

BETWEEN:

THE EQUITABLE LIFE ASSURANCE SOCIETY

Claimant

and

JENNIFER A PAGE

Seventh Defendant

OPENING WRITTEN SUBMISSIONS

24 MARCH 2005

INTRODUCTION

These submissions are made on behalf of Miss Jennifer Page, a non-executive director of the Society from 01 April 1994 until 24 April 2001.

The submissions are arranged as follows:

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1. Throughout this submission, the same abbreviations are used as are used in the Re-Re-Amended Particulars of Claim (“RRAPOC”) and the Society’s Opening Skeleton (“the SOS”). References to documents in the trial bundle are in the common format (i.e. page 17 of Chronological Bundle 30 is shown as C30.17).
2. Despite having been amended three times, the claims being advanced against Miss Page are frequently difficult to identify with precision from RRAPOC. Therefore, in each of the sections that follow, we have summarised the Society’s claims as they are presently understood before setting out Miss Page’s defence.
3. In addition, in some instances, the claims advanced in the SOS are different from the claims set out in RRAPOC. It is assumed that the Society will seek to amend its claim when the hearing commences on 11 April. Against the possibility that permission will be granted, the claims advanced in the SOS have been considered in this written submission, as well as the claims as eventually formulated in RRAPOC.
4. The Society’s case has been constructed with the benefit of hindsight. To understand why all the claims advanced by the Society are misconceived, the Court must put itself into the position in which Miss Page found herself at the time that the particular decisions were made. Only then can the allegations of negligence and breach of fiduciary duty be properly assessed.
5. It is therefore submitted, on behalf of Miss Page, that it is essential that the Court reviews very carefully certain of the contemporaneous documents. Where this is considered necessary, the documents to be read in their entirety (for the most part, papers considered at Board meetings and the minutes of such meetings) have been identified in this submission.

PART 1

MISS PAGE'S PERSONAL HISTORY

6. Miss Page was appointed as a non-executive director of the Society from 01 April 1994. She resigned with effect from 24 April 2001 (RRAPOC, Paragraph 5).
7. Miss Page worked from 1968 to 1984 as a civil servant, starting her career in the Ministry of Public Building and Works as an Assistant Principal. Other civil service positions included Assistant Secretary in the Department of Transport. From 1980 to 1984, she was seconded to posts outside Whitehall, including a posting in 1982 to the London Docklands Development Corporation, with responsibility for managing various aspects of the Docklands Light Railway project (Miss Page's Third Witness Statement dated 30 January 2004 ("JAP3"), Paragraphs 4-5, W3-2.195).
8. Miss Page left the civil service in 1984 to join Pallas Group SA, an international investment group focusing on financial services. In 1989, Miss Page left Pallas Group to become the Chief Executive of English Heritage. She was also appointed a Commissioner of English Heritage (JAP3, Paragraph 6, WS-2.195). Miss Page stayed at English Heritage until 1995, when she was asked to become Chief Executive of the Millennium Commission (JAP3, Paragraph 7, WS-2.195).
9. In January 1997, Miss Page was asked to become chief executive and a director of the New Millennium Experience Company ("NMEC"), created to design, build and operate the Millennium Dome and associated national programmes. She was asked to resign from NMEC in February 2000. Subsequently, Miss Page began a variety of part time consultancy arrangements, with the objective of returning in due course to full time employment. That objective has been, and continues to be, frustrated by the issue of the Society's claim against her in April 2002 (JAP3, Paragraph 9, W3-2.196).
10. In addition to Miss Page's principal employments, before and during her period as a director of the Society, she had non-executive experience at (a) a number of small private companies in the financial services area, (b) the British Railways Board and (c) Railtrack Group plc (JAP3, Paragraph 9, W3-2.196).
11. In November 1993, Miss Page met John Sclater, at that time a Vice President of the Society and soon to become the next President, in succession to Sir Roland Smith. Mr Sclater was anxious to broaden the directors' base, and invited Miss Page to become a director of the Society (JAP3, Paragraph 16, W3-2.197).

12. After reading material about the Society, and canvassing opinion on the Society, Miss Page met the Board in late January 1994. She also met executives of the Society. In February 1994, Miss Page was invited by Sir Roland Smith to join the Board for a 5 year term (JAP3, Paragraph 20, W3-2.198)¹.
13. Miss Page understood the Society to be committed to the idea of a Board comprising both executive and non-executive directors, including non-executives whose own skills and experience lay outside the life and pensions industry. Miss Page also understood the Society to recognise that the skills brought by non-executives were not intended to be a substitute for the proper internal and external professional resources necessary to deal with day-to-day business and, in particular, actuarial, regulatory, accounting and legal aspects. (JAP3, Paragraph 23, W3-2.199). Her understanding had been confirmed by her experience of her other non-executive directorships.
14. Miss Page's other commitments (at English Heritage and the Millennium Commission) meant that she was sometimes not present at the Society's Board meetings. Miss Page discussed this with the Society both before her appointment as a director and subsequently. After the March 1996 Board meeting, in light of attendance problems, Miss Page offered Mr Sclater her resignation. Mr Sclater told Miss Page that he would not be accepting her resignation (JAP3, Paragraph 26-27, W3-2.200).
15. When Miss Page joined the Society's Board, she had understood that the time commitment required of her was likely to be around one day a month. Remuneration for non-executive directors when Miss Page joined the Society's Board was approximately £14,000 per annum, which was increased from time to time to £22,500 per annum at the time of Miss Page's resignation in April 2001. Between January 1997 and January 2000, the Society paid the fee relating to Miss Page's directorship to her then employer, NMEC (JAP3, Paragraph 25, W3-2.200).
16. Miss Page was not asked to join any committee of the Society's Board (such as the audit or investment committee) either at the time she joined the Board or subsequently (JAP3, Paragraph 28, W3-2.200).
17. Miss Page's career prior to joining the Society had equipped her with a broad range of management skills, including communicating policy to staff and to the wider world (JAP3, Paragraph 11, W3-2.196). In light of her skills and experience, Miss Page saw the maintenance of the brand image of the Society ('the high quality low cost provider'),

¹ **At the AGM in May 1999, Miss Page was re-elected for a further term.**

combining values such as fairness and integrity with strong elements of value for money, as a key business issue. Miss Page thought that was particularly important in terms of communications with policyholders (JAP3, Paragraph 40, W3-2.203).

18. By way of example, when first informed, in September 1998, of the complaints being made by GAR policyholders about the DTBP, the focus of her concern was the impact of the DTBP issues on the Society's reputation for fair dealing (JAP3, Paragraph 60, W3-2.208-209) and the adverse press comments that resulted. Miss Page supported the proposal that PR consultants be retained. She also, at the Board meeting on 28 October 1998, expressed concern about the clarity of policy documentation and recommended that a letter be written to all policyholders about the GAR issue (JAP3, Paragraph 63, W3-2.209).
19. In 1995, the year after she was appointed as a director, Miss Page transferred the majority of her pension provision relating to her employment since she had ceased to be a civil servant into a non-GAR with-profits policy with the Society. She made regular additional payments into this policy, up to the maximum permitted, until the termination of her NMEC employment. In January 2004, she took the major part of her benefits under the policy (JAP3. Paragraph 153, W3-2.230).

PART II

DUTIES OF NON EXECUTIVE DIRECTORS

20. A non-executive director owes to the company of which he or she is a director common law duties:-

(A) to act at all times in good faith in what he or she considers the best interests of the company;

(B) to act for a proper purpose;

(Re Smith & Fawcett Ltd [1942] Ch 304 and Howard Smith Ltd & Ampol Petroleum Ltd [1974] AC 281)

(C) to act with reasonable skill, care and diligence (*Re City Equitable Fire Insurance Co. Ltd [1925] Ch 407*).

21. In *Re D'Jan of London Limited [1993] BCC 646*, Lord Hoffmann (as he now is) suggested that the knowledge, skill and experience to be expected of directors at common law was the same as that identified in s.214(4) *Insolvency Act 1986* (relating to directors' liabilities for wrongful trading).

"... the duty of care owed by a director at common law is accurately stated in section 214(4) of the Insolvency Act 1986. It is the conduct of:

... a reasonably diligent person having both -

(a) the general knowledge, skill and experience that may reasonably be expected of a person carrying out the same functions as are carried out by that director in relation to the company; and

(b) the general knowledge, skill and experience that that director has."

22. This approach sets an objective minimum standard. In addition, depending on a person's particular skills or expertise, the standard may be raised.

23. Whether a non-executive director has satisfied his or her duties is almost always fact sensitive. That is certainly the position in this case. Nonetheless, there are a number of general principles, summarised below, that all have a direct bearing on the question of whether Miss Page did discharge the duty of care that she owed to the Society.

Knowledge of the Business

24. The law recognises that boards are made up not only of directors who are expert and experienced in the business in which the company is involved, but also of directors who bring more general skills and experience to the board. For example, in *Re Brazilian Rubber Plantations & Estates Limited* [1911] 1 Ch 45, Neville J said (at page 437):

“[a director] may undertake the management of a rubber company in complete ignorance of everything connected with rubber, without incurring responsibility for the mistakes which may result from such ignorance”.

Similarly, Romer J stated in *Re City Equitable Fire Insurance Co* [1925] Ch 407 (at 428) that:

“... a director of a life insurance company, for instance, does not guarantee that he has the skill of an actuary or of a physician.”

25. In a more modern case (in 1981) of the Supreme Court of New Jersey, *Francis v United Jersey Bank* (referred to in “Company Directors: Law and Liability”, FT Law & Tax and approved by the New South Wales Court of Appeal in *Daniels v Anderson* (1995)) Pollock J. formulated a non-executive director’s duty to understand the business of which he is a director in the following way:-

“... as a general rule a director should acquire at least a rudimentary understanding of the business of the corporation. Accordingly, a director should become familiar with the fundamentals of the business in which the corporation is engaged.”

Board Meetings

26. A non-executive director’s function is intermittent and supervisory. This supervisory function is primarily performed by properly preparing for (by reading in advance papers provided) and attending Board meetings. A director is not bound to attend all Board meetings but should do so “... whenever, in the circumstances, he is reasonably able to do so.” (Romer J, *Re City Equitable Fire Insurance* [1925] Ch 407 (at page 429)).

Reliance on Information Provided

27. A non-executive director must rely on the information provided to him or her and, to some degree, may rely on the skills and expertise of others. Such reliance is reasonable where a director has no reason to doubt the competence, skill or expertise of the other party (*Dovey etc Bank v Cory* [1901] AC 477, *Norman v Theodore Goddard* [1992] BCC 14).

Delegation

28. A non-executive director may (and frequently must) delegate functions. In *Re City Equitable Fire Insurance* [1925] Ch 407, Romer J said (at page 429) that, as regards duties that may properly be left to others, a director is:

“... in the absence of grounds for suspicion, justified in trusting that official to perform such duties honestly.”

Act fairly between different shareholders

29. Directors owe a duty to act fairly between different shareholders and classes of shareholders (*Mutual Life v The Rank Organisation* [1985] BCLC 11 and *Re BSB (Holdings) Ltd (no 2)* [1996] 1 BCLC 155). An analogous duty arises in the present case, that is, to act fairly between different classes of policyholders.

Errors of judgment

30. Directors “...must exercise their discretion bona fide in what they consider – not what a court may consider – is in the interests of the company.” Lord Greene *Re Smith & Fawcett Ltd* [1942] Ch 304 (at page 304).
31. In all the circumstances, it is respectfully submitted that Miss Page did properly discharge her duties as a non-executive director. Specifically:
- (A) she acquired a sufficient knowledge of the business of the Society;
 - (B) she exercised her powers in what she considered to be the best interests of the Society and in a manner that balanced fairly the interests of different classes of policyholder;
 - (C) at no stage did she have reason to doubt the skill, honesty and expertise of the executive directors or to question the accuracy of the information with which she was provided;
 - (D) she exercised her right to delegate reasonably; and
 - (E) she attended Board meetings whenever possible for her to do so.
32. The claims against Miss Page for 1996-1998, before the *Hyman* litigation commenced, all concern two issues:-
- (A) the level of bonuses declared by the Society; and

(B) the manner in which bonuses were allocated between GAR and non-GAR policyholders, specifically the DTBP.

33. The process by which bonuses were declared, each year, is therefore considered in the following sections in some detail.

PART III

FEBRUARY 1996 NEGLIGENCE CLAIM

The Claim

34. Viewed chronologically, the first claim, which is not statute barred, is set out at Paragraph 82 et seq of RRAPOC. In summary, it is claimed against Miss Page that:
- (A) in concurring in the DTBP in February 1996, she was negligent, breaching her duty to the Society to exercise reasonable skill, care and diligence (RRAPOC Paragraph 82);
 - (B) she should have “ensured” that the Board obtained legal advice as to the extent and limits of its discretion under Article 65; whether the Board had a discretion to award differential terminal bonuses and the risk of complaints by GAR policyholders being upheld (RRAPOC, Paragraph 83 (a));
 - (C) had legal advice been obtained in early 1996, it would have been of “similar effect” to that in fact received between 1998-2000 (RRAPOC Paragraph 83(b));
 - (D) as a consequence of the legal advice received, the Society would have commenced a test action which, in the event, would have reached the same conclusion as that in fact reached in the *Hyman* litigation within a similar period of time (RRAPOC Paragraph 83(c));
 - (E) once the result of the hypothetical test action was known (“about the end of 1997” – RRAPOC Paragraph 84(b)) the Board would have concluded that the best option for the Society was a sale of its entire undertaking (RRAPOC, Paragraph 89);
 - (F) a sale would have been completed by the end of 1998 (RRAPOC, Paragraph 91) for between £900 million to £1.05 billion (RRAPOC Paragraph 92);
 - (G) her breach of duty (not seeking legal advice) caused the Society “the loss of the chance” to realise between £900 million to £1.05 billion in 1998 from the sale of its franchise/goodwill value (RRAPOC, Paragraph 93).
35. The argument summarised above is referred to hereafter as the “time-shift” claim. This aspect of the Society’s claims takes as its premise that the events of September 1998 onwards (from the first consultation with the Society’s lawyers) should have begun 2½

years earlier. Liability, causation and “loss of a chance” are considered separately. If the Society fails to establish any of these three elements, the claim must fail. It is Miss Page’s case that the claim falls at every stage of the argument.

