



<u>Decision Ref:</u>	2019-0205
<u>Sector:</u>	Investment
<u>Product / Service:</u>	Investment
<u>Conduct(s) complained of:</u>	Delayed or inadequate communication
<u>Outcome:</u>	Partially upheld

LEGALLY BINDING DECISION OF THE FINANCIAL SERVICES AND PENSIONS OMBUDSMAN

Background

The complainants' complaint against the Provider is that in the period from 2007 onwards until March 2015, the Provider withheld vital information from them and / or their financial advisor, despite having been asked by the liquidator of the Fund to pass it on. The Complainant's position is that as a result of this inaction by the Provider they were unable to understand their true position until it was too late to take action in order to "help" themselves.

The core of the complainants' grievance is that the Provider failed to furnish their financial advisor with at least 12 reports from the liquidator between 6 May 2008 and 26 January 2015, each of which showed a seriously deteriorating position. The essence of the Complainants' grievance is that the Provider essentially misled them insofar as it withheld the liquidator's reports referred to and it continued to show a valuation of £118,743.97, without attaching a note. The Complainants maintain that as a result of this conduct on the part of the Provider, they have been caused or occasioned certain losses.

In that regard, it is noted that the nature of the Complainants' complaint encompasses conduct that is of a continuing nature or conduct that consists of a series of acts or omissions for the purposes of **Section 51 (5)** of the **Financial Services and Pensions Ombudsman Act 2017**.

The Complainants' Case

It is the Complainant's position that the Provider withheld vital information from them and their Financial Adviser and as a result they have suffered a loss of £104,571.73

The Complainants set out the following Details:

1. *"In 2005 [they] invested £100,000 in a new fund (...) held as an asset within our [the Provider Bond]. [The Provider] were the nominee shareholder.*
2. *We were unaware that the [Provider's] fund was unregulated and we are both surprised and disappointed that [the Provider] admitted this into our Bond.*
3. *In 2008 this asset was valued at £118,743.97 and because this had not changed for some months our (then) Financial Adviser asked [the Provider] for a current valuation.*
4. *Our F.A. was told that The Fund had been suspended on 1/9/2007 and was sent by [the Provider] a copy of a report from The Liquidator dated 17/10/2008.*
5. *This report said that there were some £4m of assets and these were backed by insurance cover. [The Provider] continued to show a valuation of £118,743.97 and did not attach a note.*
6. *This was the only report sent to our F.A. and even this was as a result of a question from him. It now transpires that there were at least 12 reports from The Liquidator dating from 6/5/2008 to 26/1/2015. Each report showed a seriously deteriorating position and in some of the reports The Liquidator specifically drew to the attention of the nominee shareholders the importance of passing on information to the underlying investors. [The Provider] failed to do this and continued to value our asset at £118,743.97.*
7. *[The Provider's] Valuation Policy states (page 5 section 5(2)(c)) "to reflect any subsequent changes in the market, any current restrictions or difficulties in trading in such assets and other circumstances likely to affect such valuation".*
8. *It was not until our annual valuation in 2013 ([The Provider] have said online in 2012) that a note was added to say that [named fund] was suspended. In any case, [the Provider] continued to value the asset at £118,743.97.*
9. *The first we knew of our loss was when we received a letter from the [Provider] dated 13/3/2015 advising that we had received £17,708.48. This had been credited to our Bond and the valuation of £118,743.97 removed.*
10. *[The Provider] had withheld vital information (despite having been asked by The Liquidator to pass it on) and in so doing we were unable to earlier understand our true position. By the time we did become aware, in March 2015, it was too late to take action to help ourselves.*
11. *We have attempted to obtain recompense from our (then) financial adviser but without success. He has not been a F.A. for some years, has no indemnity insurance and has insufficient personal assets to meet our claim. Had [the Provider] made us or our F.A. aware of our*

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true position we believe we would have been successful in a PII claim. This is no longer an option due to the lapse of time and we must hold [the Provider] responsible for the outcome.

The Complainants' communication of 12/3/2018

"I clarify two points regarding the understanding of our complaint:

- 1. It is because of the actions, or rather the lack of them, by [the Provider] that we haven't been able to make a claim against our former financial advisor. I would not wish it to appear that we had been unsuccessful in making a claim and then looked around to see who else we might blame.*
- 2. Regarding legitimacy of fund values issued by the fund manager: we relied upon the valuation of our asset as provided to us by [the Provider]. This was our only source of information and we had no relationship with the fund manager. If [the Provider] used for their valuation information provided by the fund manager, we still cannot understand why this was not queried by [the Provider] given the liquidator's report of 8 April 2011 which stated that only £62,362 had been recovered out of £4,002,666".*

The Complainants were asked by this office: "...if you would clarify precisely what action you believe you would have taken to avoid those losses, during the relevant period, had the liquidator's reports been made available to you."

