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| <b><u>Decision Ref:</u></b>             | 2022-0234                              |
| <b><u>Sector:</u></b>                   | Investment                             |
| <b><u>Product / Service:</u></b>        | Annuities                              |
| <b><u>Conduct(s) complained of:</u></b> | Failure to provide correct information |
| <b><u>Outcome:</u></b>                  | Partially upheld                       |

#### **LEGALLY BINDING DECISION OF THE FINANCIAL SERVICES AND PENSIONS OMBUDSMAN**

The complaint relates to an annuity pension.

#### **The Complainant's Case**

The Complainant submits that following the death of her husband, his pension annuity was transferred into her name. She further submits that the Provider, in a letter dated **18th May 2011**, informed her that she was entitled to a pension effective from **1st May 2011** and that this annuity was payable "*monthly in advance throughout your lifetime*".

The Complainant contends that in **May 2019**, she went to the bank to collect her annuity where she was advised that there was no payment made. She states that when she contacted the Provider, she was advised that her annuity had expired. The Complainant submits that she is very dependent on the annuity payments.

After submitting her complaint, the Complainant appointed solicitors to represent her. The Complainant's solicitors submit that an annuity contract was taken out in **June 2009** by the Complainant's husband in consideration of €171,481.86. They submit that he passed away in **2011**. The solicitors refer to the letter dated **18th May 2011** from the Provider to the Complainant informing her that the annuity pension would be payable to her monthly in advance "*throughout your lifetime*". They submit that between **May 2011** and **June 2019**, the Provider made monthly payments to the Complainant pursuant to the annuity contract and that relying on the Provider's letter of **May 2011**, the Complainant conducted her life and financial affairs on the basis that she had a guaranteed income stream pursuant to the annuity contract, of €11,139.86 per annum for life.

The solicitors submit that at the time when the Provider stopped paying the Complainant in **June 2019**, approximately €111,398.86 had been paid by the Provider pursuant to the annuity contract.

The Complainant's solicitors submit that the Complainant is elderly, and her financial position has deteriorated, and she has suffered upset, loss and damage as a result of the Provider's actions. They submit that documentation has been supplied to her by the Provider in a piecemeal manner and that she was not provided with general terms and conditions of the contract or its schedule.

The Complainant's solicitors submit that the Complainant relied on the **May 2011** letter in making decisions and plans about how to spend her income between **May 2011** and **June 2019** on the premise that she was entitled to the annuity payment for life. They submit that the Complainant has not made provision for herself in the way she would have, if she had understood that they annuity payment was for a period of 10 years only, rather than for life. The Complainant's solicitors refer to an internal email from the Provider which provides an estimated cost of paying the Complainant an annuity of €11,139.86 for her lifetime as €200,400. They submit that the Provider is in breach of contract and in breach of duty (including fiduciary duty), and guilty of misrepresentation or a negligent misstatement.

The Complainant's solicitor submit that the total amount paid by the Provider in respect of the annuity contract between **June 2009** and **June 2019** was approximately €60,000 less than the purchase money specified in the pension annuity application. They submit that it now appears that the Provider did not furnish terms and conditions documentation in respect of the annuity to the Complainant's deceased husband. They reject the implication in the Provider's submissions that the Complainant was somehow on notice of the limited guarantee period due to the words "*remainder of guarantee*" used in certain documentation. They submit that the representation in the letter of **May 2011** was clear and unequivocal and that the Complainant was dealing as a consumer throughout. The Complainant's solicitor submits that, as part of a data access request, the Provider purported to deliver a terms and conditions document which referred to a schedule, but no schedule was provided. The Complainant's solicitor was subsequently informed that no policy conditions were issued under the contract and that the terms and conditions booklet that had been issued was in error and was a **2019** version.

The Complainant's solicitors submit that an estoppel by representation of fact, arises in the present case as a representation was made by the Provider which induced the Complainant, on foot of the representation, to alter her position to her detriment. They submit that the detriment was that, as a result of her reliance on the representation, she lost an opportunity to protect her interests by taking an alternative course of action about how to make financial provision for her old age. The Complainant's solicitors submit that the Provider is estopped from asserting a state of facts contrary to representations contained in its letter of **18th May 2011** and the Provider should be directed to pay compensation to the Complainant for loss, damage and distress.

The Complainant's solicitors submit that there was no contemporaneous written contract, and that the Provider seeks to rely on a post contract letter dated **15th June 2009** as evidence of the terms of the contract. They submit the Complainant also seeks to rely on a post contract letter of **18th May 2011** as evidence of the terms of the contract. They submit that if there is any ambiguity as to the terms of the contract, the contra proferentem rule should apply. They further submit that, if the **May 2011** letter did not reflect the contractual terms, then the Complainant was induced by the letter into thinking that she was entitled to an annuity for life. They submit that this belief induced her into spending her money in a manner that she would not have, if she had known that the income stream from the annuity would terminate in **2019**. They submit that the Complainant was thereby deprived of the opportunity of protecting her interest by taking some alternative course of action. The Complainant's solicitors deny that an intention to cause a party to enter into a contract is required, for an estoppel by representation of fact, to arise.