Liability

36. It is claimed by the Society that Miss Page was negligent in concurring with the bonus recommendations proposed to the Board, an aspect of which was the DTBP, without requiring that advice be taken regarding the legality of the DTBP. In considering this issue, it is necessary to have regard to:

- (A) the Board papers made available to Miss Page. These need to be examined in detail in order to identify (i) precisely what information was made available to directors and (ii) the decisions that the Board was asked to take;
- (B) the scope of the duty of care that Miss Page owed to the Society, as a non-executive director.

37. The question of what bonuses should be declared by the Society, as at 31 December 1995, was first raised with the Board at its meeting on 22 November 1995. The agenda for that meeting, together with the papers to be considered, is at B20.1-114. “Bonus Declaration at 31 December 1995” was item number 11 on the Agenda.

38. A short paper, entitled “Bonus Declaration at 31 December 1995” and dated 15 November 1995 (B20.108-110) was prepared by Mr Nash and Mr Headdon and circulated to directors in advance of the Board meeting. The first introductory Paragraph states:

“As usual we are presenting a paper at this time to facilitate discussion of the overall approach to be taken at the forthcoming declaration. No decisions are sought at this stage.” (B20.108) (emphasis added).

39. This paper, which warrants review in its entirety, summarises how the Society had, historically, operated its bonus system; states the bonus levels in 1994 (in particular a roll-up rate of 10%); states the anticipated earnings for 1995 (15%); recommends maintaining bonus rates for 1995 at the same rates as applied in 1994 but recognises that a cut (to a roll-up rate of 9%) may be considered appropriate for the prospective (1996) rate. The paper also recommends maintaining for 1995 the 1994 declared bonus rate, i.e. 7.6%.

40. The minutes of the meeting held on 22 November 1995 (B20.116-120) record the discussion of the 1995 bonus declaration (B20.119) in the following terms:

“The Managing Director and Actuary (RHR) outlined the salient points in the report made in the light of the level of return on the with-profits fund expected in the year ending 31 December 1995. The points listed in the summary paragraph of the

paper were accepted in the current situation subject to the further re-visiting that will take place in the coming months. There was discussion but no conclusion at this early stage about the merits of maintaining 10% roll-up rate or adopting a lower rate for the early part of 1996.”

41. Two points emerge clearly from the paper on the level of the 1995 bonuses and the discussion of that paper at the Board meeting. First, that the Board was being asked to consider matters at a strategic level: it was concerned with the “overall approach”. Secondly, that the time for a formal decision had not yet arrived.
42. The subject of the 1995 bonus rate was not considered at the Board meeting held on 20 December 1995 except for the discrete issue of the bonus rates for German Branch business (B20.232).
43. The Board meeting held on 24 January 1996 (minutes, B21.109-112) did consider (Agenda, item 7) the level of bonuses to be declared at 31 December 1995. The Board had before it a paper entitled “Valuation and Bonus Declaration at 31 December 1995” dated 19 January 1996, prepared by Messrs Nash, Headdon and Ranson (B21.100-103). Again, this paper requires to be read in detail. In summary, it set out the overall investment return for 1995 (16.2%); the value of the Society’s assets and liabilities; and the bonuses likely to be declared by competitors of the Society. Rates of declared bonuses were proposed to be the same as for 1994, at an estimated cost of £419.7 million. The paper also recommended that “...total pay-outs should be based on an overall growth rate of 10% in respect of 1995” and that 10% be maintained as the ongoing roll-up rate for 1996, but with the caveat that this rate could be varied “...later in the year [1996] when it is clearer how the investment position is developing.” (B21.103).
44. At Paragraph 2 of the paper dated 19 January 1996 (B21.100) it was said, by way of introduction:

“The aim of the discussion should be to establish firm views as to the approach to bonuses, so that specific recommendations on bonus rates can be made at the formal bonus declaration Special Board meeting next month and the necessary administrative arrangements put in place.” (emphasis added)

45. The minutes of the meeting held on 24 January 1996 (which also warrant being read in full) record (B21.111) that the Board considered and discussed the proposals made to them, prior to reaching decisions on the various bonus rates.
46. A Special Board meeting was held on 14 February 1996. While it was open to Miss Page to attend this meeting, she did not. The minutes record six directors to have been present (B21.211-212). This was because the sole purpose of the meeting, and the only agenda item, was “Valuation and Bonus Declaration as at 31 December 1995” (Agenda, B2.249).

The Special Board meeting was immediately followed by a meeting of the Investment Committee (Agenda, B21.116). That is why those attending the Special Board meeting were the same as those attending the Investment Committee, with the exception of Mr Sclater who attended the former but not the latter.

47. The Special Board meeting of 14 February 1996 had before it a paper dated 09 February 1996 prepared by Mr Ranson (B21.250-253) annexed to which was a Statement of Bonuses² (B21.254-272). In his paper, Mr Ranson made proposals:

- (A) for declared bonuses at a rate of 7.6% at a cost of £417.3 million (to be added to liabilities in both Companies Act and regulatory presentations);
- (B) for final bonuses at a roll-up rate of 10% for 1995 and (prospectively) for 1996 (payable on contractual terminations such as retirement, maturity or death and, until then, capable of being adjusted retrospectively at any time).

Mr Ranson was, in effect, putting flesh on the bones of the decision taken at the full Board meeting of 24 January 1996.

48. It is in the Statement of Bonuses, which accompanied Mr Ranson's report, that there is a description of what became known as the DTBP. The final paragraph in section B7 (B21.264) states:

"Where benefits are taken in annuity form and the contract guarantees minimum rates for annuity purchase, the amount of final bonus payable is reduced by the amount, if any, necessary such that the annuity secured by applying the appropriate guaranteed annuity rate to the cash fund value of the benefits, after that reduction, is equal to the annuity secured by applying the equivalent annuity rate in force at the time benefits are taken to the cash fund value of the benefits before such reduction."

49. In light of that factual background, it is submitted that the question that arises is: should a competent non-executive director, on reading the paragraph set out above, in context, have appreciated that there was an issue on which legal advice ought properly to be taken? It is respectfully submitted that the answer to that question is "no" for all the following reasons:

- (A) the "Statement of Bonuses" set out in detail the bonus rates for each different class of business written by the Society. It is highly detailed. No non-executive director could reach an independent view as to whether that detail was right or wrong;

² **The Statement of Bonuses was only provided for the Special Board meeting. It could only be produced once the strategic decisions had been made at the January board meeting.**

- (B) the purpose of the “Statement of Bonuses” was to apply, to different classes of policy, the Board’s decisions regarding bonus levels for 1995 and (prospectively) for 1996. The paper represented the detailed implementation of the Board’s strategic decisions;
- (C) the Statement of Bonuses was considered at a Special Board meeting. Although open to all directors, only those on the Investment Committee attended. That was not an abrogation of responsibility by those who did not attend. It simply reflected the fact that the Special Board meeting was intended to implement a decision already taken by the Board as to the appropriate bonus rates.

50. Miss Page’s evidence with respect to the Statement of Bonuses, and the process of bonus declaration, is set out at paragraphs 48-57 of her Third Witness Statement (W3-2.205-207). It is her evidence that in one of her earlier years as a non-executive director, probably 1995, she read the Statement of Bonuses. She formed the view that it was:

“impossible for her to follow the detailed effect of the clauses set out in the Statement of Bonuses without correlating them to the text of the separate classes of policy to which the clauses applied, and that this was the proper job of the Society’s actuaries, and it was not required of a non-executive director.”

51. It is respectfully submitted that Miss Page was right in reaching the view that she did. In all the circumstances, it was not the responsibility of a non-executive director to reach an independent view as to whether the Statement of Bonuses had been prepared correctly. She was entitled to rely on the Society’s actuaries to carry out the task of allocating bonuses across the range of different policies, having regard to the overall policy set by the Board. The one Paragraph in the 1995 Statement of Bonuses set out above was not sufficient to bring the DTBP to her attention, far less to enable her to identify that there was a possible legal issue on which advice was required.

52. The DTBP was not specifically brought to the attention of the Board when it met on 24 January 1996 to consider the strategic bonus decisions³. The fact is, therefore, that the DTBP had no visibility to Miss Page. In fact, she was not aware of the DTBP until it was brought to her attention in September 1998.

53. In the circumstances, the existence of the DTBP was not, and ought not reasonably to have been, apparent to Miss Page from the single reference to it in the Statement of Bonuses. The Society seeks to answer this point by claiming that Miss Page should have been aware:-

- (A) of the “significance” of GARs to the Society;
- (B) of the fall in interest rates and its impact on CARs; and
- (C) of what the Board’s policy was when GARs exceeded CARs.

(SOS, Paragraph 301(a))

- 54. As a matter of fact, Miss Page did not know, before September 1998, of the significance of GARs. The fact that she did not know of the significance (by which the Society means importance) of the GAR issue does not demonstrate negligence on her part. Negligence can only arise if it can be demonstrated that Miss Page either (a) ought to have known or (b) ought to have made enquiries which were not in fact made and which, if made, would have alerted her to the GAR issue.
- 55. As to (a), the significance or otherwise of GARs was not a matter which ought to have been obvious to Miss Page by February 1996, as the Society seeks to suggest. The charge that Miss Page ought to have appreciated the significance or importance of GARs, without it being drawn to her attention and without anything to alert her to the issue, is wrong and should be rejected.
- 56. As to (b), the Society has produced no evidence to support its contention that, if enquiries had been made, Miss Page would have obtained the awareness which it alleges she should have had about GARs. Such evidence as there is suggests that even specialists, including those considering the affairs of the Society (in particular the regulators, auditors and rating agencies) did not appreciate the significance of GARs. Nor does their significance appear to have been appreciated by other life companies which included GARs in their policies.
- 57. In all the circumstances, it is submitted that, in approving the bonus decisions in early 1996, Miss Page did not act in breach of the duty of care owed to the Society. She was not negligent. The time-shift claim falls at the first hurdle.

Causation

- 58. As already noted, there is no need to go beyond the liability issue, if that is decided in favour of Miss Page. Nevertheless, it is necessary also to consider the consequences that would have flowed if Miss Page had required the Society to take advice on the legality of the DTBP in February 1996.

³ **The only paper that referred to the DTBP, although not by name, was the Statement of Bonuses annexed to the paper considered at the Special Board meeting.**

59. The legal advice actually given in 1998, and which the Society now assumes would have been given in 1996, if requested, is clear from the contemporary documents. It is necessary to consider with care exactly what advice was given, and why, in order to understand (a) why a test action was actually commenced in January 1999 and (b) why a test action would not have been commenced at any earlier time. The relevant advice is summarised below.
60. On 07 September 1998, the Society (Mr Matthews) wrote to Denton Hall (Mr Brown) requesting advice regarding the DTBP (C18.168-9). The reason why legal advice was sought at this time was that there had been adverse press comments on policyholder complaints about the DTBP. (See, for example, C18.119-122, press reports of 29 and 30 August 1998.)
61. Denton Hall advised orally and in writing on 08 September 1998 (C18.180-185). The legal position was discussed with a number of directors⁴ on 09 September 1998 (C18.195-200). One of the points agreed at that meeting was that Denton Hall should seek Counsel's opinion as to "the strength of the legal position of the Society's current approach [DTBP]" (C18.200, Paragraph 7(i)).
62. Instructions were sent to Brian Green QC on 14 September 1998 (C18.260-268). The final Paragraph on page 4 of those instructions (C19.263) confirms the reason why legal advice was being sought at that time:
- "More recently, the matter of guaranteed annuity rates generally, and the Society's approach in particular, have been reported in the Press (see document 14). Adverse press comment has caused the Society to seek to confirm the legality (and conformity to its policy and other published documentation) of its treatment of retirement policies with a guaranteed annuity element."*
63. Counsel was asked to advise on those matters set out in eight numbered Paragraphs (C18.265 & 266). The third numbered Paragraph posed the following questions for Counsel:
- "If a policyholder were to challenge the different treatment of "Related Bonuses" under his policy, is he likely to succeed? If so, what would be the remedy afforded by the Court? Would it be feasible or desirable in Counsel's view to obtain a test case ruling on the matter. If so, what would be the procedure to achieve this?"*
64. No reference is made in the instructions to any complaints by policyholders to the PIA Ombudsman. A draft note of the consultation on 17 September 1998 appears at C19.11-

⁴ This was a meeting arranged at short notice and was not a formal Board meeting. Miss Page was not present, but did receive a note of the meeting.

15. Mr Green's advice on the questions posed in numbered Paragraph 3 of the instructions was as follows:

"As a matter of law, in Counsel's view, such a policyholder would not succeed but defence of the action would, because of the presentation of bonuses to policyholders at the outset and subsequently during the life of the policies, be tougher than it might have been had the presentation been different. On the basis of the Hastings-Bass case, if the action was successful, the last four years' bonus allocations by the Society would be void and the Society would have to recalculate bonuses for that period."

"It would be feasible but not desirable in Counsel's view to obtain a test case ruling on the matter."

(C19.13).

65. Mr Green QC subsequently settled a note of the advice that he gave in consultation (C19.35-41). His answer regarding the desirability and feasibility of commencing a test action was rather longer than that appearing in the draft note, and read as follows:

"In Counsel's view, it would be feasible, but not tactically desirable (at this stage at least), to obtain a test case ruling on the matter. Better sort matters out quietly, and to attempt to undo any damage done to date by getting a clear message across by correspondence, than to risk the publicity, cost and serious potentially adverse result of a Court hearing." (C19.39).

66. The Board met on 23 September 1998 (Minutes, C19.76 – 80). The meeting began with a report by the Managing Director and Actuary, Mr Nash, on the matter of Guaranteed Annuity Rates. He commented "that this was...the most serious problem to affect the Society for some time and that he wished to discuss the nature of the problem and the actions to be taken." Following a summary of the background to the matter, Mr Nash reported that Counsel's opinion had been sought. He is reported in the minutes (C19.77) as having summarised Counsel's opinion in the following terms:

"...that the Directors had acted within the Society's Articles of Association and within the terms of the policies. There were, however, shortcomings in the way that the Society had presented the matter to clients over the years."

