This witness statement was included with the written submissions to the Court, and was dealt with in the summing up by Gabriel Moss QC, the Society's leading counsel, but Mr Josephs was not permitted to address the Court, as his policies had been transferred out.

In the High Court of Justice No 7106/01
Chancery Division
Companies Court
The Honorable Mr Justice Lloyd

In the Matter of

The Equitable Life Assurance Society

and

In the Matter of the Companies Act 1985

Witness Statement of Michael Josephs

I MICHAEL JOSEPHS OF ==========, a Management Consultant in sole practice, say as follows:

INTRODUCTION

1. I am appearing in my personal capacity 'pro bono publico', purely to draw attention to such matters of Public Interest as might otherwise not be addressed in the proceedings. It is my intention to address issues with regard to the Scheme as a whole, and not the merits of the case for the various classes..

2. I have submitted a number of papers on the situation of The Equitable Life Assurance Society ('Equitable' or 'the Society') at the request of my Member of Parliament, Dr Rudi Vis. He in turn has passed these papers to the Treasury, and they have recently been acknowledged by Ruth Kelly, Treasury Minister. Some of these papers have been published on the Internet through the good offices of the Equitable Life Members Help Group. I will produce copies of these papers if the Court so requests.

3. I have consistently argued that the evidence shows that the management of Equitable bears the major responsibility for the distressed state of the Society which has led to these Court Hearings, and I have argued that all classes of policyholder have suffered

on that account.

4. I am generally familiar with financial matters, and have spent much of my professional career dealing with the impact of Computers and Information Technology on the financial markets.

5. I previously held two policies with Equitable, initiated in March 1999 and transferred out in May 2001. As a result I sustained relatively modest losses, and am participating in the formation of a group action against the Society which is intended to recover the major part of those losses. I do not believe that that matter has any direct bearing on this Compromise Scheme.

6. The Society has refused to provide funds for the legal representation of any of the classes of policyholders affected by this scheme, and has also used policyholders funds and the very credible threat of massive legal cost orders to deter policyholders from seeking legal redress for recent injustices. In consequence, the recent actions of the Society have not been validated in Court in any way, and , as I presently understand, there is no legally qualified advocate to represent the views of objectors. Were the situation otherwise, I would not have made this submission.

7. I am aged 68, and have no previous experience in making such a submission. I apologise for any errors caused by my lack of legal expertise.

8. There are nine matters on which I believe that Public Interest Issues arise:

- Unbalanced legal representation
- Creation of new legal precedents
- Whether section 425 is properly applicable to policyholders
- Failure by the present board to exercise due diligence
- Interference by the Halifax/Bank of Scotland group
- False accounting not remedied
- Inadequate provision of financial information to policyholders and to the court
- The demoralisation of the actuarial profession
- The absence of a committee of creditors

Unbalanced Legal Representation

9. It is my understanding, as an uninformed observer of the legal process, that the effective performance of this process in the English Courts is largely dependent on the proper functioning of the adversarial system, whereby the distinct parties are separately represented by advocates experienced in the law in question. There are at least three parties to this matter, the Board of Equitable, The GAR class and the non-GAR class. Only the first of these is legally represented, yet this hearing is not a mere formality: it has to address substantive issues bearing on the retirement income of around a million people.

10. The disparity is ludicrous: on the one side there is Mr Moss QC, an acknowledged expert in this area of company law, and ranged against him a few individuals, all totally

inexperienced in these matters. Is not this unbalance such as to make any findings by this court unsafe?

11. I would draw the attention of the Court to an earlier incident of improper representation in connection with the matter now before it. On 23 February 1999 Deputy Master Weir accepted an application from the Society for a representation order in the Equitable Vs Hyman litigation which triggered the catastrophic collapse of the Society. At that hearing Equitable and its legal advisors undertook to represent the Society and its non-GAR policyholders: neither Equitable nor its legal advisors disclosed the massive conflict of interest which existed as a result of the Society knowingly having included the non-GARs in the same with-profit fund as already held the policies of some 200,000 GARs.

12. As a result, the non-GARs were effectively cast adrift without proper representation, as the Society concealed from the Courts both the scale of the risk involved and the fact that none of the non-GARs had been made aware of those risks at the time that they entered into their policies. The result has been a major injustice to the non-GARs and great damage to the reputation of our legal system.

