

**DECISION**

<b>Firm:</b>	The Equitable Life Assurance Society ("Equitable Life")
<b>Complaint:</b>	complaints relating to points made by Lord Penrose in his report to HM Treasury, published on 8 March 2004 ("Penrose-related complaints")
<b>Date of Decision:</b>	22 March 2005

1. In this decision I consider certain complaints against Equitable Life, brought to us by individuals who took out with-profits policies with Equitable Life, where the complaints relate to points made by Lord Penrose in his Report to the Treasury published on 8 March 2004. We have received approximately 50 such "Penrose-related" complaints. I have counted them as separate complaints although some form part of existing complaints, whose main thrust relates to other matters.
  
2. On 26 May 2004, Equitable Life wrote to me and asked me to dismiss the "Penrose-related" complaints without considering their merits, using provisions in the rules of the Financial Ombudsman Service that permit us to do this in certain circumstances. At that time, Equitable Life had not yet produced a response to the complaints. It was entitled to delay doing so under the terms of a waiver of the normal rules, granted by the Financial Services Authority (FSA), that lasted from 10 May to 30 September 2004. I considered it inappropriate for me to reach a conclusion on Equitable Life's request before it had produced that response. It did this on 27 October 2004 (within the time that the FSA had allowed after the expiry of its waiver). Equitable Life also renewed its request to me, sending me a further letter on 15 November 2004 giving its reasons in detail.
  
3. To summarise, Equitable Life believes that the Financial Ombudsman Service is not an "*appropriate forum*" for resolving these complaints:
  - because of their complexity;
  - because we cannot compel third parties to give evidence or subject witnesses to cross-examination;
  - because of the FSA's views on the matter;

- because Equitable Life believes that the complaints relate to the exercise of its commercial judgment; *and*
  - because of the current investigation that the Parliamentary Ombudsman is conducting.
4. I decided to treat Equitable Life's representations as a preliminary issue, to be determined before any investigation into the merits of the complaints. If we had entered into an investigation and had only later decided to curtail it on any of the grounds urged by Equitable Life, that would have raised the complainants' expectations only to dash them later.
  5. In accordance with our Rules, when considering whether complaints should be dismissed, we provide the opportunity for the affected complainants to make representations. We therefore sent the complainants in these "Penrose-related" cases a copy of Equitable Life's letter of 15 November 2004 and also enclosed Equitable Life's response of 27 October 2004, to which that letter referred. We also published Equitable Life's letter on our website. We have received a number of representations, including submissions from the Equitable Members Action Group, the Investors Association, the Equitable Life Members Support Group and the Guernsey Financial Services Commission. I am grateful to those who have replied with submissions.
  6. I asked for submissions by 31 December 2004. I have also taken into account submissions received since then up till now. I am not aware of any complainant who has been unable to make to me the points that he or she wished to make.

It is now appropriate for me to determine whether, as Equitable Life proposes, I should *not* investigate these complaints further.

## background

7. Before turning to consider the request made by Equitable Life, it is sensible for me to set out briefly the background to this matter.

### the subject matter of the “Penrose-related” complaints

8. Lord Penrose was commissioned by the Treasury “*to enquire into the circumstances leading to the current situation of the Equitable Life Assurance Society, taking account of relevant life market background; to identify any lessons to be learnt for the conduct, administration and regulation of life assurance business; and to give a report thereon to Treasury Ministers*”.
9. In Chapter 6 of his Report, Lord Penrose considered Equitable Life’s internal office valuation of the assets of its with-profits fund at each year-end from 1989 to 2000. He compared this valuation with “*aggregate policy values*” which, he explained in paragraph 10, “*included the contractual guarantees in respect of contributions, the guaranteed investment interest to date and declared reversionary bonuses. In addition the accrued terminal bonus values were included. In and after 1998 the annuity guarantee provision was included*”.
10. He found that at each year-end, the net assets of the with-profits fund exceeded the “*aggregate policy values*”, excluding the accrued terminal bonus values, but were lower than the “*aggregate policy values*”, including the accrued terminal bonus values (see Table 6.3 together with Financial Table G.5 which he referred to in the notes to Table 6.3). He then wrote (in paragraph 21) that “*the figures showed over-allocation to with-profits policyholders at each year-end from 1989 until 2000*”.
11. The complainants to whom I refer in this decision have sought compensation from Equitable Life on the grounds of this alleged “*over-allocation*”, which is sometimes referred to as “*over-bonusing*”. Of the 50 or so complaints of this kind that we have so far received, three reached us before the Penrose Report was published; these three referred to data along the lines of Lord

Penrose's figures for the years 1995 to 1999 that Equitable Life had made public in May 2003.

