IN THE HIGH COURT OF JUSTICE **2002 Folio No 406**
QUEEN'S BENCH DIVISION
COMMERCIAL COURT

B E T W E E N:

THE EQUITABLE LIFE ASSURANCE SOCIETY

Claimant

– and –

(1) ROGER BOWLEY
(2) PETER DAVIS
(3) CHRISTOPHER P. HEADDON
(4) SHAUN KINNIS
(5) PETER MARTIN
(6) ALAN NASH
(7) JENNIFER PAGE
(8) DAVID PRICE
(9) ROY H. RANSON
(10) JOHN SCLATER
(11) PETER SEDGWICK
(12) JONATHAN TAYLOR
(13) DAVID THOMAS
(14) ALAN TRITTON
(15) DAVID WILSON

Defendants

OPENING SKELETON ARGUMENT OF ALAN NASH (SIXTH DEFENDANT)

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1. This is the opening skeleton argument of the Sixth Defendant, Alan Nash, for the trial of this action which is due to commence on 11th April 2005.

2. This document deals with a number of matters under the following headings as set out below:

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A. The essence of Mr Nash's Defence.

3. Put succinctly, the essence of Mr Nash's Defence is as follows:

   (a) At all times Mr Nash sought to serve the Society and its policyholders diligently, conscientiously and to the very best of his ability.

   (b) The fate which befell the Society is deeply regrettable for all concerned (for policyholders and Directors alike), but that is by itself not a reason for seeking to attach liability to Mr Nash. Mr Nash contends that all of his actions were ones which were entirely the correct thing to do in the circumstances, and that the Society simply cannot plausibly say that Mr Nash's actions were not ones which could have been expected of a reasonable director.

   (c) At all times Mr Nash fully discharged his duties as director of reasonable care and skill. The Society simply cannot say that no reasonable director in Mr Nash's position, armed with the information which was presented to him and faced with the difficult decisions which faced him, would have acted as Mr Nash did. The Society's allegations are unrealistic and hopelessly affected by being made by those in the privileged position of possessing 20/20 hindsight. Mr Nash's primary contention is that any reasonable director would have acted precisely as Mr Nash (and the other members of the Board) did in fact do. But even if this is wrong, the Society still cannot say that Mr Nash acted as *no* reasonable director *could* have done.

   (d) If and insofar as, contrary to Mr Nash's primary case, there has been any breach of Mr Nash's duties of reasonable care and skill, any such breach (which is denied) has not caused the Society any loss.

(e) If and insofar as, contrary to his primary case, Mr Nash is found to be liable to the Society for breach of any of those duties of reasonable care and skill, Mr Nash seeks relief under s. 727 of the Companies Act 1985 ("**s. 727**") on the basis that he acted honestly and reasonably, and that having regard to all the circumstances of the case he ought fairly to be excused.

(f) If and insofar as, contrary to his primary case, Mr Nash took some part in what was, with hindsight, a technical breach of the Articles of the Society and thereby participated in a misuse of the Society's powers, Mr Nash again seeks relief under s. 727 on the basis that he acted honestly and reasonably, and that having regard to all the circumstances of the case he ought fairly to be excused.

B. Mr Nash's representation at trial.

4. As the Court and the other parties are aware (see letter Fishburns to all parties of 16.03.05 and letter from Simon Adamyk (Counsel) to Langley J. of the same date), until very recently Mr Nash was considering becoming a litigant in person for this trial. However, between the date of the most recent CMC/PTR (04.02.05) and 16.03.05, Mr Nash, after anxious consideration, reached the decision that he would like to have some representation for trial, albeit that that representation would need to be very limited. It is hoped that Counsel will be present in Court on the opening day of the trial and to call Mr Nash to give evidence at the appropriate time and be present while Mr Nash is giving evidence. However, Mr Nash will not be represented in Court for the vast majority of the trial, and he therefore invites the Court to treat him as a litigant in person during those times.

5. No disrespect is intended to the Court by this approach to Mr Nash's representation at the trial. The approach is purely costs-driven and has been adopted in view of the ruinous costs of this litigation.

C. Scope of this skeleton argument.

6. For similar costs reasons, this opening skeleton argument is significantly more limited in its scope than it would be if Mr Nash had the luxury of significantly

greater funding for his defence of this massive claim which has been brought against him. This skeleton argument has been compiled under tight time constraints and it seeks to address only a very limited number of aspects of the claim brought against Mr Nash. Even for those aspects of the claim which it does seek to address, this skeleton argument is far less detailed than Mr Nash or those advising him would wish. This is regrettable but necessary.

7. Mr Nash will therefore seek to rely upon the submissions which will be made at trial by other Defendants both in writing and orally in relation to the many issues on which they have a common interest with Mr Nash. This is not only true of many causation and quantum issues, but also extends to the more detailed analyses which those parties will be able to carry out, and the more detailed submissions which they will be able to make, on other common issues.

8. It should be emphasised that, simply because Mr Nash does not respond in this skeleton argument to a particular point in the Society's case (whether in its pleaded case or in its evidence or in the Society's Opening Skeleton – "**SOS**"), this is not to be taken as any kind of acceptance by Mr Nash of any of the Society's arguments. Mr Nash has served a substantial Re-Amended Defence (P2-2.272) and two witness statements (the first of which – W3-2.40 – was a substantial document). He does not abandon any point raised in his statement of case or in his evidence, and he requires the Society to prove each and every element of its alleged case against him.

9. In this skeleton argument Mr Nash uses the following abbreviations:

(a) He adopts the abbreviations set out in his Re-Amended Defence dated 19.11.04 (P2-2.272).

(b) He will refer to the Re-Amended Defence itself as "**RAD**".

(c) He will refer to his first witness statement dated 30.01.04 (W3-2.40) as "**AN1**" and to his second witness statement dated 14.03.05 (W3-5.49) as "**AN2**".

(d) He will refer to the Society's Opening Skeleton as "**SOS**".

(e) He will refer to the Differential Terminal Bonus Policy as "**the DTBP**".

10. The headings used in this skeleton argument are for convenience of reference only and are not to affect the construction or breadth of this document.

D. Mr Nash's positions in the Society, and his role as Managing Director and Actuary.

11. *Positions generally.* The positions which Mr Nash has held in the Society over time are set out in AN1 paras. 3-12 (W3-2.42-45) and AN2 paras. 4-11 (W3-5.49). The following summary is based on the evidence set out there. In brief, Mr Nash was appointed as a director of the Society on 28.07.93. From that date until 31.07.97 he was a director, and from 01.08.97 until his resignation on 07.12.00, he was the Managing Director and Actuary of the Society as well as being a director.