13. May I therefore suggest, if it is not too late, that the Court should ensure the appointment of suitable counsel to represent the other two parties, and an experienced Solicitor to advise those appearing in person. It would be entirely proper for the Society to pay for that degree of legal assistance.

Creation of New Legal Precedents

14. I would not presume to instruct the Court on the legal innovations inherent in this case. However, interested parties who have sought an explanation of the proceedings have frequently been told that nothing can be predicted with confidence, as the application of a Section 425 scheme to the field of life and pensions insurance is quite without precedent. It has also been suggested that the Law of Trusts and mutual societies provides more relevant precedents which would provide a more fitting basis for a fair and effective compromise.

15. I submit that the dangers inherent in a lack of proper adversarial argument are all the greater when new legal precedents are likely to be established, many by default.

Whether section 425 is properly applicable to policyholders

16. I have read the Society's formal compromise proposals, and see that Section 425 refers to 'creditors'. To the layman, a creditor is someone whose relationship with the company can be ended by means of a simple financial transfer. Surely this can only be the case when the Society has announced an intention to renege on its policy obligations, which is not the case here. Can the Court really categorise a trapped with-profit annuitant as a simple 'creditor'? I give this as an instance of the matters referred

to under the previous heading, which deserve to be decided after expert argument.

Failure to Exercise Due Diligence by the Present Board

17. Regretfully, I must submit that the present Board of Equitable has not attempted to carry out its proper duties in the interest of shareholders (in this case Members of the With Profits Fund). Although faced with a Society in financial and managerial crisis, and the departure en masse and in disgrace of the previous Directors, there is no evidence that the new Board carried out any proper study of the Society's situation, or of the causes of that situation.

18. Instead of establishing the true facts, and then considering a list of possible strategies, they adopted a strategy bequeathed to them by some members of the previous tainted Board at the same time as they treated as "written in stone" a deal with the Halifax whose terms are so extraordinary that they have not yet been published, 12 months after the event. This deal, allegedly "written in stone" appears to have been amended under an undisclosed agreement between the Halifax and the new Board.

19. The Chairman of Equitable has been heard to say words to the effect " Your Board has (and had) only one aim: the achievement of this Compromise Agreement " I contend that it is improper for the Board of a Life Assurance company, who must act as trustees of their policyholders' interests to set itself such a narrow agenda, especially when the present Chairman is reported to have said that it was no concern of the new Board whether policyholders stayed or went as members of this supposedly mutual society.

20. If it is accepted that this is an arguable reading of the facts, it has the effect of damaging the Scheme by destabilising some of its essential assumptions. Policyholders barred from suing over the actions of the old Board will still be able to sue because of the failures of the new one.

21. More seriously, the Board's panic-stricken and one-eyed view of its options means that its views on fairness and due process should be scrutinised with particular care, not to say suspicion. The Court knows from the Board's own words that these were not criteria that concerned it, except from the point of view of appearances. Therefore the Court should make its own enquiries as to whether the Scheme meets the criteria required by the law.

22. **Interference by the Halifax/Bank of Scotland Group**

23. On examination of the actual division of powers between the Board of Equitable and that of the Halifax, this Court may well form the view that true control of the Society's affairs has passed to the Halifax, and that the Equitable board has become a front organisation through which Members funds are appropriated for purposes with

which they would not agree, and through which the Halifax imposes its will without assuming the liabilities of a true purchaser.

24. I would remind the Court that the protocol governing the relationship between Equitable and The Halifax has never been published, despite its vital interest to policyholders and despite the repeated requests of Action Groups, particularly the Equitable Members Action Group ("EMAG"), which appears to be the only group fully supported by its members subscriptions. [**Copies of the relevant letter is attached to this witness statement at 'MJ6']**

25. *I therefore suggest that the Court should require the Disclosure of the full text of the Agreement(s) between Equitable and the Halifax relating to the sale of various parts of the business and the hand-over of operating resources and the sub-contracting of responsibilities to the Halifax, together with any ancillary agreements relating to the ongoing conduct of matters affecting the two parties.*

26. What is known is that the Society is almost denuded of employees, and is dependent on the Halifax for all financial information and all information about the status of customer complaints, and similar essentials of corporate governance. The Court may well form the view that this was no accident but was the deliberate intention of the culpable members of the previous management, hoping to hide the traces of their misfeasance through the offices of the Halifax.