**other investigations or proceedings in which related issues are being or have been considered**

12. I consider it relevant to note that the issues here are connected to wide-ranging and inter-related disputes concerning Equitable Life.

- The Parliamentary Ombudsman (the Parliamentary Commissioner for Administration) investigates complaints that injustice has been caused by maladministration on the part of Government departments or certain other public bodies. She is currently conducting an investigation "*to determine whether individuals were caused an injustice through maladministration in the period prior to December 2001 on the part of the public bodies responsible for the prudential regulation of the Equitable Life Assurance Society and/or the Government Actuary's Department; and to recommend appropriate redress for any injustice so caused*". She made clear in her Report published on 19 July 2004 (at paragraph 23): "*I have no role in considering complaints about mis-selling of policies or about the conduct of the Society*".
- Equitable Life itself has launched legal proceedings before the High Court against some of its former directors, alleging negligence, and against the accountancy firm of Ernst & Young, its former auditors. The trial of that action is scheduled to begin on 11 April.
- In the Bristol Mercantile Court, proceedings have been started against Equitable Life by 422 with-profit annuitant members of Equitable Life, represented by the firm of Clarke Willmott. The particulars of the claim allege that the claimants have suffered loss and that they claim damages by way of compensation. That action has been transferred to the High Court.
- A disciplinary tribunal of the Institute of Actuaries is due to consider allegations that four actuaries, formerly employed by Equitable Life, fell short of certain professional standards.

- A tribunal of the Accountants' Joint Disciplinary Scheme is to consider professional complaints laid against members of the firm of Ernst & Young, the former auditor of Equitable Life's accounts.
- Both of the tribunal cases have been stayed until after the judgment, or sooner settlement, in the civil litigation brought by Equitable Life against the former Directors.
- A petition has been lodged with the European Parliament alleging failure of the Government fully to implement European Insurance directives, in particular in relation to the regulation of Equitable Life.
- Following Lord Penrose's report, the Financial Services Authority made a statement in July 2004. This said that it had completed its "*own detailed work to consider the issues and to reach our own conclusions about potential claims*", and that "*having undertaken our own analysis, the FSA has also concluded that generic claims against Equitable Life regarding its basis for allocating bonuses during the 1990s are unlikely to succeed.*"

### **the legal and statutory background to the jurisdiction of the Financial Ombudsman Service**

13. The statutory objective of the scheme under which the Financial Ombudsman Service is to operate is set out in section 225 of the Financial Services and Markets Act 2000. This says that a scheme is to be established "*under which certain disputes may be resolved quickly and with minimum formality by an independent person*". The following section of the Act describes the compulsory nature of the jurisdiction and allows rules to be made concerning eligibility.
14. Schedule 17 of the Act makes further provision for the scheme and allows the rules to be made which are to set out the procedure for the referral of complaints and for their investigation, consideration and determination by an ombudsman. Paragraph 14(2) of the schedule provides for areas that the scheme rules may cover, and sub paragraph (b) states that they may provide

that a complaint may, in specified circumstances, be dismissed without consideration of its merits. Paragraph 14(3) goes on to flesh out some of the circumstances that may be specified. These are:

- that the ombudsman considers the complaint frivolous or vexatious;
- that legal proceedings have been brought concerning the subject matter of the complaint, and the ombudsman considers that the complaint is best dealt with in those proceedings; *or*
- that the ombudsman is satisfied that there are other compelling reasons why it is inappropriate for the complaint to be dealt with under the ombudsman scheme.

15. The rules that have been made may be accessed via our website in the section “*about us*”, or via the FSA’s website. The rules that concern the dismissal of complaints are set out at DISP 3.3.1. This specifies the grounds on which a complaint may be dismissed by the ombudsman without its merits being considered. These are set out in full in an Appendix at the end of this decision.