The Complainant's solicitors submit that the parties are in an unequal position and that the Complainant is blameless, currently in receipt of the non-contributory old age pension. They submit that, as matters stand, she has no other income and is a person of limited means. They submit that she is a person with no expertise or knowledge of the law in relation to pensions and she was not a party to the pension contract at the centre of the dispute; she was merely a beneficiary. They submit that, by contrast, the Provider has a dedicated legal department, has organisational expertise in pension law, and its core businesses is the selling and provision of pensions. The Complainant's solicitor submits that the situation has placed a strain on the Complainant who has been unable to access the private health care services that she had accessed up to the cessation of payments, owing to financial constraints.

The Complainant's representatives have submitted a psychiatric report on her behalf. In it, the consultant psychiatrist expresses the view that the Complainant developed depression and anxiety following the withdrawal in **2019**, of a pension payment that she had received for 10 years. The report notes that she had previously suffered from depression but had been feeling well at the time when the pension was withdrawn. The report notes that the prognosis is difficult but that the Complainant is on medication and continues to experience unanticipated financial adversity.

The Complainant's solicitors on behalf of the Complainant, have requested an oral hearing. They submit that the cross examination of witnesses may be necessary and that the central redress required, is a direction to the Provider to pay the annuity for life. The solicitors submit that the Complainant's oral testimony, setting out the effect that the Provider's conduct has had on her is an essential element of determining what constitutes just and equitable financial redress. The Complainant requests that the hearing be conducted in public.

The Complainant wants the Provider to pay her pension for the duration of her lifetime. Compensation has also been requested on her behalf.

### **The Provider's Case**

In its final response letter to the initial complaint, the Provider explained that the payments being made to the Complainant, related to the remainder of a guarantee period on the annuity pension of her deceased husband. It accepts that it informed the Complainant in **May 2011** that the remainder of guarantee would be payable to the Complainant for her lifetime, but it says that this was incorrect.

The Provider submits that the pension was payable for a minimum of 10 years from the commencement date of the policy in **June 2009** and, as a result, it was guaranteed to pay in all circumstances until **1st June 2019**.

The Provider accepts that it had set an expectation that the income of €11,139.86 per annum would continue to be paid to the Complainant throughout her lifetime and that she had adjusted her lifestyle, with this expectation in mind. The Provider also accepts that the issue must impact her financial situation and, as a result, the Provider indicated its willingness to continue to pay the remainder of guarantee until **June 2020** to allow her to make the necessary adjustments to her finances.

After a complaint was submitted to this Office, the Provider extended a further offer to the Complainant with a view to resolving the matter in full. It submitted that the annuity was taken out with the guarantee period of 10 years to **1st June 2019** and that the Complainant's deceased husband did not apply for a spousal annuity. In light of the error made in its letter dated **18th May 2011** that the annuity payments would be paid for the remainder of her lifetime, rather than over the balance of the 10-year guarantee period, the Provider stated that it was willing to extend the annuity payments to the Complainant for a further two years, backdated to **1st June 2020**. This would mean in total an additional three years of annuity payments, beyond the guaranteed period to redress the Provider's error.

The Provider submits that the Complainant's late husband met with an independent broker to discuss his retirement options in **May 2009** and an application form was completed that day, to arrange an annuity with the Provider. It submits that the annuity went into force on **1st June 2009** on the basis requested in the application form. It submits that a letter was issued to the Complainant's husband on **15th June 2009** confirming that the annuity had been set up and that he would receive an amount of €11,139.86 per annum payable monthly in arrears, for the duration of his lifetime.

The Provider submits that when applying for the annuity, the Complainant's late husband selected to guarantee the monthly payments for a period of 10 years to **June 2019**. It submits that this meant that the payments would continue to be made each month to **June 2019** if the Complainant's husband died prior to that date. It submits that while it was open to him to do so when taking out the annuity, the Complainant's husband did not apply for a spousal annuity. Consequently, it submits that while annuity payments would continue to be paid to **June 2019**, no further payments were due to be made after that date, if the Complainant's late husband died before that date.

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The Provider's records reflect that the Complainant made contact in **April 2011** after the death of her husband with a view to having the monthly annuity payments redirected to her account. It submits that the Complainant signed a change of details form on **27th April 2011**, that was sent to her by the Provider. It submits that the completed form includes a reference to "*remainder of guarantee*" and submits that this information was inserted by the Provider before it was sent to the Complainant and signed by her. It further submits that pay slips from the Provider noted that the payment was in respect of the remainder of the guarantee period.

The Provider accepts that it mistakenly informed the Complainant in **May 2011** that the annuity payments would be paid for the remainder of her life, rather than the remainder of the guaranteed period. It submits that the guarantee period came to an end in **June 2019**, and the final annuity payment was paid on **30th April 2019**. The Provider says that it did not notify the Complainant prior to the end of the guarantee period that no further payments would be made. The Provider says that the Complainant called it on **31st May 2019** to ask why she had not received a payment for **June 2019**, and she was informed that the guaranteed period selected by her late husband came to an end in **June 2019**. It submits that a copy of the **May 2011** letter was emailed to it and in response, it wrote to the Complainant on **24th June 2019** to apologise for the error that had been made.

