Case No: CHY07347

**IN THE CENTRAL LONDON COUNTY COURT**

Central London County Court
13-14 Park Crescent
London W1B 1HT

Tuesday, 24 February 2009

BEFORE:

**HIS HONOUR JUDGE KNIGHT QC**

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BETWEEN:

**ANDY WALKER**

Applicant/Claimant

- and -

**CO-OPERATIVE INSURANCE SOCIETY LTD**

Respondent/Defendant

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MR WALKER appeared in person

DR DIGBY C JESS appeared on behalf of the Defendant

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**Approved Judgment**



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1. JUDGE KNIGHT: The appellant in this appeal, Mr Walker, who is also the claimant in the claim, claims against the respondent insurer, Co-operative Insurance Society Ltd, losses which he alleges have been sustained by him caused by the payment of high commission on stakeholder pensions, which he says were unlawfully high and/or in breach of uncontested implied terms and/or the payment of differential annual bonuses on stakeholder and endowment policies, which policy he alleges is unlawful and/or in breach of the implied terms.

2. Mr Walker took out 12 endowment policies and 5 industrial branch policies with the defendant from 1991. In addition, the claimant took out, later transferred, four personal pension policies and one of those personal pension policies is to be found in the appeal bundle at tab 22.

3. The stakeholder pensions are of a low-cost type pension set up by the government and have been available since 6 April 2001 and July 2006. The defendant, the Society, offered stakeholder pensions through its sales staff and agents.

4. The stakeholder pensions are regulated by the Stakeholder Pension Schemes Regulations 2000 (as amended) and I shall refer in particular to articles 14 and 15 shortly. Those regulations are 1403 of 2000. The regulations provide that there must be no initial charge and that the yearly management charge must be no more than 1 per cent (1.5 per cent after April 2005) of the underlying value of the fund concerned.

5. In the hearing before the district judge, it is said that Mr Walker accepted that the defendants had complied with all relevant FSA rules and does not suggest that the Society had breached any of these rules. However, before me on this appeal, he said that does not accurately reflect his position and that the position as it was before the district judge (particularly in relation to a letter of 5 June 2007, which Dr Jess, who appears for the defendant respondent, says amounted to a concession that there had been no breach of the regulations) does not accurately reflect his position. What he says is that the FSA's position as to their being satisfied that the FSA regulations had been complied with was wrong. In short, his submission is that if a substantial expense of some 13 per cent was reflected as a liability on a balance sheet, the FSA could not sensibly say that that was not a charge which somehow impacted on the stakeholder fund. To that extent, he dissents from the view that he accepted that the FSA was right to say they were satisfied that the Society had complied with their regulations in relation to that point.

6. Returning to the chronology of this matter, the claim in this action was limited to liability and was heard as a fast-track claim before Lightman DJ in this court on 31 January 2008. Lightman DJ dismissed that claim with costs, Mr Walker being represented by counsel at that hearing. There is a transcript of the judgment of Lightman DJ and it is that which has to be focused on in relation to this appeal.

7. But before looking at the judgment and the complaints made about it, I mention in passing that, just prior to that hearing before the district judge, Recorder Rogers QC in this court refused an application by Mr Walker for specific further disclosure and an appeal against that refusal, which was made to Arnold J, was dismissed on 20 November 2008, Mr Walker being represented on that appeal by counsel. That judgment is also in the bundle at tab 7.

8. The judge refers to the history of this matter and the particular history on disclosure which was before him focused on a particular allegation that the Society had not kept separate stakeholder pension fund accounts. The Society's evidence was that it was not required to do so by the relevant regulations. Arnold J, at paragraph 19, set out the relevant passage in the witness statement of Sean Cooper. At paragraph 20 of his judgment he said that the statement by Sean Cooper was a complete answer to the application sought to be made on appeal because it showed, as one would expect, that the defendant does indeed maintain accounting records. The judge went on to say:

> "None of the items of evidence relied upon by the claimant demonstrates the existence of stakeholder pension fund accounts for the years in question as opposed to underlying accounting records."