67. Mr Martin (who had been provided with a copy of the opinion of Mr Green QC) concurred with Mr Nash's summary, as did Messrs McGeough and Brown of Denton Hall who attended at least this part of the Board meeting. The possibility of a test action being initiated before the Courts was not discussed at the Board meeting. It is suggested that this was for at least the following reasons:

(A) the strength of the legal advice that the DTBP was lawful;

(B) although press reports suggested the possibility of a representative action against the Society, legal proceedings had not been threatened, let alone commenced⁵,

(C) Mr Green's clear advice against a test action, at least at that time.

68. At the Board meeting on 23 September 1998, Mr Tritton was in the chair (Mr Sclater being absent overseas): he proposed the formation of a group of non-executive and executive directors to provide additional Board-level input to, and oversight of, the Society's handling of the GAR/DTBP issues that had arisen (C19.272). This group is for convenience referred to as "the GAR Group". The GAR Group met in the middle of the month between each meeting of the Board, immediately before a meeting of the Investment Committee.⁶ Miss Page was not a member of the GAR Group.
69. A further consultation with Mr Green QC took place on 25 September 1998. From the questions asked (Denton Hall's letter dated 25 September 1998, C19.128), it is clear that the possibility of a test action was not discussed.
70. Mr Green QC was again asked for advice on 02 October 1998 (C19.216-217). He provided a draft opinion (concerning, in part, changes to the next annual statement of bonuses) on 04 October 1998. The Society (Mr Matthews) raised further questions on this draft opinion in a fax dated 07 October 1998 (C19.244). Mr Green QC produced his final opinion on 11 October 1998 (C20.18-23). That opinion did not deal with the desirability of a test case; on this issue, Counsel's advice given on 17 September 1998 remained unchanged.
71. On 09 October 1998, Mr Nash wrote to all non-executive directors to provide an update on the GAR problem (C19.269-270). Mr Nash referred to the fact that a further opinion had been received from Mr Green QC confirming that "...we [the Board] have acted in accordance with the terms of the policies and the powers conferred by our articles." Mr Nash also reported that:

"Despite all the publicity that there has been I have, to date, received just 27 complaints⁷."

⁵ Press reports (C19.91, 24 September 1998) suggest that a Policyholders' Action Group would pursue complaints against the Society and other companies (but had not yet done so).

⁶ The GAR Group is not to be confused with what became known as the Court Case Steering Group, comprising representatives of the Society's executives, Denton Hall and Cardew & Co (the Society's PR consultants).

⁷ A manuscript addition to the letter suggests the figure had risen to 33 complaints as at 19 October 1998.

Mr Nash also recorded:

“There have been occasional press reports of an action group being formed and/or of the possibility of some form of legal class action against us. The most definite appeared yesterday [08 October 1998] in an IFA paper called ‘Financial Adviser’. A copy has been faxed to directors for information. We are considering contacting direct the clients mentioned in the article. Interestingly, the Leon Kaye who is mentioned in the article appears not to be a client of ours.” (C19.270).

72. Further articles about the Society and the GAR issue appeared in The Daily Telegraph and Financial Times on 10 October 1998 (C20.15&16). The former referred to the threat of legal action against the Society and gave contact details for any policyholders interested in joining an action group.
73. Mr Martin wrote two letters, dated 10 and 12 October 1998 (C20.13 and C20.24), in reply to Mr Nash’s letter dated 09 October 1998. In the first, he commented on a draft leaflet, which he requested be copied to Leading Counsel “...because it is vital he is happy with all and any public pronouncements we make.” In the second letter, Mr Martin referred to the possibility of litigation against the Society and the desirability of Denton Hall reviewing potentially discoverable documents. At the initial meeting of the GAR Group on 14 October 1998 (C20. 75-77), Mr Nash confirmed that such a “pre-discovery review” of documents would be undertaken (C20.75). The note of that meeting records no actual litigation in prospect; Mr Nash referred to having received 33 written complaints and 200-300 enquiries by telephone or letter.
74. On 18 October 1998, The Sunday Telegraph reported that a class action was being considered by solicitors Leon Kaye Collin & Gittens on behalf of 50 policyholders and that Counsel’s opinion on the merits was to be obtained (C20.83). On 20 October 1998, Mr Matthews wrote to Mr Brown of Denton Hall, confirming a meeting on 21 October 1998 between Mr Nash, Mr Brown and a litigation partner⁸ to discuss the possible class action (C20.85).
75. There is no note of the meeting on 21 October 1998. Ms Leslie prepared a manuscript list (C.20.123) of points for discussion (W1.42, Paragraph 26). From that list and her letter to Mr Nash the day after the meeting (C20.127-129) it is clear that the focus of the discussion was possible claims against the Society. There is nothing to indicate that the possibility of the Society itself initiating a test action was discussed.
76. On 22 October 1998, Mr Matthews wrote to Mr Brown (C20.132) enclosing revised wording for annual statements, a leaflet outlining the Society’s approach to bonuses and a

⁸ **Ms Leslie: see her witness statement, Paragraph 26 (W1.42).**

leaflet on guaranteed annuities. These documents were forwarded to Mr Green QC for comment (C20.145 & 146). Mr Brown provided his and Mr Green's comments on the draft documents by letter of 27 October 1998 (C20.163 & 164).

77. The Board met on 28 October 1998 (minutes, C20.184-187). The Managing Director's report was the first report considered. That report (B36.199-205) began with an update on the GAR matter. Mr Nash noted (B36.199) that:

"Denton Hall have also advised me on strengthening our position in the event that the legal proceedings, which have been threatened, commence. In particular and following a helpful suggestion from Peter Martin we are conducting a "pre-discovery" exercise and are instituting appropriate control procedures in respect of literature, internal memoranda etc."

78. The minutes of the Board meeting also refer to the possibility of legal action being commenced against the Society, and the possibility of writing to all GAR policyholders before any such action commenced (final Paragraph, C20.184 and first Paragraph C.20.185). Miss Page in fact favoured writing to all policyholders.

79. Correspondence between the Society and Denton Hall, concerning the wording of documents, continued: see letters to Mr Brown dated 28 October 1998 (C20.191) and 30 October 1998 (C20.201) and his reply dated 03 November 1998 (C20.264-266). Adverse press comment also continued throughout October and into November 1998, regarding the Society's treatment of GAR policyholders, (see, for example: C20.203-209). One aspect of the press reports was that the Society had paid terminal bonuses in full to at least one GAR policyholder who had complained.

80. On 04 November 1998, Ms Leslie wrote to Mr Nash concerning the extent to which the Society was free to communicate with policyholders, if and in the event that a class action was commenced against the Society. She outlined the provisions of the Contempt of Court Act 1981 and the sub judice rule (C21.1-3). While advising that communications could continue, even if litigation against the Society commenced, she concluded her letter in the following terms:

"Nevertheless, as noted above, I would strongly recommend that all public statements are, wherever possible, reviewed in advance to make sure that any risk of contempt is avoided." (C21.3).

81. Mr Nash reported in writing on 06 November 1998 to all non-executive directors (C21.14 & 15), summarising recent developments on the GAR issue. Mr Nash expressed the view that a letter should now be sent to all policyholders, given the extent of the publicity to date.

82. On 11 November 1998 (C21.29 & 30), Mr Green QC provided a further short written opinion on the various documents that he had been asked to consider. Also on 11 November, there was a further meeting of the GAR Group (C21.41-42). Mr Nash reported that “a number of policyholders had taken complaints to the PIA Ombudsman Bureau, but it was likely to be some weeks before the Ombudsman’s decisions were known.”
83. On 13 November 1998, Mr Martin wrote to Mr Nash, commenting on correspondence provided by Mr Nash between the Society and a policyholder, Flanges Limited, culminating with Mr Ranson’s letter dated 26 February 1996 (C9.51). In that letter, and following complaints by Flanges Limited, Mr Ranson agreed to apply full fund value to either current or guaranteed annuity rates without adjustment. (This treatment conflicted with the DTBP). Mr Martin suggested that the correspondence with Flanges Limited be provided to Denton Hall, so that its impact (if any) on the Society’s legal position could be assessed. Mr Martin also raised the possibility of instructing a second Leading Counsel, able to evaluate the Flanges’ correspondence “...in evidentiary, trial terms – not just opinion on rights” (C21.65).
84. Mr Martin’s letter dated 13 November 1998 was forwarded by Mr Nash to Denton Hall on 16 November 1998 (see Ms Leslie’s witness statement, Paragraph 29: W1.43) and also to Mr Green QC, with whom the matter was discussed on the telephone on 17 November 1998. (Denton Hall’s attendance note of this discussion is at C21.187-190.) Having discussed the impact of the documents that had recently come to light, and whether they were discoverable, the discussion turned to the way forward. On this point, the attendance note reads as follows:

“4. Taking the initiative

4.1 Counsel confirmed his previous advice:

- (a) *that it was not in the Society’s best interests to bring the matter to Court;*
- (b) *if it appears inevitable that the matter will go to Court or the Pensions Ombudsman, then we should review the matter; and*
- (c) *if the matter does go to Court, the Society would want it to go on the first question, i.e. can the Society properly do what it has done – and to achieve that the Society would have to initiate the proceedings by originating summons (although Counsel indicated that it would not necessarily be possible to keep control of the issues).*

4.2 Counsel suggested that we could issue a protective originating summons with two tame defendants. CL asked in whose name the proceedings would be issued. It was agreed that the Society would want to be in the driving seat. CL suggested that there should be two defendants – one

policyholder with a guaranteed annuity and one policyholder with a non-guaranteed annuity. CL suggested that the case would be heard in 1999.

- 4.3 *Counsel emphasised that we do not want the Pensions Ombudsman to determine this. He emphasised that the Pensions Ombudsman cannot assume jurisdiction until all internal dispute resolution procedures have been exhausted.*
- 4.4 *Counsel said that he was not clear about the relationship between the PIA Ombudsman and the Pensions Ombudsman. Counsel said that we would be bound by the Pensions Ombudsman on matters of fact and not of law. SB said that he had assumed that the Pensions Ombudsman would have jurisdiction over all the policies, even though they are not all occupational schemes.*
- 4.5 *CL raised the question of timing. Counsel's advice was to get the literature finalised, send it out and then review the situation and decide whether the Society needs to take any further action.*
- 4.6 *Counsel said that he did not want the Society to commit itself to issuing proceedings as he emphasised that it was not in the Society's interests to go to Court.*
- 4.7 *CL said that she was not clear what the benefit was in issuing proceedings. Counsel said that the main advantage would be to remove the case from the jurisdiction of the Pensions Ombudsman. Counsel said that this is often done in practice.*
- 4.8 *Counsel said that whilst the case is capable of being lost, he thought that the Court would be sympathetic to the Society.*
- 4.9 *CL said that the Society may want an updated opinion from Counsel in the light of the Flanges papers."*

85. On 18 November 1998, Denton Hall reported to Mr Nash on the discussion with Mr Green QC the previous day (C21.181-184). Denton Hall raised the question of taking the initiative by commencing legal proceedings for a declaration that the Society had properly exercised its discretion regarding GAO. The possible benefits of such a course, and some of the practical consequences, were outlined. Mr Nash is recorded as saying that he would like to reflect on these proposals and to discuss them with his colleagues (Paragraph 3.7, C21.183). Ms Leslie also recommended Anthony Grabiner QC as a possible litigation Counsel.

86. In his Managing Director's Report dated 20 November 1998 (B.37.93-97), Mr Nash reported to the Board the advice of Denton Hall, and the possible merits of seeking a declaration from the Court. Mr Nash also recorded that a meeting had been arranged with Denton Hall and Cardew & Co for the afternoon of 25 November 1998 to consider the pros and cons of such a course.

87. At the Board meeting that took place in the morning of 25 November 1998 (minutes: C21.211-214), the question of whether the Society should initiate legal action was discussed but no decision was reached.
88. At the meeting in the afternoon of 25 November 1998, two principal issues were considered: (a) whether to write to all policyholders about GARs; and (b) whether to prepare a test case. On the latter point, according to their attendance note of the meeting (C22.188-193), Denton Hall advised:
- “It was only appropriate for the Society to consider taking the initiative and going to Court if it did not succeed in taking the matter “off the agenda.””* (Paragraph 3.2, C22.191).
- “Denton Hall’s advice was to see what happens in the Press, then at the appropriate time issue proceedings but not serve them.”* (Paragraph 3.3).
- “Denton Hall emphasised that PR and timing were key issues. The Society should only use litigation as a way of clarifying the position if it felt it has no choice. Litigation should be regarded as a last resort.”* (Paragraph 3.11, C22.192).
89. At the conclusion of the meeting on 25 November 1998, Mr Nash said that, subject to further information regarding the amount/scale of work required, he wanted to proceed with the preParagraphtion of proceedings (Paragraph 3.22, C22.193).
90. In her witness statement, Ms Leslie confirms that Denton Hall advised that litigation should be regarded as a last resort (Paragraph 38, W1.46 & 47).
91. On 01 December 1998, Ms Leslie wrote to Mr Nash, listing the documents likely to be required in order to prepare an Originating Summons and affidavit in support. As the penultimate Paragraph of this letter makes clear, the Society had not then decided whether to give instructions to Denton Hall to prepare proceedings (C21.239).
92. On 09 December 1998, there was a meeting of the GAR Group (minutes: C22.30-33).
93. Also on that day, Denton Hall met with the Society and Cardew & Co. At that meeting, it was agreed that Denton Hall should “...commence the preParagraphtion of legal proceedings with a view to the final decision being taken on whether to go to Court after the conference with Tony Grabiner QC on Monday, 14 December” (minutes of meeting: C22.185-187 at page 187).
94. Under cover of a letter dated 10 December 1998 (C22.78 & 79) Denton Hall sent to Mr Grabiner QC and Mr Green QC instructions to advise in consultation on 14 December 1998. These instructions set out in detail the current position on the GAR issue (C22.34-67). At Paragraph 4 of the “Overview” (C22.37) Denton Hall wrote:

“Leading Counsels’ views are sought in connection with the exercise of the Society’s discretion in relation to the declaration of final bonuses where the with-profits policy includes a guaranteed annuity rate (“GAR”). This has resulted in unprecedented adverse press comment, concern on the part of many policyholders and, to date, 13 complaints to the PIA Ombudsman. There has also been a fall in new investments.”