The Complainants responded as follows:

"We are pleased to answer as follows:

The first report dated 6 May 2008 would have worried us. We would immediately have contacted our financial advisor to ask what was going on and asked about the likelihood of getting our money back. We would have reminded him that the investment was on his recommendation and advice.

The second report dated 17 October 2008 indicated that some £4m of assets had been identified. They were in the form of loans to others by the fund and appeared to be repayable but would have to run their course over some years. This period of "some years" would have worried us and we would have arranged another meeting with our financial advisor to not only discuss our position but also to make him aware of his liability if the fund assets turned out not be recoverable. We would have followed up this meeting with a letter.

The next report we have been able to obtain is dated 8 April 2011. In addition to the two reports as above, it refers to a first annual report dated 27 February 2009 and a second annual report dated 27 February 2010. We have not seen these two annual reports and it may be that we might have been made aware of impending losses at these earlier dates and could then have taken action, as in the next paragraph, that much sooner.

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Referring then to the report dated 8 April 2011; this would have rung alarm bells very loudly had we received it. The liquidator states that only £62,362 had been recovered out of £4,002,666. At this point we would have written formal letters to both our financial advisor and also the company under which he operated .. advising of our intention to make a claim for losses suffered through bad advice. Although the precise loss would not be known until final liquidation, we could have and would have “put on notice” our intention to make a claim so that both our financial advisor and his company could have registered the claim, if they had not already done so, with their professional indemnity insurers.

Subsequent reports, through to January 2015, are somewhat immaterial to our position in that they progressively confirm the scale of losses indicated in the report of 8 April 2011.

As we have said in previous submissions, the first we knew of our loss was in 2015 when the valuation of £118,743 was removed by [the Provider] and the final cash payout of £17,708 added. We immediately tried to pursue claims against our former financial advisor (by now he had retired) and also the company under which he had operated. In both cases we were unsuccessful because of time lapse.

We believe that had the liquidator’s reports been made available to us we would have been successful in pursuing a claim because it would have been within an acceptable time frame”.

The Provider’s Case

The Provider was asked by this Office to address in detail this specific complaint and, when responding, to furnish the Provider’s detailed observations as to what action, if any, was available to the Complainants during 2008 – 2015, in order to limit the losses which were ultimately crystallised in 2015, had they been furnished by the Provider with the liquidator’s reports in question over the said period.

The Provider’s response of 16th March 2018 is as follows:

It is the Provider’s position that it can show why the Complainants were not in any way adversely affected by the Provider not forwarding on certain documentation it received to the Complainants or their adviser. The Provider says that it will also be evident that the Complainants and their adviser were aware of all material issues relating to the liquidation of the Fund from 2008.

The Provider states that it is important to re-emphasise that it is prohibited by law from providing investment advice, and because of this, policyholders, such as the Complainants, are required to appoint an adviser to, among other things, provide them with independent financial advice and review fund options. The Provider submits that it is also important to note that regarding the services provided by advisers, the Provider is not responsible for

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advice that is given or should have been given by advisers to policyholders. The Provider says that in the case of the Complainants, they appointed an investment adviser in an agreement that permitted the adviser to give investment instructions to the Provider on their behalf. The Provider refers to Section 3 of the agreement between the Complainants, their Advisor and the Provider, which states:

"[The Provider] shall not be responsible for any action or omission of the Adviser or for the investment performance of the portfolio".

It is the Provider's position that it is the case that the Complainants' investment adviser was aware in 2008 that the Fund was in liquidation. The Provider states that upon becoming aware in 2008 that the Fund was in liquidation, it was the role of the Complainants' investment adviser, to determine and advise his clients on any options that were available to them at that time.

The Provider says that further, it was the responsibility of the adviser on a continuing basis to monitor and advise, and if necessary make all relevant enquiries of the liquidator and/or the Provider in relation to the Fund. In this regard, the Provider outlines the information and advice regarding investments which is available to advisers through the Provider's online service. The Provider says that it must also be noted that the Complainants could have similarly requested access at any stage to its online service, however this option was not exercised by the Complainants until 2017. It is the Provider's position that it is not responsible for any action or inaction on the part of the Complainants or their advisers in relation to this fund.