The Provider apologises to the Complainant that its letter of **May 2011** incorrectly stated that annuity payments would continue to be paid for the remainder of her lifetime, when this was not the case. The Provider accepts that it would have been helpful, particularly in light of the incorrect information in the letter of **May 2011**, to have given advance notice that payments would be ceasing in **June 2019** (being the end of the guarantee period). In light of the errors that occurred, the Provider extended the annuity payments by 12 months initially and submitted that it was willing to extend the payments by a further two years to settle the matter.

The Provider submits that, regardless of the administration error in its letter of **May 2011**, the cessation of annuity payments in **June 2019** was in accordance with the contract entered into between the Complainant's late husband and the Provider in **May 2009** and that it communicated the guarantee period to him, in the policy documentation issued in **June 2009**.

It submits that, once incepted, an annuity is payable for the remainder of an annuitant's lifetime and, in this case, the annuitant was the Complainant's late husband. It submits that when an annuitant dies, annuity payments immediately cease unless: (i) the annuitant dies before the end of the guarantee period, or (ii) a spouse's annuity is to be paid to an annuitant's spouse for the remainder of their lifetime.

The Provider submits that in 2009, there were no policy conditions issued in respect of annuity contracts and that the letter dated **June 2009** issued by the Provider set out the terms that applied. The Provider submits that there was no failure on its part to provide full terms and conditions and that it did not supply detailed policy conditions to customers until **2011** onwards.

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The Provider denies that it induced the Complainant to spend her monies in a certain manner or that it gave her false assurances regarding future monies. It submits that the contract was concluded and entered into in **2009** between the Complainant's late husband and the Provider and the letter of **May 2011** did not amend the original terms of the agreement. The Provider submits that its offer to continue payments for three years beyond that guarantee period in light of the **May 2011** error and the inconvenience and distress caused, is a fair and reasonable offer in the circumstances.

The Provider denies that estoppel by misrepresentation of fact applies in the present case. It denies that the Complainant was induced to enter into any contract, which it submits is a requirement of the doctrine. It submits that when the Provider wrote to the Complainant in **2011**, there was no intention to alter the terms of the existing contract, no intention that she would act in a certain way, and there was no intention to cause her to change her behaviour. It submits that the change of details form, in conjunction with the pay slips, evidence that it was not the Provider's intention to induce the Complainant to act in a certain manner or to radically alter the contract it had agreed with her late husband. The Provider submits that the Complainant should not be entitled to pursue estoppel by representation, as it was never the Provider's intention to change the legal relations between the parties.

#### **The Complaint for Adjudication**

The complaint is that in **June 2019**, the Provider wrongfully ceased making payments to the Complainant under her late husband's annuity contract, as a result of which it has caused the Complainant loss and inconvenience.

#### **Decision**

During the investigation of this complaint by this Office, the Provider was requested to supply its written response to the complaint and to supply all relevant documents and information. The Provider responded in writing to the complaint and supplied a number of items in evidence. The Complainant was given the opportunity to see the Provider's response and the evidence supplied by the Provider. A full exchange of documentation and evidence took place between the parties.

In arriving at my Legally Binding Decision, I have carefully considered the evidence and submissions put forward by the parties to the complaint. Having reviewed and considered the submissions made by the parties to this complaint, I am satisfied that the submissions and evidence furnished did not disclose a conflict of fact such as would require the holding of an Oral Hearing to resolve any such conflict. I am also satisfied that the submissions and evidence furnished were sufficient to enable a Legally Binding Decision to be made in this complaint without the necessity for holding an Oral Hearing.

A Preliminary Decision was issued to the parties on **26 April 2022**, outlining the preliminary determination of this office in relation to the complaint. The parties were advised on that date, that certain limited submissions could then be made within a period of 15 working days, and in the absence of such submissions from either or both of the parties, within that period, a Legally Binding Decision would be issued to the parties, on the same terms as the Preliminary Decision, in order to conclude the matter. Following the consideration of additional submissions from the parties, the final determination of this office is now set out below.

I am conscious in that regard that the Complainant's representative has indicated the Complainant's preference that the adjudication of this complaint include an Oral Hearing in public.

**Section 12** of the **Financial Services and Pensions Ombudsman Act 2017** (the **2017 Act**) provides as follows:

*"The principal function of the Ombudsman shall be to investigate complaints in an appropriate manner proportionate to the nature of the complaint by:*

- (a) informal means,*
- (b) mediation,*
- (c) formal investigation (including oral hearings if required), or*
- (d) a combination of the means referred to in paragraphs (a) to (c)."*

No regulations have been made under **Section 47(4)** of the **2017 Act** and in that context, **Section 47(5)** of the **2017 Act** provides as follows:

*"Subject to any regulations made under section 4, the procedure for the making of complaints and the conduct of investigations shall be such as the Ombudsman considers appropriate in all the circumstances of the case, and he or she may, in particular, obtain information from such persons and in such manner, and make such enquiries, as he or she thinks fit."*

I further note that **Section 56(1)** of the **2017 Act** provides as follows:

*"The conduct of investigations under this Part shall be undertaken as the Ombudsman considers appropriate in all the circumstances of the case and in a manner that is appropriate and proportionate to the nature of the complaint."*

It was open to this Office, when determining the most appropriate procedure for the conduct of the investigation of the present complaint, to consider holding an Oral Hearing to that end, bearing in mind what is appropriate and proportionate to the nature of the complaint.