12. *Positions before becoming a director.* Although Mr Nash has a paper qualification as an actuary and has had some actuarial experience as a result of his qualification, he has never practised as a qualified professional actuary and has never held a practising certificate or any equivalent certificate (AN1 para. 4 (W3-2.42) and RAD para. 7(b) (P2-2.273-274)). Although the early part of his career within the Society (1971-1975) involved some calculation work using actuarial formulae, as Mr Nash rose up the management ladder within the Society his role became more a general managerial role rather than a technical actuarial one. So, for example:

    (a) In 1975 he transferred to marketing services as head of that unit, providing administrative support to the sales force.

    (b) In 1980 he transferred to the Society's Aylesbury office and was in charge of three departments (a policy servicing department, an underwriting department responsible for assessing medical information and evidence on clients, and a retirement annuity department).

(c) In 1983 he had the joint role of Systems Development Manager and Staff Secretary, responsible for developing certain new computer systems and for the Society's personnel and training functions for non-sales staff.

(d) In 1985 he was promoted to an Assistant General Manager, responsible for all the Society's computer areas and with continuing responsibility for personnel and training.

(e) In 1988 he took charge of a range of departments providing service to individual clients and for the Society's group pensions area.

(f) In the early 1990s and until some point in 1993 his job title was "General Manager – UK Operations". In that role, he had responsibility for most of the UK customer service operations within the Society, including the group pension areas. There were no actuarial departments under his control and indeed he had had no actuarial involvement in the actual running of the office at any time previously. His areas of expertise were in the customer service areas, in marketing, in personnel management and training, and in IT system development.

13. *Position after becoming a director.* Even when Mr Nash was appointed to the Board in July 1993, his responsibilities remained general managerial ones across a wide area. Upon his appointment to the Board, he became "General Manager – Finance". In that role as an executive director, he had an office-wide responsibility for reducing costs and improving customer services throughout the Society and, in addition, had responsibility for the Society's accounting, some actuarial and the group pension areas. Mr Nash freely accepts that these responsibilities included line management responsibility for Julian Hirst (the Society's Chief Accountant), for Chris Headdon (on the actuarial side) and their departments and for the group pension areas. However, that was line management responsibility for the overall running of those departments, and Mr Nash had other responsibilities too. It was recognised that Mr Nash had no specialist accounting or actuarial knowledge, as opposed to his general management expertise.

14. It is therefore wrong to view Mr Nash as a specialised actuary in the same way that some others in the Society were. He has never assisted either the Appointed Actuary or the Reporting Actuary with any aspect of their work as such. The benefit which Mr Nash brought to the Society in particular was wide management experience across a number of areas. His role was one of making sure that whatever specialist accounting and actuarial tasks needed to be addressed were indeed addressed. In order to accomplish this, he did not need to have (and was not expected to have) any in-depth knowledge or understanding of the detail of those specialised tasks themselves. That was a task for the specialists concerned, and he himself did not have the requisite skills. Rather, his role was to understand the general nature of the task in hand and to ensure (a) that it was (or at least appeared to be) being properly attended to by those with the requisite skill and knowledge, and (b) that (as and when the appropriate time came) the relevant task had been (or at least appeared to have been) completed.

15. *Position as Managing Director and Actuary.* One of the main officers of the Society is termed the "Actuary" (see Regs. 46 and 47 of the Society's Articles of Association (MA12 and MA36)). It is clear that the office of "Actuary" is subordinate to the Board as a whole (see Regs. 46, 47 and 54 of the Articles of Association (MA12-13 and MA36-37)). Mr Nash's evidence (AN1 paras. 6-9 (W3.2-43-44)) is that the office of "Actuary", as the 'head' of the Society, is the equivalent of the individual who might in other large companies nowadays be called the "Chief Executive". As far as Mr Nash recalls, when he joined the Society in 1971 this role was known simply as the "Actuary" for historical reasons (out of respect to the Society's long roots) and Barry Sherlock (who held this position from 1974 until 1991, when Roy Ranson was appointed in his place) had the title of either "General Manager" or "General Manager and Actuary". At some point at or after the time when Roy Ranson took over the role in 1991, the name of the position was changed to "Managing Director and Actuary", which was the title inherited by Mr Nash when he took over the role. After Mr Nash's resignation on 07.12.00, when Chris Headdon in turn took over the role, Mr Nash understands that the name of the role was changed to "Chief Executive" or "Chief Executive and Actuary". During the time when Mr Nash was employed by the Society, all of the Society's Managing Directors (by whatever title they happened to have been known at any particular time) have been qualified as Fellows of the Institute of Actuaries, although they have possessed different levels of actual actuarial skills.

16. In light of this, it is important to emphasise that the holder for the time being of the office of Actuary (as that term is used in the Society's Articles of Association) does not necessarily have a high level of technical practising actuarial skill. The position within the Society which is termed the "Actuary" is equivalent to the role of Managing Director or Chief Executive. Mr Nash was as reliant on the detailed technical expertise of those reporting to him as much during the period 01.08.97 onwards (ie. during the time when Mr Nash was the "Actuary") as during the period before then.

E. The content of the director's duty of skill and care as applied to Mr Nash.

(1) Standard of skill and care.

17. It is submitted that no special duties attach as a matter of law to the office of Managing Director (by whatever name that position might be known) *qua Managing Director*, ie. in a manner different in principle from that owed by other Directors. Mr Nash accepts that an objective standard of skill and care applies to him, either (1) on the basis that the modern law is represented by the objective standard as set out by Hoffman LJ (sitting as an additional judge of the Chancery Division) in *Re. D'Jan of London Limited* [1994] 1 BCLC 561[1], or (2) on the basis that Mr Nash was an executive director and therefore an objective standard of skill and care was implied under his contract of service.

18. The matters set out in section D above are therefore among the matters which the Court should bear in mind when assessing the content of the duty of skill and care as it applied to Mr Nash.

(2) Delegation and trust of others.

19. Mr Nash does not accept for one minute that the actuarial recommendations which were made to the Board could (on any grounds other than with the luxury of 20/20 hindsight) be the subject of any criticism. For reasons which will be dealt with in detail by other Defendants, Mr Nash will say that those actuarial recommendations were entirely proper ones to have made. If and

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[1] Thus in effect superseding the subjective test imposed in *Re. City Equitable Fire Insurance Co Ltd.* [1925] Ch 407 at p. 428 *per* Romer J. (affd. on other grounds by the CA).

insofar as, contrary to these submissions, the Court finds that there was some flaw in the actuarial recommendations which were made to the Board, Mr Nash's position is as follows.