The Provider states that in August 2008, the Complainants' appointed investment adviser, contacted the Provider by phone querying the valuation available through the Provider's online service. The Provider says that in its reply dated 25 August 2008 it advised that the fund was in liquidation and provided the latest price given to it from the fund manager. The Provider submits that this phone call in August 2008 clearly shows that the Complainants' appointed adviser was aware about the liquidation and the probable adverse impact to the fund value.

The Provider states that it furnished further information to the Complainants investment adviser in its email dated 13 November 2008, in which it outlined an estimation of the liquidation process and expressed a concern regarding the return to Investors as follows:

"The uncertainty over the financial strength of the ... debtors coupled with the lack of security over loans made means that the liquidators of the Fund are unable to give any comfort of a return of any size to investors in the Fund. We will continue to seek to protect what rights the Fund has to recovery of debts due. Investors should regard their investment in the Fund with the same timescale and risk as any other speculative investment and provide accordingly".

It is the Provider's position that this email clearly illustrates that it provided the Complainant's adviser with all relevant information which it had at that time regarding

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the unclear financial position of the fund. The Provider says it was the responsibility of the adviser engaged by the Complainants, as part of the investment services provided, to monitor the Fund and to advise the Complainants in relation to any options open to them at that stage in 2008 until the fund was liquidated.

The Provider submits that all relevant facts relating to the liquidation of the Fund which the Provider had, were given to the investment adviser in 2008. Notwithstanding its communications however, it is clear from what the Complainants state in their FSPO Complaint Form, that the Complainants were aware in 2008 of the liquidation of the Fund and that the fund was accordingly in financial difficulty from 2008. The Provider says that it cannot be said that because the Complainants did not receive certain communications which the liquidator sent the Provider, that they did not know of the difficulty the fund was in. The Provider states that the Complainants were clearly aware of the difficult position the fund was in from 2008, however it would appear from documentation submitted with their complaint, that they may have failed to do anything in relation to any possible claim they may have had regarding their original investment in the fund or advice received from their original investment adviser or subsequent advisers.

The Provider states that an email received by the investment adviser on 6 November 2008 states that he was in conversation with the Complainants regarding this fund. In this email the investment adviser states:

"I must ask that you obtain up-to-date prices on the following element of the above client's portfolio, as a matter Of urgency. It is ridiculous for these two funds to be so out-of-date and is an embarrassment to me when discussing to the client, and surely you can see that these fund prices are just not acceptable".

The Provider submits that this email further shows the awareness of the investment adviser that the fund price quoted was the latest available due to the liquidation, and that the adviser was discussing the fund value issues of this fund with the policyholders. The Provider says it replied to this email confirming to the adviser that the prices were actually the last available prices for the funds.

The Provider informs that an enhancement was added to its online valuation service in April 2012, which provided that the Fund, as a suspended fund was clearly marked as such. As part of this enhancement, the Provider says it also included a note to its online valuations highlighting where a fund has been suspended from trading. The note reads:

"Funds marked with an exclamation mark are currently suspended. This means that the fund administrator isn't currently processing trading instructions.

For more information on these funds, including the lifting of suspensions, you should seek advice directly from the fund manager or your financial

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advisor. We don't accept responsibility for any errors or omissions in the fund listing".

The Provider submits that it was accordingly obvious to all advisers advising the Complainants, upon looking at the valuations on its online service in relation to the performance of the investment in the Fund that:

- No update on fund price had been received by the Provider since the date the last fund price was received from the fund manager prior to the fund going into liquidation in 2008;
- The Fund was clearly marked as a suspended fund since April 2012; &
- An explanatory note was set out on each fund valuation since April 2012 highlighting the fact that that the Fund stands suspended and advising that advice of a financial adviser or the fund manager should be sought.

The Provider states that the above demonstrates that both the Complainants and their advisers at all times were clearly aware of the difficulty, which the fund was in from 2008. The Provider's position is that the adviser had the obligation to monitor the fund(s) invested in and keep the Complainants appropriately informed regarding performance and any risks associated with their investments. The Provider says that all relevant information was made available to the advisers of the Complainants since the fund entered liquidation. The Provider says that if at any time the investment adviser (or any other adviser of the policyholders) or the policyholders themselves had any further queries in relation to the fund since 2008, it was available to answer any such queries.

The Provider says that in terms of the liquidation notices, as a shareholder, the Provider received a number of communications from the liquidator, from 2008 to 2015. The Provider says it does not accept it misled the adviser or the policyholders by continuing to show a valuation of £118,743.97. The Provider states that as previously mentioned its pricing of the fund was based on the last available pricing information which it received from the fund manager. This, it says, was explicitly communicated to the investment adviser in 2008. It is the Provider's position that it could not make an adjustment to the price of the Fund and that in order to do so, it would have required access to up-to-date publicly available information on the asset, such as an audited set of accounts, or published updates from a liquidator appointed to the holding, however it did not have such information available to it.

