

2002 FOLIO NO 339 & 406

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

THE EQUITABLE LIFE ASSURANCE SOCIETY

-AND-

PETER MARTIN

5TH DEFENDANT
IN PERSON

OPENING STATEMENT

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If Mr Justice Langley reads nothing else I ask him please to read E and J which will form, for the avoidance of repetition, the basis of my oral opening.

A - METHOD

1. The Society's opening statement served on 12th March 2005 (hereafter "SOS") provides a helpful framework for my own.
2. I will, after a number of introductory paragraphs set out below, comment on discrete paragraphs of the SOS by citing them as "*SOS para.xx*" in bold italics after citing the relevant SOS sub-heading thus "*The business of the Society*" also in bold italics.
3. This is intended to provide an orderly summary of my approach to the material, to the extent that it is different from the Allen & Overy ("A+O") approach, and¹ which I hope the judge will be able to read in advance.
4. However, the Milligan QC letter to the judge of 11th March appears to be an attempt to set the agenda for the judge's reading in quite a significant way; I have no idea of the forensic propriety of this letter, given I have no High Court/Commercial Court advocacy experience, but this letter coupled with the further Milligan QC letter of 17th March has left me with a sense of disquiet since they both appear to me to go far beyond ACCG J5.1. I should have expected, to meet the "*approved by all advocates point*" in J5.1, that a draft letter or letters should have been circulated before submission to the judge. If I am wrong, no doubt I will be

¹ As to which please see heading D below.

corrected. At the very least, it is to be hoped the judge will also read in advance of trial, as a necessary antidote to the SOS, the A+O opening submissions.

5. Silence by me on any specific issue is not to be taken, obviously, as acquiescence in the Society's arguments – as I point out below, I adopt the broad terms of the opening submission of the A+O6 and of Mr Sclater in particular on matters of detail and for the sake of brevity.
6. Furthermore, close study of the SOS reveals that its succinctness covers a multitude of inaccuracies, distortions, exaggerations, assumptions, and divergences from the Society's pleaded case most of which are explored by A+O and all of which will require to be tested by cross examination – see for a non-exclusive example, SOS para 385 which is neither a fair nor an accurate summary of the preceding paragraphs. There is lots of this, as Mr Headdon will also show.
7. I refer to the Claimant as either “Equitable” or as “the Society” depending on the context from which the reference is first drawn.
8. Cases, after initial citation in full, will be cited simply as ***Hyman, Bratton***, etc, in bold italics. The Warren opinion of 10th May 2001 will be cited simply as “Warren”. Quotations in italics only.
9. My understanding of the notion of a skeleton or opening statement as set out in Appendix 9 2(c) of the ACCG is that it should “*avoid arguing the case at length*” and therefore be relatively brief and succinct – I therefore set a limit by self denying ordinance of not more than 30 pages in this non-exhaustive response to the SOS in an attempt to put my case “*concisely*”. To have been exhaustive would have been to argue the whole case on papers contrary to the sense of the SJ judgment of 17th October 2003 and the ACCG².
10. Much of this summary will therefore have to be fleshed out orally, but as succinctly as possible, in my opening which I ask the court to accept will not be unnecessarily contentious.

B - INTRODUCTION

1. The starting point of this opening statement must inevitably be the “overall conclusion” reached by Langley J in his 17th October 2003 judgment³ on my summary judgment application.
2. “***Equitable's claims against the non-executive directors are not ones of which it can be said that they have no real prospect of***

² Which is that the viva voce evidence needs to be heard and tested.

³ O-113

succeeding. I should stress that this conclusion does not mean that I think Equitable’s case is right or even probably right. I am not required on these applications to address those questions and I have not done so.”

3. My clear understanding of the judgment as a whole was that the judge would be required to read the documents, hear the evidence, and test the arguments before he could reach a final conclusion, and further, that his mind was in no sense made up either as to the rightness or even the probability of the rightness of Equitable’s claim.
4. At that time, Equitable advanced two causes of action: negligence and breach of fiduciary duty, the allegations of negligence being essentially two:-
5. The first was that in 1996, 1997, and 1998 I failed to take legal advice as to the validity of the DTBP before awarding differential terminal bonuses in February of each of those years and
6. The second was that in 1999 and 2000, after the problem was known and legal advice had been sought and given, failing to reduce bonuses and to ensure that prospective policyholders were fully aware of the potential costs to Equitable in respect of GAOs should the *Hyman* litigation be lost.
7. In paragraphs 21 et seq. of the judgment the judge summarised the causation case.
8. It is further to be noted that in paragraph 34 of his judgment the judge pointed out he had no evidence of my assets by reference to which he could have considered my disproportion arguments – that evidence was given in summary form in my WS⁴ and has since been ignored, as, apparently, has the clear invitation by the judge to the Society and its members to reconsider this litigation.
9. What I will say now, and what all the evidence and the case law supports, is that this case is now more about the reliability, nature, completeness, expression, and quality of legal advice than any thing else. As Baroness Hale said in *Moy v Pettman Smith (a firm) [2005] UKHL 7*, a significant and very new decision on advocates’ negligence, “*But there is still a respectable body of professional opinion that the client pays for the advocate’s opinions, not her doubts*”⁵.
10. I will revert to *Moy* and explain the significance of *Bratton* later in this submission. It is my defence that I relied on the opinions of our *Hyman* solicitors and counsel, not their doubts and that the

⁴ W3-2.1

⁵ Para 29, penultimate line.

chain of causation of both alleged negligence and breach of fiduciary duty was broken by the astonishing negligence with which *Hyman* turns out now to have been litigated, as to which see E below.

C - WHY WE ARE WHERE WE ARE

1. Nineteen months later we face an 8 months trial, with E+Y, of these and of related issues. More than 165 files of trial bundles have so far been delivered to the court and with more to come yet.⁶ In excess of £90,000,000 has been committed to the costs of the litigation⁷, excluding Court Service and judicial costs. Two of the former directors are LIPs, 9 are on CFAs, the remainder, save one, are marginally represented as the inter-partes correspondence shows. One former director only is conventionally represented.
2. Shorn of all rhetoric, the challenges facing me now are unchanged: did I fail to recognise the alleged dangers of the DTBP and did I then, having recognised them, fail to take any or any adequate prophylactic steps.
3. I DENY BOTH CHARGES.
4. My defence is, and has unchangingly been since first challenged by the Treasury Committee in early 2001⁸ and later by the Society in December 2001 in its robustly answered letter before action, that when first advanced the DTBP had no or no obvious or apparent dangers, given the plain contractual language of the articles and relevant pensions contracts, and that later, advice having been sought and taken, the risk of the DTBP being found unlawful was not such as to require me (as a member of the board) to insist on any or any radical change of commercial or policyholder relations course by the Society.
5. The decision by the House of Lords to refine a non-existent contractual right to final bonus into PRE by judicial invention and then to remove the right of the directors to award bonus at discretion by the implication of a term into the articles on an unexplained test of strict necessity was at the very least unexpected and at best astonishing!
6. Despite all, this, my defence and the defences of other former directors, witness statements served in these proceedings, and

⁶ HS/Peter Lane letters of 11th and 21st March 2005

⁷ PM/CPH supplementary skeleton of 4th March 2005

⁸ R2-94

relevant expert evidence have all been ritually dismissed by the Claimant and its advisers in favour of this trial.