It has been the consistent practice of this Office to conduct oral hearings where there are conflicts of material fact arising in the dispute. This is in keeping with principles of natural justice.

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In *J&E Davy v Financial Services Ombudsman* [2010] 3 IR 324 at para 135, the Supreme Court noted that:

*"[c]onflicting evidence of fact . . . generally does not admit of resolution on written submissions and will generally require some form of oral hearing appropriate to the issues which arise."*

Within the same judgment, Finnegan J quoted from the judgment of Costello P, in *Galvin v Chief Appeals Officer* [1997] 3 IR 240, as follows:

*"There are no hard and fast rules to guide the appeals officer, or on an application for judicial review, this Court, as to when the dictates of fairness require the holding of an oral hearing. This case (like others) must be decided on the circumstances pertaining, the nature of the inquiry being undertaken by the decision-maker, the rules under which the decision-maker is acting, and the subject matter with which he is dealing and account should also be taken as to whether an oral hearing was requested."*

It has further been held that an oral hearing is only necessary where the resolution of the dispute of fact will assist materially in resolving the dispute, or if the facts in issue cannot be resolved without such hearing; *Coleman v Financial Services Ombudsman* [2016] IEHC 169 at para 24.

Having examined the facts of the present complaint, I have not identified any conflict of material fact between the parties to the dispute such that I consider an Oral Hearing to be desirable, or to be required to resolve a dispute of fact. Rather, the material facts of the within complaint are agreed between the parties.

The substantive issue for determination is the legal consequence, if any, of a **May 2011** letter from the Provider to the Complainant. I am of the view that the present complaint does not require oral evidence to facilitate a fair adjudication. Representations have been made on behalf of the Complainant in respect of the impact that the Provider's conduct has had on her and a medical report was submitted into evidence. The Complainant has accordingly had a full opportunity to make representations to this Office with regard to the effects that the Provider's actions have had, including a further opportunity made available to the Complainant in April - June 2022, in the course of the parties' additional submissions after the preliminary decision of this Office, was issued to them.

In all the circumstances, I have determined that it is not appropriate or necessary to hold an Oral Hearing in respect of the complaint, notwithstanding the Complainant's stated preference. In determining accordingly, I have taken account of the Complainant's additional submissions received since the preliminary decision of this Office was issued in April 2022, which are referenced in more detail below.

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I note that in May 2009, a **Pension Annuity Application** form was submitted to the Provider by or on behalf of the Complainant's late husband. The purchase price of the annuity was stated as €171,481.86 and the source of the money was specified as "*occupational pension scheme*".

Under section 4 of the form, in respect of "*Annuity details*", the commencement date was specified as **1st June 2009**. In relation the option of a "*Guarantee period*", the applicant chose a guarantee period of 10 years, from a number of options available. The applicant selected that the annuity would be paid monthly in arrears, rather than in advance.

Section 5 of the **Pension Annuity Application** form is entitled "*Spouse's annuity*" and the option was given to apply for an annuity for the applicant's spouse as a percentage of the principal's annuity. I note that this section was not completed and was crossed out by the applicant. In other words, the option of including a spouse's annuity was not selected.

I note that the application form was signed by the applicant (ie the Complainant's late husband) on **12th May 2009** and also signed by his intermediary. By his signature, the applicant agreed to "*the purchase of an annuity*" from the Provider and agreed that the application form "*shall form the basis of the proposed contract*" with the Provider.

I note that the **Pension Annuity Application** form and a cheque for **€165,505.17** was submitted by letter dated **26th May 2009** to the Provider by the applicant's intermediary.

A **Pension Annuity Quotation** dated **2nd June 2009** has also been submitted in evidence. This Quotation provides the following details:

|                       |                      |
|-----------------------|----------------------|
| <i>"Annuity Rate</i>  | <i>6.73%</i>         |
| <i>Purchase money</i> | <i>€165,505.17</i>   |
| <i>Your pension</i>   | <i>€11,169.86 pa</i> |
| <i>Start Date</i>     | <i>01 June 2009</i>  |

- 1. This quotation is for a Male aged [xx] years and [yy] months.*
- 2. The pension is payable monthly in arrears. It is guaranteed for 10 years and for life thereafter. Pension payments will be taxed under normal PAYE rules.*
- 3. Your pension will remain level in the future.*
- 4. This quotation does not constitute a contract but the rate quoted is guaranteed for 10 working days. The quotation has allowed for intermediary remuneration of 2.0%."*

I note that by letter dated **16th June 2009**, the Provider wrote to the Complainant's late husband as follows:

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***“RE: Pension – 62\*\*\* - [Complainant’s late husband]”***

*Dear [Complainant’s late husband],*

*Under the terms of the above contract you are now entitled to a pension of €11139.86 per annum, esc at 0% per annum and payable with effect from 01/06/2009.*

*This pension is guaranteed for a minimum period of 10 years certain and is payable thereafter monthly in arrears throughout your lifetime.*

*...*

*The initial instalment of your annuity will be sent to reach you by 30/06/2009. This payment will include backdating of pensions payments to the 01/06/2009. Please note a payslip confirming payment details and the amount credited to your account will be sent to reach you on the first of every month.”*

I take the view that the above documents constitute the best evidence made available of the contract entered into between the Complainant’s late husband and the Provider in **2009**.