20. A director is entitled to trust that other Directors and/or employees of the Society were properly carrying out their duties and functions. See *Re. City Equitable Fire Insurance Co Ltd.* [1925] Ch 407 at p. 429 *per* Romer J.:

> "(3) In respect of all duties that, having regard to the exigencies of business, and the articles of association, may properly be left to some other official, a director is, in the absence of grounds for suspicion, justified in trusting that official to perform such duties honestly."

21. See too *Dovey v Cory* [1901] AC 477 at p. 492:

> "I think the respondent was bound to give his attention to and exercise his judgment as a man of business on the matters which were brought before the Board at the meetings which he attended, and it is not proved that he did not do so. But I think he was entitled to rely upon the judgment, information and advice, of the chairman and general manager, as to whose integrity, skill and competence he had no reason for suspicion. I agree with what was said by Sir George Jessel in *Hallmark's Case* (1878) 9 ChD 329, and by Chitty J. in *In re Denham & Co.* (1883) 25 ChD 752, that Directors are not bound to examine entries in the company's books. It was the duty of the general manager and (possibly) of the chairman to go carefully through the returns from the branches, and to bring before the Board any matter requiring their consideration; but the respondent was not, in my opinion, guilty of negligence in not examining them for himself, notwithstanding that they were laid on the table of the Board for reference."

22. Mr Nash does not submit that this means that any director is entitled to place unquestioning reliance upon others to do their job (cf. Langley J.'s decision on the non-executive Directors' summary judgment and strike-out application earlier in this litigation, reported as *Equitable Life Assurance Society v Bowley and others* [2003] EWHC 2263 (Comm), [2004] 1 BCLC 180 at [41]). Rather, it is submitted in outline as follows. It is necessary in any sizeable business for there to be delegation to some extent, otherwise every individual would end up performing the job of every other individual lower down the hierarchy. There must, it is submitted, be something in the circumstances which puts the director on notice of some actual or potential default in those

circumstances, or in the system generally, or in the way in which the system was working. It is submitted that none of these factors was present here. When, therefore, a particular actuarial recommendation was made by a director or employee of the Society who was a qualified actuary practising at a high level, Mr Nash was entitled to assume that such a recommendation had a sound basis.

23. In *Re Barings plc (No. 5), Secretary of State for Trade and Industry v Baker (No 5)* [2000] 1 BCLC 523 at pp. 535–536 *per* Morritt LJ (para. [36]), the Court of Appeal approved the summary given by Jonathan Parker J. at first instance ([1999] 1 BCLC 433 at p. 489) in these terms:

> "… (ii) Whilst Directors are entitled (subject to the articles of association of the company) to delegate particular functions to those below them in the management chain, and to trust their competence and integrity to a reasonable extent, the exercise of the power of delegation does not absolve a director from the duty to supervise the discharge of the delegated functions. (iii) No rule of universal application can be formulated as to the duty referred to in (ii) above. The extent of the duty, and the question whether it has been discharged, must depend on the facts of each particular case, including the director's role in the management of the company."

24. The ability legitimately to delegate particular functions and to trust employees and delegates appropriately is still therefore very much alive in principle: whether it exists in any particular circumstances is a question of fact which depends on the circumstances. Indeed, the importance of examining the facts underlying any allegation of negligence in the discharge of a director's duties can also be seen in *Re Queens Moat Houses plc (No 2), Secretary of State for Trade and Industry v Bairstow and others (No 2)* [2004] EWHC 1730 (Ch), [2005] 1 BCLC 136, Sir Donald Rattee (sitting as a Judge of the High Court). Even though the director in question there (Mr Bairstow) was a senior executive director who had spent a number of years with the organisation, and was the chairman of the company, and even though a number of allegations of negligence had been successfully made out against him on the facts of that case, there were still a number of other breaches alleged by the Secretary of State which were dismissed by the learned Judge. See eg. para. [35]:

> "[35] In the circumstances of this case – and, like Jonathan Parker J [in *Re. Barings plc (No. 5)*], I stress that it is not possible to lay down any universally applicable principle – I do not consider that Mr Bairstow

> can reasonably be held to have been under a duty to query the draft financial statements produced to the Board by the finance department, save to the extent that they included matters which should, on a perusal of them, have been apparent to a man of Mr Bairstow's business experience and knowledge of this particular company's affairs as being of at least doubtful accuracy or propriety. I do not consider he was under a duty to check the performance of functions delegated to Mr Hersey which were properly within the expertise of an accountant and which Mr Bairstow had no reason to doubt were being properly performed."

And see also those allegations made against Mr Bairstow which were dismissed by the Judge (eg. paras. [52]-[53], [54]-[56], (cf.) [61], [65]-[66], [69]-[70], [82], [84]-[85]).

25. It is submitted that, even applying these modern tests on the facts of this case and not just the test set out by Romer J. in *Re. City Equitable Fire Insurance Co Ltd.* [1925] Ch 407 at p. 429, Mr Nash was properly justified in trusting that recommendations which were made by specialist practising actuaries within the Society were proper recommendations to have made.

F. Board resolutions for 1993/94 and 1995.

(1) The Society's former Leading Counsel's own views of the Society's claims.

26. On 23.11.00 (C60.182-184), following the decision of the House of Lords in the *Hyman* litigation, the Society sought legal advice in consultation from Terence Mowschenson QC as to (among other things) whether the Directors had been negligent in failing to seek legal advice in respect of the bonus declarations from 1993/94 to 1998, whether, if there was a finding of liability, relief would be granted to the Directors under s. 727, and whether it was appropriate for the Society to bring proceedings against the Directors. At the consultation (C60.182-184), Terence Mowschenson QC advised (among other things) that the Directors had not been negligent and it was clear that the Court would not make a finding of breach of duty against them in failing to obtain legal advice, that it was "absolutely inconceivable" that the Directors would not be relieved of liability to pay under s. 727, that no action should be taken against the Directors, and that any attempt by a purchaser of the Society to sue the Directors would be seen as "naked opportunism". All of the complaints which the Society seeks to make now should be seen in the light of this

assessment (on behalf of the Society itself and by the Society's own lawyers) of the Society's current claims.

(2) Reasons for the introduction of the DTBP.

27. The introduction of the DTBP was Mr Ranson's actuarial recommendation to the Board. It was the mirror of the approach adopted by the Society at the time at which CARs exceeded GARs (as pleaded in RAD para. 24 (P2-2.283)). It was designed to achieve fairness between different classes of policyholders for the reasons set out in RAD sections B2 and B3 (P2-2.279-288). The intended and actual effect of the DTBP was to ensure (so far as possible) that, subject to a minimum level of guaranteed policy benefits, each policyholder would receive benefits of a broadly similar value irrespective of the way in which those benefits were taken (namely, irrespective of whether the policyholder chose to take benefits using the GAR or the equivalent capital value of the policy). The DTBP was consistent with the Society's Full and Fair Distribution Policy (as defined in RAD para. 18 (P2-2.279)).