9. That appeal was dismissed. Mr Walker sought the adjournment of the trial before Lightman DJ, it having been confined to liability. Lightman DJ (after Mr Walker had renewed his application before Judge Dight in this court, who also turned it down) heard the matter on 31 January.

10. Following that decision, there was an application by the claimant made on 20 February for permission to appeal the district judge's order, in particular his order dismissing the claim with costs. Judge Marshall QC in this court gave permission to appeal and reserved it to herself with a time estimate of two days. That application was made by Mr Walker, the respondent Society not being present.

11. Unfortunately, there is no document in which the grounds of appeal are set out and Mr Walker has confirmed to me that he no longer has a copy of that document. There is no transcript of the hearing before Judge Marshall. Indeed, that would be unusual, save that there is not any record of the submissions made before her, nor whether she expressed any view on the merits of the appeal, save for granting permission, or whether she confined it to any particular point. In the event, Mr Walker has produced for the purposes of this appeal a skeleton argument which appears to be dated 12 January 2009. The conduct of this appeal has followed the points which he has outlined in that skeleton argument, although he has sought to raise one or two other matters during the course of this appeal.

12. So that it is clear, I intend to proceed in this appeal as an appeal by way of review and not rehearing, as Dr Jess correctly submits. In that context, it is for Mr Walker to persuade me that the decision of Lightman DJ was wrong or, alternatively, was unjust because of a serious procedural or other irregularity in the proceedings below.

13. Mr Walker in his skeleton argument and in his oral submissions today has referred me to the second amended particulars of claim (as they are headed) and these particulars set out in paragraph 2 the with-profits endowment contracts which he and his wife took out with the Society from 1991, and industrial branch policies. In addition, Mr Walker took out four personal pension policies with the Society but these were transferred by the claimant on the dates set out in paragraph 2 of the particulars of claim. He says that they were not subject to a penalty imposed by the Society. That point was not pursued in the court below.

14. The particulars of claim go on to say in paragraph 4 that under the terms of the policies the Society agreed to pay on maturity the sum assured increased by permanent annual or reversionary bonuses with discretionary terminal or final bonuses. Paragraph 5 of the particulars of claim sets out seven implied terms, the seventh term being added (as I understand it) by way of amendment. I will not set out those terms in full but it is alleged, as we shall come to see in a moment, that breaches of those terms were made by the defendants.

15. Paragraph 6 goes on to refer to stakeholder pension and low-cost pensions, and paragraph 7 refers to the fact that there should be no initial charge, and that the yearly management charge must be no more than 1 per cent of the fund value. That increased in April 2005, as I said, to 1.5 per cent.

16. Paragraph 8 says:

> "In order to increase its return from selling unprofitable stakeholder pensions CIS operated a policy of subsidising commissions in excess of the statutory limit to its sales staff to the detriment of with profits funds/bonuses. CIS stakeholder pensions were subject to annual charge of 1% and commission amounting to 13.6% of the first year's premium. In about July 2006 CIS stopped selling stakeholder pensions by its face to face sales force."

17. Paragraph 9 says:

> "Payment of high commission in respect of stakeholder pensions was unlawful and/or in breach of the above implied terms.
> 9A. Further, from about 2002 CIS operated a differential policy between its personal pension policyholders and endowment policyholders and from about 2004 onwards CIS stopped paying annual bonuses on the personal pension policies altogether whilst continuing to do so for endowments. Please see attached schedule."

18. A schedule was attached, which is at page 4 of this tab. Indeed, that shows that the annual pension bonuses in relation to 2004-2006 were reduced to nil.

19. Paragraph 9B says:

> "The said differential policy at 9A was unlawful and/or in breach of the implied terms. At the time of writing the claimant is unsure whether this differential bonus practice was limited to annual bonuses only were included terminal bonuses as well."