16. The main provisions of the Act and the Rules apply to complaints received after the Act’s commencement date (1 December 2001), and relate to events that occur after it. But the Act also made provision for the Treasury to make transitional provisions to allow the Financial Ombudsman Service, after the commencement date, to take over the functions - of and continue the service provided by - a number of predecessor ombudsman organisations. Indeed, the Treasury made a Transitional Order enabling the new organisation to continue to handle complaints that were in train at the commencement date or that were related to events that happened before that date but were received after it. Complaints that relate to events that occurred before the commencement of the Act are referred to in the transitional order as “*relevant*” complaints. The order states that for such complaints “*the Ombudsman, in deciding whether a relevant complaint is to be dismissed without consideration of its merits, is to take into account whether an equivalent complaint would have been so dismissed under the former scheme in question*”.

17. The scheme of the Act and rules brings a very wide range of complaints within the potential remit of the ombudsman's jurisdiction. By comparison, most of the previous schemes had much tighter rules on eligibility. But the scheme then gives wide grounds under which complaints, although technically eligible to be considered, can be dismissed without their merits being determined. Not all disputes, only "*certain disputes*" (in the words of section 225) are to be determined. And the schedule and the rules made under it explicitly envisage grounds for dismissal.
18. There is a wide discretion entrusted to the ombudsman. That discretion should be exercised fairly, both in the procedure to be adopted and in the reasonableness of the decision reached. DISP Rule 3.2.8 provides for the procedure to be adopted before a complaint is dismissed. It states:
- "Where the ombudsman considers that the complaint may be one which should be dismissed without consideration of its merits under DISP 3.3.1 (Dismissal of complaints without consideration of their merits) he must give the complainant an opportunity to make representations before he makes his decision. If he then decides that the complaint should be dismissed, he must give reasons to the complainant for that decision and inform the firm of that decision."*
19. In the case of complaints that relate to events that occurred before 1 December 2001, the ombudsman must also take into account whether an equivalent complaint would have been dismissed under a previous scheme. Being required to take this factor into account is not the same as directing the ombudsman to reach the same outcome. There is a discretion and that must be exercised reasonably.

### **representations received from complainants**

20. It is evident from the replies received that there is a great deal of entirely understandable upset about the situation that has arisen at Equitable Life, together with a sense of grievance and a belief that compensation should be forthcoming. However, there are a variety of views on the reasons why compensation should be paid, and on how much it should be or who should pay it. Indeed, a consensus was hardly to be expected on this, because if we

required Equitable Life to pay compensation to some policyholders, it would be taken from the with-profits fund and so would be to the disadvantage of other policyholders. None of the responses I received from complainants or representative organisations outlined any method of compensation that took that fact into account, or suggested how redress should be calculated. The Financial Ombudsman Service can only consider the cases of those who bring complaints to it, so if we were to form a view that some individuals had withdrawn investments from Equitable Life with more than they ought to have received, we would have no power to “claw back” such overpayments, even if that was a practical proposition.

21. It is important to stress that the Financial Ombudsman Service has the sole function of considering eligible complaints against firms and, if appropriate, of investigating them and, if the complaints are justified, of awarding compensation to be paid by firms. We have no role in considering complaints against regulators or against the Government.
  
22. All the submissions made have been considered. It would be impractical for me to set out every point made, but I will summarise the main thrust of them. The main points raised by complainants were arguments:
  - on the merits of the cases, including in particular an argument that we should uphold the complaints on the grounds that Lord Penrose has found that “*over-bonusing*” took place, and that an analysis that aimed to show that Equitable Life's reduction of policy values on 16 July 2001 was partly caused by “*over-bonusing*” in earlier years;
  - that we should not dismiss the complaints because, in statements made at the time that the Penrose Report was published, the then Financial Secretary to the Treasury pointed complainants in the direction of the Financial Ombudsman Service; also that it would be very difficult for complainants if the only alternative left to them was to take legal action;
  - that investigations or proceedings by the Parliamentary Ombudsman or others might produce evidence to support the complaints.



23. Several submissions put forward arguments on the merits of the cases. I am not reaching any decision on the merits of the cases; rather, I am considering whether it is appropriate to dismiss the cases without doing so. However, I should comment on one view that has been expressed, that we should uphold the complaints and award compensation against Equitable Life without the need for any further investigation, on the ground that Lord Penrose has found that “*over-bonusing*” took place.

In the foreword to his Report, Lord Penrose made it clear that “*this inquiry could not determine legal liability or adjudicate on the discharge of formal responsibilities*”, and in the Postscript to his last chapter, he wrote: “*Many readers of this report will be frustrated that it has not provided answers to two questions: who is at fault for the problems encountered by the Society, and who deserves redress as a consequence? It has been no part of this inquiry to attempt to answer either question*”.