27. I submit that the reality of the situation is that the Halifax Board are acting as Shadow Directors of Equitable, at the same time as they are purporting to be acting at arm's length in the completion of a commercial transaction with the Society. If I am correct in this reading of the situation, then the Scheme submitted to the Court would be that of the Halifax, not the Directors of Equitable, and should be avoided on grounds of improper interference by the larger organisation.

28. The deadline of 1st March for the progress payment of £250,000,000 from the Halifax has already been mentioned in this Court. EMAG have written to Mr James Crosby, Chief Executive of the HBOS Group, requesting that he defer the deadline until the completion of these proceedings. A response was received on 29th January, implying that the Halifax is still seeking to coerce this Court by insisting on the deadline in relation to the conduct of this litigation, litigation which was required by the agreement in which the deadline was set. [**Copies of this exchange of letters are attached to this witness statement at 'MJ1' and 'MJ2']**

False accounting not remedied

29. The implication of the massive criticisms that have been levelled at the Society in regard to the presentation of information to the policyholders and to the regulators is

that the accounts showed a materially false picture for many years, most particularly from 1993 onwards when no provision was made for the GAR liabilities, on the spurious basis that they might not be enforceable.

30. As a result, profits were overstated, bonuses were over-declared, and pensions were overpaid Thus, not merely were the published accounts misleading, but the even more important annual statements of policy funds exaggerated the values in the hands of policyholders, thereby improperly encouraging new policy sales, misleading existing policyholders on the merits of continuing with their current arrangements, and causing the payment of excessive pensions.

31. It is my understanding that it is a normal prerequisite of a scheme under section 425 that such false accounting be remedied by restating the accounts and records in question, unless it is strictly impossible to do so. Only when the accounts have been restated in a proper manner, underwritten by the auditors, should reconstruction proposals be brought forward.

32. The existing Board has not sought to do this, and indeed has doggedly resisted all attempts to establish a fair and true basis of account, arguing that nothing must be allowed to stand before the earliest imposition of its 'compromise scheme'.

33. I submit that this tolerance of, and reliance on, false accounts makes the proposed scheme unacceptable at law.

Inadequate provision of financial information to policyholders and to the Court

34. Exacerbating the problems identified in the preceding paragraphs are those caused by the provision of inadequate financial information about the current affairs of the Society and of the anticipated future developments. The gaps have been well characterised in the statements of other witnesses and in the draft report independently prepared at the request of EMAG by Professor David Blake, a copy of which is already with the Court.

35. Essentially, despite repeated requests to the Board, there is no proper up-to-date statement of affairs, despite massive departures from Membership, involving movements of huge but unspecified funds. If the Chairman's words are to be taken at face value, his Board has not yet begun to plan seriously how the Society should direct itself once the scheme is ratified. How then can Members ('creditors') be expected to make an informed decision on the proposals before this Court?

36. Indeed, how can the Court judge whether the proposals are appropriate without information that enables it to see where the proposals are leading.

The demoralisation of the actuarial profession

37. A most unfortunate aspect of this affair has been the repeated demonstration that the opinions and the advice of actuaries, even the most eminent, were not to be relied upon.

38. The moral dimension of the actuarial profession seems no longer to be considered. For example, when at the request of Parliament, the Institute of Actuaries set up a special committee to review the technical history of this matter, the committee could not bring themselves to utter a word of regret to the policyholders who had suffered from such serious mismanagement, usually on the part of people with senior actuarial qualifications. Nor, despite that the Committee was not operating in a judicial role, could they bring themselves to criticise directly the people responsible for the worst mistakes,. **[I attach a copy of the 'Corley Report' containing their findings at 'MJ3'.]**

39. Furthermore, it is my understanding that no public announcement of any sort has yet been made regarding the initiation of disciplinary proceedings over what, to the layman, are clear failures of professional duty. Indeed, the profession has been in the forefront of those providing apologia for the Society's unique way of operating its funds.

40. I have read the report of Mr Michael Arnold, the 'Independent Actuary' in the context of these questions about the actuarial profession, and I suggest to the Court that it gives rise to many concerns about the meaning of 'independent' in his mind, and about the definition of 'fairness' which he seeks to apply. Indeed, he uses the term 'actuarial fairness' in various parts of his report, implying that this is something different from ordinary fairness, and somehow more appropriate to a section 425 scheme.

41. Mr Arnold exhibits impressive fluency in the technical aspects of his report, which I found relatively easy to follow despite possessing no qualifications in actuarial science. There is perhaps an excess of detailed analysis in relation to matters of small import, but he may have felt such analysis necessary in order to demonstrate that no relevant

issue was being ignored.

