Case No: CHY07347

IN THE CENTRAL LONDON COUNTY COURT

13-14 Park Crescent
London W1N 1HT

Thursday, 31 January 2008

BEFORE:

DISTRICT JUDGE LIGHTMAN

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BETWEEN:

Claimant

WALKER

- and -

Defendant

CO-OPERATIVE INSURANCE SOCIETY LIMITED

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MR BIRKIN appeared on behalf of the CLAIMANT

DR JESS appeared on behalf of the DEFENDANT

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JUDGMENT
(As Approved by the Court)

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Please note that due to the poor standard of recording it has not been possible to produce a high quality transcript in this case.

DISTRICT JUDGE LIGHTMAN

1. I have before me a fast track trial which, following an order made by His Honour Judge Serota in September of last year, is limited today to the issue of liability. By his amended Particulars of Claim, in fact what he calls the second amended Particulars of Claim, the claimant, Mr Walker, has brought proceedings against the defendant, Co-operative Insurance Society Limited, claiming damages limited to £5,000. He sets out in his Particulars of Claim details of the policies that he and his wife had taken out with maturity dates and, subject to one point mentioned in the amended Defence, there is no real issue on that, and he says that:

> "Under CIS Rules its 'objects … are to carry on the business of insurance, including the granting of annuities, in all its branches in any manner or form, and to carry on and transact every kind of guarantee business and every kind of indemnity business, and to undertake any offices or situations of trust or confidence…'"

2. He goes on in paragraph 5 to set out what became seven implied terms in relation to the various policies and, subject to observations made in the amended Defence, there is no real dispute on any of those implied terms. He says at paragraph 6:

> "Stakeholder pensions are a type of low-cost pension set up by the Government that have been available since 6 April 2001 and between 6 April 2001 and about July 2006 CIS offered stakeholder pensions through its sales staff and agents."

3. In paragraph 7 he says:

> "The Government has set minimum standards for stakeholder pensions that a provider must meet to do with inter alia, payment levels and costs, namely:
>
> (1) There must be no initial charge;
> (2) The yearly management charge must be no more than 1% of fund value."

He then says something in brackets, pointing out that that 1 per cent has increased in 2005 and makes a comment and I will not say any more about that.

4. Then the nub of the case at paragraph 8:

> "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.
>
> "The payment of high commission in respect of stakeholder pensions was unlawful and/or in breach of the above implied terms."

5. So the first point and the first issue of liability to be decided is whether or not there has been some breach of what I will call the statutory regulations, that they have gone above the 1 per cent, effectively they have taken 13.6 per cent and that is unlawful.

6. Then at 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."

7. Then he refers to a table which is attached to the second Particulars of Claim and this and another table that I have seen, certainly this one, show that over the years the annual bonuses have reduced, pension bonuses down to zero and endowment bonuses down to a very small amount. He says at 9B:

> "The said differential policy at 9A was unlawful and/or in breach of the implied terms."

8. So that was the second issue to be decided: is that unlawful? Depending on my decision on those points, if I find in favour of the defendant on one or both, then no doubt there will be a trial in due course relating to damages.

9. At paragraph 10 he says: "By reason (...reading to the words...)", which I will not go into at the moment.

10. Before I make my decision and my reasoning I think it worth pointing

out the history to this case, some of which was touched upon earlier today. This case started off in the Ilford County Court, the claim being and still is for a sum limited to £5,000. It came before a district judge in that court and I am afraid I have not been able to work out the writing and there is no name, just a signature, and the parties were unaware of this until I mentioned it to counsel today. Directions were given and the case was allocated to the multitrack and transferred to the Central London County Court. Whether it was intended to be transferred to the Central London County Court Chancery list (because this is the type of matter that is dealt with in Chancery) I do not know, but it was sent to this court.

11. It came before, I cannot tell from the file, but the orders would suggest His Honour Judge Cowell, but it seems it came before Judge Marshall, the senior Chancery circuit judge, who, whether she saw the manuscript order or not I do not know, but directed a CMC to take place and one of the things to be considered at the CMC, so she said, was the question of allocation. It seems to me that she had not known that it had already been allocated to multitrack, otherwise I think she might have said that consideration should be given to reallocating it, either to fast track or to small claim.