28. Moreover, Article 65 of the Society's Articles of Association (MA16 and MA40) gave a very wide discretion in relation to the allocation of bonuses and that therefore the proposed change in approach was permissible (being consistent with the contractual terms of the policy) and within the discretion of the Board.

(3) Qualifications of those on the Board at the time of the DTBP.

29. There is evidence that, prior to the Board meeting to consider the DTBP, the papers presented to the Board were sent to Mr Brian McGeough, a partner of Denton Hall Burgin & Warrens (see witness statement of Roy Ranson (W3-3.138 para. 222) and witness statement of Pat Pepper (W3-2.232-233)). At no time did he raise any concern that the Board was not, or might not be, entitled to exercise its discretion under Article 65 to introduce the DTBP or that such a change in policy might be contrary to the policyholders' reasonable expectations and/or that there might be a risk that some policyholders would object to such a change in policy.

30. Furthermore, Peter Martin (who was a Director of the Society on the Board at the relevant time) was an experienced solicitor, but even Mr Martin was not alerted to the possibility that Article 65 was not sufficiently wide to permit the Board to adopt and implement the DTBP, nor did he consider it necessary to suggest that the Board seek legal advice on the scope of Article 65 or the proposed change in policy (cf. W3-2.30 para. 24, R.6.60 para. 81). Equally, Barry Sherlock (the Society's long-term former General Manager and Actuary, and Appointed Actuary, and a Chairman or former Chairman of LAUTRO) was a director of the Society at the time. Even with his many years of experience, Mr Sherlock was not alerted to the possibility that Article 65 was not sufficiently wide to permit the Board to adopt and implement the DTBP, nor did he consider it necessary to suggest that the Board seek legal advice on the scope of Article 65 or on the proposed change in policy.

31. The introduction of the DTBP was a reasonable and prudent decision in the light of and in accordance with:

    (a) The Society's policy and practice of treating its members fairly and equitably.

    (b) The terms and conditions of the policies and their management over many years.

    (c) The reasonable expectations of all the Society's with-profits policyholders.

    (d) The actuarial advice and recommendations of Mr Ranson.

    (e) The fact that the decision of the Board was consistent with accepted actuarial practice that groups of participating policies were appropriately and equitably distinguished when making a distribution of bonuses.

32. Accordingly, Mr Nash submits that there was nothing in the circumstances surrounding the introduction of the DTBP, or in the introduction itself, which ought to have suggested to Mr Nash that the Society ought to be seeking legal advice as to the lawfulness of the DTBP. The DTBP had no apparent dangers in the light of the (apparently) clear wording of Article 65. Any apparent

analogies with a guarantee given on a motor car (David Wilson witness statement, para. 43 (W3-4.147)) are inapt. The two situations are very different because (among other things) questions of fairness as between different classes of policyholders arise in the present case but do not arise in respect of the motor car example, and the only source of funding for the guarantee is the asset share of other classes of policyholders.

33. Indeed, the Society's own Leading Counsel, Terence Mowschenson QC, advising the Society in consultation on 23.11.00 (C60.182-184), agreed (C60.182 para. 2) that:

> "Considering the circumstances pertaining in late 1993, there was no evidence of any factor which may have put the directors on notice that they should have taken legal advice as to the proposed change in final bonus policy … The steps being taken were not obviously inconsistent with the articles and accorded with the steps being taken by other life offices."

G. Board resolutions for 1996, 1997 and 1998.

34. In essence, Mr Nash says that nothing changed after the initial introduction of the DTBP until later on in 1998 when the level of complaints in relation to the DTBP had risen significantly so as to require attention. The Board meetings for 1996, 1997 and 1998 still took place against the background of the underlying need to pass on fairly and reasonably to with-profits policyholders the benefit of returns arising from investments, and the Society's policy of treating all members equitably. In considering the advice and recommendations of Mr Ranson or Mr Headdon, Mr Nash was entitled to rely on the accuracy of the calculations provided to the Board by those people and to assume that the basis of the valuations used and the valuations provided were accurate.

35. From early 1994 until about September 1998, the Society's DTBP was regarded, at least by Mr Nash, as a settled and non-contentious policy (AN2 para. 21 (W3-5.49)).

36. During those years no concern on the part of any member of the Board regarding guaranteed liabilities were brought to Mr Nash's attention at any time before about September 1998, beyond the general routine need to monitor and manage the Society's statutory solvency position. Although the Society relies on a letter from Alan Tritton to Peter Davis dated 19.01.98 (C15.206), which was copied to Mr Nash, Mr Nash does not believe that any concerns existed at this stage as to GARs. It appears that Mr Davis had written, following an Audit Committee meeting, suggesting that there should be a separate Risk Management Committee. Mr Nash believes that the reference to "guarantee liabilities" in Mr Tritton's response ought more accurately to have been a reference to "guaranteed liabilities", and believes that this reference was nothing more than a simple reference to the basic guaranteed benefits under the Society's policies, that is to say, the total of (1) the premiums paid in (less expenses), (2) the guaranteed investment returns (if any) earned in relation to those premiums, and (3) the declared bonuses which had been declared from time to time in respect of the policy. In other words, it was nothing to do with the issue in the *Hyman* litigation. See too Mr Tritton's witness statement (W3-4.113-114 paras. 64-65).

37. To the best of Mr Nash's knowledge and belief, he was not informed of any challenge to the DTBP prior to September 1998 (AN2 para. 23 (W3-5.49)). It was only after the preparations for the *Hyman* litigation had begun that he subsequently became aware that a small number of complaints (including the Flanges complaint (see eg. C8.122-125)) had been handled by Roy Ranson without his (Mr Nash's) knowledge. Even if Mr Nash had been aware of a few complaints regarding the DTBP in the period prior to 1998, he would not have expected those to have been reported to the Board, as inevitably in any large organisation with hundreds of thousand of clients, a whole variety of complaints are handled and resolved satisfactorily in the ordinary course of day-to-day business. If each of those complaints had been reported to the Board and dealt with at Board level, the Board would simply have become rapidly bogged down in matters of detail concerning the day-to-day running of the Society's business. Significant numbers of complaints on a particular topic would almost certainly have been reported to the Board but small numbers would not have been (AN2 para. 24 (W3-5.49)).