95. The instructions considered in considerable detail the nature of the complaints to the PIA Ombudsman and his jurisdiction to entertain the complaints. At Paragraph 66 (C22.61), Leading Counsel were asked to advise:

“.....on the advantages and disadvantages to the Society of:

- (a) having a test case before the PIA Ombudsman;
- (b) commencing its own High Court proceedings (with or without use of the clause 7 test case procedure);
- (c) taking the jurisdiction point in relation to the current complaints to the PIA Ombudsman;
- (d) letting the current and future complaints to the PIA Ombudsman run their course; and
- (e) waiting to see if it is sued in the High Court and/or if complaints are made to the Pensions Ombudsman.”

96. At the conclusion of the instructions, Leading Counsel were requested to advise on the GAR issues generally, including whether the Society had acted properly to date (C22.65 & 66).

97. On 11 December 1998, Denton Hall sent to Leading Counsel an addendum to their instructions (C22.99-103). This concerned the extent to which the Society was required to reserve for GARs under relevant legislation, which had been the subject of correspondence between HM Treasury and the Society.

98. Denton Hall’s note of the advice of Mr Grabiner QC, given at the consultation on 14 December 1998, is at C22.115-121. His advice as to whether or not the Society should commence Court proceedings was clear.

“PIA Ombudsman

Mr Grabiner was firmly of the view that none of the existing complaints should be dealt with substantively by the PIA Ombudsman. Mr Grabiner said that the Ombudsman would not take account of the legal points to the extent that a Court would, and was generally more favourable to the complainant than to the insurance company. In effect, it was a “merits tribunal”.

Given this the options appeared to be:

- (a) go to Court for directions i.e. ask the Court how the Society should exercise its discretion in relation to bonuses for the future, and/or
- (b) go to Court in relation to policies which had already matured (i.e. past issues as to what the Society had done).

Mr Grabiner recommended two test cases, one to deal with (a) and the other to deal with (b).

He was of the view that if the matter proceeded to Court without delay there would be a decision from the High Court by the end of 1999 and, he hoped, earlier.” (C22.116).

99. Mr Grabiner QC also advised that the directors had “...exercised their discretion [on bonuses] properly and that their legal case was “solid”.”

100. On 16 December 1998, there was a meeting of the Board (minutes: 22.194-197). Mr Nash reported on the advice given at the consultation two days previously. The minutes record Counsels’ advice in the following terms:

“Their advice had been that the Society should seek to have the matter determined by the Court, to avoid cases being decided by the PIA Ombudsman or the Pensions Ombudsman.”

(C22.195).

101. There was then a unanimous decision by the directors present to proceed with the initiation of a test case, as recommended by Counsel.

102. At the Board meeting on 27 January 1999, Mr Nash reported that proceedings had been commenced earlier than intended,⁹ in order to avoid a writ being issued against the Society (B38.116). An Originating Summons was issued, against Mr Hyman, on 15 January 1999.

Conclusion on Causation

103. The contemporaneous documents, summarised above, make it clear that a test action was only selected as the appropriate way forward because the Society (on Counsels’ firm advice) preferred to have the legal issues resolved by the Courts rather than by the PIA Ombudsman. The Society also wished to be Claimant, and not Defendant, in any Court proceedings. Had the Society sought legal advice on the DTBP in 1996, as it is alleged that it ought to have done, it would have been advised:

⁹ **The original intention had been to commence Court proceedings only after the PIA Ombudsman had confirmed that, in the event of a test action, he would cease consideration of the complaints pending.**

- (A) that the DTBP was lawful; and
- (B) not to commence a test action.

104. It was Mr Green QC's original advice not to take a test action. Denton Hall regarded litigation as the last resort. Mr Grabiner QC advised that a test action should be commenced only because of the 13 cases pending before the PIA Ombudsman as at 14 December 1998. Had he been asked to advise in early 1996 (at which point there was no publicity adverse to the Society, no threat of a class action and no complaints to the PIA Ombudsman) it is likely (and, it is respectfully submitted, to be inferred) that he would have concurred with the original view of Mr Green QC. In fact, as there was then no adverse publicity, no threat of a class action and no complaints to the PIA Ombudsman, he would not even have been instructed. The Society would have relied on the advice of Denton Hall and Mr Green alone.
105. In the circumstances, the Society's assumption that legal advice in 1996 would have resulted in a test action being commenced at that time is wrong. The reason for the test action was the Society's desire to avoid the legality of the DTBP being determined by the PIA Ombudsman. This aspect of the Society's claim against Miss Page fails on causation.

Loss of a Chance

106. The loss that the directors are said to have caused to the Society, by failing to take legal advice and to initiate a test case earlier than was in fact the case, is set out in section 8 of Mr Cryan's first report dated 27 May 2004 (E1-1.277-1.283). The premise that underpins all that Mr Cryan has to say is set out at Paragraph 8.1.2 of his first report:

"It is contended that the Board ought to have taken legal advice on the legality of the DTBP. Initial advice would have been inconclusive. Accordingly, the directors would have initiated a test case akin to the Hyman litigation. It is assumed that the results of the test case would have been the same as the outcome from the Hyman litigation."

(E1-1.277).

107. The flaws in this premise have already been dealt with above in the context of the allegation that legal advice should have been taken in February 1996 as to the legality of the DTBP. It not accepted that the advice, if sought in 1996, would have been "inconclusive" (to quote Mr Cryan). In fact, robust advice would have been obtained that the DTBP was lawful, given the width of the discretion conferred on the Board by Article 65. In the light of that advice, and absent the other factors that came into play in the Autumn of 1998, and only at that time – namely severe press criticism of the Society, threats of class action litigation and actual complaints to the PIA Ombudsman, all of which

were driven by the widening gap between GAR and CAR – no test action would have been commenced.

108. Had a test action been commenced in 1996 as Mr Cryan contends it should have been (ignoring all the available evidence as to what in fact necessitated such a test action), then the sale process would, according to Mr Cryan:

- (A) have commenced in March 1998, following two years of reduced bonuses and an adverse House of Lords decision regarding the DTBP;
 - (B) completed in December 1998;
 - (C) realised (for the goodwill or franchise alone) between £900 million - £1,050 million.
- (E1-1.277-278).

109. The figures of between £900 million - £1,050 million are calculated by taking an assumed value of the Society's 1997 new business of £30 million and multiplying it by 30-35 times (E1-1.279). This, according to Mr Cryan, is what a willing purchaser would have paid for the franchise or goodwill alone. (More would have been paid for the other assets of the business equal, it is said, to what third parties actually paid).

110. Mr Cryan undertakes a similar exercise with respect to the claim that the directors should have taken legal advice in February 1997 (i.e. the next annual bonus declaration). In this scenario, it is said, the sale process would have:

- (A) commenced in March 1999;
 - (B) completed in December 1999;
 - (C) realised (for goodwill/franchise alone) between £782 million - £952 million.
- (E1-1.279-280).

111. The same calculation is performed by Mr Cryan on the basis that the directors first recognised the necessity for legal advice in February 1998. On that scenario, the sale process would have:

- (A) commenced in March 2000;
 - (B) completed in December 2000;
 - (C) realised between £504 million - £616 million for goodwill/franchise alone.
- (E1-1.281-283).

112. This final scenario should be contrasted with what actually happened:

- (A) *Hyman* case lost and Society put up for sale in July 2000;
- (B) last interested bidder withdrew in December 2000. Thereafter, certain assets sold to third parties;
- (C) nothing realised for goodwill/franchise (according to Mr Cryan)¹⁰.
113. Why would a sale process, commencing in March 2000 have produced £504 million - £616 million more for the goodwill/franchise than the actual sale process, which commenced in July 2000? What changed in 4 months between March and July 2000?
114. Mr Cryan provides no answer to these questions. In his Supplementary Report he attempts to distinguish his hypothetical Viable Sale Structure from the actual sale of assets to Halifax on the grounds that, in his hypothesis, the Society would not have been closed to new business (as was the case by the time of the Halifax deal). That is an incredible hypothesis if his basic assumptions are considered and, even if accepted, incapable of explaining why a purchaser of the Society's goodwill/franchise should have paid more when, hypothetically, the Society itself would be competing for future new business than when it was not. It is submitted that the outcome of a sale process, commenced in March 2000, would have been precisely the same as the actual sale process, commenced in July 2000. Whenever commenced, by the time there had been a test action and the House of Lords had found against the Society, the damage to the Society's reputation and goodwill would have been done.
115. In short, it is unrealistic for Mr Cryan to argue that, after the conclusion of the test case, the Society was worth (for its goodwill/franchise) a multiple of the value of its new business in the preceding year. The evidence of Mr Franklin should be accepted on this point. His evidence also makes it clear that Mr Cryan's views are as equally flawed with respect to a sale in 1998 or 1999 as they are to a sale in 2000.
116. For a claim for "loss of a chance" to succeed:

"... the plaintiff must prove as a matter of causation that he has a real or substantial chance as opposed to a speculative one. If he succeeds in doing so, the evaluation of the chance is part of the assessment of the quantum of damage, the range lying somewhere between something that just qualifies as real or substantial on the one hand and near certainty on the other."

per Stuart-Smith L J in *Allied Maples Group Ltd v Simmons & Simmons (a firm)* [1995] WLR 1602 (at page 1614D).

¹⁰ **It is not accepted that nothing was paid by Halifax for the Society's goodwill/franchise.**

117. Did the Society have a “*real or substantial chance*” of selling the business in 1998 for more than was achieved in 2000, or merely a “*speculative*” one? The answer is clear: Mr Cryan’s arguments are speculative in the extreme. If nothing was changed except the date of the sale (being advanced in time), then the hypothetical outcome would not have differed from the actual outcome.
118. Mr Cryan is critical of the way in which, in 2000, the Society was offered for sale. The attempted sale of the whole business, as a going concern, was, he says, doomed to failure. Rather, a sale should only have been attempted on a “Viable Sale Structure”. He says that “...Schroders was mistaken in pursuing a demutualisation scheme” (Paragraph 3.12, Supplementary Expert Report, E1-3.141). Rightly, the Society makes no claim against the directors as to the manner in which the sale was attempted. Such a claim would be bound to fail. The directors took proper professional advice and followed it.
119. In summary, the time-shift claim breaks down at every stage. Miss Page was not negligent in approving the bonus decisions without legal advice; that advice (if obtained) would have been to the effect that the DTBP was lawful and no test case would have been commenced; even if a test case had been commenced and decided against the Society in 1998, the Society’s goodwill/franchise would not have been worth more to a third party purchaser than was in fact the case, post *Hyman*.

Bonus Cuts in 1996

120. A further claim is advanced against Miss Page, also said to result from her failure to ensure that legal advice was taken on the DTBP in February 1996. It is said that:

“In the meantime, whilst awaiting the decision of the Court [in the hypothetical test case], the directors should and would have taken precautions against the risk of losing the test action, and done what they could to preserve and increase the value of the Society, namely:

- (i) [claim abandoned]¹¹*
- (ii) reducing bonuses so as to build up the Society’s reserves.” (RRAPOC, Paragraph 84(c)).”*

121. This claim has precisely the same flawed factual basis as the time-shift claim. All the same points arise and are not therefore repeated.
122. But even if a test action is hypothesised, the ‘bonus cuts’ claim is a bad one. It is said that whilst the test action was ongoing, “...directors ought to have cut bonuses so that

¹¹ **Obtaining a hedge against the potential costs of GARs if they had to be honoured in full.**

aggregate policy values were reduced to the level of underlying asset values". Had the directors acted in this way, the bonus "saving" for 1996 would have been £105 million (RRAPOC, Paragraph 86). The Society relies on the Expert Report of Mr Arnold, dated 27 May 2004, in particular Paragraphs 292-303. (E1-1.130-133).

123. However, the Society has now made it clear that Mr Arnold's evidence is relevant only to the quantum of the alleged saving, and is based on an assumption that Mr Arnold was instructed by the Society to make, namely that directors would or should have abruptly reduced policy values to asset values¹². The Society has no evidence, from Mr Arnold or any other expert, to substantiate or support its case against the directors that policy values should have been reduced in that way.

124. The decisions on bonuses effective from 31 December 1995 are clear from the documents. In their paper for the Board meeting of 22 November 1995, (B20.108-110) Mr Nash and Mr Headdon reported that:

"The negative actual return in 1994 has led to another period where allocated earnings have run ahead of the actual position. A natural reaction to a relatively high actual return for 1995 would be to allocate less than the actual earnings, so beginning the process of bringing actual and allocated returns back into line over the current smoothing period. Confirming the current roll-up rate of 10% for the year would seem to be an appropriate starting point and that would have the benefit of avoiding a discontinuity across the year end.

Looking ahead, the decision on the appropriate level for the prospective roll-up rate during 1996 essentially depends on the view taken of future investment prospects. Experience has normally been smoothed over periods of 3-5 years and that would indicate that the aim should be to eliminate the current margin of allocated over actual earnings over the next 2-3 years. If, for example, actual earnings were 15% p.a. in each of the next 2 years, then the allocated rate could be maintained at 10% p.a. and a position of balance would be restored by 31 December 1997."

(B20.109).

125. The paper considered at the Board meeting on 24 January 1996 repeats this point:

"A year of relatively good performance, such as 1995, provides an opportunity to move towards bringing allocated and actual earnings back into balance. The natural consequence of smoothing will, therefore, be to allocate less than was earned in respect of 1995."

(Paragraph 13, B21.102).