24. In the second paragraph of Chapter 19, in which he summarised his conclusions, Lord Penrose wrote:

“*As throughout this report, I have not qualified my comments by reference to professional standards current at the time events occurred: that is a matter for the courts and professional bodies exercising disciplinary functions. Further, I have the benefit of hindsight, and I have not restricted the comments made to those matters that can be shown to have been within the knowledge or contemplation of individuals or groups at material times*”.

25. We are required under our Rules to “*take into account, regulators' rules and guidance and standards, relevant codes of practice and, where appropriate, what [the Ombudsman] considers to have been good industry practice at the relevant time*”. Therefore, from our standpoint, to speak of “*over-allocation*” or “*over-bonusing*” is not specific enough. If there was such “*over-allocation*” or “*over-bonusing*”, was it due to any failure by Equitable Life to observe the relevant law, regulations *etc*? Or was it because the relevant law, regulations *etc* were not what some might think they should have been? Is it with the benefit of hindsight that Equitable Life may be thought to have allocated bonuses at a higher rate than might have been prudent? Lord Penrose did not

seek to answer these questions, and in order to reach a conclusion of the merits of these complaints a further investigation would be needed. The scope and length of the enquiry might be at least as challenging as that undertaken by Lord Penrose.

### **some relevant factors**

26. I now set out some factors that I have found persuasive in reaching my conclusion. They are not necessarily the same as those advanced by Equitable Life. In particular I do not accept Equitable Life's views that because of the complexity of these cases, or because we cannot compel third parties to give evidence or subject witnesses to cross-examination, the Financial Ombudsman Service is not an appropriate forum for resolving these complaints. We deal with some extremely complex cases and have professionals available to us both on our staff and externally, as required. Most of the evidence in these cases is of a factual nature and is not seriously in dispute. It is possible that we might seek evidence from third parties and be unable to obtain it, but I agree with one complainant who wrote that this is "*speculation as to what might happen during the investigation*".

### **would these complaints have been dismissed by a former scheme?**

27. These complaints are about events that took place before 1 December 2001, when the Financial Ombudsman Service replaced predecessor organisations. In these cases, the former scheme in question was the PIA Ombudsman Bureau, the rules of which included the following:

*"The Ombudsman shall have no power to investigate or consider a complaint if the complaint is in respect of a life policy investment, to the extent that it concerns those actuarial standards, tables and principles which the firm may apply to any such policy including in particular (but without being limited to) the method of calculation of surrender values and paid up policy values and bonus system and bonus rates applicable to the policy in question (provided that this shall not preclude the Ombudsman from considering any complaint to the extent that it concerns the application of the PIA Rules, or, if relevant,*

*the rules of any other recognised body or organisation or of the Securities and Investments Board and/or the Financial Services Authority’.*

28. It is evident that Equitable Life’s annual decisions on the level of allocation of with-profits bonuses are central to the complaints. The PIA Ombudsman would therefore probably have dismissed such complaints without considering their merits, at least in respect of pension or annuity policies, which implicitly include a life assurance element. I need to bear this in mind in considering whether or not the Financial Ombudsman Service should investigate these matters.

**other proceedings under way**

29. It is now clear that many of the facts and issues at the heart of these complaints – whether the conduct of Equitable Life, through its directors and officers, was culpable and did in fact cause the losses now claimed – will be tested in at least some of the legal and other proceedings that are under way. Although Clarke Willmott proceedings raise the issue fairly directly. The legal and disciplinary cases against the former directors will inevitably involve these issues. The disciplinary case against the auditors may cast considerable light on them. The Parliamentary Ombudsman’s enquiry will consider whether the regulatory oversight was sufficient in the light of alleged shortcomings in conduct by Equitable Life.

30. One of the specific grounds on which I may dismiss complaints without considering their merits (DISP 3.3.1.(9)) is if I am satisfied that the subject matter of the complaint is the subject of court proceedings. Although these particular complaints are not the subject of court proceedings, they do raise the same issues as some current court proceedings and other investigatory and disciplinary processes. It appears to me that the findings of those processes would have a direct bearing on any consideration of the merits in these disputes.