7. The reasons for that dismissal have not been made out in any or any convincing way in the SOS.

D - MY APPROACH TO THIS TRIAL

1. Allen & Overy (“A+O”) and their six clients have very generously allowed me to see in late draft, comment upon, and adopt as if my own, their opening submissions.
2. As my defence is very substantially the same as that of the A+O client group of former directors with whom I served contemporaneously (and known colloquially as the “A+O 6”) I adopt for the sake of brevity and the avoidance of wasteful duplication of facts and arguments and the material diversion of scarce resources the A+O 6 opening submissions in full and without qualification⁹.
3. I have also had an opportunity of reading critically a very late draft of the opening submissions of Miss Page; with her generous consent and that of her solicitors Simmons + Simmons I would like, for the further avoidance of wasteful duplication of effort and the material diversion of scarce resources, to adopt for myself her very fully researched analysis of events, advice, and evidence, both factual and expert, and the legal conclusions to be drawn from them in additional support of the analysis and conclusions of the A+O6 I have earlier notified in paragraphs 1 and 2 above.
4. In particular, but without prejudice to the generality of all that support, I also adopt the expert evidence of John Franklin¹⁰ in the retainer of whom I participated.
5. That position of support for the A+O clients and Miss Page was the position I took at the summary judgment hearing, and have taken since in all our contacts, and I see no helpful purpose in adopting a different position here. There seems no constructive benefit to the court in repetition for the sake only of making identical but individual points.

⁹ I have checked each and every reference specifically to me and/or documentation initiated or responded to by me in the opening submissions and adopt all of them as accurate or, where made by way of comment, reasonable. I add that it is wholly beyond the resources of an LIP such as I am, without the bundles save for a defective electronic version of C11, to produce detailed documentation of this quality. I have largely worked from pre-existing and SJ documentation.

¹⁰ E3-1.1 and amendments.

6. If there are any differences they must be in the viva voce evidence I am to give when cross examined, as to which I can obviously say nothing now.
7. It is now well past time for this trial and for oral evidence and argument and I welcome the opportunity this gives me to make good my defence in open court.
8. However, the completeness of the written record, must be recognised to be a unique feature of this case insofar as the defence is concerned.
9. Finally, as the judge noted in paragraph 85 of his judgment, granted that the claims in negligence are to be the subject of a full trial, it is neither necessary nor desirable for the questions to which s 727 of the CA 1985 directs the court's attention to be addressed individually by me in this skeleton at this stage and I do not now seek to do so. I adopt nevertheless the general A+O arguments.

E - HYMAN, THE HOUSE OF LORDS, AND PENROSE

1. According to the report of the public inquiry by Lord Penrose (a Scottish judge), the decision of the House of Lords in *Equitable Life v Hyman [2002] 1 AC 408, (Hyman)* while it did not cause the crisis in the Society's affairs, precipitated that crisis.
2. As such, the decision provides an essential ingredient in any public assessment of the Society's actions towards its policyholders.
3. There is undoubtedly a corpus of respectable legal and other opinion to the effect that the decision of the HL was "wrong" in the sense that it ought not to have been reached¹¹. Yet, Lord Penrose declined to review the HL decision "as many of those who have approached the inquiry have sought to persuade me to do". Lord Penrose further stated that the decision was "final on the issues that were referred to the Appellate Committee for judgment. That is the nature of our civil justice system and those affected by the system must accept it." See Penrose para 117, p 38, Part 1, Chap 1.

¹¹ Warren at para 7. "We are acutely aware that there is a large body of opinion which considers that the House of Lords' decision is one which it should not have reached or, at least, that the reasoning leading to that decision was at best opaque." Further described personally to this LIP by Sir Philip Otton, (then still a Lord Justice of Appeal but later in retirement chairman of the Society's legal audit committee and a vp), as "a shabby little decision"; Lunch at Knighton Cottage 07/01/01 Martins/Ottons/other guests and described as "Reckless and irresponsible" by Professor Sir Roy Goode; Telecon Goode/Martin 16/12/2000. Also, see Cindy Leslie at C48.159-165 "many lawyers had been surprised by the judgment and that many considered the House of Lords had effectively made new law in that judgment."

4. Lord Penrose implies that constitutionally any review of a final decision of a court of final appeal would be impermissible. Yet there has recently been uncovered a judicial authority directly relevant to the “rightness” of the decision in *Hyman*. A legal commentator in the September 2002 issue of the Journal of Business Law has written that it is difficult to reconcile the lead judgment of Lord Steyn with a decision of the Court of Appeal in *Bratton Seymour v Oxborough* [1992] B.C.L.C. 693¹², a decision not cited in *Hyman* at ANY stage and to which Lord Steyn (as a Lord Justice) was a party. In a key passage in *Bratton* Steyn LJ (as he then was) found as follows:
 5. “.... *The question is whether the implied term of requiring members to contribute to maintenance of the amenities can be implied not on the basis of any language to be found in the articles, but on the basis of extrinsic circumstances. The question is, is it ever possible to imply a term in such circumstances? I will readily accept that the law should not adopt a black-letter approach. It is possible to imply a term purely from the language of the document itself; a purely constructional approach is not precluded. But it is quite another matter to imply a term into articles of association from extrinsic circumstances.*
 6. *Here, the company puts forward an implication to be derived not from the language in the articles of association but purely from extrinsic circumstances. That, in my judgment, is a type of implication which, as a matter of law, can never succeed in the case of articles of association. After all, if it were permitted, it would involve the position that different implications would notionally be possible between the company and different subscribers. Just as the company or individual members cannot seek to defeat the statutory contract by reason of special circumstances such as misrepresentation, mistake... and is furthermore not permitted to seek a rectification, neither the company nor any member can seek to add or to subtract from the terms of the articles by way of implying a term derived from extrinsic surrounding circumstances. If it were permitted in this case, it would equally be permissible over the spectrum of company law cases.*

¹² B.C.L.C. = Butterworths Company Law Cases, available online since 1999 and always on paper– not some obscure series but one well known to solicitors and counsel researching the law relating to the construction of company articles when a complete understanding of that constantly developing law was critical to the defence of the Society’s *Hyman* interests! *Bratton* is also reported at [1992] EGCS 28, The Times, [1992] 2 March, and cited in the implication of terms context in Palmer’s Company Law @ para 2.1108, and Gore-Browne on Companies @ para 6(32) and @ para 43(18) – the latter Gore-Browne citation appears to approve *Bratton* and to deplore *Hyman*. There are several other journal notes. All case citations found in Current Law.*Bratton* cited as[1992] CL 374 and annotated in the print version “*The surrounding circumstances of a company could not be used to imply terms into the articles of association.*” In the online version Reference 92/374 annotated “*Held, that the fact that O was a member of BSS could not be used to imply a term into the articles of association obliging him to make a reasonable contribution towards maintenance of the utility and amenity areas of Bratton House development.*” NB It is unusual for print and online versions of CL annotations to vary but this is a case where they do, but without material difference.