12. Within the file are allocation questionnaires filed by each party. One party suggests, and I think it is the claimant, that the case should be dealt with within a day, hence should be small claim. The defendants say one day and four hours and because of its nature and complexity it suggests multitrack. They also suggest, because of the witness or witnesses coming from the defendants, it should go up to Manchester, which I think has a Chancery section, I am not too sure but I believe it has. Of course that would be prejudicial to a litigant in person and it should from his point of view stay in Ilford or certainly stay in London. The decision was taken to send it to Central London, obviously being London.

13. The matter passed to one or two circuit judges and eventually the matter was listed before His Honour Judge Serota in September. I understand from both counsel in front of me, who I think were before His Honour Judge Serota, that a submission was made, presumably on the assumption that they had not been aware that it had by then been allocated, that the matter be allocated to the multitrack. That, I believe, was the submission made by Dr Jess on behalf of the defendant. In the event and after hearing from both counsel he directed that it be allocated to fast track, and he did not say reallocated, he said allocated to the fast track, and gave directions and said it should be on liability only. Towards the beginning of this hearing it was, I think, going to be raised, certainly it was suggested and I made a comment and I say it

now, whether anything turns on the fact that it was originally multitrack, then, as Judge Serota said, fast track. In my view nothing turns on it whatsoever.

14. The direction given by the Ilford County Court was made on paper and anyone is entitled to challenge a paper direction at a further hearing with parties present and that is exactly what happened in the event before His Honour Judge Serota and he decided it should be fast track. On the paperwork at that time I suspect that was the right decision. I have to make the observation that in the light of all the documents that I know have been floating around (many of which, apparently most of which, I have not seen, I have only really seen the court bundle) would it be more appropriate to have allocated this to the multitrack, but when you consider the value of this case, would that really have been proportionate? It might have been better to keep it to the small claims track. That would at least give the court the opportunity and the parties of considering one, two, three or infinite days' hearing. Fast track means one day, although of course fast track sometimes do extend, then the costs available for the successful party are limited under CPR 46. That is the background.

15. There were then applications, which I touched upon this morning, for disclosure, which were rejected. I know that there is an application before the High Court to appeal in respect of the refusal of Recorder Rogers to allow further disclosure. I have made my view that this trial should not be adjourned for that purpose, and I have actually made a comment and I repeat it again, that I do not think that the claimant has any chance of success on the hearing of that appeal, but that is a personal view. I have decided, rightly or wrongly, to continue with this trial today.

16. Last night when I first got the papers (I had to take the papers home because they were extensive) I spent some four hours reading the entirety of the court file, reading what I now understand, but did not know then but made the assumption it was, the trial bundle or the bundle before Recorder Rogers last week, which contained witness statements, including those of Mr Walker, who has been in the box to give some further evidence, and the witness on behalf of the defendant, Dr Bunch, and, as ordered by His Honour Judge Serota, statements of facts and issues and skeleton arguments of both parties. I also took home with me the core bundle, but only read a limited way into it. I do not think I went beyond about page 80. It was so extensive I did not know precisely what was going to be said to me in respect of those documents. Some of them have been referred to me today at this hearing.

17. The claimant has got to prove his case on liability. He therefore has to satisfy me, as he puts it at paragraph 1.4 of his skeleton, that there are two separate heads of claim, the unlawful subsidy claim and the unlawful differential bonus points of claim.

18. 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 it is in breach. What I think he is saying is that by using monies which should not have been touched the amount available for the policyholders, including himself, the stakeholder pensions, is reduced and he has suffered loss.

19. I have been referred to the regulations and referred to the Welfare Reform and Pensions Act 1999, which was what I will call secondary legislation. I was referred to, on page 21 of the core bundle, paragraph 14 of the Statutory Instrument 2001/403, which talks about charges. Subparagraph (2):

> "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."

which has been interpreted as, with compound interest, 1.1 per cent so that out of the fund you can take no more than 1 per cent per annum to fund this scheme.