### **a potential stalemate**

31. It is the FSA's role to regulate financial firms. The role of the Financial Ombudsman Service, as adjudicator of individual consumer complaints, is not that of setting regulatory standards. However, the Financial Ombudsman Service might make a decision in a case (or a series of cases) that firms consider will have wider implications – overlapping with the FSA's regulatory powers – because the Financial Ombudsman Service is likely to adopt the same approach in other similar cases. Such decisions could have implications for a large number of consumers or for the commercial practices of firms.
  
32. Where a case with wider implications is referred to the Financial Ombudsman Service, then once the factors that give the case wider implications have become apparent, the Financial Ombudsman Service can raise the case with FSA, in line with the Memorandum of Understanding between us. The Financial Ombudsman Service and FSA have made it clear that, in the interests of consistency and to help avoid confusion, they will continue to work together so that the industry has clear and consistent guidance. In this way the FSA meets its statutory obligation to ensure appropriate consumer protection, and provides an overall structure within which the Ombudsman can operate specific powers to adjudicate on unresolved disputes between consumers and firms.
  
33. I have therefore considered how these matters might be progressed if I determined that I should consider the merits and, having done so, found these complaints to be justified. Clearly, in such circumstances a critical question would be what redress would be relevant. In effect, any award of compensation to those who had complained would have to be found out of the with-profits fund that is the sole source of funds for Equitable Life members. Some major scheme of re-arrangement of fund values would be necessary. To the extent that the fund values of other members would be reduced, these other members would feel aggrieved and I might be required to consider their complaints. But more crucially, implementing any such scheme of rearrangement would inevitably have to be subject to the supervision of the FSA, both to oversee the continuing solvency of the society and to ensure the fair treatment of all the affected members.

34. Under the Memorandum of Understanding, we would refer the regulatory issues to the FSA. And I am confronted by the fact that the FSA has already investigated the very issues that are the subject matter of these complaints and has reached its conclusions. The FSA's Chairman wrote to the Parliamentary Ombudsman on 7 July 2004:

*"We also think that there is real doubt about whether any loss can in fact be attributed to the regulatory system. On Lord Penrose's view, many policyholders were in fact paid out more than their asset share. While others will get less than they had come to expect, it is very unclear, even after considerable analysis by legal and actuarial experts, that this can be shown to result from any culpable conduct by the company itself. Still less is there any clear link with the regulatory system in allowing such conduct to take place. We think it much more likely that losses were in fact caused by a combination of a full distribution policy, about which the company made no secret, and very substantial falls in the equity market which as a result of this policy the company had no cushion to absorb. I should make it absolutely clear that I am not trying to defend the regulatory system we inherited. We have made the case for change and are well on our way to completing a fundamental programme of reform. What we are questioning is the causative link between the way the old system operated and any losses that policy holders may have suffered".*

35. The FSA's conclusions constitute a fact I cannot ignore. It clearly took both legal and actuarial advice. But it is irrelevant to me how it reached these conclusions. Recently, the FSA responded under the Freedom of Information Act to someone who requested further information about this and it gave me a copy of the information it supplied. This shows that it convened an expert team including a number of internal and external experts. The external experts included Anthony Trace QC, Rebecca Stubbs of Maitland Chambers and the actuarial firm of Mercer Oliver Wyman. I have no more knowledge than is publicly available about the work that the FSA has done, nor have I sought it.

36. It is a simple fact that even if the merits of these complaints were to be upheld, any practical implementation of a scheme of redress would require the regulator's supervision and cooperation, and it has made it clear that it does not believe that any such scheme is justified. I should make it clear that I have no criticism to make of the fact that the FSA has reached a conclusion on these issues. It has its own objectives and priorities and it might well have been justifiably criticised if it had failed to reach a view on whether claims against Equitable were likely to be of a kind that would destabilise the society.
37. I have indicated that if, after investigation, I found the merits of these complaints to be justified, this would result in something of a stalemate. It is highly unlikely that, if any aspect of the award disadvantaged existing policyholders (which would be almost inevitable), Equitable would simply comply with it without seeking directions from the regulator; it might also seek judicial review of my decision. My powers, extensive though they can be, do not bind the regulator. Only decisions of the courts (or of the Financial Services and Markets Tribunal) can do that. My powers would be confined to giving a remedy to the 50 individuals who have complained. I cannot direct a more general reconstruction of bonus allocations, and the regulator might prohibit Equitable from engaging in such a scheme even if it were minded to attempt one.
38. I have referred to the statutory objective of our scheme – that of enabling disputes between consumers and firms to be resolved quickly and with minimum formality. I cannot see that the use of our powers to investigate these complaints would result in a resolution of the disputes; it is doubtful whether the disputes could be concluded at all quickly and with little formality through the ombudsman scheme.
39. One of the specific grounds on which I may dismiss a complaint without considering its merits (DISP 3.3.1(10)) is if I am satisfied that it would be better dealt with by a court.