7. The commentator concluded that the HL could properly have reached its decision in *Hyman* “*only by examining... and giving a reasoned decision*” overruling or distinguishing the *Bratton* case. No such exercise was undertaken. No official review has been conducted. Warren appeared uncritically to support it. It is submitted that, leaving aside that *Bratton* was a “*company law*” case, seeking to distinguish it would have been a difficult exercise since, on a simple reading, it matches the issues faced by the HL in *Hyman* to perfection. There has been no discussion of the so-called “*test of strict necessity*” of which no warning or even mention of its existence was ever given to the Society by any of its advisers¹³.
8. While an unappealed and unappealable decision of a court of law is necessarily final, no judicial decision is entirely unreviewable, either exceptionally by the court itself or by a properly constituted public inquiry¹⁴. Within the principle of the inherent jurisdiction of a court to control its own practice and procedure, a court may re-open a case which it has finally determined.
9. An instance of this occurred in *R v Secretary of State for the Home Department, ex parte Khera and Khawaja* [1983] 2 WLR 321 where the Appeal Committee rescinded its earlier order refusing an aspiring appellant leave to appeal to the House of Lords¹⁵.
10. It is still potentially open to an unsuccessful appellant or respondent in even *Hyman* to re-petition the House of Lords to re-hear an appeal. The grant of it would, I accept, be wholly exceptional. A palpable error of law might suffice, as it does in the criminal jurisdiction under the Criminal Cases Review Commission as to which see Criminal Appeal Act 1995. Since the Lord Chancellor’s Statement to the House of Lords of 26th July 1966¹⁶, the House of Lords may reverse its earlier decision, and has

¹³ A full search of all disclosed legal advice to the Society has revealed no mention of the words “*implication*” or “*strict necessity*” save in Warren.

¹⁴ *A court which is final and unreviewable needs more careful scrutiny than any other. Unreviewable power is the most likely to indulge itself and the least likely to engage in dispassionate self-analysis...In a country like ours (the USA) no public institution, or the people who operate it, can be above public review.* Warren Burger, Circuit Court of Appeals judge to Ohio Judicial Conference on 4th September 1968 – nine months before becoming CJ of the US Supreme Court.

¹⁵ From reported historical background - “*On May 6th 1982 the Appeal Committee of the House of Lords (Lord Fraser of Tullybelton, Lord Roskill, and Lord Brandon) dismissed the appellants’ petition for leave to appeal. On July 19th 1982 the same Appeal Committee allowed the appellant to re-petition and granted him leave to appeal.* See also speech of Lord Fraser in which the unusual history of the application of *Khera* is described.

¹⁶ Statements to the House – Judicial Precedent; Die Martis 26 July 1966 – by the Lord Chancellor (Lord Gardiner) cited in full between 4A-90 and 4A-91 [2004] Civil Procedure vol 2. Also at 4B-81 and [1966] 1 WLR 1234

- occasionally done so. It did so in the *Khera/Khawaja* case, two years after a contrary ruling.
11. On the assumption that there was no likely prospect of a renewed hearing before the House of Lords, the alternative for the Society would have been to seek review of *Hyman* in the form of a public inquiry. There is nothing constitutionally nor in the Tribunals of Inquiry (Evidence) Act 1921 to prevent a Minister of the Crown to seek a review of a court decision by way of a public inquiry.
 12. And it is interesting to observe that in Clause 2 of the Inquiries Bill (HL) now before Parliament, inquiries under the prospective law will be statutorily debarred from identifying or assigning any liability, civil or criminal, to any person interested in the topic under investigation by the public inquiry. It will not preclude a public inquiry into the reliability of a court decision.
 13. The absence of a review by Lord Penrose should not be taken by the court as an automatic acceptance of the decision in *Hyman*¹⁷.
 14. This, in turn, must give rise to serious questions about the s 425 scheme. In particular, taken as a whole, whether it would have been necessary or desirable if the HL had successfully been petitioned on the basis of a fully informed Warren¹⁸.
 15. Finally, in this context, :-
 - a. It is to be noted that the JBL article identifying the *Bratton* case very obviously postdated the Warren opinion of 10th May 2001¹⁹ which clearly persuaded the Society and its

¹⁷ Much, but not all, of Penrose may charitably be characterised as the advancement of this litigation by other means.

¹⁸ See generally, CS8.1-186, the s 425 scheme document. However it is also noteworthy that none of the broad mass of CS documentation refers to any possibility that *Bratton* might affect the scheme as a whole given that its basis was the immutability of the decision in *Hyman*, accepted unquestioningly by all save the disadvantaged non-GAR policyholders who continued and continue to be militant. See also Warren M1-1.1-82 at page 60, para 101 and Vanni Treves's letter to policyholders of 18th September 2001 @5.92 130 all of which make directly or indirectly the assumption that nothing can be done to re-open the *Hyman* litigation, thus making the s 425 scheme necessary, not to say inevitable. See passage in Treves's letter headed "*Why do we need a compromise*" with the rhetorical answer "*On top of this, we now have legal advice from Nicholas Warren QC which indicates that non-GAR policyholders may have claims against the Society because they were not warned of the extra costs of GARs when they bought their policies*". This begs the big question whether this would have been so if the HL decision had successfully been reviewed. I will submit that the s 425 scheme was a false prospectus and should not have been approved by the court.

¹⁹ M1-1.1-82. An extract from para 2 encapsulates its purpose, namely, "*It is accepted that the purpose of our instructions is really to see if there is any way in which the consequences of the House of Lords' decision (in Hyman, obviously) can be ameliorated from the point of view of those who are adversely affected by it and that we should, in doing so, not be constrained by the narrow scope of the questions expressly asked*". It is particularly to be deplored that in an opinion of more than 80 pages, said to be for the very purpose of helping the disadvantaged non-GARs, Warren QC and Lowe did not identify *Bratton* as an authority going to the very heart of their expressed instructions. There is a lengthy exegesis at Addendum 1 with a full explanation of the implication issue at para 2 on page 65. No

advisers that nothing could be done about the HL decision, notwithstanding the complaints of the non-GAR policyholders represented by EMAG, this provoking these proceedings. But that hardly explains why Nicholas Warren QC and Thomas Lowe failed to have spotted *Bratton*, decided as it was in 1992, while undertaking their review of *Hyman* for the express purpose of seeing what might be done for the non-GAR policyholders. What happened? And, why was the matter not re-opened by the Society in August 2003 when the JBL article appeared and was drawn to the attention of the Society – was it because of the s 425 scheme? That, too, now requires close examination in all its public and forensic aspects.