I am satisfied that in return for the purchase monies, the contract provided for a pension to be paid to the applicant of **€11,139.86** per annum, payable from **June 2009** for a guaranteed period of 10 years and, thereafter, payment throughout his lifetime, if such arose. There was no spousal annuity payable under the contract, in the event his death.

I note that confusion arose between the Provider and the Complainant’s solicitors in the context of a data access request, whereby a terms and conditions document was supplied to the Complainant. This document also refers to a policy schedule. It should be noted that this office has no jurisdiction in respect of data access requests or complaints arising therefrom, which are a matter for the Data Protection Commission.

The Provider has confirmed that at the time when the Complainant’s late husband agreed the contract in **2009**, no terms and conditions document was in existence and no policy schedule was issued to customers. Accordingly, it has confirmed that the terms and conditions document (which post-dated the policy in question) is not applicable and was sent in error to the Complainant as part of the data access response. The Provider has confirmed in a response to a query from this Office, that the **2009** documents quoted from above, are the only documents in its possession, which record the contract entered into.

The Complainant’s husband unfortunately passed away in **2011**, shortly after he had entered into the annuity contract with the Provider.

Because there was a guaranteed element to the contract, the balance of the 10-year guarantee period (approx. 8 years) was payable to his estate. There was, however, no benefit payable to his wife, by way of a spousal annuity under the terms of the contract, beyond that guaranteed 10-year period he had contracted for.

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I note that The Complainant completed an application form dated **27 April 2011** to have her late husband's pension payments redirected to her bank account. The form contained her personal details and the details of her bank. Beside an entry entitled "Employee number", the following was written: "Remainder of guarantee – 62\*\*\*". The Provider has argued that it is relevant that it included the reference to 'Remainder of guarantee' on the form in question, and this was sent to the Complainant and signed by the Complainant.

By letter dated **18th May 2011**, the Provider wrote to the Complainant in the following terms:

***"Re: Pension – 67\*\*\* - [Complainant]"***

*Dear [Complainant],*

*Under the terms of the above contract you are now entitled to a pension of €11,139.86 per annum, and payable with effect from the 01 May 2011. This pension is payable monthly in Advance throughout your lifetime.*

*...*

*The initial instalment of your annuity will be sent to reach you by 31st May 2011. This payment will include backdating of pension payments to the 01 May 2011.*

*Please note a payslip confirming payment details on the amount credited to your account will be sent to reach you on the first of every month."*

[My underlining above, for emphasis]

I am satisfied that the Provider's letter of **18 May 2011** clearly and unequivocally represented to the Complainant that the annual pension payment of €11,139.86 would be payable to her for her lifetime. Though it objects to the use of the word 'representation', the Provider agrees that it misinformed the Complainant that the annuity would be payable throughout her lifetime.

The Complainant's solicitors have submitted that this letter forms part of the terms and conditions of the contract, such that the representation (that the annuity is payable for life to the Complainant) constitutes a term of the contract. I disagree.

The first paragraph of the letter begins with the words "[u]nder the terms of the above contract". In my opinion, the letter was intended to inform the Complainant what her entitlements were under the contract that was concluded in **2009** and not to become, in and of itself, an additional term of the contract. I do not accept that the letter constitutes an amendment of the terms of the contract that was entered into between the Provider and the Complainant's late husband in **2009**. There was no consideration paid by the Complainant to amend the contract in that manner. I further note that the change of details form, from **April 2011** and subsequent pay slips refer to 'remainder of guarantee', although this phrase is not particularly helpful, as it could have a number of meanings.

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Accordingly, insofar as contractual entitlements are concerned, I do not consider that the letter of **18th May 2011** amended the terms of the existing annuity contract, such that the Complainant was or is entitled to payment of the annuity for her life. Rather, the contractual terms remained the same - there was no spousal annuity payable under the contract and the guarantee period of 10 years was due to elapse in **June 2019**.

I note that the annuity was paid from **June 2011** onwards to the Complainant and was then stopped without warning in **June 2019**. When the Complainant contacted the Provider to inquire about the **June 2019** payment on **31st May 2019**, because the monthly payment had not been paid into her account as normal, she was informed that the guarantee period end date in respect of the pension was **June 2019**, and she was told there was no further payments to be made under the pension. The Complainant referred to the letter she had received from the Provider in **May 2011** which stated that the pension would be payable for her lifetime. The Complainant confirmed that the **May 2011** letter was the only correspondence she received and there was no end date on that letter.