It is the Provider's position that the furnishing of communications relating to the fund from the liquidator, from 2008 to 2015, would not have affected the Complainants' ability to limit their losses in relation to the fund. The Provider says that it is of note that the advisers and the Complainants were aware, of the liquidation of the fund in question and accordingly its precarious financial position from 2008, as evident through the communications with the adviser and submissions made by the Complainants. The Provider states that it was not however possible to sell the Complainants' investment in the fund once it went into liquidation and the Provider is not aware of any other action that could have been taken by the Complainants. The Provider says that as the fund was suspended from trading upon going into liquidation, any potential losses could not have been recovered from the fund. The Provider submits that it is however its view that it was the responsibility of the investment adviser in any event to monitor the position of all funds invested in by the Complainants and to explore any / all options open to the Complainants in respect of the investment made in the Fund. The Provider concludes

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that if there were a failure in this respect, responsibility lies with the advisers and not with the Provider.

Further submission

The Complainants' submission of 2nd April 2018

The Complainants state that they feel that the Provider's response contains assumptions and interpretations that could mislead or distort the facts, and submit the following:

1. *It is not correct to say (first paragraph from the Provider's response) that they and their adviser were aware of all material issues relating to the liquidation of the Fund from 2008 and that previous submissions from them contain considerable detail that states the exact opposite.*
2. *.....*
3. *Para 4.....[the Complainants] could have similarly requested access at any stage to our online service.....
We were unaware of this service and subsequently only became aware of it in 2014 through our own enquiries. In any case, by the time a note was added to the online valuation it was too late for us to take action to help ourselves.*
4. *Para 5.....In August 2008.....
We object to the word probable in the last line. At that stage and based on the only liquidator's report received, there was hope of a good recovery of assets.*
5. *Para 6.....We provided further information.....
We feel the tenor of this paragraph is misleading. A copy of the email of 13 November 2008 was included in our letter to FSOB dated 14 July 2016 – Document C. It is incorrect to say that the Provider outlined an estimation of the liquidation process and expressed a concern regarding return to investors.....
You will see from the email that the Provider did not express concern. A copy of the Liquidator's report of 17 October 2008 (Copy in your possession) was attached to this email. This report gave hope of a good recovery of assets, stating that some £4 million had been identified and were recoverable. The report contained 8 pages of information and a footnote was added (number 11 on the report) on the last page entitled "Estimated outcome and return to investors". We understand that it is standard practice for liquidators to include such a cautious caveat at this stage. It is this caveat in the Liquidator's report, quoted in full by the Provider, that the Provider is referring to and stating as having been outlined by them.*

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6. *Paragraph 7.....All relevant facts.....*

We object to the view that....it is clear that [the Complainants] were aware in 2008 of the liquidation of the ... Fund and that the fund was in financial difficulty. We were unaware of any financial difficulty. We had understood that the fund was being wound up, but this would take some time and that we would eventually see a return of our investment.

7.

8. *Paragraph 11.....All relevant information was made available to the advisers of [the Complainants] since the fund entered liquidation.*

It is a pity that the Provider failed to pass on copies of the Liquidator's reports to either our (then) financial adviser or us, the underlying shareholders, despite having been asked to do so by the Liquidator. Had the Provider done so it would have exonerated them from any blame, the responsibility for using that information would have passed to us.

9.

We note the Provider's final paragraph but would state that we believe that the furnishing of communications relating to the fund from the Liquidator would indeed have affected our outcome, as detailed in our response of 12 March 2018".

Evidence

Investment Documentation

Application Form

8. Investment Strategy

(ii) Advisory (was selected)

"I /We appoint an Investment Adviser to provide independent investment advice and to give written investment instructions to [the Provider] but not to handle investment monies"

The full name of Independent Financial Advisor Firm is set out on the Application Form.

Key Features document

"What might I get back?

The amount you get back is not guaranteed and will depend on several factors, such as:

- *How much you invest*
- *The length of time you invest for*
- *The performance of the assets and funds chosen*

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- *Our charges and any withdrawal charges which may apply*
- *The amount of any withdrawals”.*

Policy Conditions

“Portfolio Valuation

5(2) Method of Valuation

(c) For the purpose of valuation of assets, the value of the assets shall be determined having regard to the latest published prices (but subject to such adjustment as [the Provider] may consider equitable to reflect any subsequent change in the market, any current restrictions or difficulties in trading in such assets and other circumstances likely to affect such valuation)”.