- b. I submit that the court and all the parties, let alone policyholders, need to know what happened or could have happened.
- c. **At the very least, the failure to uncover the *Bratton* decision was due to an oversight, incompetence, or even dereliction of the duty of care to the Society, its members, and the court.**
- d. **This failure had, among other things, the unexpected effect of allowing the approval of the Society’s s 425 scheme in February 2002²⁰.**
- e. **And all this irrespective of whether such failure may constitute the tortious wrong of professional negligence in respect of which I**

reference of any kind is made to *Bratton*. Further, is it too Machiavellian to argue that the earlier discovery of *Bratton* by Dentons and counsel would have struck at the very heart of the need for a s 425 scheme by opening up again the possibility of a petition to the Lords, at least as a necessary preliminary if it had failed. As to all of which see all documents under general heading CS. As previously stated *Bratton* is nowhere mentioned.

²⁰ Given the palpable sufferings of the non-GAR policyholders as a result of *Hyman*, the Society’s professional advisers owed the highest duty of care to them in particular - in this they singularly failed. Furthermore, and even more importantly, I go so far as to say that Lloyd J wholly, if understandably, misdirected himself in the s 425 compromise approval proceedings since he, too, appeared to conclude on the basis of the inadequate Warren opinion that *Hyman* was immutable; see report of *Equitable Life* compromise approval proceedings, [2002] EWHC 140(Ch) at paragraphs 18, 19, 74, and 79. In the circumstances which now exist, should not the whole matter be referred back to Mr Justice Lloyd by Mr Justice Langley? The fact that re-petitioning the House of Lords might have led to “*further, possibly lengthy, litigation*” is as nothing compared with the length and cost of this litigation.

- am not at present in a position to claim any legal remedy.**
- f. **I shall seek to persuade the court, therefore, that all this creates a huge doubt about the whole of the Society’s pleaded and unpleaded case by demonstrating that it is built on a wholly false premise and that approval of the s 425 scheme might not have been granted had, as now appears, there been a chance successfully to re-petition the House of Lords re *Hyman*²¹. Or, that even if a review did not result in a complete reversal of *Hyman*, a review by the House of Lords might, in turn, have resulted in some different s.425 scheme.**
- g. **None of this is any more fanciful or unrealistic than the house of cards of test cases, opportunities for sale, bonus reductions, and assorted and inventive prejudice of all kinds, the Society has laboured to erect and which the A+O 6, Headdon, Page, and E+Y submissions²² so effectively and so comprehensively destroy.**
- h. No mention is made in any of Dentons or counsels’ papers of the *Bratton* decision. Had it been drawn to the attention of the Society’s board, and explained, it would surely have strengthened this defendant’s belief that neither interpretation nor conventional implication tools could reasonably have been used to arrive at the decision in *Hyman* as it was decided – on implication of a term, as

²¹ While the practical nature of the observations of Lloyd J about the cost and uncertainty of going back to the House of Lords cannot reasonably be criticised, the chances of success would have been pro tanto greater if Warren had been aware of *Bratton* and *Khera/Khawaja*. Mr Justice Lloyd made his assumption on the basis of an attempt to go back to the Lords in the face of Warren as published – as to which see para 18 of the judgment in which Lloyd J comments that Warren was “*intended specifically for publication*”.

²² Without prejudice to others not cited as not yet seen.

interpretation was found by the HL to be an unsuitable tool. And nothing was ever said about tests of strict necessity, either.

- i. Had Lord Penrose reviewed *Hyman*, as he could have done, he would have been able to take on board the belated discovery of the decision in *Bratton*. His conclusion might have persuaded the Claimants not to proceed with this protracted and expensive litigation.
- j. It is no secret, since Lord Penrose refers to me personally in his report, that I gave evidence to his inquiry. While I am bound by a confidentiality agreement in relation to my part in that inquiry I am sure it is no breach of confidence simply to say that I learnt of *Bratton* only months after my role in the inquiry was concluded so that he was not made aware of it by me. I assumed the Society would refer him to it.
- k. a. and b. above represent either downright sloppy lawyering by all of Dentons, *Hyman* counsel, and Warren QC and Lowe²³ OR all that taken together with cynicism of a very high order by the Society and its advisers, as I shall seek to show.
- l. As to sloppy lawyering, it is possible that had non-GARs been separately represented from GARs in the *Hyman* litigation, *Bratton* might well have been spotted by solicitors other than Dentons and/or their counsel and well have been argued. Warren is instructive on this discrete and important point²⁴.
- m. If the Society had wanted to benefit non-GAR policyholders by a review of *Hyman*, which is the avowed purpose of Warren, the time to have done it, or at least seriously reconsidered it, was at the latest after the JBL article drawing attention to *Bratton* was published if it had not been spotted in [1992] B.C.L.C. before.
- n. But, of course, by then these proceedings were under way and, despite, my drawing the attention of HS and the court to

²³ On 14th May 2001 the Society issued a press release (not apparently bundled but taken from ELAS website) headed “Summary of Conclusions of Nicholas Warren QC and Thomas Lowe”. And signed off by them both. Under the banner “Headline Conclusions” appear the words “1. *The House of Lords decision cannot be re-opened or challenged.*” It will be argued that this press release formed part of the s 425 exercise although the joint opinion is bundled oddly under “Mis-Selling Claims” as M1.11-82. It is noteworthy that not a single one of the published counsels’ opinions listed at M1.1 (apart obviously from Warren) canvasses even as a remote possibility the notion of a petition to the HL to review *Hyman* - it is as if the negative, because uninformed, position taken by Warren was accepted by all. And therefore also by the FSA who, for example, instructed Glick QC/ Snowden.

²⁴ Warren paras 8b, 15, 42 and 70.

- the **Bratton** case in the SJ proceedings, nothing was done or at least visibly seen to be done.
- o. Were not Dentons professionally negligent, or were **Hyman** counsel not so, in not researching for, finding, and then citing **Bratton** in advice to the Society and submissions to the courts? It is no excuse to say that this 1992 case only saw the light of common day in September 2003 because of an article in a professional journal. In the exchanges HS had in late 2001/early 2002 with Dentons, Brian Green QC, and Lord Grabiner QC over their potential professional negligence²⁵, the **Bratton** case was not mentioned²⁶. Nor was implication of terms nor tests of strict necessity. These odd omissions, even taking account of the fact that the JBL article had not then been published, even though **Bratton** was first reported in 1992 in B.C.L.C., must be explored at trial with Mr Thomson, Mr McGeough, and Miss Leslie, the only Society witnesses of fact with knowledge of this background. **Bratton** was decided in 1992 and then reported – failure to spot it and advise was at least prima facie negligent²⁷.