20. A defence was put in. I need not refer to that in detail and do not propose to do so. For the purposes of this appeal, I understand that Dr Jess says that the Society has either admitted or not contested the implied terms quoted by Mr Walker in paragraph 5 of his second amended particulars of claim.

21. Very shortly, in relation to that point, Dr Jess's submission is that, if the judge was right in saying that there had been no breach of the 1 per cent cap or indeed of the FSA regulations, it would be unarguable that there was a breach of any of those implied terms and indeed the district judge found that there was no a shred of evidence to support the alleged breaches. I mention that because Mr Walker in his oral submissions suggested that the breach of the implied terms was an issue which the district judge had not dealt with. In my judgment, if Mr Walker's primary submission in relation to the cap is wrong, it would follow that any breach of the implied terms would be unsustainable. That appears to have been the view that the district judge adopted.

22. Mr Walker in his skeleton argument for the purpose of this appeal raised a point at paragraph 5 relating to the breach of the sixth implied term in his second amended particulars of claim. The sixth implied term was:

> "The Society would exercise reasonable care to its with profits policy holders."

23. It is said on behalf of the Society that that is a new assertion by Mr Walker and does not relate to the pleaded claims which are the subject of this appeal.

24. That submission is right. Further, criticism can be made of it because it is not clear how such a term could extend to the right to examine with-profit stakeholder accounts. That is really, in any event, a hopeless submission.

25. I will now deal with the point relating to the 1 per cent cap. The district judge dealt with this in the first part of his judgment. He spent a great deal of time going through the history of this matter, which presumably was of interest to him. At paragraph 17 he makes the obvious point that the claimant has to prove his case on liability. In paragraph 18 in relation to the 1 per cent cap, he says:

> "In respect of the unlawful subsidy claim what he is saying, as I have said already, is that these defendants, instead of complying with the regulations, which is taking up to 1 per cent and no more than 1 per cent, had taken 13.6 per cent and is in breach. What I think he is saying is that by using monies which should not have been touched the amount available for policyholders, including himself, the stakeholder pensions, is reduced and he has suffered loss."

26. The district judge goes on to deal with the Welfare Reform and Regulations Pensions Act and the regulations made under the Act. These are contained in tab 27 of the bundle. The regulations are 1403 of 2000. Article 14(2) says:

> "To the extent that a member's rights are represented by a fund allocated to him to the exclusion of other members, the value of those rights may be reduced by the making of deductions from that fund no greater than 1/365 per cent of its value for each day on which it is held for the purposes of the scheme."

27. I also mention in passing that Article 15(3) sets out an obligation:

> "Prior to entering into any agreement whereby any assets of the scheme will be invested in a with-profits fund, the trustees or manager of that scheme shall … obtain a written contract from the insurance company maintaining the with-profits fund which provides that the insurance company will, in respect of any period that the stakeholder pension scheme has assets invested in the with-profits fund … (b) ensure that members of the stakeholder pension scheme will not be treated less favourably than any other members of stakeholder pension schemes who may have assets invested in the with-profits fund."

28. Article 15(4) says:

> "The insurance company must, at least annually, provide the trustees or manager of the stakeholder pension scheme with a certificate from the auditor to the insurance company or the appointed actuary to the insurance company certifying that the insurance company has systems and controls that are designed and used so that … (c) no expenditure is charged to the with-profits fund where that expenditure would be contrary to the requirements of regulation 13 or 14."

29. The district judge in his judgment goes on to refer to the setting-up of the stakeholder pensions and refers to the evidence of Dr Bunch contained in a witness statement provided for the trial on liability. Dr Bunch was cross-examined on that evidence.

30. One of the points, if not a major point, taken by Mr Walker in relation to the regulations is that there is an ambiguity arising out of a statement made by the Minister in an exchange which was recorded in relation to the absolute cap argument. He relies on an extract from Hansard in which Mr Rooker, the relevant Minister, says:

> "The 1 per cent figure applies to the stakeholder fund and should not be confused with other business arrangements."