¹² **Herbert Smith letter of 6 August 2004 to Miss Page: "Paragraph 291 (of Mr Arnold's Report) sets out the assumption Mr Arnold was instructed to make."**

126. The same paper (B21.100-103) showed that on the Companies Act accounts basis the Society's position was strengthening; at the end of 1995, assets exceeded liabilities by £1892.5 million, as compared with a figure of £1173.7 million for 1994; the Fund for Future Appropriations had increased by £718.8 million.
127. In round figures, from this increase £400 million was used to fund declared bonuses and £300 million retained.
128. Thus, when they set the overall roll-up rate of 10%, both retrospectively for 1995 and prospectively for 1996, the directors were moving in precisely the direction that the Society says they ought to have been going, namely to bring policy and asset values into balance. The only difference is the speed at which the gap should be closed. In RRAPOC the Society asserts that the gap should be closed immediately. In the SOS, the Society now suggests as an alternative that the gap should be closed less abruptly. That was, of course, what the directors were seeking to achieve. The very fact that the Society puts its own case in the alternative demonstrates that the speed with which the gap is closed is pre-eminently a matter of commercial judgment¹³.
129. Thus, the claim that bonuses should have been cut, while a hypothetical test case commenced in 1996 was underway, is baseless because:
- (A) the advice would have been against commencing a test case;
 - (B) even if there had been a test case, the directors were in any event withholding earnings, in order to increase the FFA and bring policy and asset values back into balance. The Society adduces no evidence that directors would or should have accelerated this process because of such a test case. This lack of evidence is no surprise, given that the issue is one of commercial judgment.
 - (C) given the very strong legal advice, the directors had to have regard to the likelihood that the Society would win any test case. In the light of that advice (i) it would have been unfair to those retiring in 1997 to award artificially reduced final bonuses,¹⁴ and (ii) any savings from cutting bonuses during the test action would have been

¹³ In the Society's letter to the FOS dated 15 November 2004, the Society relies on a May 2004 Adjudication to the effect that bonus decisions are "a legitimate exercise by [the Society] of its commercial judgment" to support the Society's submission that the FOS should not adjudicate 'over-bonusing' allegations (C70.321).

¹⁴ A bonus may only be awarded to the holder of a participating policy (Article 65(1)). Under Article 1, a "participating policy" is defined to mean "...any policy which for the time being confers a present entitlement to participate in the profits of the Society..." (emphasis added).

likely to be less than the reduction in new business and the Society's goodwill that would also have flowed from such cuts.

130. The SOS (Paragraph 319(b)) advances a new and additional 'bonus cuts' claim on a time shift basis – namely that on the hypothesis of an earlier test case and even if bonuses had not been cut during the test case, at least once the result was known the Society would have cut bonuses so as abruptly to reduce policy values to asset levels. Again, no evidence is produced – the cross-reference to Mr Arnold's Report is to a Paragraph concerned solely with quantum. The Society's claim is contrary to the evidence of the actual bonus recommendations following the actual *Hyman* decision both of Mr Headdon, Appointed Actuary in July 2000 and of Mr Thomson, Appointed Actuary in February 2001; neither adopted the approach which the Society now alleges would have been adopted in earlier years. The allegation has no merit.

PART IV

FEBRUARY 1997 NEGLIGENCE CLAIMS

131. It is said that, in February 1997, Miss Page was in breach of her duties to the Society "...in similar fashion to her breaches in February 1996" (RRAPOC, Paragraph 96). Again, it is said that:
- (A) a test case should have been initiated;
 - (B) that "...by about the end of 1998" the directors would have known that differential terminal bonuses were not permissible;
 - (C) that while the test case was underway, precautions against the risk of the test case should have been taken by reducing bonuses so as to build up the Society's reserves (RRAPOC, Paragraph 97). Bonuses should have been cut so that "aggregate policy values were reduced to the level of underlying asset values", producing a "saving" in 1997 of £131 million (RRAPOC, Paragraph 99), plus additional savings in the years 1998-2000 totalling, with the investment return on such savings, £479 million (RRAPOC, Paragraph 100).
132. In addition, it is said that if a hypothetical test case had been initiated in early 1997, and reached a conclusion by the end of 1998, there was a chance that the Society could have sold its goodwill/franchise for £782 million - £952 million more than was in fact the case. (RRAPOC, Paragraphs 102-104).

Liability

133. The Society's claims, said to be grounded in the events of February 1997, take as their starting point that it was negligent for Miss Page not to have required that advice be taken as to the legality of the DTBP. Although it is necessary to review all the papers put to the Board in their entirety, they are dealt with relatively briefly in this written opening, given that they are similar to the papers considered with respect to the February 1996 bonus decisions. The documents follow the same pattern as in previous years.
134. "Bonus Declaration at 31 December 1996" was item 9 on the agenda for the meeting of the Board held on 18 December 1996 (B25.209). The Board had before it a report prepared by Mr Headdon and Mr Ranson dated 12 December 1996 (B25.300-303). As was the case a year before, at this stage the paper was intended to provide information to the Board: no decisions were required, except with respect to German Branch business.

135. In summary, the report stated that actual earnings are likely to be a “little higher” than the current roll-up rate of 10%; recommended that 10% be declared as the roll-up rate for 1996 and that the prospective rate for 1997 should be reduced to 9%. This would “...begin to slow down the build up of policy values” (B25.303). The declared bonus rate was to be set at 7.5%.
136. The minutes of the meeting of the Board that took place on 18 December 1996 (B26.2&3) record that the recommendations set out in Paragraph 20 of the report of 12 December 1996 were accepted (B26.3).
137. The Board met again on 22 January 1997. It considered a paper, entitled “Valuation and Bonus Declaration at 31 December 1996” prepared by Mr Headdon and Mr Nash and dated 17 January 1997 (B26.96-100).
138. In summary, it was reported that:
- (A) the overall return on the ‘with profits’ business achieved in 1996 was 10.7%;
 - (B) the FFA had increased from £1705.2 million (1995) to £2105 million;
and it was recommended that:
 - (C) the rate of declared bonuses at the rate of 7.5% (at an estimated cost of £502 million);
 - (D) the roll-up rate for 1996 be 10%;
 - (E) the prospective roll-up rate for 1997 should be reduced to 9%.
139. As the minutes of the Board meeting of 22 January 1997 confirm, the recommendations regarding bonus rates were approved (B29.109-112 at page 111).
140. A Special Board meeting took place on 12 February 1997. The only item on the agenda was “Valuation and Bonus Declaration as at 31 December 1996” (B26.260). Six directors¹⁵ were present (B26.258), four of whom also attended the meeting of the Investment Committee that took place the same day (B26.113). (Messrs Tritton and Bowley attended the Special Board meeting but not the Investment Committee.) The Special Board meeting considered a report by Mr Ranson, dated 7 February 1997, annexed to which was the Statement of Bonuses (B26.261-286). This report set out (among other matters): the estimated results for 1996 (in both Companies Act and DTI Return format); the cost of new declared bonuses, £503.4 million, applying the rates discussed at the January Board meeting; and the FFA (£1777.3 million, after declared

¹⁵ **Messrs. Sclater, Tritton, Bowley, Price, Ranson and Thomas.**

bonuses). As in previous years, the Statement of Bonuses was only prepared for the Special Board meeting.

141. The summary and recommendations were:

- (A) that from the surplus of £2280.7 million, bonuses be declared costing £503.4 million at the rates referred to in the Appendix;
- (B) that bonuses vest on 1 April 1997;
- (C) that final bonus entitlements be announced as described in the Statement of Bonuses;
- (D) that the directors reserve the right to reconsider the rates of final bonus at any time.

(Minutes, B26.258 & 9).

142. As recorded in the minutes (B26.258 & 259), the recommendations were accepted. At the next ordinary Board meeting, held on 26 February 1997, the minutes of the Special Board meeting were themselves approved (B27.2).

143. For the reasons already fully set out with respect to the events of February 1996, Miss Page was not negligent in concurring with the bonus decisions without requiring that advice be obtained as to the legality of the DTBP.

Causation

144. Even if, contrary to Miss Page's primary submission, legal advice should have been obtained regarding the DTBP, the Society's claim must fail on causation. The legal advice, if sought, would have been that the DTBP was lawful, given the ambit of Article 65, and no test case was either necessary or desirable.

145. The position, in 1997, would have been no different from the position in 1996 already discussed.

Loss of a Chance

146. For the reasons already set out, in the context of the claims said to arise in February 1996, there was no real or substantive chance that a greater price would have been obtained for the business of the Society if the sale process had started earlier than was in fact the case.

Bonus Cuts in 1997

147. For the same reasons as set out above in relation to February 1996, the Society's RRAPOC and its new SOS claims (if permitted) in respect of February 1997 bonus cuts have no merit.

148. It is also appropriate to record a bonus decision taken by the Board in September 1997. As set out above, in February 1997 the prospective roll-up rate for that year was set at 9%. On 24 September 1997, the Board met and considered a recommendation by Mr Headdon that this rate be increased to 10%, the same level as had in fact been applied in 1996. Mr Headdon's reasons for making this recommendation are set out in his paper "Final Bonus Rate", dated 16 September 1997 (B30.133-135).

149. In summary, Mr Headdon recommended increasing the final bonus rate to 10% because (a) actual earnings for 1997 were likely to exceed 15% on sterling investments (more for other currencies) and (b) it would be unfair to those now leaving the Society to receive a final bonus of only 9%.

150. The Board approved Mr Headdon's recommendation (Minutes, B30.155-158 at 157).

151. Against Miss Page, it is said that bonus rates should, in 1997, have been cut while the hypothetical test case was underway. (The amount of the requisite cuts is pleaded on one basis in RRAPOC and stated, but unpleaded, in the SOS in a different way.) This claim, in respect of September 1997 as for other dates, should be rejected for all of the following reasons:

- (A) there would have been no test case commenced in 1997, even if legal advice on the DTBP had been obtained;
- (B) even if a test case had been commenced, the appropriate level of bonuses was a matter of judgment;
- (C) the relationship between policy values and assets was not such that a test case as hypothesised would or should have caused the cuts alleged: Mr Headdon's paper

showed that, after a negative year in 1994, the allocated growth rates were less than actual earnings, as follows;

<u>Year</u>	<u>Actual earnings</u> %	<u>Allocated growth rate</u>
1993	28.8	13
1994	- 4.2	10
1995	16.6	10
1996	10.7	10
1997	15 (projected)	9 (current)

(B30.133).

- (D) to have reduced bonus levels below those in fact set would have been to risk damaging the competitiveness of the Society;
- (E) cuts as alleged would have been unfair to policyholders retiring in the immediate future.

PART V

FEBRUARY 1998 NEGLIGENCE CLAIMS

152. The negligence claims said to arise from the events of February 1998 are set out at Paragraphs 108-119B of RRAPOC. The claims follow the same pattern as those said to arise from the events of February 1996 and 1997. Once again, the SOS attempts to set out unpleaded variations and additions to 'bonus cuts' claims.
153. In principle, the arguments against the claims advanced with respect to the events of February 1996 and 1997 apply with equal force to the claims said to arise in February 1998. It is however necessary to consider whether there had been any relevant changes to the factual matrix which might impact on the liability or causation issues.

Liability

154. The bonus declarations to be made, as at 31 December 1997, were matters first considered by the Board at its meeting on 26 November 1997. As in earlier years, the Board considered a paper, prepared by Mr Headdon and dated 19 November 1997 (B31.122-127), that was intended for discussion purposes only. Mr Headdon set out the relationship between actual earnings and the roll-up rate over the eight previous years. He considered the likely investment return for 1997 and policyholders' reasonable expectations before summarising his suggestions in the following terms:

"Summary

31. *This paper discusses the general approach which might be appropriate at the forthcoming declaration on the assumption that actual 1997 earnings will be in the range 10-15%. The specific suggestions offered as a basis for discussion are:*
- (i) That declared rates should be based on a return of 6.5% compared to the 7.5% which applied in 1996.*
 - (ii) That the total return allocated for 1997 should be below the actual earnings but that the margin between the two rates should not be too large. Some more specific suggestions are given in paragraph 29.*
 - (iii) That the total return to apply from 01 January 1998 onwards should revert to the 9% p.a. rate which was originally introduced from 1 January 1997."*

155. Mr Headdon's paper of 19 November 1997 should be read in its entirety. It sets out the range of issues that required to be considered when deciding on the appropriate bonus levels.

156. As the minutes of the meeting of the Board held on 26 November 1997 record (B31.148-152), there was “general support” for the possible reduction in the declared bonus rate from 7.5% to 6.5%. The minutes continue:

“He [Mr Headdon] demonstrated that there remained a gap between the total amounts allocated in the current cycle of smoothing and the actual earnings in the period and that this indicated it would be appropriate to allocate less than the actual earnings in respect of 1997.”

(B31.151)

157. At the Board meeting held on 17 December 1997, the directors reached a decision on bonus rates for German Branch business. Bonuses were not otherwise discussed.

158. On 28 January 1998, the Board met to consider the question of the bonuses to be declared as at 31 December 1997. The Board had before it Mr Headdon’s paper, “Valuation and Bonus Declaration at 31 December 1997” dated 19 January 1998 (B32.134-144). This also requires to be read in full in order to understand all the factors that influenced the level at which bonuses were set. In summary, Mr Headdon recommended:

(A) declared bonus rates for 1997 should be set at 6.5% (for 1996, the rate had been 7.5%). At that level, the cost of the new declared bonuses was estimated to be £520 million;

(B) the roll up rate should be set at 13% for 1997, and at 9%, prospectively, for 1998, subject to adjustments from 1 February 1998.

159. The proposed roll-up rate of 13% was higher than had been anticipated when the initial Board discussions took place in November 1997 because, in the event, the return attributable for 1997 on the Society’s with-profits business had been 17.2%, i.e. higher than originally predicted.

160. The minutes of the Board meeting held on 28 January 1998 (B32.158-162) record that Mr Headdon’s proposals were approved.

161. A Special meeting of the Board took place on 17 February 1998. As in previous years, the sole agenda item for that meeting was “Valuation and Bonus Declaration at 31 December 1997” (B32.316) and the five directors present were those who also attended a meeting of the Investment Committee held the same day (B32.163). Mr Headdon presented a paper, annexed to which was a Statement of Bonuses (B32.318-345). Mr Headdon made the same bonus recommendations as he had at the January Board meeting: declared

bonuses for 1997 at the rate of 6.5% (at a cost of £507.7m): a roll-up rate of 13% for 1997 and 9% (prospectively) for 1998. The Special Board meeting accepted these recommendations (Minutes: B32.317).

162. As in 1996 and 1997, the only reference to what is now known as the DTBP was the single paragraph, in the terms already quoted, in the Statement of Bonuses (B32.333).
163. In conclusion, the events of January and February 1998 were, so far as the present proceedings are concerned, no different from the events of January and February 1996. It is unlikely that Miss Page read the Statement of Bonuses in detail. Nor was there any reason why she should have read the Statement, given that it did no more than apply to different classes of business the bonus decisions taken at the January 1998 Board meeting. Without reference to the policy documents, Miss Page could not independently determine whether the bonuses had been correctly applied to the different classes of business. It was not her job to undertake that exercise any more than it was her job to check that annual bonus statements, provided to individual policyholders, had been correctly prepared.
164. Even if Miss Page had read the Statement of Bonuses in full, it would not have been apparent to her from that document that the DTBP was a problematic matter on which legal advice was required. In not identifying any need for legal advice, Miss Page was not in breach of her duty of care.