²⁵ Although not expressed in quite such crude terms the threat was very clear. No such letter was sent to Elizabeth Gloster QC (Mrs Justice Gloster) and, despite requests from this LIP, HS refused to say why not; it is to be noted that Gloster QC (as she then was), with her juniors, settled at my specific request the paragraph headed “*Our criticism of the House of Lords judgment*” in the 15th February 2001 evidence of the Society to the Treasury Committee @ R2.94; the criticism is trenchant and direct and it is plain from its language that at that time **Bratton** had not been recognised by the Dentons/Gloster team. No mention of it was made at a consultation I attended, with Cindy Leslie, in her chambers on 14th February 2001 for a final briefing of me on the legal issues I might have to address at the TC meeting the following day.

²⁶ Dentons exchange - C70.121-126/C70.208-212

Green QC exchange – C.70.115-120/70.182-181

Grabiner QC exchange –C70.109-114/C70.169-178

²⁷ The test to be applied in negligence actions against an advocate was stated by the late Lord Hobhouse in **Arthur JS Hall & Co v Symons [200] IAC 615** @ p 737G as being “... *the same as that applicable to any other skilled professional who has to work in an environment where decisions and exercises of judgment have to be made in often difficult and time constrained circumstances. It requires the plaintiff to show that the error was one no reasonably competent member of the relevant profession would have made.*” It is my case that failure to find, advise fully upon, cite, and argue **Bratton** was professionally negligent. Furthermore, citing Brooke LJ in **Moy v Pettman Smith** in the Court of Appeal (in a passage in which the Lord Justice himself cited **Hall v Simons**) reported @ [2002] EWCA Civ 875, para 66 “*The law requires the exercise of reasonable care. The exercise of reasonable care has never extended to **unreported** decisions of the Court of Appeal.*” My bold italics. **Bratton** was of course twice reported. Para 67 is quoted below in full “*It would be a disaster to the conduct of litigation in this country if an effect of the decision of the House of Lords in Hall v Simons is that advocates believe they have to hedge their opinions about with “ifs” and “buts” in order to avoid an adverse finding of professional negligence. They are being paid to express their opinion, and if they assess their clients’ prospects as 25%, or 50%, or “strong”, then that advice will usually suffice unless they are expressly invited to explain it. However, if they have fallen below the standard of care reasonably to be expected of them when formulating their opinion, whether their negligence relates to*

- p. It goes arguably to the core of the Society’s case against me.
- q. This LIP is reminded of Benjamin Franklin’s Preface to Poor Richard’s Almanac (1758) in which he wrote “*A little neglect may breed mischief...for want of a nail, the shoe was lost; for want of a shoe the rider was lost; and for want of a horse the rider was lost.*”
- r. The Claimant has erected a structurally faulty edifice on a fanciful allegation of failure to take timely legal advice when there was no legal or historical justification for doing so. And furthermore that legal advice, once taken, was unequivocal in support of the Society’s position and required no prophylactic hedging.
- s. This LIP argues that the failure by successive solicitors and counsel to spot and act upon **Bratton** in one or more of the variety of ways described above was a neglect breeding a far greater mischief than any such alleged failure and is now clearly exposed.

F - SOME SPECIFIC ISSUES ARISING FROM THE SOS.

A non-exhaustive analysis

1. The issues in the Hyman case.

SOS paras 103 to 108. It is noteworthy that **Bratton** was not cited to any of the three courts which heard **Hyman**. And even more noteworthy that Lord Steyn did not mention it in his speech in the HL. Yet, there it was, clearly reported in 1992 in a respectable series of law reports which, ex hypothesi, solicitors and counsel might have researched and noted.

2. What were the consequences of the Hyman case?

SOS para 109(a). What proof is there that the take-up rate of GARs “would” have tended to 100% given the lack of the widows’ reversion, and other unattractive limiting features? There is none. Certainly it was not the advice the board received.

questions of fact or questions of law(including procedural law) they will now be as vulnerable to a finding of professional negligence as any other professional man or woman”.

3. *The claim*

SOS para 254. This proposition benefits from perfect 20/20 hindsight and is the foundation of the whole claims edifice on which this litigation is founded. Its imperfection lies in its failure to recognise that had **Hyman** been properly fought, and then won, if fought at all, the resolutions to implement the DTBP would have been lawful.

SOS para 255(d). It is no part of my aim to intervene in the case against Miss Page. Lord Steyn pointed out in **Hyman** in the HL that “*The inquiry is entirely constructional in nature proceeding from the express terms of article 65, viewed against its objective setting, the question is whether the implication is strictly necessary*”. Is it seriously suggested that any non-executive director, even a non-Chancery solicitor such as I was, could reasonably have been expected to be familiar with the use of construction tools such as “implication of terms” into articles otherwise clear on their terms and the application of “tests of strict necessity” when at no time in the whole lamentable history of the **Hyman** case no solicitor nor counsel had ever mentioned either concept?

4. *Section 727*

SOS paras 266/267/268.

Had legal advice been taken by the Society at any time after **Bratton** had been reported in 1992, and had the advisers been competent and not, as they were, clearly negligent, such advice would have been to the effect that as a matter of interpretation the board had the vires both under the articles and in the policy language to act as they did AND that the implication of a term into the articles by the court to change the rights of one group of policyholders vis-a-vis another was impermissible using extrinsic circumstances. No doubt advice about tests of strict necessity would have been tendered – Lord Steyn in **Hyman** was the first I ever heard of this test from anyone. Had advice about a test of strict necessity been tendered in 1998, and had a serious or real risk of the authority being distinguished been identified by counsel as a “make or break” issue for the court and the Society, it has consistently been my position that at the least a compromise under s 425 would have been considered by the board; the alternative was obviously that the Society’s position as having a “*solid*” case was strengthened.

5. What ought to have happened?

SOS para 283

The Society here contends for a series of hypotheses unsupported by the evidence, as shown below:

- (a) There is no contractual right to any terminal bonus in any amount – it is a matter of discretion.
- (b) “Unlikely” does not mean impossible if asset share concepts, mutuality, and fairness had been well explained.
- (c) What Mr Headdon said is not supported by his own actions.
- (d) “Would” is too strong – “could” would be less emotive and more in line with the evidence.
- (e) “Would” is too strong – “could” would be less emotive. As Warren succinctly and very learnedly points out, it is only a convention that the construction of documents is regarded as a matter of law – he describes it as a “*historical fiction*”²⁸. To require legal advice about the construction of all documents would make commercial life impossible

SOS paras 284/285/286

Mr Wilson made a conversational point it would have been unkind to challenge in a serious discussion. An analogy is a figure of speech involving a comparison; it is not a fully reasoned comparison, fact by fact, argument by argument. His point simply demonstrated why the problem was so difficult to deal with rationally. However, as the matter was seen by me, it was also a question of maintaining the asset share /mutuality/ fairness policies of the Society in a balanced way; Mr Wilson’s point was a gross oversimplification, as analogies so often are. On that basis it was not an appropriate reason for a change of course. In that overall context the matter seemed not, in 1993/94, to be a matter for legal advice but the application of common sense. Further, sadly, and at least so far as I am aware, these cited complaints were not made known to me. Had they been, however, it is my case that I would have reacted as I did to the Flanges Limited case in late 1998²⁹.