6. Valuation and Reports

(i) Portfolio Valuations

(a) [The Provider] will, where the Custodian Bank is ... as defined in Condition 1), within 15 Business Days of each Quarterly Valuation Date, provide to the Policyholder a valuation showing the assets held, the value of each of the assets held, the value of the Cash Account, details of all movements in the Cash Account, details of all movements in the Cash Account during the period of valuation and all of all charges accruing on the Portfolio during the period of valuation”.

Investment services appointment

“Appointment basis

Option 2 [is selected]

The Policyholder(s) confirms that the Investment Adviser will be acting on an advisory basis in relation to the assets linked to the Policy in accordance with the terms and conditions set out in section 3.1.3”.

3. Terms and conditions

3.1.3 The Investment Adviser will, If appointed to act on an advisory basis in relation to the Portfolio, provide independent investment advice and investment instructions will only be sent after the Investment Adviser has consulted with the Policyholder(s). The Policyholder(s) acknowledge and agree that the Investment Adviser is authorised by the Policyholder(s) and that the Investment Adviser has confirmed to the Policyholder(s) that they have the necessary regulatory authorisation to perform their role”.

Advisory Investment Management Agreement

“3. Limitation of Liability

[The Provider] shall not be responsible for any loss or liability caused to the Policy or the Policyholder(s) as a result of the operation of this Agreement. In particular, [the

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Provider] shall not be responsible for any act or omission of the Adviser for the investment performance of the Portfolio”.

Quarterly Statement for 2008 to 2011

“This statement shows the details of your .. Portfolio. It gives you a chance to review your policy and investment aims with your financial adviser.

- *Your financial adviser can get an up-to-date valuation including a surrender or cash-in value for you through our online services at www.....”*

The value in policy currency recorded on the Quarterly Statement for the investment in question was £118,743.97.

*“Note(s) * Market price is the latest price available as at ...”*

Quarterly Statements for 2012 to 2014

*“Note(s): *Market price is the latest price available as at*

! Funds marked with an exclamation mark are currently suspended. This means that the fund administrator isn't currently processing trading instructions. For more information on these funds, including the lifting of suspensions, you should seek advice directly from the fund manager or your financial adviser (where applicable). We don't accept responsibility for any errors or omissions in the fund listing”.

Correspondence

Letter from the Liquidator to the Shareholders of 26 January 2015

“I refer to my previous letter dated 8 August 2014, I am now in a position to declare the first and final distribution payment to all shareholders.

E-mail from Liquidator to the Provider of 26 October 2014

“We are attempting to clarify the shareholder listing for the purpose of making a distribution at the end of the liquidation. The Joint Liquidators are therefore not presently permitting stock transfers in this fund”.

E-mail response from Liquidator to the Provider 29 September 2014

“There is no other source for valuation and we are unable to provide one. The value will be the rate of dividend at the conclusion of the liquidation which has not been confirmed yet”.

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E-mail from Provider to Liquidator – 26 September 2014

“We require some indication of how we should be valuing the asset. Is there anyone I could liaise with on the matter if you are not in a position to advise?”

E-mail 1 September 2014 – From Liquidators to the Provider

“Please be advised the only asset in the fund is now cash that will shortly be distributed to shareholders. The size of the dividend is about to be calculated but will not be 100p in the £. We have recently advised all shareholders that we will be making a distribution in the near future and closing the liquidation. We are in the process of obtaining up to date KYC [Know Your Customer] and calculating the distribution rate. I will be able to provide a copy of the correspondence in this regard once you confirm how the shares are held”.

E-mail 11 August 2014 from Provider to Liquidator

“If the Fund has stopped pricing, can you please provide a set of accounts or anything that would help determine the value of the fund?”

Letter 8 August 2014 from the Liquidator to the Shareholders

“I refer to my previous letter dated 29 July 2014. Concerns have been raised that the previous letter was not received by shareholders therefore this letter is issued again to all shareholders on the share register and supersedes my previous correspondence.

.. This letter should be read in conjunction with previous annual reports that have been issued to shareholders at the anniversary of the liquidation to accompany the annual general meetings held each year”.

E-mail 6 August 2014 from Liquidator to Provider

“The liquidators are not required to produce NAV so none are available for the liquidation period”

E-mail – 6 August 2014 from the Provider to the Liquidator

“Many thanks for the below, the last price we received was September 1st 2007, would this have been the last issued price before the liquidation? We need to assign a value to all funds held within our nominee, and in the absence of the liquidators issuing a price/confirming a zero value we must use the last audited NAV released”.