20. I think it is accepted, certainly by the defendants, because I have been told, this type of scheme, stakeholder pensions, has to be set up. I think the setting up costs, from what Dr Bunch said, was £7 million. The defendants' case is that this money came from what I will call a totally separate fund, working capital, call it what you like, but totally and utterly separate from the funds in relation to this scheme. I will come back to that shortly. The claimant says that there is some ambiguity as to precisely what this means because on their case they have taken out of the fund, the stakeholder pensions, not 1 per cent but 13.6 per cent. If there is any ambiguity they say that I am allowed to look at Hansard and they have referred me to what appears at pages 205 and 206 and other pages, but certainly some observations from Mr Rooker, the minister, and I am looking at page 205 and I read it out:

> "There is no plan to snuff out without profit schemes. The one matter that we have been rigid about is the 1 per cent cap. It is not 1 per cent for majority stakeholder pensions, it is something

> else for with profit stakeholder pensions ... we are offering 1 per cent and we are not prepared to deviate from that."

It is crystal clear what they are getting at.

21. The claimant has sought to prove to me, because the onus is on the claimant, that the monies used (and it is accepted, I believe, by the defendants that they had paid commission to their sales staff, I think, of up to 5 per cent and then there are other incidental costs hence you get to a figure ultimately of 13.6 per cent) were taken out of the funds, if you like, that had been separately put away for the stakeholder pensions. That is the way I understand it. But the defendants' evidence, I have to say, is crystal clear -- emphasised in the witness statement and emphasised in the witness box -- that that is nothing of the sort; that is not the case. When questioned, and I deliberately put the question I did in a somewhat roundabout way at the end of his evidence, I wanted to clarify, and he has clarified, that the monies come in from, for example Mr Walker; out of the monies that are received no more than 1 per cent each year is taken and in order to recoup what I will call the losses, that comes from a completely separate fund, the working capital I will call it, and one per cent is dragged over from that and put in the stakeholder pension fund, or whatever expression you give it.

22. I have to say I am totally satisfied on the evidence that I have heard from the defendants that that is exactly what has happened and I am quite satisfied in fact there is no ambiguity as to the meaning of anything in these regulations and in theory at least that means I should not even be looking at what Mr Walker has said, but I think it is totally academic.

23. I am assisted in my observations (though I do say that Mr Birkin on behalf of the claimant thinks I should put little weight on it) by the correspondence that appears at pages 197 to 200 in this bundle. At 198 to 200 there is a letter from the Financial Services Authority addressed to the defendants headed "With Profits Stakeholder Pension Fund". It refers to a letter, which I have not seen, of 6 November but obviously it is raising a point which is the subject of these proceedings in my view. At the top of the second page it says:

> "All expenses will be met from outside the Stakeholder fund; the only deduction from the fund for expenses will be the 1% pa charge (made by daily rests)."

24. As I understand this letter, having read it, it seems to be telling the defendants how they should run the scheme and what they should do

and that is clear and it ties in with the regulation I read out at paragraph 14. Then a little further down on that page it says:

> "Expense reserve.
>
> > "I agree that an expense reserve will be required calculated on the basis of a prudent estimate of the present value of future expenses less future recoveries via the 1% pa charge on the Stakeholder fund. This reserve should be held in balance of the long term fund (ie outside the Stakeholder fund) because that is where the expenses will be paid from."

25. As I understand it, that is exactly what the defendants have been doing, no more, no less. I was referred by Mr Birkin to the second paragraph on the next page, page 200, and I was referred to the words: "In such a case the deficit will be shown in line 13." I will not read it all out. I have to say I am not assisted by that paragraph at all.

26. At page 197 is a letter dated 8 January 2004 from the defendant to the claimant. In the third paragraph it reads as follows:

> > "The charges we are allowed to take from Stakeholder pensions are set by the government and are currently capped at 1% of the fund per annum. [We know it has gone up to 1.5 per cent for a period of ten years but I will not go into that.] It is true that in the early years these charges are insufficient to cover the expenses incurred in administering this product. However, policies are written as long-term contracts covering the period up to the expected retirement date of the customer and we expect over the lifetime of a policy to recoup these losses from the higher charges we are able to take in later years. Until then, this shortfall is made up using funds taken from the Society's free reserves. These reserves are independent of the asset shares which are used to determine the value, and hence the bonuses, of with-profits policies such as endowments. Therefore sales of Stakeholder pensions should not have any adverse impact on the payouts made to our endowment policyholders."