5. 1995 Resolution

²⁸ Paras 37/38.

²⁹ C21.78-80

SOS para 299 – 301

I have never argued or sought to argue that absence from the February 1994 meeting in any way exonerated me.

6. What legal advice would have been received?

SOS paras 305/306/307

- (a) If Mr McGeough had been reading his law reports in the years from his appointment as the Society’s principal policy draughtsman and the September 1998 consultation of him by the Society he, or leading counsel, would have considered and advised upon the implications of the ***Bratton*** case as strengthening the Society’s position.
- (b) Leading counsel and, by implication, solicitors are paid for their advice and not their doubts – as a new and critically important decision of the HL now shows.
- (c) In ***Moy*** (cited above and usefully summarised in [2005] NLJ No 7167 @352) Lord Carswell endorsed the view expressed by Lord Justice Brooke in the Court of Appeal³⁰ that “*It would be a disaster to the conduct of litigation in this country if an effect of the decision in Hall v Symons is that advocates believe that they have to hedge their opinions about with “ifs” and “buts” in order to avoid an adverse finding of professional negligence. They are being paid the express their opinion, and if they assess their clients’ prospects at 25%, 50%, or “strong” then that advice will usually suffice unless they are expressly invited to explain it*”. It is my case that Grabiner QC’s “*solid*” and Broke LJ’s “strong” are synonymous.
- (d) When consulted, solicitors and leading counsel revealed, from start to finish, few if any doubts beyond what might be described as general “health warnings” for defensive and self-protective reasons. The case was “*solid*” from start to finish.
- (e) I, as a board member, was bound to make a judgement about that advice, as made known to me, and I did.
- (f) That judgement was evidenced by my probings about litigation risk.

³⁰ ***Moy v Pettman Smith [2002] EWCA 875 @ paras 42 and 67.***

- (g) I was consistently told that my anxieties were unfounded³¹.
- (h) To a large extent, this case is about the reliance that can be placed by lay clients on professional advice. While this is clearly not a case about professional negligence by solicitors and counsel – although perhaps it should be – there may be a case, as *Moy* clearly shows, for expert evidence to show whether the relevant standard of care has been departed from to the detriment of the lay clients and other affected third parties. *Moy* must be read in full, particularly Lord Hope and Baroness Hale. And in full in the CA too.
- (i) I shall argue that the performance of Dentons and counsel fell far below the standard the lay clients were entitled to expect in the matter of the failure to cite and advise upon *Bratton* and that accordingly I am entitled to argue (or not to be debarred from arguing) as if any test case might have been decided in favour of the Society.

7. Should there have been a test case?

SOS paras 308/309

The Society’s fanciful and self-serving contention cannot reasonably be sustained. Litigation, as all actually or prospectively engaged in it know, is a high risk occupation³². By 1998, shareholder/policyholder power, a more interventionist regulator, codes of conduct, media pressures, demutualisation strains, more liberal courts were all issues to be reckoned with; a test case might have had, as *Hyman* did, a wholly unexpected not to say “*aberrational*”³³ result. Why would, or should, the board have taken it if, particularly as strengthened by *Bratton* as it would have been, the advice had been as strong as it was. The evidence will show that, on principle, I at least would have argued against any such step. Sadly, as the evidence shows, solicitors and counsel repeatedly failed to take these risks seriously if they considered them at all.

8. Should growth have been cut pending the outcome of the test case?

³¹ An example, as we have just heard about Flanges Limited, is at C21.114

³² “...*this court knows judicially there is always a chance to lose in any kind of lawsuit.*” Clarke, Ernest S., in *Moorman v Louisville Trust Co, 181Ky. 30, 39(1918)*

³³ Mr Treves’s well known and much quoted observation about the “*aberrational judgment*” of the HL is at C68.116

SOS paras 310/314

The evidence will show that growth rates/bonuses were annually judged by reference to many criteria, one of which was competitive pressures and their PRE component – what the competition was doing or likely to do and what the policyholders expected from that. Goodwill, in the para 313 context, is finely balanced and easily damaged by loss of confidence. “Betting the farm”, a colloquialism much misunderstood in this litigation, related to the loss of confidence in the Society’s reputation for fair dealing in the board’s exercise of its unlimited discretion any concession would create or loss of the **Hyman** case would cause; added to this a loss of confidence by and in the sales force. The phrases “disastrous consequences” and “commercial damage” must, as the evidence will show, be seen in that context and not in these over dramatic terms.

9. What would the outcome of the test case have been?

SOS paras 315/316/317

As to para 315, I contend that, given **Bratton**, the outcome would not have followed the same course as the **Hyman** litigation; the Society consistently fails to say to what court of appeal, IF ANY, any such test case would have gone. I will argue that, at first instance and in the Court of Appeal, the balance would have been in favour of a judgment like that of the VC in **Hyman** with the added strength of **Bratton** behind the VC’s interpretative solution.

As to para 316, I agree.

As to para 317, there are other alternatives.

10. Overpayments

SOS para 319

On my hypothesis, which does not include a test case but is willing to concede a test case won for reasons given above, these outcomes are fanciful and inventive but unconvincing. A test case, further, is only a case that binds the parties to it. It is not a representative action, as **Hyman** was and it is not impossible that if a test case had been lost, a s.425 scheme might have been put forward as a means to settle all outstanding and potential claims.

11. Sale

SOS para 320.

I adopt the position of Mr Sclater summarised in SOS para 320(b)(v) and support the proposition in para 320(d).

12. Other possible outcomes

SOS para 321

The Society asserts, without giving reasons, that “*it is not open to the directors to contend*” that the result of the test action would not necessarily have been the same as that which occurred in ***Hyman***. I do so contend for the ***Bratton*** and ***Moy*** reasons cited above.

13. Directors’ arguments as to no recoverable loss

SOS para 322

- (a) I am content, for the sake of brevity, to adopt the arguments attributed in this paragraph to Mr Sclater. That said, I turn to para 322(b)(iii) and the old *canard* that the board “chose not to heed” a warning that the HL decision in ***Hyman*** was a possible one.
- (b) The evidence will show that any responsible commercial enterprise (whether an airline or an insurance company) makes contingency plans for incidents and accidents – that is planning for risk and risk (not to say disaster) management.
- (c) It is not to be said that because there is a mathematically calculable risk that an aircraft may crash, and that emergency plans are made for such an event, all aircraft in a fleet are to be kept on the ground. Flight itself is a defiance of the law of gravity.
- (d) Similarly, if leading counsel as eminent and as experienced as Grabiner QC say a case is “*solid*”, are the directors to behave as if the case were already wholly or partly lost?