I note that the Provider stated that it did not have a copy of the letter and it committed to investigating the matter for her. It asked her to send a copy of the letter to it. The Complainant stated that she was shocked by what she had been told. The Provider's representative told her that the guarantee period should have been explained to her and she should have been informed, before the payments ceased. The Complainant's daughter followed up on the complaint with an email dated **4 June 2019** to the Provider and forwarded the letter from **May 2011**, as requested. The complaint was acknowledged by letter dated **7th June 2019** and a complaints procedure brochure was sent to her on **17th June 2019**.

By letter dated **26th June 2019**, the Provider wrote to the Complainant as follows:

*"I understand your issue is in relation to the remainder of guarantee period on annuity 62\*\*\* [the Complainant's husband] (Deceased) and the communication we issued to you on 18 May 2011, confirming that this remainder of guarantee will be payable to you for your lifetime.*

*I am very sorry we notified you incorrectly that this income will be paid to you for your lifetime. Your late husband provided that his pension was payable for a minimum of ten years from the commencement date of the policy.*

*We have reviewed [Complainant's husband's] original file and the benefits requested were a single life annuity of €11,139.86 per annum, guaranteed to pay in all circumstances until 01 June 2019. I enclose a copy of the quotation and the application form signed by [Complainant's husband] on 12/05/2009.*

*I am aware that we have set an expectation that this income would continue to pay to you throughout your lifetime and that you have adjusted your lifestyle with this expectation in mind. I realise this issue will have an impact on your financial situation and we are willing to continue to pay the remainder of guarantee until 01 June 2020 to allow you time to make the necessary adjustments to your finances.*

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*Your payment will re commence on 01 July 2019 and included in this payment will be a backdated payment for June 2019.”*

I note that both during the telephone call on **31st May 2019** and in the final response letter of **26 June 2019**, the Provider acknowledged its error to the Complainant. Its response to her complaint was swift and she was given an additional one year's payment under the annuity contract to reflect the incorrect impression that the Provider had created in respect of the duration of her annuity entitlements and the impact on her financial position. This however was not acceptable to the Complainant and a complaint was made to this Office.

Reasonably promptly thereafter, in November 2020, in its formal response to the investigation of this Office, the Provider followed up with an extended offer to the Complainant of a further two years of payments under the contract, which would then in total allow an additional three years of payments over what was provided for in the contract.

I note that based on the date of death of the Complainant's husband, under the contract she was entitled to just over 8 years of payments under the guarantee period, after he passed away. Through this offer, which I understand remains open for acceptance, the Complainant would receive just over 11 years of payments to reflect the incorrect expectation created by the Provider and its failure to notify her, prior to the cessation of her payments. I note that the initial one-year period has already been paid by the Provider, while the additional two years of payments have been offered.

It has been argued on behalf of the Complainant that an estoppel by representation, has arisen in the present case and that the Provider should not be permitted to resile from its representation in **May 2011** that the annuity would be payable for life, since the Complainant has relied to her detriment on that representation in managing her financial affairs. It is submitted that she would have organised her financial affairs differently, if she had been made aware that the annuity payments would cease in **June 2019**. The parameters of the doctrine of estoppel by representation are in dispute between the parties.

In my opinion, the parties' arguments regarding the doctrine of estoppel, are more suitable to a Court of Law. For that reason, I do not consider it appropriate to make a determination regarding those arguments. When I issued the preliminary decision to the parties in April 2022, I pointed out at that time that if, having received the preliminary decision, the Complainant then decided that she wished to pursue an argument on the basis of the doctrine of estoppel, it would be open to her to withdraw her complaint from this Office, before a Legally Binding Decision was issued, and she could then, instead, pursue litigation to that end.

In taking that position, I am conscious of the provisions of **Section 12(11)** of the **Financial Services and Pensions Ombudsman Act 2017** which prescribes that the Ombudsman, when dealing with a particular complaint *“shall act in an informal manner and according to equity, good conscience and that the substantial merits of the complaint, without undue regard to technicality or legal form.”*

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I note that the Complainant did not withdraw her complaint, with a view to proceeding instead by way of litigation. Accordingly, the adjudication of the complaint by this Office, has continued on that basis. In those circumstances, whilst I am satisfied that it is appropriate to take into account the impact on the Complainant, from the incorrect information she was given by the Provider in 2011, nonetheless I take the view that the necessary detailed analysis and consideration of the doctrine of estoppel, is a matter for the Court alone, and I make no determination in that regard.

I am conscious that the Supreme Court considered the doctrine of estoppel by representation in *Courtney v McCarthy* [2008] 2 IR 376 and Geoghegan J determined (at page 388) that there was a great deal of overlap between it and the doctrine of promissory estoppel. As I understand it, for the Court to determine that an estoppel applies there must be a clear and unequivocal promise or assurance or representation which is intended to affect the legal relations between parties to a transaction which is understood as such, and before it is withdrawn, the party to whom the representation is made, acts upon it in such a way that it would be inequitable to permit the first party to withdraw the promise or act inconsistently with it; *Cromane Seafoods Ltd v Minister for Agriculture* [2017] 2 IR 119 at 222 (Charleton J). While there was a clear representation made by the Provider in **May 2011** that the annuity would be payable for the Complainant's lifetime, it is unclear to me whether or not a Court would accept that the representation in question was intended to affect the legal relations between the Provider and the Complainant, given that the **May 2011** letter opened with the words “[u]nder the terms of the above contract you are now entitled to...”