Causation/Loss of a Chance

165. The 1998 claim is not different, as regards causation and loss of a chance, from the claims for 1996 and 1997. Specifically, had legal advice been sought in (say) March 1998 it would have been to the same effect as that in fact given by Denton Hall and Brian Green QC in September 1998.

Bonus Cuts in 1998

166. The actual decisions reached on bonuses in January 1998 have been set out above. Two points require to be emphasised. First, declared bonus rates for 1997 were reduced by 1% from 7.5% to 6.5%. Secondly, the roll-up rate for 1997 was set at 13%, ie. less than the investment return (17.2% on with-profits business). For the third year in succession, the roll-up rate was set below actual earnings.
167. It is now said that bonus rates should have been set at a lower rate than was in fact the case. There was no reason known to Miss Page in January 1998 which would have

required setting bonuses at any different rates either at the time or in the hypothetical situation of there being a test case. The same arguments apply as in earlier years.

168. In particular, the Board, including Miss Page, reached a reasonable commercial decision as to the appropriate bonus rates. The Court should reject the Society's arguments that different, lower bonus rates (at whatever level) should have been set. The Board was building up reserves and moving towards a position where policy and asset values would be in balance, precisely the actions which the Society now claims that the Board ought to have taken, but in a more abrupt fashion.
169. At Paragraph 319(b) of the SOS, the suggestion is made, for the first time, that even if the Board did not cut bonuses when a hypothetical test case was commenced, in 1996, it should have done so once the "adverse outcome" was known. This would mean that bonuses should have been cut back so that policy and asset values matched at the end of 1997, given the likely timetable that a hypothetical test case would have followed.
170. If the Society wishes to pursue this argument, it should be properly pleaded. Again, no evidence is produced – the cross-reference to Mr Arnold's Report is to a Paragraph concerned solely with quantum. The Society's claim is contrary to the evidence of the actual bonus recommendations following the actual *Hyman* decision both of Mr Headdon, Appointed Actuary in July 2000 and of Mr Thomson, Appointed Actuary in February 2001; neither adopted the approach which the Society now alleges would have been adopted in earlier years. The allegation has no merit.

PART VI

FEBRUARY 1999 NEGLIGENCE CLAIMS

171. The Society's claims, with respect to the events of 1999, are set out in section G2 (Paragraphs 73-77) and sections H5A & B (Paragraphs 120-126B) of RRAPOC. The SOS attempts to introduce an unpleaded variation to the Society's causation and loss claim.
172. It is said that Miss Page did not exercise reasonable skill and care because:
- (A) she ought to have been aware of the cost to the Society, if the DTBP was held to be impermissible (RRAPOC, Paragraph 73);
 - (B) she ought to have been aware of legal advice to the effect that (i) there was a real risk of losing the *Hyman* litigation and (ii) that ring-fencing GAR liabilities might not be possible (RRAPOC, Paragraph 74);
 - (C) she ought to have been fully aware of the legal advice obtained by the Society (RRAPOC, Paragraph 75);
 - (D) she ought to have concluded that the Society should take precautions against the risk of losing the *Hyman* litigation. Such precautions should have been taken before the DTBP was applied again (RRAPOC, Paragraphs 76 & 77);
 - (E) the precautions that it is said should have been taken were to have cut bonuses so that "...aggregate policy values were reduced to the level of underlying asset values" (RRAPOC, Paragraph 123). Such bonus cuts would have produced savings of £77 million in 1999 and £51 million in 2000 (in both cases including the investment return on such savings) (RRAPOC, Paragraph 124). The quantification of the alleged loss is set out in Mr Arnold's Report; and
 - (F) in the alternative, bonus cuts that would have produced an alleged saving of £43 million should have been made (SOS, Paragraph 351)¹⁶.
173. To answer the case advanced against Miss Page, it is necessary to consider in some detail (a) the legal advice that was made known to the Board and (b) the factors taken into consideration when bonuses were actually decided in February 1999.

¹⁶ The figure of £43 million is said in the SOS to be taken from Mr Arnold's Report (Paragraph 302). In fact, Mr Arnold does not address a "smoother cut"; his Paragraph 302 concerns an abrupt cut in 2000.

Legal Advice

174. The legal advice provided by Denton Hall and Leading Counsel is well documented. How that advice was reported to all directors, including Miss Page, is also clear from the documents. In her Third Witness Statement, Paragraphs 58-80 (W3-2.208-214), Miss Page records her recollection of events between September 1998 and February 1999. That Statement also refers to documents that Miss Page received concerning all aspects of the GAR issue. In summary, Miss Page received information regarding the Society's legal position as follows:

- (A) note of meeting held on 09 September 1998, sent to directors on 11 September 1998 (B36.4-11). Denton Hall (Mr McGeough) are noted as having advised that the wide powers given to the directors enabled them to adopt the DTBP. A caveat was added: there was nothing in policy conditions that would lead a policyholder to believe that the DTBP applied;
- (B) Managing Director's Report of 18 September 1998: by the time of the Board meeting, Counsel's opinion would have been obtained;
- (C) Messrs McGeough and Brown of Denton Hall attended at the Board meeting on 23 September 1998. Mr Nash summarised Counsel's opinion as being that the Directors had acted within the terms of the Society's Articles and within the terms of the policies. There were however shortcomings as to the way that the Society had presented the matter to policyholders. Messrs McGeough and Brown concurred with this summary;
- (D) note of 09 October 1998 to all non-executive directors (C19.269) from Mr Nash. This recorded that a further opinion had been obtained from Counsel (Mr Green QC) confirming that the directors had acted in accordance with the policies and powers conferred by the Articles;
- (E) Managing Director's Report of 23 October 1998 (B36.199-205), enclosing Note of the 14 October 1998 GAR Group meeting (C20.134), which recorded the fact of discussion with Denton Hall and Leading Counsel regarding finalising an explanatory leaflet and annual statement for policyholders. It also recorded that Denton Hall's advice had been given on strengthening the Society's position in the event of legal proceedings being commenced against the Society;

- (F) note to all non-executive directors dated 06 November 1998 (C21.14 & 15), reporting that the text of an explanatory leaflet and annual statement for policyholders had been agreed with Denton Hall and Leading Counsel;
- (G) Managing Director's Report dated 20 November 1998 (B37.93-97), enclosing a Note of the 11 November 1998 GAR Group meeting (C21.41), reporting that Denton Hall were now advising (depending on future developments) that there may be merit in commencing proceedings for a declaration. By taking the initiative (in Denton Hall's view) the Society would be seen to be confident in its legal position: able to control and limit discovery and (possibly) avoid cases being considered by the PIA Ombudsman;
- (H) Minutes of the Board meeting of 16 December 1998 (seen by Miss Page in advance of the next Board meeting, 27 January 1999) recording that Mr Green QC and Mr Grabiner QC had advised that proceedings for a declaration should be commenced by the Society, and that the Board had unanimously resolved so to do (B38.2-5);
- (I) discussion of the High Court action at the Board Meeting held on 27 January 1999 (B38.115-119). Mr Nash said that the Society's lawyers remained "rock solid" (C24.214) and that Mr Grabiner QC considered the Society's case "solid" (C24.215).
- (J) oral report (C27.72) to the Board meeting on 24 February 1999 (from Peter Martin who had met prior to the Board meeting with Ms Leslie of Dentons) stating, amongst other matters, that "if lost in whole or part, appeal could be within 1999. Solicitors & Leading Counsel remain confident ... Going better than hoped for."

175. The thrust of the advice regarding the legality of the DTBP, summarised above, is clear: the Society's legal advisers all considered, consistently, that the Society had a strong case. Miss Page, like all of the directors, knew that there was a possibility that the test action could be lost: indeed, that possibility was discussed at the Board meeting on 27 January 1999 (C25.13-15). That was regarded, correctly, as a remote possibility, given the strength of the legal advice received. There was a separate, less remote, risk, but one which concerned Miss Page and other directors, namely that a 'win' might be accompanied by criticism from the judge that would exacerbate the reputational problems that the Society was already experiencing.

176. In order to ensure that she was “fully aware” of the legal advice being provided, it is the Society’s case that Miss Page should have asked to see Leading Counsel’s written advice and/or met them in consultation and/or requested them to attend a Board meeting (Society’s Response dated 14 June 2004 to Further Information Request (P2-7.83 & 84)). It is respectfully submitted that this formulation of the Society’s case in this regard is as fanciful as is its case generally.
177. In the circumstances where (a) regular reports were being provided to Miss Page, both in writing and orally, regarding the legal position and (b) a special group (the GAR Group) had been formed to oversee the handling of the GAR issues, none of the steps that the Society suggests should have been taken were either necessary or appropriate. Even if Miss Page had met Leading Counsel, or read their opinions, it would not have altered the views she formed on the information that was in fact provided to her.

Bonus Declaration

178. Following the same pattern as had applied in earlier years, at the Board meeting held on 25 November 1998 Mr Headdon tabled for discussion a paper headed “Bonus Declaration at 31 December 1988 – Initial Considerations” (B37.114-119). That paper commented on: the Society’s bonus policy generally: policyholders’ reasonable expectations; bonus declarations in previous years and likely earnings in 1998. If actual earnings for 1998 were within the 7-11% range, Mr Headdon concluded his paper by recommending:
- (A) a cut in the declared bonus for 1998 from 6.5% to 5.5%;
 - (B) a roll-up rate of 9% for 1998;
 - (C) a prospective roll-up rate of 9% for 1999.
179. A further paper, for discussion, was presented to the Board at its meeting on 16 December 1998. In that paper (B37.258-260), Mr Headdon set out the advantage and disadvantages of setting the declared bonus rate at 5%, rather than the rate of 5.5% proposed in his paper to the November Board. (As Mr Headdon’s paper makes clear, the possibility of moving to a 5% declared rate had been discussed at the November Board.)
180. Mr Headdon’s paper to the December Board stated, at Paragraph 2 of the Introduction:
- “This paper assumes that the current issue regarding the reserving for guaranteed annuity rates will be resolved satisfactorily and that exceptional measures, such as passing the bonus declaration, will not be necessary.”* (B37.258).

181. Clearly, and quite correctly, the issue of reserving for GARs was regarded as a matter potentially impacting on the Society's decisions regarding the bonus levels.
182. Miss Page did not attend the December Board. She did, however, read the minutes (B38.2-5) from which it was clear that, before bonus rates were considered, there was a lengthy discussion regarding the GAR issue, culminating in the decision to initiate a test case. As Miss Page says in her Witness Statement, she was informed of the decision even before she read and received the minutes (W3-2.211). Bonus rates were not considered in a vacuum: the impact of the GAR issue was well understood.
183. Mr Headdon presented a paper entitled "Valuation and Bonus Declaration as at 31 December 1998" at the Board meeting held on 27 January 1999 (B38.87-94). Again, this paper must be read in full.
184. The question of the appropriate reserve for GAR liabilities was discussed by Mr Headdon in his paper at length. He commented that the GAR reserve needed to be addressed at three levels:
- (A) for the purposes of the Companies Act accounts, which the auditors would accept as "true and fair". "Such a reserve can be characterised as a 'cautious best estimate'." (B38.89).
 - (B) a reserve in the statutory returns which meets regulatory requirements; and
 - (C) a reserve at the level indicated in the recent FSA and GAD guidance.
185. Pending further discussions with the auditors, Mr Headdon assumed in his paper that the reserve for Companies Act and regulatory purposes ((A) and (B) above) would be the same, (B38.90) namely £610 million.
186. Having set out in considerable detail the issues concerning the GAR reserve, Mr Headdon recommended:
- (A) declared bonus rates for 1998 be set at 5% at an estimated cost of £365 million;
 - (B) a roll-up rate for 1998 of 10% (the overall return on the fund in 1998 had been 14%);
 - (C) prospectively, a roll-up rate for 1999 of 9%.

187. The minutes of the January 1999 Board meeting (B38.115-119) record that the declared bonus rate for 1998 of 5% was agreed. The minutes record:
- “It was recognised that a reduction of 1½%, which this represented, would be at the high end of reductions being made by other life offices but should not be so out of line as to be perceived as a sign of difficulty.” (B38.118).
188. The 1998 roll-up rate of 10%, and prospective 1999 roll-up rate of 9%, were also agreed.
189. On 24 February 1999, a Special Board meeting took place, which was unusually preceded by an ordinary Board meeting, which was itself preceded by an Audit Committee meeting. 11 directors (including Miss Page) attended both meetings. The Special Board meeting considered Mr Headdon’s paper “Valuation and Bonus Declaration at 31 December 1998” and the annexed Statement of Bonuses (B38.286-318).
190. Mr Headdon’s paper for the Special Board meeting recorded the fact that £350 million had been provided as a reserve for GARs, and that there “...had been detailed discussion with the auditors concerning the level of this reserve to justify it as being consistent with the required ‘true and fair’ view.” (B38.287).
191. Applying the 5% declared bonus rate for 1998, Mr Headdon advised that the cost was £363 million (B38.287). “An analysis of that cost across the categories of business is given in Appendix 1 to this paper”, i.e. the Statement of Bonuses.
192. At the ordinary Board meeting, which preceded the Special Board meeting, it was reported to the Board that detailed discussions of GAR liabilities in the Companies Act accounts had been discussed and agreed with the auditors: also, it had been agreed that no Contingent Liability note on the *Hyman* litigation was to be included in the Companies Act accounts.
193. In conclusion, the following points are emphasised:
- (A) declared bonus rates for 1998 had been cut from 6.5% to 5%, more than had originally been suggested by Mr Headdon when discussions on bonus rates had commenced in November 1998;
 - (B) the 1998 roll-up rate of 10% was again, for the fourth year in a row, set below actual earnings (14%);
 - (C) experienced solicitors and two Leading Counsel had all advised that the DTBP was lawful and, in order to confirm the position, the Society had commenced a test action;

(D) the appropriate provision for GAR liabilities in the Companies Act accounts had been the subject of detailed discussions with Ernst & Young.