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E-mail 29 July 2014 from Provider to Liquidator

“Could you please confirm the latest available audited NAV released for the above fund?”

Letter 28 February 2014 from the Liquidator to All Members

“To All Members

....

Important notice: If you hold shares in the Company in a nominee capacity please be advised that the Joint Liquidators have fulfilled their responsibilities by notifying the registered shareholders of the Company”

Attached – *“Joint Liquidation Account of Receipts and Payments ..”*

Letter 26 April 2013 from the Liquidator to All Members

“The liquidation of the Company has been in progress for five years. ...”

E-mail 4 December 2012 from the Liquidator to the Provider

“The Joint Liquidators have never published a NAV and that continues to be the case now. There is no indication of the estimated outcome to investors since the fund is in litigation with various third parties and the outcome of that litigation cannot be stated with any certainty.

Can you please provide a copy of the last NAV that you were issued with from the Fund Administrator and I will check this to the records. The date of the last NAV was, I understand, October / November 2007”

E-mail of 4 December 2012 Provider to Liquidator

“I would appreciate if you can provide the last published NAV price for the above liquidated fund. We are not certain how we obtained our last NAV price record of GBP 1,271.04 as of 01/07/2009”

Letter 3 July 2012 from the Liquidator to All Shareholders

Accounts and Proposals

Letter 3 July 2012 from the Liquidator to All Shareholders

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Accounts and Proposals

Letter 12 June 2012 from the Liquidator to All Shareholders

Minutes of Annual General Meeting

Minutes

“Additional comments from members present at the AGM:

[..] noted that due to the structure of the shareholdings in the Company and the fact that there were nominee members he found that the people who had actually invested money into the Company via the nominee members did not strictly speaking have a vote. [..] confirmed that the Joint Liquidators have always been aware of the fact that whilst voting at any AGM would be made by those nominee members any money within the insolvent estate was money actually provided by those underlying investors and it was for that very reason that the Joint Liquidators have always been very careful in the way that they have approached the issues and difficulties relating to the Company.

[..] also stated that it is unfortunate that as a result it may be the case that not every investor is informed of the Joint Liquidators’ annual reports and accounts, but as Joint Liquidators they could not do much about this other than inform those nominee members that the annual report and account should be provided to the underlying investors.

At this point [...] confirmed that an interpretation of the annual report and account of the Joint Liquidators was included in investment reviews provided by the nominee members to each underlying investor. ..”

Letter 7 June 2011 from the Liquidator to All Shareholders

“I refer to the report and notice of annual general meeting to shareholders and dated 8 April 2011”

Letter 8 April 2011 from the Liquidator to All Shareholders

“The liquidation of the Company has been in progress for three years. The liquidation has a number of matters remaining to be resolved and the Joint Liquidators are not yet in a position to conclude the winding up”.

E-mail of 13 November 2008 from Provider to the investment adviser

“.. I was waiting on an update from our Investments department who have actively been investigating this. They have come back to advise that the ... Fund has been

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suspended as at 01/09/2007 and the price we have is the last available price for it. The prices for the funds – they aren't old, but the last available for the funds. ..."

Letter / Report dated 17 October 2008 from Liquidators to All Investors

"Estimated outcome and return to investors

The uncertainty over the financial strength of the .. debtors coupled with the lack of security over loans made, means that the liquidation of the Fund are unable to give any comfort of a return of any size to investors in the Fund. We will continue to seek to protect what rights the Fund has to recovery of debts due. Investors should regard their investment in the Fund with the same timescale and risk as any other speculative investment and provide accordingly".

E-mail of 25 August 2008 from the Provider to the investment adviser

"Thank you for your email below [e-mail dated 20/08/2008]

With regards to the ... fund, this has gone into liquidation and the latest available price is 01/09/2007 as per our records. Please note we source our fund prices from Bloomberg".

E-mail of 20 August 2008 from the investment adviser to the Provider

"Below is todays valuation of the above account. I have some queries:

- 1. ...*
- 2. The price date of the ..Fund is even worse – 1st September 2007. Why?"*

E-mail of 13th November 2008 from the Provider to the investment adviser:

"Firstly my apologies for the delay in getting a response to you I was waiting on an update from our Investments department who have actively been investigating this. They have come back to advise that the .. Fund has been suspended as at 01/09/2007 and the price we have is the last available price for it. The prices for the funds – they aren't old, but the last available for the funds. We have managed to get the information from Liquidators regarding the .. Fund which I have attached"

The "attached" information is stated to be for "All investors"

"10. Timescale for completion of the winding up of the Fund

There are two primary areas driving the timescale for completion of the liquidation of the Fund being:

- Complete investigations*
- Recovery of loans*

It is therefore too early to give an indication of the time at which, assuming significant recoveries, there may be a return of funds to investors.