H. Board resolutions for 1999 and 2000.

38. The sequence of legal advice which was received by the Society during the *Hyman* litigation is, on the whole, very well-documented. The content and sequence of the advice is summarised in RAD sections B6, B7, B8, B9, B10, B11, B13, B14 and B15 (P2-2.290-314). The account set out there of the legal advice sought and obtained is in its very nature only a summary, and the Court will be taken as necessary during the trial to the content of that legal advice as necessary in order to demonstrate its exact content and tenor.

39. Mr Nash's position in relation to the legal advice received by the Society is that:

    (a) The Society consistently received confident legal advice from Denton Hall and some of the most eminent Leading Counsel in the land to the effect that the Board was entitled to adopt and implement the DTBP pursuant to the wide discretion conferred by Article 65 and that the Society would win (or ought to win) an action to determine the legitimacy of the Society's approach and actions. While on various occasions the legal advisers warned the Society of the risk of litigation and the fact that there could be no certainty, at no stage did any legal adviser proffer advice which would have resulted in the Society, acting prudently, not adopting or continuing the DTBP.

    (b) Mr Nash was aware that all the Society's legal advisers were confident that the Society would win the *Hyman* litigation, although there could be no guarantee. Mr Nash's understanding was that, even if the Society should lose, it was highly unlikely that the Society would be prevented from ring-fencing the holders of GAR policies.

    (c) Mr Nash accepts that he was aware that there was a risk in relation to the *Hyman* litigation, but it is inappropriate to characterise that risk as involving staking the future of the Society on the outcome of that litigation. The risk of losing the *Hyman* litigation in the manner which eventually resulted from the House of Lords decision in *Hyman* was seen as highly unlikely. Further, it was believed that even if *Hyman* were to be lost in the worst possible way (as per the actual House of Lords judgment) a sale of the Society would avoid any loss to policyholders. For example, at the Schroders presentation in February

1999 on risks and possible strategic options for the Society, Schroders stated that a sale of the Society would result in sale proceeds of £3bn-£5bn (C25.91). This is entirely consistent with amounts mentioned to Mr Nash by firms of investment bankers seeking business from the Society and also with various newspaper articles. See, for example, press articles C38.40, C40.88 and C40.89 (referring to the Society as being highly saleable and that a bid of £4 billion was being considered for the Society and that other bidders were likely to follow suit). See also C43.66 (appraisal value of the Society of some £3.6 billion calculated with significant input from the actuarial arm of Ernst & Young following, for example, C34.112-114 and C40.172-206).

40. In addition, the decisions of the Board were reasonable, rational and prudent in the light of:

(a) The wording of Article 65 and the natural reading of the same (in respect of which Mr Nash relies upon the advice given by Denton Hall and all Leading and Junior Counsel and the subsequent decision of the Vice-Chancellor and the judgment of Morritt LJ in the *Hyman* litigation).

(b) The recommendations and advice of Mr Headdon, which were themselves reasonable, rational and prudent.

(c) The fact that the exercise of the discretion under Article 65 was fair on its face and was made *bona fide* in what Mr Nash reasonably and honestly believed to be in the best interests of the Society and its members.

(d) The fact that, while the terminal bonuses awarded to those taking the GAR was lower, this did not imply that any lower value was paid than to equivalent GAR policyholders who did not take the GAR, nor was it any evidence of discrimination, lack of fairness, or inequity.

(e) The possible adverse consequences to the Society as a whole and its members of any alternative course of action.

(f) The fact that the DTBP was consistent with (and necessary in order to continue) the Full and Fair Distribution Policy (as defined in RAD para. 18 (P2-2.279)).

(g) Furthermore, the letter dated 18.12.98 from Mr Martin Roberts, the Director of H.M. Treasury Insurance Directorate, to the Managing Directors of all life companies (C22.246-247), showed that there existed a range of views on the question of how to approach reserving for GAR liabilities. That letter stated *inter alia* the Treasury's "considered view" that (see the first paragraph on the second page):

> "Under the majority of participating policies which have been written it appears that any guarantee of annuity option is applicable to at least the guaranteed initial benefit under the policy and any attaching declared bonuses. As a consequence of this, we would expect that for most companies the present guaranteed cash benefits (including declared bonuses) would be converted, as a contractual minimum, to the annuity on the guaranteed terms. However as indicated above, it would appear possible, depending on the particular circumstances relating to the contract, that any terminal bonus added at maturity may be somewhat lower than for contracts without such options or guarantees, and that this terminal bonus could in some cases be applied at current annuity rates."

41. In addition, one of the first meetings in relation to what was later to become the *Hyman* litigation took place on 09.09.98 (C18.195-201) "to brief the Directors more fully on the issues arising from the situation in relation to GARs". At that meeting Mr Headdon stated in summary (among other things) that to apply the full fund (including full final bonus) to GARs contained in the policies would represent a potential cost of up to approximately £1 billion in respect of retirement annuity policies, and that the maximum potential cost would rise to approximately £1.5 billion with the inclusion of individual pension plans and group pension schemes. Mr Headdon further explained that this maximum potential cost was based on annuity rates remaining at their current level and *all* benefits being taken on GARs (emphasis added). It is important to note that throughout the meeting the word "cost" was used by Mr Headdon to mean additional benefits which the GAR policyholders would receive at the expense of other with-profits policyholders (namely a transfer between different classes of policyholders) and was not used to mean an external commercial cost to the Society. All of the subsequent legal advice and the actions of the Directors needs to be seen in this light.

42. The Directors acted perfectly reasonably in formulating proper contingency plans against the possibility of losing the *Hyman* litigation in view of the strong legal advice which the Society was receiving. In addition, any steps which the Society now alleges ought to have been taken would not have placed the Society in any better position, given the adverse commercial impact which any such steps would with certainty have had. In other words, it is all very well for the Society now to say that the Directors ought to have safeguarded the Society against a *possibility* of losing the *Hyman* litigation in a House of Lords manner, when those very steps would *certainly* have impacted adversely on the Society.

43. It is crucial to bear in mind the commercial exercise on which the Directors were engaged. In particular:

    (a) Bonuses were to be decided annually by the Board bearing in mind many different criteria, including (among other things) the competitive pressures under which the Society was working and the goodwill of the Society (which could easily have been significantly damaged or destroyed altogether by hasty decisions which failed to weigh up properly the competing considerations).

    (b) As a Director of the Society, one of Mr Nash's duties was to make a commercial decision, exercising commercial judgement, based on the legal advice which the Society was receiving. This is precisely what he did. The Society is now blessed with the benefit of perfect 20/20 hindsight and it is easy for it to criticise those who were making the decisions on the ground at the time. The decisions which Mr Nash made, and the actions which he took, were perfectly reasonable decisions for any Director to make in those circumstances. It is submitted that the Society simply cannot say that these were decisions which were outside the generous scope of the way in which a reasonable Director could have acted in those circumstances.