27. So the claimant was told this four years ago. He clearly does not accept what he has been told. That is the only reason why we are here today. He said in the witness box he found this odd that he was told about this some years ago. This claimant is not your ordinary claimant, if I can put it that way. This claimant used to work, as I understand, for CIS so he is not unfamiliar with this type of policy, or indeed any policies, and presumably is not unfamiliar with the practices of the defendant. But he simply does not accept anything that is said. Dr Jess

has made it crystal clear, as indeed has Mr Walker, that both he and Mr Walker are very unhappy at the disclosure made by the defendants, hence the applications and hence the respective appeal to the High Court following the decision of Recorder Rogers. It may well be that had they had different disclosure we would not be sitting here today. I do not know. From what I have read, and I have read a great deal in these bundles, there is clearly something underlying between both claimant and defendant, there are other matters that have gone on before and I do not know if they are still going on. I doubt whether this claimant would have just stopped even if he had had all the disclosure in the world. I think, I regret to say, he would still dispute this case today.

28. I take on board, I merely just say, that I have read the entire witness statement of the claimant. I have already observed, and indeed Dr Jess observed at the very beginning of this case, that that really is a mass of submissions, not evidence. I found it extremely difficult to read and understand initially. I had to read it twice (many, many pages), helped by the statement of facts and issues, which I regard as a contracted version of the statement, helped further by his skeleton argument, which is a contracted version of that. I only mention it just to say that I have read it but I have nothing further to say on the 1 per cent issue.

29. The other issue before me is the unlawful differential bonus policy claim and for this I quote from his own skeleton argument. He says:

> "This head of claim has two limbs. First, personal pension policies taken out before 1999 were subject to indemnity guarantees and, as explained in Equitable Life, these cannot be taken away by reducing the bonus. The statement of CIS of 1 April 2000..."

30. I will not read it all out. He refers to the Equitable Life decision and the Paragon v Nash decision, both of which I am familiar with. I think I am right in saying that paragraph 5.7 of the second amended Particulars of Claim quotes precisely from one of those cases. The parties will not know, but I am familiar with the Paragon cases. There was another case before me which resulted in a reserved judgment because it was anticipated it would go certainly to appeal, if not the Court of Appeal, but it was dropped, much to my disappointment. I mention it only because I am familiar with this field. He says:

> "To ensure that these valuable guaranteed benefits are not increased [?] further to the potential detriment of other with profits policyholders no further annual bonuses are currently being added to this policy seems again to fly in the face of the

> Equitable Life decision. In the Equitable Life case the bonus reduced was the terminal/final bonus. Mr Walker argues that this also makes unlawful reduction of reversionary annual bonus."

31. I will not read it all out. He then comments on Dr Bunch's evidence:

> "Dr Bunch's assertion that the payment of annual bonuses is irrelevant because CIS should now make some sort of enhanced final payment cannot be right because, firstly, such terminal bonus payments are uncertain, secondly, it seems to conflict with the FSA fact find requirement, which includes the CIS noting the risk profile Mr Walker and all other policyholders which have been in force since about the mid 1990s. This legal obligation on the CIS to ascertain a policyholder's risk attitude is undermined if the CIS can now say that they have no legal obligation to grant a bonus because this makes pension policies more (inaudible) at the point of sale."

32. Then he says: "Dr Bunch's evidence falls short in a number of respects", and he refers to the Pension Institute Financial Services (inaudible). He makes some observations.

33. I have been referred to the tables. I have been referred to the fact that there are differentials. It really is for the claimant to prove his case but, as Dr Bunch says, I do not think there is a shred of evidence to support anything that the claimant is saying. Dr Bunch has given his evidence and made it crystal clear: all policies in general are different. Depending on what policy you take out you get different results.

34. Criticism is made, I think, that the decision has been made by the defendants over the years to reduce to zero in some respects the annual bonus and leave it to the end of the term by reference to asset value what the final figures will be paid, and I have seen what Dr Bunch says, that it does not make much difference one way or the other whether annual bonuses are paid as an annual bonus or it is left to the final bonus. It comes to the same thing. I have to say I am not absolutely sure that can be said is logically correct, but one thing I am certain of is that there is nothing to suggest in anything that I have read that the CIS in any way breaching their obligations, their clear obligations. They are doing, as far as I can see, what I expect them to do.

35. I make this final observation: although this matter is before a court my instinctive reaction is everything that has been raised by Mr Walker is something not for a court but for the FSA. If I am right, that may have been dealt with by the FSA already and this is a second bite at the cherry. I may be wrong, but one thing is certain in my mind: this claim

is to be dismissed because in my view it is hopeless. Action dismissed.