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11 Estimated outcome and return to investors

The uncertainty over the financial strength of the [Fund] debtors coupled with the lack of security over loans made means that the liquidators of the Fund are unable to give any comfort of a return of any size to investors in the Fund. We will continue to seek to protect what rights the Fund has to recovery of debts due. Investors should regard their investment in the Fund with the same timescale and risks as any other speculative investment and provide accordingly”.

Letter of 6 May 2008 from the Liquidators to All Investors

“Returns to Investors

The timing and quantum of a return to investors will be dependant on the speed by which the loans made by ... can be realised.

Investors will be aware that at the date of the liquidation, a rebasing exercise was being completed for the year to 1 October 2007. This exercise has yet to be finalised. However we are advised by ... that the rebasing figures have been calculated and are awaiting review by independent firm of Chartered Accountants. The independent firm of Chartered Accountants have been appointed and are aware that the rebasing needs to be concluded as a matter of urgency. The review of the rebasing figures has been required by the Custodian.

We are mindful of the rightful concerns of stakeholders in the Fund that cost be contained in the winding up process. We will continue to communicate with stakeholders about potential significant costs and before they are incurred.

For the present time, there is no prospect of an early return of funds to investors. ... Investors are reminded that information concerning the liquidation is available from this office at any time”.

The Complaint for Adjudication

The complaint is that the Provider misled the Complainants insofar as it withheld the liquidator’s reports and it continued to show a valuation of £118,743.97, without an explanatory attaching a note on the valuation.

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 Complainants were 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.

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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 17th May 2019, 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.

Submissions dated 7th June 2019 and 28th June 2019 from the Complainants and submission dated 26th June 2019 from the Provider, were received by the Financial Services and Pensions Ombudsman after the issue of the Preliminary Decision to the parties. These submissions were exchanged between the parties and an opportunity was made available to both parties for any additional observations arising from the said additional submissions. I have considered the contents of these additional submissions for the purpose of setting out the final determination of this office below.

In the Complainants' submission of 7th June 2019 they set out the full extent to which they pursued other avenues of redress in relation to their complaint issues. However, this information does not alter the outcome set out in my Preliminary Decision. The Complainants also queried whether the proposed compensatory payment of £15,000 included the sum of £3,536.24 for commissions that they say was overcharged by the Provider. This will be further commented upon below. Finally, the Complainants asked that I indicate the basis for calculating the proposed compensatory payment. On this point I can advise that each complaint is looked at upon on its own particular facts and the amount of compensatory payment that is directed reflects what is considered to be fair and reasonable in the circumstance of the complaint.

In the Provider's submission of 26th June 2019, the Provider advised that it noted and accepted the findings set out in the Preliminary Decision. The Provider stated that:

"In addition to the proposed compensatory payment outlined in the Decision; and in light of the Submission [from the Complainants of 7th June 2019], we are prepared to make one additional and final payment, on an ex gratia basis, in the amount of £3,536.24 to address the commission aspect of the Submission".

Analysis

It must be noted that there are a number of parties concerned or connected to the Investment Fund in question. The parties involved are the Complainants, the Provider, the Complainants' Financial Adviser and the Joint Liquidators of the Fund. However, the parties to the complaint examined and adjudicated here by this Office are only the Provider and the Complainant. The Provider would not be responsible for any alleged act or omission of the Financial Adviser, or any alleged act or omission of the Liquidator.

The Complainants have highlighted how they were impacted by not having the fullest of information about the Fund, in particular they note the reasons why they were unable to pursue the Financial Adviser. However, I consider that it would not be reasonable or fair to hold the Provider entirely responsible for any such lost opportunity as the outcome on such other avenues for redress could not be certain. Also it should be noted that in a Liquidation scenario the losses could only have been known upon the Liquidators finalising matters with regard to the Fund.

In general it is expected, and is reasonable to expect, that a Provider would ensure that all information it gives to a consumer is clear, accurate and up to date. Key information should always be brought to the attention of the consumer. The supply of information should be given in a timely manner. In providing information the Provider reasonably must have regard to (i) the urgency of the situation; and (ii) the time necessary for the consumer to absorb and react to the information provided.