I am also conscious that the **April 2011** change of details form, and subsequent pay slips referred to “remainder of guarantee”. I appreciate that the subtlety of this language is not likely to have clarified the position to the Complainant, but I take the view that that such details constitute part of the evidence available to a Court to draw its conclusions, regarding the Provider’s intention or not, to alter the underlying contractual position, when it issued the **May 2011** letter.

Although it will be a matter for the Court alone, taking account of the doctrine of estoppel, to determine whether the Provider is bound in equity to abide by the representations made, and whether there was clear detrimental reliance by the Complainant, nevertheless I am satisfied that, for purpose of determining this complaint pursuant to the ***Financial Services and Pensions Ombudsman Act 2017***, I must accept that the **May 2011** letter must have led the Complainant to believe that she would receive the annuity payment for life, rather than for a period of 8 years.

It has been argued that she would have organised her financial affairs differently, if she had been aware that the annuity payment would cease in **June 2019**. In my preliminary decision, I accepted that position, in a general sense, but noted that no details or specifics had been provided in that regard. Subsequently, the Complainant submitted that if she had known that the pension was for a finite duration, she would have saved a minimum of €100 out of the monthly pension. She also said that she would not have continued her health insurance cover; such a matter is one which any consumer should give very serious consideration to, before deciding to end such cover.

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On **14 June 2022**, I wrote to the Complainant's representatives, noting that their submissions on behalf of the Complainant had include a submission that "*the absence of an Oral Hearing deprives our client of the opportunity to specifically address these matters in person*" and "*these matters*" appeared to reference her difficulty in making evidence available as to how she "*would not have acted in terms of spending etc. had she known that the pension was for a finite period.*" I therefore asked for clarification of the nature of the evidence which the Complainant would be able to make available orally, at a Hearing, which could not be made available in writing, so that further consideration could be given to this aspect of the matter.

The Complainant's representatives replied advising that:

*"It must be re-emphasised at this juncture, that our client is an elderly lady, and this matter has exacted an extreme toll on her.*

*The exercise our client is asked to engage in, is to view the years since her husband's passing through a different lense in terms of her spending. Given this, the nature of the evidence is always going to involve a degree of speculation; by its very nature, it must. Just because the exercise is speculative it does not mean that the evidence should not be accepted. We submit in the absence of an oral hearing the evidence must be accepted.*

*Our client instructs us that she would not have spent as liberally on day-to-day items such as food and clothing. Furthermore, she would have 'cut her cloth to the appropriate measure' or indeed have purchased 'a cheaper and/or more durable fabric in terms of her lifestyle choices. Spending on the purchasing of Christmas and birthdays gifts for her loved ones would have been reduced. Furthermore, occasions such as dining out, nights out and trip to cinema/shows with family and friends would have been curtailed or replicated in cheaper manner. Similar consideration would have applied to items such as holidays and weekend breaks.*

*Our client instructs us that she further thinks she would have accepted more financial assistance from her children.*

*Our client instructs us that she further thinks she would have endeavoured to save 50% of the annuity per annum."*

This is the evidence offered of what the Complainant would have done differently, if she had been aware of the true position.

I accept that the Complainant may indeed have managed her financial affairs differently, had she not been given the incorrect information by the Provider, whether by cutting back on spending and saving more than she did, during the period from **May 2011 to May 2019**, or by accepting financial assistance from her loved ones. I consider this likely, considering that the Complainant believed that the annuity was payable for life, until the true position came to her attention in 2019.

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In all of those circumstances however, I do not accept the Complainant's contention that I should direct the Provider to pay the annuity for the duration of the Complainant's lifetime. This was not what was requested and agreed in the contract entered into between the Complainant's late husband and the Provider.

I appreciate that the untimely death of Complainant's husband has left her in a difficult financial position. The Provider, however, simply entered into an agreement with the Complainant's late husband in accordance with the product that he applied for. It was not the Provider's decision, whether or not a spousal annuity would be requested. Presumably if it had been, this would have represented an additional cost when they contract was incepted.

The Provider's error in this case is an unfortunate one, in that it wrongly informed the Complainant in **May 2011** that the annuity would be payable to her for her lifetime, rather than until **June 2019**, and indeed it gave her no indication during the following 8-year period that a mistake had been made. Rather, payment was abruptly stopped, out of the blue, without any details confirmed to the Complainant as to why. In my opinion, the error in May 2011, compounded with the failure to identify that error at any point during the 8-year period which followed, constituted conduct by the Provider, which was unjust and unreasonable, within the meaning of **Section 60(2)(b)** of the **Financial Services and Pensions Ombudsman Act 2017**.