31. Mr Walker submits that the Minister said categorically that the 1 per cent was inviolable. He says that somehow there is an ambiguity which arises on the construction of, initially, Article 15(4)(c). Try as I may, I cannot see the ambiguity. In response, Dr Jess submits that Article 14(2) contains no ambiguity and, if Mr Walker was relying on Article 15(4)(c), that too, I would expect, also contains no ambiguity.

32. As I have said, I cannot see that there is any ambiguity. As I understand the point, it is said that the 1 per cent cap was an absolute requirement which should not be circumvented by resort to any other funds to permit these additional expenditures and that, if that is so, somehow it gives rise to an ambiguity. But, as I have said, I am unable to follow that argument at least to the extent to which it could be said to give rise to any arguable point. Therefore, it is an argument which I would reject.

33. The point made by Mr Walker and summarised at paragraph 9 of his skeleton argument was that it was an inevitable consequence of offering stakeholder pensions that a substantial shortfall during the 2001-2006 period had to be backed by using other funds, thereby reducing the annual bonuses available to add to non-stakeholder pension funds. His point is that he would suffer as a result. He goes on to say:

> "I say from the limited evidence available that this breaches the implied duty of care term and the Equitable Life authority as it amounts to a differential bonus in favour of stakeholder pension holders at the expense of endowment and personal pension policyholders like me. It should be noted that the district judge admits to not having read all the documents." (See paragraph 9 of his submissions)

34. I do not think he can make that point because there was simply a complaint by Lightman DJ that he had a substantial number of documents foisted on him at short notice. But there was no suggestion that the fact that he had not read any document in the bundle overnight somehow impaired his judgment on the issue of liability.

35. The district judge in dealing with these matters had regard to the evidence of Dr Bunch and in his judgment he set this out. It is clear from it that Dr Bunch had satisfied him that a separate fund had been resorted to for the purpose of meeting these expenses. He says at paragraph 21 that he was satisfied on this point, which he said had been made crystal clear. At paragraph 22 he said that he was totally satisfied on the evidence he had heard from the defendants that that was exactly what had happened and that there was no ambiguity as to anything in the regulations. He considered that Mr Walker's point was academic.

36. I, too, have looked at the evidence of Dr Bunch and I cannot see that the conclusion of the district judge reached in paragraph 21, in which he said that that evidence had satisfied him, is one which can be impugned. With respect to Mr Walker and his efforts to persuade me otherwise, I conclude it was one which the district judge reached on the evidence available to him. I cannot see that it can be said that in reaching that conclusion he was wrong. In fact, I cannot see that there is any sort of opening which would enable the district judge's conclusion to be challenged. I propose to dismiss the appeal on this particular point.

37. In relation to the allegation about the breach of the implied terms, I simply reiterate the point I made earlier. I do not see, in the light of that conclusion, that any case on breaches of implied terms could be made out.

38. In relation to the payment of differential annual bonuses on stakeholder endowment policies, again, the district judge found against Mr Walker on liability. Mr Walker placed massive reliance on the decision in Equitable Life Assurance Society v Hyman [2002] 1 AC 408. Mr Walker provided me with a copy in another report that he had downloaded, but it did not have the benefit of being set out and paginated in the same way as the official report. I make no criticism of Mr Walker because he has done his best to provide me with the relevant authority. Mr Walker submitted to me that

Equitable Life applies in this case. He made a number of submissions. Without any discourtesy to him, I will not go through all of them.

39. But Mr Walker said that that case made it clear, under the Equitable Life precedent (as he called it), that the non-payment of bonuses on personal pensions was in conflict with the principle to be derived from that case. He said that the district judge was wrong in law to find that that case did not bind the Society to pay annual bonuses. He took me to a document at tab 20, which said:

> "Personal pensions and deferred annuity policies have relatively high levels of guaranteed benefits. To ensure that these valuable guaranteed benefits are not increased further, to the potential detriment of other with-profits policy holders, no further annual bonuses are currently being added to these policies."