14. Contributory Negligence

SOS paras 332/338

- a. I confirm again that I am not one of those former non-executive directors who have pleaded a contributory negligence defence.
- b. Furthermore, in the light of the additional WS of Headdon, Nash, and Ranson³⁴ prepared pursuant to the 4th February 2005 Order which I have had an opportunity to review while preparing this skeleton, I regard the Wilson contributory negligence defence as ad hominem attack, unwarranted by the facts, on these defendants, despite all avowals to the contrary in inter partes correspondence and at the CMC/PTR.
- c. As to the Society’s arguments in these paragraphs of the SOS, they have clearly seen and seized upon a gratuitously offered forensic opportunity and their adoption of some of the Wilson arguments needs to be tested in that light.
- d. Noteworthy indeed is the recognition by the Society in SOS para 338 that the attack by Wilson on Headdon arising from C29.176 is economically pointless.

15. Section 727

SOS paras 339/340

For the avoidance of wasteful duplication of currently ineluctable argument and counter-argument best reserved for trial, I deal here only with para 340(f) as to which:

- (a) It is not a question of “blame” of the HL. This phrase, indeed the whole unimaginative argument, misses the point. I am concerned whether the HL reached the only possible result given the case was not fully argued to it.
- (b) What my evidence will show and what I argue is that if solicitors and counsel had read, understood, and advised the board about ***Bratton*** – the risk of implication of a term into the articles as contrasted with interpretation of the articles and the pensions contracts reviewed, the HL might have decided differently, not least as Lord Steyn dismissed Lord Woolf’s interpretative solution of the problem.
- (c) Advice from Dentons and Grabiner QC about ***Bratton*** might well, had it been negative as demonstrating a real risk of its being distinguished in favour of the ***Hyman*** decision as it turned out, have caused me as a board member to contend to my colleagues

³⁴ [CPH@W3-3.29](#), [Nash@W3-5.49](#), [Ranson@W3-5.59](#)

for a s 425 scheme or any one or more of the prophylactic solutions which the Society argues the board should have sought.

16. 2000 resolution

SOS paras 353/359

Once again, for the avoidance of wasteful duplication of currently ineluctable argument, that is to say, argument impossible to resist but resisted only for forensic reasons, I concentrate (without thereby abandoning any other point) particularly on SOS para 359(b) which does grave injustice to Grabiner QC. Following the sub-paragraph numbers:

359(b)(i) It was not so much that leading counsel “could be wrong” – as I saw it, *Hyman* in the Court of Appeal was lost by poor advocacy of a good case, not despite good advocacy of a bad case. The silk purse of the judgment of the VC at first instance was turned into the sow’s ear of the confused and confusing judgments in the CA, only that of Morritt LJ being fully comprehensible. Grabiner QC recognised that things had gone badly wrong.

359(b)(ii) My evidence will be that, as I saw and understood the ebb and flow of the case in the CA, Grabiner QC had difficulty with the (to me much irrelevant) details of the case when faced with Sumption QC’s magisterial grasp of them, while displaying an admirable robustness insofar as principles were concerned. I did not doubt his views of the merits at all. But endless argument over the related bonus issue was obscuring, to me at least, essential and simple principles. As to these details, see the summary in SOS paras 92/94 although I question the use of the term “critically” in para 94.

359(b)(iii) This is a gross oversimplification. Reliance on Green QC was strong, indeed very strong – Grabiner QC was retained because of what might be described as the “policyholder/PRE” aspects of the case given the concerns posed by Flanges Limited – concerns which, rather surprisingly to me, Grabiner QC ignored but which PRE concerns seemed to me much to colour the outcome of the case. My evidence will show that, from first to last, I was concerned that the courts, as the decisions of the CA and HL showed, would feel that the GAR policy holders’ “ox had been gored” and that a perceived injustice had to be righted – irrespective of consequences. Those consequences were made known in the Nash affidavit but were apparently ignored by the HL, as Warren shows.

359(b)(iv) There was no reason whatsoever to think that Gloster QC (now Mrs Justice Gloster) would take a different line, not least as she shared chambers with Grabiner QC and could at least have been expected to “pick brains” with him. In recommending, with Cindy Leslie, the making of the change I was concerned for better advocacy and mastery of detail. I add that it was a difficult, sad, and embarrassing exercise.

359(b)(v) It is my evidence that the contrary is the case – why take unnecessary risks with PRE for chimerical reasons?

17. The directors’ liability for mis-selling claims

SOS paras 377/389

SOS para 377

- (a) While the potential cost of the DTBP being ruled invalid was £1.5 billion, this potentiality was seen as remote for reasons rehearsed in the evidence of Mr McNamara³⁵ and which my evidence will endorse.
- (b) It is my evidence, that the “betting the farm” risk was a risk to confidence in the Society, which could be repaired; not that it was a terminal risk.
- (c) The risk was real, as is the risk of losing any and all litigation, but remote – as such it could be discounted. This is itself borne out by SOS para 378 – it is a matter of interpretation.

SOS para 382(c)

- (a) It is my evidence that I have absolutely no recollection of having seen the Nash letter of 1st February 2000 in draft which is why I commented on it on 4th February when it was received by my wife³⁶. The transcripts of the 26th January 2000 board meeting and the minutes appear to record discussion of what a draft might contain³⁷.

³⁵ W2.305

³⁶ A+O have dealt very fully with all this in the opening submissions and I adopt their treatment of the correspondence.

³⁷ See C38.85 – C38.123

- (b) I acknowledge that the evidence needs thoroughly to be tested; it is my evidence that since the so-called “cost” represented a transfer of value between policyholders – something the whole *Hyman* litigation was designed to avoid – no new money or change in the Society’s financial position overall was involved as the Society appears now to have grudgingly conceded in SOS para 112.

SOS para 383

- (a) It is my evidence that I know nothing of this letter.
- (b) As to C41.83 the transcription is very succinct and summary, but recognisable, and my evidence will be that I was concerned that too little space was to be devoted to the litigation issue.

SOS para 385

- (a) to (e) My evidence will show that at the AGM in 2000 and indeed in the run-up to it described here, a satisfactory outcome in the HL was still confidently anticipated - I do not think winning and losing are the correct descriptions.

SOS para 387

- (a) A potential downside was £1.5 billion – not “the potential downside”; had that been the case, and had I been advised about it by Gloster QC, my evidence will be that I would have reacted to such advice; as it is, my fears of an HL upset were discounted after they were made known to Dentons.
- (b) This was not an issue for the HL.
- (c) It will be my evidence that John Weller attended nearly all board meetings and was well aware of these issues.
- (d) The Society is grossly inconsistent in its arguments. Of the construction of the simple language of the article 65 and the DTBP when the language and intention of both was plain it argues legal advice was necessary – in the matter of issues referred for legal advice such as communications with policyholders, it argues that further inquiry by directors was a matter of common sense when that was what was applied to the articles and the DTBP.