194. Against that background, it is said that Miss Page was negligent because she did not require that bonus levels were set at some lower level. Miss Page reached a view on the information available to her at the time. She did so having regard to a variety of factors, including the advice provided to her. The test of whether Miss Page was negligent was whether she reached a reasonable decision at the time. She did, and again the Society's claim must be rejected. The bonus decisions taken on 24 February 1999 were well within the range of what was reasonable in all the circumstances.

PART VII

FEBRUARY 2000 NEGLIGENCE CLAIMS

195. With one exception, the claims, said to arise from the events of February 2000, are similar to those said to arise in February 1999 (RRAPOC, Paragraph 127). There is no variant claim for this year in the SOS.
196. In summary, it is said that Miss Page was negligent:
- (A) by concurring with the continuation of the DTBP¹⁷; and
 - (B) by not cutting bonuses so that policy and asset values were in balance. Such a cut would have saved the Society £43 million, including the investment return (RRAPOC, Paragraph 128-132).
197. Again, in order to determine whether the bonus decisions actually reached were reasonable in all the circumstances, it is necessary to identify all the factors that the Board took into consideration.
198. Mr Headdon presented a paper on bonus declarations, as at 31 December 1999, for discussion at the Board meeting held on 24 November 1999 (B43.130-135). Much of this paper, intended for discussion, was similar to the equivalent papers in the two previous years.
199. In his introduction, Mr Headdon noted that, for the purposes of his paper, he had assumed that the Court of Appeal would find in the Society's favour and that no "exceptional measures" would be necessary regarding bonuses (B43.130).
200. That the Court of Appeal would find in favour of the Society was a reasonable assumption for Mr Headdon to make at that stage, given the clear terms of the first-instance judgment of the Vice Chancellor (H2-50-85), delivered only some two months earlier, and of the advice being given to the Society by its lawyers. Indeed, it would have been extraordinary to have made any other assumption.
201. Mr Headdon had regard, when suggesting bonus levels, to policy values as against allocated earnings. He noted that policy values had moved significantly ahead of the actual position in 1994, that there was some redressing of the balance in 1995 and that:

¹⁷ In the Society's original Particulars of Claim continuation of the DTBP was alleged to be negligent in all years from 1996 to 2000: this allegation was abandoned in RAPOC for all years except 2000.

“There was a further ‘catching up’ of actual earnings to those allocated in both 1997 and 1998 so that asset values were only a little behind policy values as at 31 December 1999.”

(B43.134).

202. In the circumstances, Mr Headdon recommended a declared bonus rate of 5% for 1999, i.e. the same as 1998; a roll-up rate for 1999 (depending on the actual outcome) a little higher than actually earned and a prospective rate for 2000 of 9%. The Board indicated agreement to these proposals (B43.140).

203. Prior to discussing bonuses, the November Board had considered the position regarding the pending appeal to the Court of Appeal, due to commence on 30 November 1999. Ms Leslie attended that part of the Board meeting. The minutes record her advice in the following terms:

“CIML reported that the Society’s skeleton argument refuted all points raised by the other side and that the Society’s legal team remained confident but not complacent and that obviously success could not be guaranteed.” (B43.138).

204. The meeting of the Board held on 15 December 1999 considered a paper from Mr Headdon (B43.291-292) with essentially the same proposals as his paper for the November Board.

205. At the December Board meeting, Mr Nash and Mr Martin reported on the hearing before the Court of Appeal, which had concluded on 2 December 1999. The minutes (B44.3) record that the proceedings had been “...much as expected.” The possibility of the case going to the House of Lords, and representation in that event, were also matters discussed.

206. Mr Headdon prepared a paper, “Valuation and Bonus Declarations as at 31 December 1999”, dated 20 January 2000 (B44.131-139) for consideration at the Board meeting to be held on 26 January 2000. He expressly stated, once again, that his bonus recommendations were based on the assumption that the Court of Appeal would uphold the first instance decision. On that assumption, he recommended that the declared bonus rate for 1999 be set at 5%, the roll-up rate for 1999 at 12% (again less than earnings of 16%)¹⁸ and a prospective rate of 9% for 2000.

207. On 21 January 2000, the day after Mr Headdon had written his paper, the Court of Appeal gave its decision. By a majority of 2 to 1, it allowed Mr Hyman’s appeal (H3-1-56).

208. A meeting of the Board was arranged for 5.00 p.m. on 21 January 2000. Miss Page was not able to attend. She did however receive notice of the meeting (C38.32) and a summary of the judgment of the Court of Appeal prepared by Denton Hall (C37.202).
209. Ms Leslie attended the meeting on 21 January 2000 to advise the Board on the legal position, following the decision of the Court of Appeal. The substance of her advice is clear from her aide memoire and the notes of the meeting taken by Mr Wilmot.

“General point (A) Court of Appeal only affects those with GARs, (B) important to get over that GAR Policyholders ring fenced” (C37.249).

“Legal advice can attack Woolf and Waller. Strong recommendation is to go to House of Lords – still believe will win. Started proceedings to get certainty – not got it – should appeal” (C37.253).

210. The minutes of the Board meeting on 21 January 2000 record (inter alia) that:

“[t]he Society’s Counsel had indicated to Ms Leslie that they considered this a most unexpected judgment, not explicitly based on existing law... The Society’s Counsel considered that the Society had strong grounds to appeal against this view” (C38.28).

“[Ms Leslie] reported that Counsel’s advice was that the judgments against the Society could be attacked and that they would recommend an appeal to the House of Lords. Both the Society’s Counsel were confident of success in the House of Lords, although no guarantee could be given” (C38.28).

211. Mr Wilmot’s notes of the Board meeting on 21 January 2000 record Ms Leslie as advising (consistent with her aide-memoire (C37.248-253)) that “Court of Appeal opinion directed exclusively at GAR policyholders – ring fence non GAR not directly affected” (C38.10). She went on to advise, according to Mr Wilmot’s notes, that “[r]ecommendation seek leave to go to House of Lords (for legal not just PR purposes). Grabiner/Green unanimous that [the Society] will win in House of Lords” (C38.12).
212. Mr Sclater queried whether the Society would be in “[a]ny worse position if goes to House of Lords” (C38.14). Mr Wilmot’s notes record Mr Nash as stating that “Court of Appeal restricted to GAR class ie unified rate only to that class. If to House of Lords could be less palatable solution”. Mr Sclater asked whether the House of Lords “... could come up with something which will affect all policyholders.” Here, Mr Wilmot’s notes record Ms Leslie as advising that Mr Sclater’s concern was “... never hinted at in Sumption’s case. Risk – but v. small. Would be difficult to spill over from GAR class” (C38.14).

¹⁸ Mr Headdon noted that the stock markets had risen sharply at the end of 1999 but then fallen back at the start of 2000.

213. There was also discussion as to whether or not, pending the appeal to the House of Lords, the DTBP should, in effect, be continued and final bonus rates maintained. Mr Headdon recommended that they should (B44.158). Two factors (at least) were clearly considered:

(A) the legal advice provided by Ms Leslie, summarised above. In addition, the minutes also record:

“The Court of Appeal had agreed that the Society could maintain its current approach to bonuses and had indicated that it would be inappropriate for others to initiate legal action on these matters until the House of Lords ruling.” (B44.155)¹⁹

(B) that if the House of Lords allowed the appeal “...as is expected” (B44.156) then a change to the bonus policy now would be unnecessary. It was noted that if bonus payments to GAR policyholders were increased²⁰, any excess could not later, in practice, be reclaimed by the Society.

214. The outcomes of these discussions were that the Board concluded that (a) an appeal should be made to the House of Lords, for which the Court of Appeal had given permission and (b) current bonus rates should be maintained. It is clear that, if the legal advice to the Board had not been so clear, different decisions on both these issues might have been reached.

215. The Board met again on 26 January 2000. Ms Leslie was again in attendance (Minutes: B44.149-153). It was agreed that the Society should change Leading Counsel. Mr Headdon’s paper, “Valuation and Bonus Declaration as at 31 December 1999” was considered. Mr Headdon said that he considered the GAR reserve, for Companies Act purposes, of £200 million to remain appropriate and that he would be meeting with the Society’s auditors to confirm that they concurred with that view.

216. The Board indicated its approval regarding Mr Headdon’s bonus recommendations.

217. Formal approval of the bonus recommendations was given at a Special Board meeting held on 16 February 2000. That Board meeting had before it a paper from Mr Headdon of 10 February 2000 (B44.343-374). That paper recorded that the cost of new declared bonuses at 5% would be £423 million and that after payment of such bonuses, the FFA would be £4831 million. (The 1998 FFA was shown as £3025.3 million). The paper also

¹⁹ **The transcript of the discussion in Court, following judgment being handed down (H3-57-62), does not support the view that the Court of Appeal had said that the Society could maintain its approach to bonuses. However, the Society accepts that this is what the Board understood to be the case.**

²⁰ **i.e. by abandoning the DTBP.**

recorded that discussions with the auditors were continuing but that it seemed likely that a reserve of £200 million would be agreed for Companies Act purposes.

218. The Board accepted Mr Headdon's bonus recommendations.
219. As set out above, the Society's complaints against Miss Page, with respect to the decisions of February 2000, are that (i) the DTBP should have been abandoned, and (ii) bonuses should have been set at a lower level than was in fact the case, so that policy values were reduced to the level of underlying asset values, producing "savings" of £43 million.
220. In reaching its decisions on bonuses, for the year to December 1999 and, prospectively, for the year to December 2000, the Board had to balance many different factors, including:
- (A) the legal advice regarding the validity of the DTBP and the prospects of an appeal succeeding;
 - (B) the legal advice regarding ring-fencing;
 - (C) the actual earnings achieved in 1999;
 - (D) policyholders' reasonable expectations.
221. From the documents, it is clear that the Board had proper regard to all these different factors. Only with the benefit of hindsight can the argument be advanced that bonus levels were set too high. The roll-up rate, once again, was set below actual earnings for the relevant year. The Society was moving towards a position where policy and asset values were in balance. (According to the Society, the gap between the two was now 2.4%.)
222. There was a range within which bonus levels could properly be set. The actual bonus levels chosen by the Board were well within that range. That being the case, Miss Page was not negligent in concurring with the bonus decisions reached in February 2000.

PART VIII

CLAIMS FOR BREACH OF FIDUCIARY DUTY

223. In relation to breach of fiduciary duty, Miss Page gratefully adopts the points advanced on behalf of the Allen & Overy Defendants. The following points are made in addition.

1996 Breach of Fiduciary Duty

224. It is said that, in concurring in the award of differential terminal bonuses in February 1996, Miss Page acted in breach of her duties to the Society:

(A) to comply with the Articles; and

(B) not to use her powers for an improper purpose.

(RRAPOC, Paragraph 95A).

225. As a consequence of the alleged breaches of fiduciary duty, it was originally claimed that the Society had suffered loss in the amount of £1.9 billion. This figure was reduced, on amendment, to the sum of £751 million. In the alternative, the Society claimed the cost of rectifying the unlawful consequences of the DTBP in the sum of £200 million (RRAPOC, Paragraph 95B).

226. In the SOS, the Society has attempted to change its position yet again. It is now said that the Society is entitled to 'recoup' from the directors the difference between (a) the amounts of terminal bonus paid to policyholders, in 1996 and whilst the DTBP was in effect and (b) the amounts that would have been paid out, had the Board acted "properly". The amount claimed is £6.7 million (SOS, Paragraph 257). The details of the calculation are set out in Appendix 6 of the SOS.

227. Again, it is unacceptable that the Society should seek to amend its claim, for the fourth time, in its SOS. The proper course would be for the Society to prepare Re-Re-Re-Amended Particulars of Claim, apply for permission to make amendments and, if such permission was granted, pay the costs of the defendants dealing with the abandoned claim. For obvious reasons, namely its embarrassment, after the expenditure of over £20 million to date on legal and associated expenses, at having to change its case once again, the Society has not adopted this approach.

228. It is denied that Miss Page breached her fiduciary duty to the Society. The process by which bonuses were declared, both retrospectively and prospectively as at 31 December

1995, has already been considered in detail. Miss Page concurred in the decisions reached at the Board meeting on 24 January 1996. Although the Society now argues that a different decision should have been reached as to the level of bonuses declared, it is not suggested that the decisions taken on 24 January 1996 were ultra vires or a breach of Article 65.

229. What was ultra vires, according to the House of Lords in *Hyman*, was the DTBP. Miss Page was not a director when that policy was introduced in 1993 or earlier. Thereafter, the DTBP was not identified as an issue warranting Board consideration until 1998: in the interim, the policy was simply continued.

230. Even if Miss Page had known of the DTBP, it does not follow from the *Hyman* decision that Miss Page was in breach of fiduciary duty. She was under a duty to act in accordance with the Society's Articles. Miss Page read the Articles prior to joining the Board of the Society (JAP3, Paragraph 19, W3-2.198). On its face, Article 65(3) is clear:

"The amount of any bonus which may be declared or paid pursuant to paragraph (1) or paragraph (2) of this Regulation and the amount (if any) to which any participating policyholder may become entitled under any mode of payment or application of any such bonus, shall be matters within the absolute discretion of the Directors, whose decision thereon shall be final and conclusive."

231. There is no dispute that Miss Page was under a duty to comply with the Articles of the Society. What is disputed is that she was required to comply with terms that were not express but were only implied into the Articles by the House of Lords in *Hyman*. Prior to that case, the law was clear: a term could not be implied into articles of association by reference to extrinsic circumstances. In *Bratton Seymour Service Co. Ltd v Oxborough* [1992] BCLC 693 at 697, Dillon LJ (with whom Steyn LJ and Sir Christopher Slade agreed) observed:

"To my mind it is wholly inconsistent with [Scott v Frank F Scott (London) Ltd] that there should be any power in the Court to imply a term into the articles of association, such as [Counsel for the defendant] has contended for, which arises from the surrounding circumstances not apparent from the terms of the memorandum and articles themselves."

232. A director must comply with a company's articles having proper regard to (a) the wording of these articles and (b) the current state of the law. If that is done, as it was in this case, there can be no breach of fiduciary duty.

233. Further, no loss resulted from the bonus decisions taken with effect from 31 December 1995 because they included the DTBP. The DTBP had the effect of:

- (A) dissuading those with GAOs from exercising those options;
- (B) reducing terminal bonuses to those policyholders who did exercise GAOs;
- (C) not decreasing the amount of bonuses payable to non-GAR policyholders simply to pay more to more to GAR policyholders.