40. But there is a direct conflict of approach between Mr Walker and the Society. Mr Walker is saying that these bonuses are within the expectation of policyholders and they therefore have the character of guaranteed bonuses and that their non-payment and not honouring that obligation was in conflict with the Equitable Life decision.

41. I expressed the view during argument that the Equitable Life case was on its own facts and the result depended upon the particular language of the policy and, in particular, Article 5. The central part of the decision is to be found in the speech of Lord Steyn at page 458 from A to F and, in relation to the construction of Article 65 from page 458C to the top of page 460.

42. At one stage, I thought Mr Walker had agreed that, while that decision was a decision which was confined to its facts, it nevertheless had a more extensive application. I beg to disagree with him on that. I do not think there can be extracted from that decision a principle which covers his case in these proceedings.

43. As I have said, the major conflict with the defendants which is reflected in the evidence of Dr Bunch is that the only matters guaranteed in the with-profits policy is the sum assured and any annual bonus which has accrued. Any guarantee does not extend further than those two matters. That was set out in some detail in the evidence of Dr Bunch at paragraphs 26(4), 30, 42, 44, 45 and 54 of his evidence. That was evidence which the district judge preferred and relied upon when coming to his judgment in relation to Mr Walker's argument on the application of Equitable Life. At paragraph 33 he expressed the view:

> "Dr Bunch has given his evidence and has made it crystal clear: all policies in general are different. Depending on what policy you take out you get the results."

44. But in relation to any guarantee, it is clear and I am satisfied that the guarantee did not extend any further than that which Dr Bunch annotated in his witness statement.

45. For those reasons, therefore, the district judge was right in reaching his conclusion that Equitable Life could not be extended to apply with any benefit to the policies referred to by Mr Walker in this case.

46. The only other matter I point out is that this district judge has clearly had experience of dealing with these cases before. This is made plain in paragraph 30 of the decision. So he was not coming to this case without the benefit of that experience. Of course, Mr Walker would comment that, notwithstanding that experience, he reached the wrong conclusion. I am afraid I disagree.

47. I award the costs of the appeal and the pre-appeal review in the amount of £13,897.40 (including VAT of £787.50) to the Society.

48. I am going to refuse permission to appeal. Mr Walker has raised four particular points. The first is the ambiguity point with particular reliance on the question which Mrs Leigh MP raised and what she thought was an ambiguity. I tried to understand what the ambiguity was but was unable to, so I do not accept that as a point on which Mr Walker has a real prospect or can overcome the threshold.

49. The impact of the 1 per cent cap and the argument Mr Walker raised in connection with it being important and straddling both limbs of the threshold because of its possible impact on a substantial number of policyholders is a point upon which I thought the district judge was right and I have no hesitation in agreeing with him.

50. On the third point Mr Walker raises as to whether the implied terms could still be employed as a basis of claim if he failed on the other argument in relation to the 1 per cent (in particular why he should be shut out from arguing that the differential subsidy was unfair and that 13 per cent was manifestly unreasonable), again, the district judge found that he was satisfied on the evidence. I cannot see that the conclusion of a district judge could be said to be even arguable on that point, so I do not think there is a real prospect there or that Mr Walker can overcome the threshold, although that is a matter for the Court of Appeal.

51. Finally, Mr Walker submitted, so far as the application of Equitable Life is concerned (in relation to the annual bonuses in particular), that this point could apply to a number of policyholders and was therefore compelling reason. In addition, it was of importance for the court to decide whether that decision had a wider application than simply its own terms. Again, Mr Walker has no real prospect on that because it is clear that it is limited to its own terms and will eventually come down to a matter of construction. That would apply to any other policy which would have to be scrutinised by the court. So, again, there is no real prospect and Mr Walker will have to go to the Court of Appeal to seek permission to appeal.

52. Therefore, permission to appeal is refused.