G - MARTIN CORRESPONDENCE

Much play was made at the SJ hearing by Mr Milligan of the correspondence cited by Mr Copeman in his SJ witness statement of 11th July 2003; reference to some of it was made by the judge in paragraph 66(iii) of his SJ judgment. Much of it is accurately cited or quoted by A+O. I accept, as I must and do, that some or all of this correspondence may still form the basis of cross-examination of me by Mr Milligan, as Mr Milligan threatened at the SJ hearing. I will say now only that none of the correspondence was intended in any way to “*exonerate*”³⁸ me, as Mr Milligan suggested in the SJ proceedings and:

- a. That from the start of the *Hyman* litigation era, in late 1998, I was concerned, given the pensions mis-selling debacle³⁹, the hostile media environment, the pressures from action groups and the Annuity Bureau, and far greater judicial and regulatory activism than previously, about litigation risk despite the very positive legal advice we constantly received from Dentons, from Green QC, and Grabiner QC. It appeared to me these risks were constantly discounted.
- b. That I accepted this discounting based on leading counsel’s advice since it was not I who was running the litigation, but others with more and more relevant experience⁴⁰.
- c. That I was also concerned about further loss of reputation by the Society following upon the earlier pensions mis-selling debacle.
- d. I saw no real choice but to litigate, not least as no s 425 scheme to resolve the dispute – if such it was – seemed possible. It appeared to me that the ombudsman was likely to be more policyholder-friendly than otherwise although the cases could have been “toughed out” one by one.
- e. That I said I was concerned. For example, the exchanges in connection with the Flanges Limited correspondence shown to me by Alan Nash in November 1998 when my carefully expressed concerns were effectively dismissed by Green QC although Grabiner QC was instructed to bolster

³⁸ That or a synonymously pejorative usage – I have no transcript and rely only on my contemporaneous note.

³⁹ C13.6

⁴⁰ I rely generally on references to me in the Leslie WS@ W1.35 and exhibited documents.

Green QC. At that time the earlier mis-selling debacle was much in my mind.

- f. That while respected, as perhaps they were by my board colleagues, these concerns and views were naturally overridden in favour of the wiser, more experienced, and always consistent advice of the Society's professional legal advisers which was that the Society would "win" *Hyman* on interpretation and that populist courts and media pressures were not relevant factors.
- g. That I believed the litigation placed at serious risk the Society's reputation for fair dealing/confidence in the sales force's assurances to actual and potential policyholders and that this together was expressed in the now well-known phrase "*betting the farm*" meaning not that the Society's whole financial future was at stake (because I did not believe this) but rather that its hard won reputation, if further lost or damaged, might be difficult ever to recover.
- h. That while much encouraged by the first instance decision of the Vice Chancellor, I was dismayed by the form and content of the decision of the CA and sought a change of leader as I believed that while the advice of Grabiner QC/Green QC was fundamentally sound, the advocacy and command of detail demonstrated to the VC and the CA were (in my opinion apparently shared by Dentons) poor.
- i. That when Gloster QC replaced Grabiner QC I again questioned the HL litigation risk, in an exchange with Dentons, and was assured that the risk I outlined (and which eventually matured in the HL decision) was no risk.
- j. That I was concerned, and said so, about what appeared to me at least to be a shortfall in contingency planning if the plan to sell the Society should fail and for preservation of the sales force if and when the Society closed to new business.
- k. That when preparing for the Treasury Committee in late 2000/early 2001 I questioned in preparatory correspondence what the board had understood of the DTBP, what very clearly I meant was whether the board of which I was throughout a member had ever contemplated when assenting to the simple aims of the DTBP the extent of the disaster which had befallen the Society as a result of the "*aberrational judgment*" and wholly unexpected result of *Hyman*, by the total failure of the sales process, and the subsequent closure to new business.

H - THE CORE OF MY DEFENCE

The core of my defence is, very simply, that the decision in *Hyman* was, in all the surrounding circumstances, unexpected, not to be anticipated, and in terms for which no or no reasonably commercial or PRE acceptable prophylactic measures could or should have been taken in advance.

I - CONCLUSIONS

I adopt those of A+O and Miss Page.

J – BRATTON EFFECTS TIMELINE

1966 - House of Lords Practice Direction re reviews. ⁴¹

1983 – House of Lords decision in *Khera/Khawaja*.

1992 – CA decision in *Bratton* – reported as shown.

1994 – DTBP approved by ELAS board.

1998 – First legal advice re DTBP – no reference to *Bratton*.

1999 – *Hyman* begins before VC – no mention/citation of *Bratton*.

2000 – *Hyman* in CA and HL – no mention/citation of *Bratton* by any solicitor or counsel. Lord Steyn fails to distinguish own earlier decision. ⁴²

2001 – Treasury Committee February – no mention of *Bratton* or possible HL review. **2001** – Warren/Lowe opinion May – no mention of *Bratton* in context of an HL review which was principal purpose of Warren opinion. No mention of 1966 PD or 1983 *Khera/Khawaja*.

⁴¹ This is of great historical interest as it was a compromise of an earlier proposal by Lord Evershed to abolish appellate jurisdiction of HL and replace with a panel of 5 Lords Justices of Appeal with power to reconsider any previous decisions of Court of Appeal. The point is that the HL review power has been known and available 40 years.

⁴² It is recognised that the judicial convention in UK is that the judge does no research, has no memory, and relies for all information on counsel.

- 2001** – s 425 scheme documentation begins September. LBAs to former directors/E+Y December – no mention of **Bratton** and no mention reviewability HL **Hyman** decision. Warren adopted re s 425 scheme.
- 2002** – Lloyd J approves s 425 scheme February and refers approvingly to Warren but still no mention of **Bratton**. September JBL article criticising **Hyman** on basis **Bratton**. October **Towcester Racecourse** follows **Bratton**
- 2003** – **Bratton** cited by PM in SJ skeleton/argued but not mentioned in Langley J judgment 17 October. This first public mention of **Bratton** recorded of **Bratton** in **Hyman** context apart JBL article.
- 2004** – Penrose published March – declines consider review **Hyman** on questionable legal basis. No mention by Penrose of **Bratton** or clear and accessible law re HL reviewability from 1966 onwards.
- 2005** - **Moy** decided in HL and reported. No reaction from HS.
- 2005** - April – ELAS trial begins.

PETER MARTIN
23rd March 2005⁴³
Revised typos 3rd April 2005

⁴³ The service of this submission many weeks before it is to be delivered in open court gives HS and Lovells every opportunity to consult Dentons and others named in it on the allegations of professional negligence I have made against them in relation to **Bratton**. As a professional courtesy to HS I forwarded the then current draft to them, with copies for all parties and their advisers, on 17th March so that if HS chose to inform them, those criticised would have the fullest notice of my intention to name them in open court with my reasons for doing so. I see no point in trial by ambush in matters of this kind – we are concerned in a search for the truth. At the moment of delivery today I have had a reply from HS acknowledging the receipt of the draft the principal paragraph of which reads “*We note the points you make about Bratton Seymour v Oxborough [1992] BCLC 693. We think it preferable to deal with any points in relation to it if they develop at trial”.* My underlining. Subject only to the court, I have every intention that the points I raise on **Bratton** will develop in open court since **Bratton** and all consequences arising from it are wholly and very directly relevant to my defence in general and Article 6 terms.