234. Had no DTBP been applied, there is no reason to suppose that the bonus decisions, with effect from 31 December 1995, would have resulted in less being paid out, in aggregate, than was in fact the case. Bonus decisions, not including the DTBP, would have meant more policyholders exercising GAOs, higher terminal bonuses to such policyholders and lower terminal bonuses to non-GAR policyholders. The increase in the payments to GAR policyholders, and the lower payments to non-GAR policyholders, would not of themselves necessarily have meant greater payments, in aggregate, by the Society.
235. The Society assumes that if the Board had not applied the DTBP, the decision on bonuses, with effect from 31 December 1995, would have been the same as that taken, retrospectively, in October 2000.²¹ That is wholly speculative. The position in October 2000 was very different from the position in January and February 1996.
236. In summary, there is no evidence, and it cannot be assumed, that a “correct” bonus decision (ie one without the DTBP) would have cost the Society less in total than the decision actually taken.
237. For all the reasons summarised above, the Court should reject the Society’s claim that Miss Page acted in breach of her fiduciary duty to the Society and that any such alleged breach caused loss to the Society.

1997 and 1998 Breach of Fiduciary Duty

238. In 1997 and 1998, the claims for breach of fiduciary duty are the same as the claim advanced for 1996 save as to quantum. For the reasons already set out with respect to the 1996 claim, the claims for breach in 1997 and 1998 should be dismissed.

1999 Breach of Fiduciary Duty

²¹ Following the House of Lords decision, it was necessary for the Board to exercise afresh its discretion regarding the appropriate bonus levels from 1993-2000.

239. Because the DTBP continued into 1999, it is said that Miss Page was in breach of her fiduciary duty. Miss Page relies on all the points already made with respect to the claims for breach of fiduciary duty in 1996-1998.
240. What was different, in February 1999, was that Miss Page was (a) aware of the existence of the DTBP and (b) knew that it was a matter of dispute with GAR policyholders.
241. As to the legality of the DTBP, and as already summarised, Miss Page, in common with all of the directors, had been given a consistent message: the DTBP was lawful and the directors were acting within the powers conferred on them under the Articles. The DTBP was a policy intended to balance the interests of different groups of policyholders and to ensure that both GAR and non-GAR policyholders received their appropriate share of the Society's assets. Dealing fairly, as between competing policyholders' interests, was also a duty of the directors.
242. Having considered the legal advice, and acted in accordance with it, Miss Page was not in breach of her fiduciary duty in allowing the DTBP to continue.

2000 Breach of Fiduciary Duty

243. By 26 January and 24 February 2000, when bonus rates effective from 31 December 1999 were decided, the Court of Appeal had delivered its judgment. None of their Lordships had suggested that a term could be implied into Article 65. The Society lost because two of their Lordships held that the DTBP was contrary to policy wording. Morritt LJ dissented. Only Lord Woolf held that the directors had improperly exercised their powers under the Articles. Waller LJ had observed that ring-fencing was permissible.
244. The advice that the Society received regarding the implications of the decision of the Court of Appeal and the prospects of a successful appeal to the House of Lords has already been considered above.
245. In these circumstances, Miss Page believed, as she was entitled to believe, that she retained the discretion, under the Articles, to continue the DTBP. It was only when *Hyman* reached the House of Lords that it was established that a term should be implied into the Articles and that the DTBP was unlawful.
246. Even if the decisions, with respect to bonuses effective from 31 December 1999, were unlawful, because the DTBP was continued, no loss resulted for the reasons already set out with respect to earlier years.

PART IX

MIS-SELLING CLAIMS

247. The Society claims against Miss Page the amount that it has, and will, pay to compensate policyholders who were, or may have been, mis-sold policies by the Society from September 1998 onwards. Those claiming to have been mis-sold policies maintain that they would not have invested as they did had the consequences of the Society losing the *Hyman* litigation been fully explained to them (RRAPOC, Paragraph 135).
248. Those claiming against the Society maintain that the Society is guilty of mis-representation or non-disclosure (in breach of contractual, tortious and statutory duties) in that:
- (A) they were not informed of the financial consequences if the *Hyman* litigation was lost; and
 - (B) they were not advised that there was a real risk that the Society would lose the *Hyman* litigation (RRAPOC, Paragraph 137 (a) & (b)).
249. In RRAPOC the Society maintains that the directors, including Miss Page, are responsible for the breaches about which complaints have been made because they failed "...to keep [the Society's] sales representatives properly informed" (Paragraph 137 (d)). It is also alleged that Miss Page ought to have "... explained to policyholders the risks of investing in the Society whilst the *Hyman* litigation was ongoing ..." (Paragraph 140(c)).
250. Answering the Society's claim is rendered unnecessarily difficult because of the lack of detail. No serious attempt has been made to identify: (a) those statements, made by the Society, which it is said were misleading to actual or potential policyholders; or (b) the statements which it is said that the Society should (but did not) make, regarding the risks posed to the Society by the *Hyman* litigation; or (c) when such statements should have been made.
251. Against Miss Page it is said, for example, that she knew (or ought to have known) that the GAR issue was:
- "...an issue which could bring down the Society, or at least severely affect the benefits to be received by new policyholders;"* (SOS, Paragraph 385(b)) *and that "policyholders were not being told this;"* (Paragraph 385(c)).
252. At Paragraph 140(a) of RRAPOC, it is claimed that each of the directors ought to have:

“appreciated that if the Society lost the Hyman litigation the costs of the GAO’s would have to be borne by non-GAR policyholders, and that this represented a real risk for such policyholders” (emphasis added).

253. The only circumstance in which non-GAR policyholders would have to bear any of the costs of GAO’s would be if (a) the *Hyman* litigation was lost and (b) ring-fencing was not permitted. The Society won the *Hyman* litigation at first-instance and ring-fencing was permitted by the Court of Appeal. The risk that the House of Lords would disallow ring-fencing, the directors were advised, was “v. small”. (C38.14).
254. It is wholly unreal to suggest that directors should have advised both existing and potential new policyholders (which was the public at large) that the *Hyman* litigation, if lost, “could bring down the Society...”, or that non-GAR policyholders would have to pay for GAO’s, for all of the following reasons:
- (A) the legal advice actually being given to the Society, from start to finish, was that the DTBP was lawful and that the *Hyman* litigation would be won;
 - (B) even after the adverse decision of the Court of Appeal, the Society was advised that there was no real risk to ring-fencing;
 - (C) providing ring-fencing was permissible, the cost to the Society, if the *Hyman* case was lost, was likely to be less than the Companies Act reserve of £200 million;
 - (D) ring-fencing ensured that non-GAR policyholders would not be adversely affected.
255. The Society is “only” making claims in respect of mis-selling from September 1998 onwards (SOS, Paragraph 373). This can only be on the basis that, as soon as the GAR issue was raised with the Board, and even before Counsel’s opinion was obtained, a warning of possible closure should have been given to policyholders. That is an absurd suggestion.
256. If not given in September 1998, when should a warning have been given? The Society cannot sensibly identify another date, given the way in which the GAR issue developed. Having received robust advice from two Leading Counsel (December 1998) a warning in the terms for which the Society contends was wholly inappropriate. The Society’s confidence only increased after the first-instance decision, making a warning of closure not only unnecessary but positively misleading.

257. The decision of the Court of Appeal clearly impacted on the Society's confidence that the Courts would find the DTBP lawful. That was a point at which policyholders required to be given further information. They were, in a letter of 01 February 2000, as discussed below.
258. The statements about GAR issues and the *Hyman* litigation that were sent to policyholders were generally sent to the Society's lawyers for approval. Indeed, some of them were specifically settled by Counsel. Furthermore, the comments about the litigation that appeared in the annual reports were approved by Denton Hall. What the Society had to do was explain the *Hyman* litigation, and its consequences, fairly and accurately, without painting either too optimistic or too pessimistic a picture. That is a matter of judgment. In ensuring that a proper balance was struck, the Society was entitled to rely on its legal advisers.
259. In the SOS, Paragraph 381(a), the Society criticises the answer given by Mr Nash at the May 1999 AGM because he avoided saying that the cost to the Society "...could be..." £1.5 billion. Ms Leslie, by contrast, considered the answers given at the AGM were "...terrific..." (C31.127 Paragraph 2.11).
260. Likewise, the Society criticises Mr Nash's letter to policyholders of 1 February 2000. (SOS, 382(b) and (c), 410(b) and 423(c)). This letter was provided to Denton Hall in draft and they provided detailed advice on 27 January 2000. (C38.149) (The reference in the SOS at Paragraph 423(c) as to the substance of the advice is inaccurate.)
261. Further, it was not the responsibility of a non-executive director to settle the terms in which policyholders were advised about the *Hyman* litigation and the associated risks. That was a matter for the executive, in consultation with legal advisers. Nor was it the duty of the Board to settle the terms on which the Society's own staff, including sales representatives, were told of the issues. Miss Page knew that, from September 1998 onwards, the Society was consulting its legal advisers about policyholder communications. The process of consultation, and the involvement of the Society's lawyers in approving or settling communications with the policyholders, is dealt with extensively in earlier Sections of these Written Opening Submissions and in the A & O Defendants' Opening Submissions. Miss Page repeats the description set out above, and adopts the description and the submissions of the A & O Defendants.

PART X

Section 727

262. Section 727 of the Companies Act provides:

“If in any proceedings for negligence, default, breach of duty or breach of trust against an officer of a company or a person employed by a company as auditor (whether he is or is not an officer of the company) it appears to the court hearing the case that that officer or person is or may be liable in respect of the negligence, default, breach of duty or breach of trust, but that he has acted honestly and reasonably, and that having regard to all the circumstances of the case (including those connected with his appointment) he ought fairly to be excused for the negligence, default, breach of duty or breach of trust, that court may relieve him, either wholly or partly, from his liability on such terms as it thinks fit.”

263. As the wording of s.727 makes clear, that section is only of relevance should the Court reach the view that Miss Page “...is or may be liable..”. For all the reasons already given, it is respectfully submitted that the Court ought not to find Miss Page liable for negligence or breach of fiduciary duty. The question of whether the Court ought to relieve Miss Page of liability therefore does not arise.

264. If it does become relevant to consider s.727, the Court must consider three questions:

- (A) did Miss Page act honestly? The Society accepts that she did;
- (B) were Miss Page's decisions reasonable?
- (C) ought she fairly, in all the circumstances (including the circumstances of her appointment) to be excused liability?

Breach of fiduciary duty

265. The Society sets out three reasons why s.727 should “...not avail the directors in the present circumstances to any substantial extent” (SOS, Paragraph 265):

- (A) as regards the payment of terminal bonuses before September 1998, the directors “had only themselves to blame” that they had not taken legal advice on the DTBP and that it turned out that payment of bonuses, applying the DTBP, was unlawful (SOS, Paragraph 266). There are two points to be made in response: Miss Page knew nothing about the DTBP until September 1998: had legal advice been taken, the Society would have been advised that the DTBP was lawful;
- (B) as regards terminal payments after September 1998, these were decided by directors “...knowing they might be improper..” (SOS, Paragraph 267). As already

discussed, the clear legal advice was that the DTBP was lawful. This ‘reason’ itself begs the following question: what should directors have done, knowing of (as they were advised) the remote possibility that DTBP was unlawful? Abandoning the DTBP would have breached the directors’ duty to seek to deal equitably between different classes of policyholder, giving more to GAR policyholders than their asset share justified at the expense of non-GAR policyholders.

- (C) *“Thirdly, and most fundamentally, if this claim stood alone, it would be strange if the directors were to be relieved under s.727 where they were the only people to blame. In other words, where there is a choice between the Society recouping the overpayments for the benefit of policyholders and those responsible in law for the overpayments, why should the latter be relieved?”* (SOS, Paragraph 268).

This third ‘reason’ is a paradigm “boot-straps” argument. First, it inaccurately describes the directors as ‘the only people to blame’. Secondly, it is not a necessary consequence of the mere existence of a claim that somebody is to blame. It is not *“for every mischance in an accident-prone world, [that] someone solvent must be liable in damages”* (per Lord Templeman in *CBS Songs Limited -v- Amstrad Consumer Electronics Plc* [1998] AC 1013 (at 1059G))

Negligence

266. The Society also maintains that Miss Page should be denied s.727 relief with respect to the claims for negligence (Paragraph 339 of the SOS).
267. The Society accepts that all the directors acted honestly but then seeks to undermine the relevance of this point by describing it as a “threshold” question (SOS, Paragraph 340(a)). On that basis, reasonableness would also be a threshold issue. In fact, both are matters critical to the exercise of discretion.
268. The Society maintains that Miss Page did not act reasonably and that the case against her is not “exceptional”, so as to justify the grant of relief (SOS, Paragraph 340(b)). S.727 has no requirement that a case must be “exceptional” before relief can be granted.
269. When considering the question of reasonableness, the Court must have regard to all of the relevant facts. Those facts will include: the duties properly to be expected of a non-executive director; how and the circumstances in which those duties were discharged; and “all the circumstances of the case (including those connected with [that director’s] appointment”.

270. For all of the reasons set out above, if, contrary to Miss Page's submissions, the Society succeeds against her, whether for negligence or breach of fiduciary duty, it is submitted that Miss Page should be wholly relieved from all liability.

PART XI

Conclusion

271. In conclusion, and for all the reasons summarised above, it is respectfully submitted that the claims that Miss Page was negligent in the discharge of her duties as a non-executive director, or in breach of fiduciary duties owed to the Society, are all wholly misconceived. Miss Page's actions were, throughout, those of a sensible and competent non-executive director.
272. If, contrary to that submission, the Court finds fault with anything done, or not done, by Miss Page, it is further submitted that any such failings by her did not cause any loss to the Society. If the Court should find any breaches causative of loss, it is respectfully submitted that this is clearly a case in which an honest director should fairly be relieved from all liabilities under s.727.
273. Finally, it is respectfully submitted that Miss Page should be awarded costs against the Society on an indemnity basis. In support of this submission Miss Page relies on the following facts and matters: the wholly speculative nature of the claims; the manner in which the litigation has been conducted; the reasons underlying the claims (which cannot have been commercial) ; and her entitlement under the Articles to such an indemnity.

PETER LEAVER Q.C.
PHILIP VAUGHAN
24 MARCH 2005