losing the Hyman litigation*" [para 72(c)].

My reference to the Particulars of Claim should not be taken as an endorsement or comment on the validity or otherwise of the claims against former Directors set forth in them. Rather, I have simply taken into account the factual information from Board Minutes and other documents quoted by Equitable Life in these Particulars of Claim.

3. Did Mr B rely on the representations such that they induced him to enter into the contract?

Mr B and the representatives Ms H and Mr G all agree that Mr B asked about the uncertainty of the Hyman case. This fact in itself shows that Mr B was concerned about that matter and is evidence. Such enquiry tends to support the view that he only entered into the contract because he received a misleading reply.

As mentioned above, Mr B wrote in a letter to Equitable Life on 7 August 2000:

“As my decision to take an income drawdown pension from you may well have been different if this information had been made available, I consider that I was misled”.

I wrote to Mr B on 6 March 2003 asking him if he was able to give further details of all the circumstances of his decision to take an Equitable Life Managed Pension, and to clarify the above sentence. He replied:

“At the time in question I was approaching my 65th birthday and no longer received any earned income. Therefore I decided to take retirement benefits from my personal pension plan to supplement investment income from other sources.

I was attracted to a Managed Pension because I did not wish to commit my pension fund to the purchase of an annuity. However, had I been aware of the true situation within Equitable Life I would not have purchased their Managed Pension but would have made arrangements to transfer my pension fund to another Provider”.

I also have regard to what Mr B had already written in his Complaint Form to us (dated 27 January 2001):

“If they had not given me misleading advice I would have transferred the funds to another provider for my Managed Pension. ... I would have preferred to have stayed in a Managed Pension fund and did not want to purchase an annuity at this time but have been forced into doing so from another provider because I have lost all confidence in the Society and this was the only way that I could remove my funds from their care”.

He transferred from his Managed Pension with Equitable Life to an annuity with the Prudential on 24 January 2001.

I believe that the evidence shows on the balance of probabilities that Mr B did rely on the representations such that they induced him to enter into the contract.

Conclusions

I believe that Mr B was induced to enter into the Managed Pension contract having relied on material misrepresentations of fact that representatives of Equitable Life had made to him, and that Equitable Life is liable to compensate Mr B for any loss.

[Adjudicator]