    (c) This is amply illustrated by the fact that all of the Directors of the Society reached those decisions, acting honestly and in what they believed to be the best interests of the Society and its policyholders, and without any motivation for personal gain.

I. Mis-selling claims.

44. These claims by the Society are based on the Directors' alleged mis-selling to policyholders as a result of an alleged failure to clarify the position of the Society in relation to the *Hyman* litigation.

45. At one of the first meetings which took place on 09.09.98 in relation to what was later to become the *Hyman* litigation (C18.195-201), Mr Headdon made a presentation to the Board which discussed the maximum potential 'cost' of the litigation. However, as has been explained in paragraph 41 above, throughout that meeting Mr Headdon used the word "cost" to mean additional benefits which the GAR policyholders would receive at the expense of other with-profits policyholders (namely a transfer between different classes of policyholders) and not to mean an external commercial 'cost' to the Society.

46. The tenor of the strong and confident legal advice which was received by the Society throughout the course of the *Hyman* litigation has been noted above (see paragraphs 38 to 39). The risk of losing the *Hyman* litigation in the manner which eventually resulted from the House of Lords decision in *Hyman* was seen as highly unlikely. Furthermore, and as noted above (see paragraph 39(c)), even if this highly unlikely scenario did turn out to be the case, then a sale of the Society was seen as a strong fallback way of avoiding adverse effects on non-GAR policyholders.

47. As a matter of sound commercial practice and plain common sense, the nature and extent of the warnings which were given to new policyholders (and to existing policyholders who were considering investing further premiums with the Society) in the light of the *Hyman* litigation had to be proportionate in the light of the legal advice received by the Society and had to reflect the tenor of that advice properly. It was eminently reasonable for Mr Nash and the other Directors to bear in mind the strength of the legal advice which the Society was receiving in determining the extent to which, and the terms in which, the *Hyman* litigation should be described to policyholders and the degree of risk which ought to be described. To have delved into great detail in such communications with policyholders in relation to eventualities which were

seen as remote would have been both unnecessary and highly damaging to the Society. The ability of the Society to attract new business, the retention of the valuable salesforce and the affect on the Society's existing policyholders, would all have been needlessly and adversely affected, to the detriment of all policyholders. The nature and terms of the communications to policyholders were matters of commercial judgment.

48. In any event, it was relevant to distinguish between at least two different broad eventualities in deciding upon the nature and terms of communications with policyholders with regard to the *Hyman* litigation. The first such eventuality was the possibility of simply 'losing' the *Hyman* litigation (in the sense of failing to achieve a full vindication of the Society's position). The second such eventuality was the possibility of 'losing' in the same manner which eventually became the actual outcome following the House of Lords decision in *Hyman*. As to the first of these eventualities, the legal advice which the Society was receiving was strongly in favour of the Society succeeding in the *Hyman* litigation. However, even if the Society were to 'lose' in this sense, this would still not impose on the Society any great financial burden with which the Society was unable to cope. As to the second of these eventualities, this was seen as a remote possibility. In the circumstances, it was entirely proper not to refer to such risks in communications with policyholders.

49. In addition, the question of whether and in what form there should be communications with policyholders was a regular subject of the legal advice which was sought and received in the run-up to the *Hyman* litigation and during the course of that litigation. See eg.:

(a) Denton Hall advised from an early stage on communications with policyholders (see for example their letter of 04.11.98 (C21.1-3)).

(b) Following the initial consultation with Brian Green Q.C., Dentons asked for the substance of the consultation to be covered in a written Opinion and for Counsel to advise on certain specific aspects of policy documentation. Brian Green provided his Opinion on 11.10.98 (C20.17-23). That Opinion confirmed the legitimacy of the aims of the DTBP and that the Society was "justified in law" in its approach. The rest of the Opinion contained a detailed legal analysis of the steps

underlying the approach and recommended changes to client communications to make those steps clear.

(c) Brian Green Q.C. and Anthony Grabiner Q.C. were asked to advise on this too, in Anthony Grabiner's case from his very first involvement (see the instructions sent to him by Dentons on 09.12.98 (C22.34-67)). The instructions set out the rationale behind the DTBP, set out the type of challenge which was being made to it or which could be made to it, dealt with communications with policyholders, and set out various options as to whether the complaint should be dealt with by the Pensions Ombudsman or the PIA Ombudsman or the High Court.

(d) The initial consultation with both Anthony Grabiner Q.C. and Brian Green Q.C. pursuant to those instructions took place on 14.12.98 (C22.115-121). It was also attended by Simon Brown and Cindy Leslie of Dentons.

(e) The Society's sales force was supplied with detailed questions and answers which were vetted by Denton Hall.

(f) Cindy Leslie was present at the meeting on 13.07.99 (C33.51-60) when there was discussion of the difficulties which the field force had at that time with the uncertainty of the court case hanging over them (see item 1.11 of the minutes of that meeting (C33.53)). However, Ms Leslie raised no queries as to whether there was more which the Society ought to have been doing vis-à-vis its policyholders in order to communicate to them the current status of the *Hyman* litigation or the advice which the Society was receiving as to the risks (such as they were) which were involved in that litigation. The attendance note of the meeting even deals with this matter under the heading of "Legal issues arising from hearing and judgment", and yet Dentons still considered that nothing needed to be done or adjusted in relation to the Society's handling of the *Hyman* case as regards communications with policyholders.

(g) Each of the Directors and Mr Nash were entitled to rely upon the Society's legal advisers to draw to their attention any specific matters which ought to have been drawn to the attention of policyholders.

50. In addition, in relation to the letter to policyholders dated 01.02.00 (C38.175), Mr Nash was satisfied that that letter was a proper letter to write. The letter was only sent after very careful consideration and following input from the Board and extensive discussions with management colleagues within the Society and Denton Hall. Specifically:

(a) It was simply not the case that the non-GAR policyholders were going to have to face a cost of £1.5 billion because of the Court of Appeal's decision. Even though the Court of Appeal had found against the Society, the judgment of Waller L.J. nevertheless permitted the Society to ring-fence the cost of meeting the GAOs within the GAR class. The cost to the Society was therefore significantly smaller and was not a matter which posed any significant threat to the Society (see para. 48 above). The wording of the letter of 01.02.00 was therefore chosen to reflect this fact and to try to make clear that, whether the House of Lords found in favour of the Society or whether it upheld the Court of Appeal's view, the cost of the decision was nothing to be unduly concerned about.