42. His independence is called into question by reason of the following:

- He makes no mention of the findings of the Corley Committee, which criticised the actuarial policies and methods of Equitable over the period from 1988 onwards, implicitly raising issues of possible false accounting.
- He accepts management and legal opinions regarding the rights of various types of policyholder, when he, as an eminent consulting actuary, is at least as well qualified to comment on such matters as they are.
- He accepts, without question, the validity of the capital levy on policyholders funds which was imposed in July 2001, whereas no legal basis for such a levy has yet been provided.

46. Mr Arnold's definition of 'fairness' is not evident in his report. By implication, he thinks a scheme is fair if its numbers are consistent and it is expedient for the management. I submit that his version of fairness would not be understood by the ordinary policyholder, and give these instances:
    - He spends 16 pages on an elaborate exposition of the rules for the GAR uplifts, and dismisses any claim for comparable treatment by the non-GARs in one paragraph.
    - He completely ignores the case of the late-joiners who have lost guaranteed capital from their funds, whereas those with older policies have only lost bonuses.
    - He gives no consideration to alternative formulae for the compromise, even for the purpose of showing that they would produce an inferior result.
    - He gives no critical examination to his assumption that the GAR-related claims are worth only £200 million, preferring to rely on a dubious higher authority.

47. In relation to the issue of independence, I draw the attention of the Court to the dispute which erupted in the newspapers between Mr Arnold, and Professor Gemmill of City University Business School, over the fairness of the compromise. On examination, Professor Gemmill's complaint appears to relate to the wording of the summary of Mr Arnold's report, because the full report meets his objections on nearly every point. Mr Arnold had only to point this out, but he rushed to defend the fairness of the Compromise, which was not of his making. One must ask whether it was appropriate for an expert witness to take such a partisan position before the matter was decided in court. [**I attach a copy of the text of the letters in question to this witness statement at 'MJ4' and 'MJ5'.]**

48. In view of these doubts about Mr Arnold's approach, I suggest that the Court require Equitable to revisit the matter, by commissioning two further actuarial reports, one from the perspective of the GARs and one from the perspective of the non-GARs, with instructions that they should confine themselves to fundamental issues, excluding computational trivia.

No Committee of Creditors

49. It is fundamental to the operation of section 425 that the creditors are expected to represent their interests by forming a Committee of Creditors, through which the various classes emerge, and which negotiates with the company regarding the Scheme of Arrangement. Indeed, the very definition of 'class' presumes such a Committee, and the discussions which take place within its sub-committees.

50. No such Committee of creditors has been allowed to come into existence in this case. The very opposite is true: the Society has bent every sinew to prevent proper informed discussion and debate among the creditors, and has given the most cursory and derisory attention to the views of those members groups that showed any independence of mind. It is known that many of the 40,000 responses to the consultation exercise contained well argued and critical points of view, none of which were allowed mention in the Society's summary of the results.

51. In addition, policyholders' groups were starved of both funds and information while the Society spent policyholders funds with great lavishness to support the imposition of its own arbitrary approach.

52. I submit that the lack of any proper Committee of Creditors, or any proper equivalent, is sufficient to render the proposed scheme invalid by reason of failure to comply with the letter and spirit of the Act.

Actions Open to the Court

53. I have felt it necessary, in the public interest, and because of the legal precedents that may be set, to object to the way in which the Scheme has been presented to the Members, and to the Court. However, I fully agree that some sort of resolution of the open ended liabilities of the Society is necessary, and I accept that any Scheme of Arrangement is likely to be rough and ready in its application.

54. The fact that these proceedings are taking place implies that each Class of Members of the With Profit Fund have voted for the Scheme. It is reported that the majorities in favour averaged around 99%, a truly remarkable level of support.

55. Hence, even if the existing proposals fall to be rejected for one or other of the reasons given above, the Court should use its powers, if at all possible, to ensure that the Scheme is remedied to the necessary degree, resubmitted for Member approval and brought back to this Court with all possible speed, thereby abiding by the stated choice of the Members.

56. The Court might also impose a standstill on all 'non-contractual' policy changes while this is being done, to ensure that the financial position of the Society does not

deteriorate due to panic reactions.

57. The Court should ensure that any remedial action takes place under its own supervision, to minimise the possibility of further external interference, well intentioned or otherwise.

[End of M Josephs' submission]