The Complainant's representatives refer to her having developed depression and anxiety following the withdrawal in **2019**, of the annuity that she had been receiving for a number of years. I am conscious that the medical report submitted, notes that the Complainant had previously suffered from depression, but had been feeling well at the time when the pension was withdrawn. I am conscious in that regard of the Complainant's potentially complex medical history. In this context, the Complainant's representatives, referred this Office to the Judicial Council's Personal Injury Guidelines, relating to psychiatric injuries. I am satisfied however that the Judicial Guidelines are directed towards members of the Judiciary only, pursuant to the provisions of the Judicial Council Act, and such guidelines are not a matter for this Office.

Nevertheless, I can fully appreciate how shocked and disappointed the Complainant was in **June 2019**, to discover the situation, which was contrary to the only written communication she had received in May 2011. To its credit, the Provider accepted from the outset, that it had created an expectation that the Complainant would be paid for life and it apologised to her and made one year of extra payments to her. It subsequently extended its offer of a further two years of payments. I am not satisfied however, that this offer of a total of three additional years of annuity payments, is a fair and reasonable offer from the Provider to reflect its errors in the present case.

The medical evidence shows that the error has had a significant impact on the Complainant, and she has been, and indeed remains, worried about finances. While I accept this evidence, it is worth noting that if the error had not been made by the Provider in **May 2011**, the annuity payments would have ceased in **June 2019** and no extensions would have arisen.

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In that scenario, I do not believe that the Complainant's financial position today would be much better, in the sense that she would have been reliant on the non-contributory state pension from **June 2019** onwards, in any event.

I accept however that the Complainant was denied the opportunity to make better provision over a period of 8 years, for the post-**June 2019** period, due to the incorrect information given to her by the Provider and also due to its failure to advert to that error in May 2011, at any time thereafter until the Complainant brought it to the Provider's attention in 2019. In those circumstances, I take the view that the offer of an additional three years of payments under the annuity contract falls short of the required redress.

I am conscious that since **June 2019**, the Complainant has been abruptly exposed to a significant financial impact that she was given no opportunity to prepare for in the period after May 2011 and it is understandable that this has had a negative impact on her well-being, in addition to her finances. I am also mindful that the Complainant's representatives suggest that the appropriate redress to be directed by this Office, is for the Provider to pay the annuity for the duration of the Complainant's lifetime. I do not however accept this, because an annuity in those terms was not what was originally contracted for between the Provider and the Deceased.

To take account of the nature of the error however, and the unfortunate omission to identify that error at any time before the Complainant brought it to the Provider's attention in June 2019, I am satisfied that it is appropriate to partially uphold this complaint. Although I accept that, as a matter of contract, the Provider was entitled to cease payment of the annuity in question, I take the view that it ceased those payments in a manner which was wrongful, owing to its very unfortunate but far-reaching error in May 2011 when it wrote to the Complainant, and owing to its ongoing failure in the period that followed, to advert to the error which it had made, and to warn the Complainant.

To mark that finding, and in recognition of the inconvenience caused to the Complainant by the Provider's error, I consider it appropriate to direct the Provider pursuant to **s60(4)(a)** of the *Financial Services and Pensions Ombudsman Act 2017*, to rectify the conduct complained of, as specified below.

### Conclusion

- My Decision pursuant to **Section 60(1)** of the *Financial Services and Pensions Ombudsman Act 2017*, is that this complaint is partially upheld, on the grounds prescribed in **Section 60(2)(b)**.
- Pursuant to **Section 60(4) and Section 60 (6)** of the *Financial Services and Pensions Ombudsman Act 2017*, I direct the Respondent Provider to rectify the conduct complained of by reinstating the annuity payments from the time they ceased in May 2020, and to continue those annuity payments up to and including May 2024 (unless the Complainant ceases to live during that period, in which instance the annuity payments should immediately cease from her date of death).

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- The Provider is also required to comply with **Section 60(8)(b)** of the **Financial Services and Pensions Ombudsman Act 2017**.

The above Decision is legally binding on the parties, subject only to an appeal to the High Court not later than 35 days after the date of notification of this Decision.



MARYROSE MCGOVERN  
FINANCIAL SERVICES AND PENSIONS OMBUDSMAN (ACTING)

18 July 2022

## PUBLICATION

### Complaints about the conduct of financial service providers

Pursuant to *Section 62* of the *Financial Services and Pensions Ombudsman Act 2017*, the Financial Services and Pensions Ombudsman will **publish legally binding decisions** in relation to complaints concerning financial service providers in such a manner that—

(a) ensures that—

- (i) a complainant shall not be identified by name, address or otherwise,
  - (ii) a provider shall not be identified by name or address,
- and

(b) ensures compliance with the Data Protection Regulation and the Data Protection Act 2018.

### Complaints about the conduct of pension providers

Pursuant to *Section 62* of the *Financial Services and Pensions Ombudsman Act 2017*, the Financial Services and Pensions Ombudsman will **publish case studies** in relation to complaints concerning pension providers in such a manner that—

(a) ensures that—

- (i) a complainant shall not be identified by name, address or otherwise,
  - (ii) a provider shall not be identified by name or address,
- and

(b) ensures compliance with the Data Protection Regulation and the Data Protection Act 2018.