(b) At this time, the legal advice which the Society was receiving was strong and clear. Lord Grabiner Q.C. had been very uncomplimentary about the quality of the analysis of the two Lords Justices who were in the majority in the Court of Appeal, particularly Lord Woolf. Based on this legal advice, it was an entirely reasonable and proper conclusion that realistically the worst thing that would happen was that the House of Lords would merely confirm the reasoning of the Court of Appeal, which would still leave it open to the Society to ring-fence the GAR liabilities within the GAR class. In fact, the tenor of the legal advice was that the decision of the Court of Appeal was misguided and that the House of Lords would reverse it.

(c) Consequently, the outcome which was the actual eventual outcome of the House of Lords decision in *Hyman* was not seen as anything more than a highly remote possibility.

(d) A draft of the letter was sent to Denton Hall for their approval on or shortly before 27.01.00 (C38.149-150). On 27.01.00 no fewer than three representatives of Denton Hall (Cindy Leslie, Simon Brown and Nicholas Sargent) made comments on the letter (*ref*) and, subject to

these comments, the letter was duly approved by Denton Hall before being sent out to policyholders.

(e) After the letter was sent out to policyholders, and in light of some of the concerns raised by Peter Martin (C39.25, C.39.38, C39.84, C39.135) Cindy Leslie of Dentons wrote in terms strongly supportive of the Society's position generally in the litigation and specifically in relation to the letter (C39.266).

51. Mr Nash will also refer to the matters dealt with in AN1 paras. 318-330 (W23-2.182-185). For all of these reasons, Mr Nash submits that he did not breach any of his duties to the Society in relation to the selling of policies.

J. S. 727 relief.

(1) General.

52. If and insofar as (contrary to his submissions) Mr Nash is found to be liable to the Society to any extent, Mr Nash seeks relief under s. 727 on the basis that he acted honestly and reasonably, and that having regard to all the circumstances of the case he ought fairly to be excused. The thrust of Mr Nash's submissions on this issue is that at all times he acted *bona fide*, he acted honestly, he acted reasonably, he acted in the belief that he was acting in the best interests of the Society, and he acted in the belief that he was acting within his powers and/or that the information he was providing was enabling others to act within their powers, and that accordingly, he ought fairly to be excused by the Court.

(2) Relevant legal principles.

53. In addition to any of the points made by any of the other Defendants on matters of common interest, Mr Nash will rely on the following points.

54. *Point 1 – relevance of legal advice.* As soon as the level of complaints began to rise in 1998, the Directors sought expert legal advice. They sought it from a large and respected firm of solicitors (Dentons) and also from Leading and

Junior Counsel of eminent reputation. In fact, it is submitted that, if legal advice was going to be taken, it is hard to see how the Directors could have better sought to consult on and protect the Society's position. The fact that the Directors acted in good faith, did not act for their own benefit, and that they sought legal advice in this manner is a strong factor in their favour under s. 727. See *Re. Claridge's Patent Asphalte Co. Ltd.* [1921] 1 Ch 543 at pp. 547-549, *per* Astbury J., esp. at p. 549:

> "The then Directors did their utmost for the benefit of their cestui que trust company; they took the best advice; they acted in the way complained of openly for no benefit to themselves, but for the benefit of their cestui que trust …"

See too *Re. Duomatic* [1969] 2 Ch 365 at pp. 376-7 *per* Buckley J.[2]

55. *Point 2 – nature of test to be applied under s. 727.* It is easy to see how s. 727 could be applied in respect of any technical breaches (which are not admitted) by the Directors under the Society's Articles of Association (ie. the fiduciary duty claims). The fact that any breach was a technical breach is a relevant consideration under s. 727 (*Re. Duomatic* [1969] 2 Ch 365 at p. 376 *per* Buckley J.). In such circumstances, and even if there has been a breach, the Court is able to grant relief under s. 727 and (it is submitted) should do so for the reasons referred to in section J3 below.

56. In respect of any breaches (which are denied) of the Directors' duties of skill and care, the Society quite rightly recognises (SOS para. 709) the potential for an apparent paradox in that an officer of a company (including a Director) may be held to have acted reasonably for the purposes of s. 727 notwithstanding that he acted unreasonably according to the standards imposed on him by the common law[3]. The Society nevertheless quite rightly

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[2] Buckley J.'s comments were made in respect of a failure to take legal advice, but this is merely the converse side of the principle, and the point in favour of the Directors remains a good one in principle. Nor do the Directors have anything to fear from any argument that *Re. Duomatic* therefore supports the contentions which the Society is putting forward in this case as to the failure to take legal advice in the early years, as the facts of the two cases (including the reasons for not seeking legal advice here in the earlier years) are poles apart from the reasons (such as they were) for not taking legal advice in *Re. Duomatic*.

[3] This apparent paradox has been recognised more clearly by the Society in the context of its claim against Ernst & Young (SOS paras. 705-715) but similar principles would apply in respect of the Society's claim against the Directors (cf. eg. SOS para. 340(b)).

recognises (SOS para. 709) that s. 727 gives the Court jurisdiction to grant relief from liability even in cases of negligence[4].

57. How is this apparent paradox to be resolved? It is submitted that it can be resolved in any one or more of the following ways:

(a) S. 727 enables the Court to take into account a wider range of factors than the considerations going only to the question of whether there was a breach[5]. These factors include those set out in *Barings v Coopers & Lybrand* [2003] EWHC 1319 (Ch), [2003] PNLR 34, at [1133] *per* Evans-Lombe J.:

> "1133 I conclude from the above authorities that s. 727 is available to me if D&T acted honestly and reasonably. They may have acted reasonably for the purposes of the section even though I have found them to have acted negligently, if they acted in good faith and their negligence was technical or minor in character, and not 'pervasive and compelling'. Nor am I limited to consideration of the nature of D&T's fault, but may take into account wider considerations …"

(b) Further or alternatively, when considering the question of reasonableness for the purposes of s. 727, the Court may take into account the seriousness and scope of the breach[6]. See eg.:

(i) *Per* Evans-Lombe J. at [1137]:

> "I have held that she should have checked the explanation more thoroughly than she did, but she did carry out some checks and, in the view of [one of the expert witnesses], … those checks were sufficient. I have found the issue of negligence to be a finely-balanced question of judgement."

(ii) *Per* Evans-Lombe J. at [1139]:

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[4] This was also accepted by Langley J. at the non-executive Directors' summary judgment application earlier in this litigation, reported as *Equitable Life Assurance Society v Bowley and others* [2003] EWHC 2263 (Comm), [2004] 1 BCLC 180 at [45].

[5] In making this submission, Mr Nash respectfully agrees with one of the Society's submissions (SOS para. 710, made in the context of the Society's claim against Ernst & Young), though not with the Society's suggested application of that principle to the facts of this case.