It is not certain how successful the Complainants would have been had they been able to pursue other parties in respect of those other parties' involvement with the Investment Fund. The Complainants also had a responsibility in relation to the limited enquiries they made in respect of the Investment Fund while being aware that there was a Liquidator in place. Likewise any expectation the Complainants may have had relevant to what would be returned to them from the Fund has to be measured by their knowledge of the presence of the liquidator over the fund for such a prolonged period and the likely expenses associated with the liquidation.

Overall having regard to all the evidence and submissions from the parties I consider that this is a complaint where there could have been greater and better communication between the parties on what was happening to the Fund during the liquidation process. For the Provider's part, it is evident that it could have been clearer in its communications on the Fund value it was quoting in the Quarterly Statements over the years. I do not consider that merely quoting an outdated value was adequate or reasonable. I consider that the Provider could have improved its communications, and in considering this, I note the following:

- The Provider accepts that it had received a number of communications from the Liquidator over the period 2008 to 2015.
- The Provider could have given to the Complainants' Financial Adviser all the information and reports that were issued by the Liquidator to the Provider for the

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Shareholders / Investors and advised the Financial Adviser (i) to pass them on, and (ii) explain them to the Complainants. It is clear from the Liquidator's reports that the annual report and accounts should be provided to the underlying investors.

- The Provider could have passed on the information it received from the Liquidators when the Provider had specifically queried the value of the fund with the Liquidators. In this regard it is evident that the Provider was unsure how it should communicate the Fund value and sought advices from the Liquidator on this point.
- It is clear from the minutes of the Annual General Meeting of the Fund (in liquidation) of 13th May 2011, that there was an issue raised about the nominee members not being provided the annual reports and accounts.
- It is evident from these minutes that a nominee member confirmed that in relation to the sharing of the accounts with the underlying investors, an interpretation of the annual report and account of the Joint Liquidators was included in that nominee's investment reviews provided by the nominee member to each underlying investor. I consider that it would also have been reasonable of the Provider here to do likewise. The Provider was aware of the same issue and should reasonably have taken extra measures itself to make sure that underlying investors were receiving adequate information either direct from itself or through the appointed intermediary.
- The Provider's position is that it received no information that allowed it to consider adjusting the fund price or to use any value for the asset which differed from the latest price received from the fund manager. The Provider says it used this published price in valuing the investment within the bond and continued to do so in its valuations as set out in its policy conditions until it received the liquidation proceeds. I consider that it would have been helpful had the Provider specifically advised the basis on which it was valuing the asset to either the Complainants directly or through their Adviser for passing on to the Complainants.
- The Provider states that in making an adjustment to the price of a fund, as referred to in its policy conditions, it requires access to up-to-date publically available information on the fund such as audited set of accounts, or published updates from a liquidator appointed to the fund, If this information is available and provides a clear indication of the net asset value, which can be attributed to the fund, the Provider can update the fund price to reflect this net asset value.
- It is noted that the Fund was only clearly marked as a suspended fund since April 2012. This was a passage of over 3 years from the liquidation process commencing, before this was specifically mentioned in the Provider's Quarterly Statements.

- The Provider refers to its online facility for providing information, but merely sets out there what it had stated in its Quarterly Statements, that is, that the fund was suspended from trading.
- There was no reason why the Provider could not have drawn greater attention to the fact that the fund was in liquidation.

Overall I consider that the Provider could have been clearer in its communications with the Complainants' Adviser and the Complainants as to the reason for continuing to use the last available price. Therefore, it is my Legally Binding Decision that the complaint is partially upheld and that in order to do justice between the parties I direct that a compensatory payment of Stg£15,000 (fifteen thousand sterling) be made by the Provider to the Complainants. This payment is in addition to the *ex gratia* payment of £3,536.24 offered by the Provider in its submission of 26th June 2019 and which was accepted by the Complainants in their letter of 28th June 2019.

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)(g)**.
- Pursuant to **Section 60(4) and Section 60 (6)** of the ***Financial Services and Pensions Ombudsman Act 2017***, I direct the Respondent Provider to make a compensatory payment to the Complainants in the sum of £15,000, to an account of the Complainants choosing, within a period of 35 days of the nomination of account details by the Complainants to the Provider. I also direct that interest is to be paid by the Provider on the said compensatory payment, at the rate referred to in **Section 22** of the ***Courts Act 1981***, if the amount is not paid to the said account, within that period.
- 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.

GER DEERING
FINANCIAL SERVICES AND PENSIONS OMBUDSMAN

11th July 2019

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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

ensures compliance with the Data Protection Regulation and the Data Protection Act 2018.