### **wider implications of the cases**

40. I take into account that the powers entrusted to the ombudsman under the Act are considerable. If complaints are upheld, an ombudsman can make money awards to compensate for financial or other loss up to £100,000 payable by the firm; alternatively, I have the power to make directions that a firm shall take such steps in relation to the complainants as I consider to be just and appropriate (whether or not a court could order those steps to be taken). A firm in respect of which orders or directions are made has no right of appeal, although we are amenable to judicial review if we have exceeded our powers. Nonetheless these powers should be exercised with a due sense of care and responsibility.

41. There are over a million individuals who have investments in, or are drawing pensions from, Equitable Life. Fifty individuals have lodged complaints. My assessment is that our intervention in this arena would add to rather than subtract from the turbulence affecting this aspect of the affairs of the Society and its members. In the particular circumstances of these cases, this reinforces my view that this matter is not an appropriate one for the Financial Ombudsman Service to consider.

### **statements by the Treasury minister**

42. Some respondents have written that I should not dismiss the complaints because the then Financial Secretary to the Treasury said in a statement to the House of Commons on 8 March 2004:

*“This Government has also provided for a single Financial Services Ombudsman to consider individual complaints. I understand that he is currently considering the cases of a number of different categories of former policyholder who have made claims for redress, for which the Society has already made provisions.*

*I want to make it clear to the House that we stand ready, if requested, to assist the Financial Ombudsman in expediting the resolution of these complaints”.*

43. On 16 March 2004, the then Financial Secretary to the Treasury said in evidence to The Treasury Select Committee: *“We have set up a system...for resolving the sort of disputes that may arise in that case, the Financial Ombudsman Service, which people if they feel that have a claim arising from the report are very welcome to pursue.”*
44. In these statements, the then Financial Secretary made no commitment that the Financial Ombudsman Service would, in fact, investigate these complaints. She was careful not to do so. And insofar as I have a decision of a quasi-judicial nature to make, I must make that decision independently of ministers. The passage of time since March 2004 has clarified the position and has exposed the number of other investigations and proceedings that are now under way, have since started or have been concluded. No doubt at that time there was concern, in the wake of the Penrose report, that many thousands of individuals might have launched claims or sets of legal proceedings. It was right for the Financial Secretary to explain the potential role of the ombudsman.
45. In the event, the passage of time has enabled the picture to become clearer. As is right, complaints were made in the first instance to Equitable Life which considered them and, as it is obliged to do, responded to them. Only fifty individuals have referred their complaints to me. The situation today is very different from that which presented itself in the days that followed the publication of Lord Penrose’s report.

**other points**

46. Set against these points, I do recognise that a decision to decline to reach a formal conclusion on the merits of these disputes has the effect of excluding the customers concerned from an important potential avenue of redress. However, for the reasons I have explained, I do not believe that in practice in this case it would be possible to reach an informal and prompt conclusion, and certainly not one which delivered to these complainants the redress to which they feel entitled. My general approach in making decisions on a firm’s



request to dismiss a complaint without considering its merits is to give significant weight to the benefit of access to this dispute resolution mechanism. However, in the present case, as this access is unlikely to provide little practical benefit, I consider I can give this little weight.

47. I also note that my conclusion does not affect any legal rights that complainants may have to take legal action if they wish. The Financial Ombudsman Service cannot give legal advice about how a court may handle a case or about any court requirements - for example, on time limits - that may need to be complied with. I would point out that under the terms of the FSA waiver that lasted from 10 May to 30 September 2004, Equitable Life gave a written undertaking that, for the purpose of the Limitation Act 1980, it would not count any period within which an eligible complainant's case had been subject to that waiver.

## **decision**

48. I have concluded that, in accordance with the rules governing the Financial Ombudsman Service, I should exercise the discretion available to me to decline to further investigate these complaints and accordingly to decline to reach a conclusion on the merits of the disputes.

49. I have reached this conclusion, having taken full account of the views of both Equitable Life and the complainants, for the following reasons.

- a) It seems probable that the PIA Ombudsman would have dismissed equivalent complaints.
- b) I am satisfied that there are court proceedings, disciplinary proceedings and other enquiries and investigations under way regarding some aspects of the subject matter of these complaints.