[6] Again, in making this submission, Mr Nash respectfully agrees with another of the Society's submissions (SOS para. 712, made in the context of the Society's claim against Ernst & Young), though not with the Society's suggested application of that principle to the facts of this case.

> ”Therefore the negligence found was limited in extent and technical in nature and certainly was not ‘pervasive and compelling’. In these circumstances, I hold that s. 727 is capable of applying.”

(c) The Court should give effect to its sense of fairness and justice. See *Maelor Jones Investments Pty Ltd v Heywood-Smith* (1989) 54 SASR 285 at p. 295 *per* Olssen J.:

> “… the court, in balancing the competing interests which, necessarily, are ventilated before it, ought not to shrink from giving effect to its sense of fairness and justice.“

58. Furthermore, when applying s. 727, the Court has a wide discretion as to whether liability ought fairly to be excused, and, in exercising that discretion, the Court is required to look at all the circumstances (*per* Evans-Lombe J. at [1134].

(3) Factors relied upon by Mr Nash.

59. The factors upon which Mr Nash relies under s. 727 include the following:

(a) The factors set out in RAD paras. 110 to 111 (P2-2.361-363).

(b) The grounds set out in AN1 paras. 331-340 (W3-2.185-189).

The Court is respectfully referred to those paragraphs. However, and without detracting from each and every one of those points, it is worth setting out briefly one of the themes set out there. AN1 paras. 332-334 (W3-2.186-187) state as follows when discussing the motivation for adopting and defending the DTBP:

> “332. If the DTBP had never have been adopted in the first place, the inescapable effect would have been that lower bonuses across the Board would have been declared for all GAR policyholders (and probably for all non-GAR policyholders too) regardless of the manner in which they chose to take their benefits under their policies.
>
> 333. The Society would presumably either:

> i) Have adopted a low single rate of final bonus for GAR policies (as per the Court of Appeal decision) from 1993 – which would have penalised all those GAR policyholders wanting benefits in fund, rather than GAR, form.
>
> ii) Have adopted a common rate of final bonus for both GAR and non-GAR policies (as per the House of Lords decision) from 1993 – which would have resulted in substantially lower benefits from 1993 onwards for the non-GAR group (as a result of their subsidising the overpaying of the GAR group) and a much more constrained investment policy through the equity boom years of the mid to late 1990s.
>
> This would have been very unfair to a large section of the policyholders, and it was in order to try to avoid this perceived unfairness that the Society acted as it did. Either approach would have raised legal action from one group or another. If legal advice had been sought by the Society there is evidence that it would have been strongly supportive of the Society's DTBP. …
>
> 334. The Society itself did not stand to gain anything from the way in which it acted – all of the profits which it made were a part of the fund and were therefore distributed to the Society's policyholders. I do not know the position of other members of the Board but I myself had a modest GAR component to my pension arrangement and it is likely that I am marginally better off as a result of the House of Lords decision, which I continue to regard as deeply flawed and ill-considered. My own position in any respect did not affect my thinking or I believe that of other members of the Board. The Society could have taken an easier way out and altered its approach, but it chose instead to adopt and continue the DTBP in order to act in what it saw as the best interests of its policyholders. Each of the Directors who are Defendants in these proceedings are being criticised for no more and no less than attempting to act as fairly as possible to the Society's policyholders, in a manner which was not in any way designed to benefit them personally. I believe that it is wholly unfair to each of the Defendants in these proceedings that the current Board of the Society is seeking to impose liability on them in this way."

60. In addition, and bearing in mind the "wider range of factors" to which the Court is to have regard, Mr Nash also relies upon the following factors:

(a) During the *Hyman* years, the additional burden which was placed on the Directors in having to deal with all of the detailed issues involved in the ongoing litigation was enormous. A simple glance through the index to the chronological trial bundles reveals the huge increase in

correspondence which was generated during the years 1998 to 2000. These were detailed matters, all of which took considerable time to address properly. In addition, the documentation which has been included in the trial bundles is only a subset (albeit a large subset) of the documentation generated in relation to *Hyman*. And, furthermore, the *Hyman* litigation was only one of the issues with which the Directors had to deal during that period. There were several special projects underway at that time (including, for example, in relation to the new stakeholder pensions) as well as all the 'normal' day-to-day activities of the Society which were unrelated to GAR matters or *Hyman*.

(b) There is evidence before the Court that, once account has been taken of the industry-wide reduction in policy values as a result of the recent reductions in stock market values generally, the position of the Society's policyholders is in fact comparable to those of policyholders with other insurers (see the relevant section of Chris Headdon's opening skeleton argument and the documents referred to and analysis set out there). See also *Re. D'Jan of London Limited* [1994] 1 BCLC 561 at p. 564 *per* Hoffman LJ: "… I think that the economic realities of the case can be taken into account in exercising the discretion under s 727."

(c) The decision of the House of Lords in *Hyman* was unexpected, controversial and was contrary to the legal advice received by the Society from all of its legal advisors. It has been publicly acknowledged subsequently by Jonathan Sumption Q.C. (Leading Counsel for Mr Hyman) that the consensus of opinion amongst lawyers prior to the decision of the House of Lords was that Mr Hyman's case against the Society was not winnable. Furthermore, Nicholas Warren QC and Thomas Lowe, in their Joint Opinion of 10.05.01 after the *Hyman* litigation, observed that, "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" (para. 7 on pages 5-6). Even the current Chairman of the Equitable, Vanni Treves, who is effectively bringing this action against Mr Nash and his former colleagues, is reported in a respected publication as referring to the House of Lords judgment as "aberrational" (W3-2.13-14, footnote 37).

K. Conclusion.

61. For (1) all of the reasons set out above, (2) all of the reasons set out in Mr Nash's RAD (P2-2.272) and his two witness statements (W3-2.40 and W3-5.49), and (3) all of the reasons relied upon by other Defendants on matters of common ground between them and Mr Nash, Mr Nash respectfully asks that the Court dismisses the claim brought against him with an appropriate order for costs.

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24th March 2005

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

B E T W E E N:

THE EQUITABLE LIFE ASSURANCE SOCIETY

Claimant

– and –

(1) ROGER BOWLEY
(2) PETER DAVIS
(3) CHRISTOPHER P. HEADDON
(4) SHAUN KINNIS
(5) PETER MARTIN
(6) ALAN NASH
(7) JENNIFER PAGE
(8) DAVID PRICE
(9) ROY H. RANSON
(10) JOHN SCLATER
(11) PETER SEDGWICK
(12) JONATHAN TAYLOR
(13) DAVID THOMAS
(14) ALAN TRITTON
(15) DAVID WILSON

Defendants

OPENING SKELETON ARGUMENT OF ALAN NASH (SIXTH DEFENDANT)

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