- c) Even if no current court proceedings determine the subject matter conclusively, I am satisfied that it would be more suitable for these complaints to be dealt with by a court.
- d) Were I to proceed to investigate the matter and to determine the complaints in favour of the complainants, it seems likely - for the reasons given above - that my decision would result in a stalemate, given the earlier substantive conclusions of the regulator on these matters.
- e) The wide implications in any investigation that potentially affects up to a million people, contrasted with the relatively small number who have complained.

50. Some of these factors – in isolation – would in my view be sufficient to warrant a decision to decline to consider these complaints further. I am struck, however, by the unique combination of circumstances here and am satisfied that all these circumstances, taken together, constitute compelling reasons why I should dismiss these complaints without determining their merits.

### **observations**

51. I emphasise that I have reached no conclusion as to whether these complaints are justified. Indeed in considering the arguments for and against investigating them, and in order to test whether any injustice might be done if they were not investigated, I have had to make the assumption that they might be justified. Even on that basis, I have concluded that I would be doing no injustice in declining to make available our services for the pursuit of this claim, since this would not result in a worthwhile resolution. If, of course, one makes the opposite assumption, namely that the complaints have no justification, then in dismissing them now I am not unfairly depriving the complainants of a remedy, since they would never have succeeded.

## **next steps**

52. We are therefore now writing to the affected complainants. Where the complaint made to the Financial Ombudsman Service is solely “Penrose-related” - one of the kind that I have considered in this decision - we will close our file on the complaint and inform Equitable Life that we are doing so. Where the complaint is only partly “Penrose-related”, we will continue to investigate those parts of the complaint that are not “Penrose-related”.

**Walter Merricks**  
**chief ombudsman**

## APPENDIX

### DISP 3.3.1

The ombudsman may dismiss a complaint without considering its merits if he:

- (1) is satisfied that the complainant has not suffered, or is unlikely to suffer, financial loss, material distress or material inconvenience; *or*
- (2) considers the complaint to be frivolous or vexatious; *or*
- (3) considers that the complaint clearly does not have any reasonable prospect of success; *or*
- (4) is satisfied that the firm has already made an offer of compensation which is fair and reasonable in relation to the circumstances alleged by the complainant and which is still open for acceptance; *or*
- (5) is satisfied that the complaint relates to a transaction which the firm in question has reviewed in accordance with the regulatory standards for the review of such transactions prevailing at the time of the review, or in accordance with the terms of a scheme order under section 404 of the Act (Schemes for reviewing past business), including, if appropriate, making an offer of redress to the complainant, unless he is of the opinion that the standards or terms of the scheme order did not address the particular circumstances of the case; *or*
- (6) is satisfied that the matter has previously been considered or excluded under the Financial Ombudsman Service, or a former scheme (unless material new evidence likely to affect the outcome has subsequently become available); *or*

- (7) is satisfied that the matter has been dealt with, or is being dealt with, by a comparable independent complaints scheme or dispute resolution process; *or*
- (8) is satisfied that the subject matter of the complaint has been the subject of court proceedings where there has been a decision on the merits; *or*
- (9) is satisfied that the subject matter of the complaint is the subject of current court proceedings unless proceedings are stayed or sisted (by agreement of all parties or order of the court) in order that the matter may be considered under the Financial Ombudsman Service; *or*
- (10) considers that it would be more suitable for the matter to be dealt with by a court, arbitration or another complaints scheme; *or*
- (11) is satisfied that it is a complaint about the legitimate exercise of a firm's commercial judgment; *or*
- (12) is satisfied that it is a complaint about employment matters from an employee or employees of a firm; *or*
- (13) is satisfied that it is a complaint about investment performance; *or*
- (14) is satisfied that it is a complaint about a firm's decision when exercising a discretion under a will or private trust; *or*
- (15) is satisfied that it is a complaint about a firm's failure to consult beneficiaries before exercising a discretion under a will or private trust, where there is no legal obligation to consult; *or*
- (16) is satisfied that a complaint which involves or might involve more than one eligible complainant has been referred without the consent

of the other complainant or complainants and the Ombudsman considers that it would be inappropriate to deal with the complaint without that consent; *or*

- (17) is satisfied that there are other compelling reasons why it is inappropriate for the complaint to be dealt with under the Financial Ombudsman Service.