



<u>Decision Ref:</u>	2019-0234
<u>Sector:</u>	Investment
<u>Product / Service:</u>	Shares/Equities Investment
<u>Conduct(s) complained of:</u>	Failure to provide correct information Maladministration
<u>Outcome:</u>	Partially upheld

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

Background

This complaint concerns the administration of the Provider's records.

The Complainant's Case

The Complainant retired from the defence forces in 1999. In **July 1999**, he received a lump sum of IR£52,059.87 (approx. €66,000).

The Complainant invested all or part of this lump sum in various investments.

The Complainant has furnished this office with copy periodic account valuations which he received from the Provider in the period from **December 2004** to **December 2012**, apparently evidencing an investment he had made through the Provider in a policy with a third party, detailing an initial investment cost of €10,158 (approx. IR£8,000).

In **April 2015**, in response to a query from the Complainant, the Provider advised that it could find no trace of this investment with or through it, and it queried whether he had perhaps withdrawn the funds prior to April 2007.

The Complainant believes that he invested circa €10,000 with or through the Provider in 1999 and did not ever withdraw that investment.

On the basis of the valuations furnished to him over a number of years and because the Provider can now find no trace of the investment in question, the Complainant believes that the Provider has lost his money.

The Complainant therefore believes he is at a loss of at least €10,000.

The Provider's Case

The Provider states that it has no record of the investment. It has conducted searches of its own systems and the systems of associated policy providers, to no avail.

The Provider states that it sent valuations to the Complainant in error, and notwithstanding that he did not make the investment referred to therein. It accepts this error and has apologised for it. The Provider offers a number of explanations as to how this may have occurred.

Firstly, the Provider suggests that the error may have occurred due to an administrative or clerical error during a system upgrade from an "SDS" system to a "BAM" system that took place in 2002:

"... we discovered an old excel [third party provider] commission file relating to the SDS system. This file shows a commission transaction for an investment commencing on 11th October 1999 for a [third party provider] for a [Provider] account number which is identical to [the Complainant's] account number except for 1 digit. In 2002 [the Provider] embarked on a transfer of data from the legacy administration (SDS) to a new bespoke administration which was being built at the time and is still in use today "BAM". As part of the migration process client accounts and investments were imported into BAM from SDS.

It is possible that in processing the investment in the SDS system, [the Complainant] was incorrectly allocated the [third party] policy which was actually meant for another client. This error was then imported into the BAM system leading to [the Provider] issuing the valuations in error.

This scenario explains why none of [third party provider], [the Provider] and [the Complainant] can provide records of the investment being made. It also explains why [the Provider] would have erroneously issued valuation letters."

A second possibility suggested by the Provider is that an investment inquiry (as opposed to an actual investment) was made by the Complainant but not followed up:

"In this scenario, when [the Complainant] was considering the investments to make in connection with his retirement lump sum he made an enquiry to [the Provider] regarding the [third party provider] product. [The Provider] erroneously set this enquiry up on its system as an investment, not an enquiry. [The

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Complainant] did not subsequently proceed with the transaction as an alternative investment was considered more suitable to his needs.

In the Firm's experience it would not be unusual for potential clients with substantial sums to invest, to change their minds during the process and not proceed with a particular investment.

This scenario explains why none of [third party provider], [the Provider] and [the Complainant] can provide records of the investment being made. It also explains why [the Provider] would have erroneously issued valuation letters."

The third possibility suggested by the Provider is that the Complainant did have an investment but encashed it more than six years ago:

"In this scenario [the Complainant] made an investment through the Firm and encashed it more than 6 years ago. As the intermediary Firm, [the Provider] would not necessarily have been advised of the encashment, or if advised, may, due to administration issues, not [have] removed the policy from the system.

This scenario explains why [the third party provider] does not have any records of the transaction as they would have been destroyed for data protection reasons. It also explains why [the Provider] would have erroneously issued valuation letters. It does not explain why [the Complainant] cannot provide any records of the investment being made nor why as owner of the encashed investment he is entitled to claim the proceeds again."

With regard to how the Provider originally obtained the Provider's details if it he didn't make an investment through the Provider, the Provider speculates that he may have made an enquiry with it at some point:

"The information held by [the Provider] refers back to an unknown date. The firm has not been able to locate any information in relation to the transaction and cannot therefore confirm how the details were obtained. It would seem likely that [the Complainant] contacted the Firm with an enquiry regarding a proposed investment."

The Provider has noted that, while it can find no trace of the investment, equally the Complainant is unable to furnish any of the following documentation or information in relation to the investment:

- Policy document;
- Policy number;
- Contract;
- Fact find;
- Application form;
- Confirmation of receipt of application form;

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- Confirmation of receipt of payment.

The Provider has apologised for issuing valuations in error, and it offered €2,500 to the Complainant as a goodwill gesture.

The Complaint for Adjudication

The complaint is that the Provider has lost the Complainant's investment funds, and that it has failed in its obligation to maintain adequate records of the manner in which these monies were invested by the Complainant in 1999.

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 8 August 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.

In the absence of additional submissions from the parties, other than confirmation from the Complainant that the terms of the Preliminary Decision were accepted, and confirmation from the provider that would not be making any further submissions, the final determination of this office is set out below.

The Complainant has furnished valuations in relation to an investment, that he received from the Provider, between 2004 and 2012.

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In response to the complaint, the Provider has conducted extensive searches of both its own records and the records of third party providers with which it conducted its intermediary business. It found no record of the Complainant having made the investment referred to.

That presents a difficulty for the Complainant in establishing, on the balance of probabilities, that the investment was made. In order for him to do so, in my view, he would have to be in a position to furnish some or indeed any of the documents/information suggested by the Provider – Policy document; policy number; contract; fact find; application form; confirmation of receipt of application form; or, confirmation of payment made to the Provider.

A large number of documents are generated when a policy is incepted. As a general proposition (and as is their regulatory obligation) providers have robust systems and document retention policies to keep a record of a policy, or a payment in/out.

I note that when the Complainant made contact with the Provider in or about 2015, the Provider explained at that point that:-

“In April 2007 [the third party provider] and [the Provider] carried out a full audit on all our joint clients with holdings at that time, and your name did not appear on the list for this. One explanation of this could be that you withdrew the funds with [the third party provider] prior to April 2007.”

Of course, if the Complainant had had an investment and if he had withdrawn the funds from the third party provider prior to April 2007, this of course would beg the question as to why the Provider continued to issue him with Valuation Statements in late 2007 continuing beyond into the subsequent years, including a Valuation Statement dated 31 December 2012 suggesting a value of €9,138.

The Complainant has confirmed that he has *“no record of any kind from [third party provider]”* and in addition, *“the investment was current during a very volatile economic period. I have no correspondence saying that investment had matured and would be repaid”*.

Against that background, and in the context of the usual records maintained by a provider, I cannot be satisfied that the “lost” investment suggested by the Complainant is a more likely explanation than one of the clerical errors suggested by the Provider.

Given the dates that valuations were sent out, and the identical investment made by another customer with an account number differing by just one digit, the error in migrating from one IT system to another put forward by the Provider seems a very likely explanation for valuations being sent to the Complainant, in error.

I am also satisfied that a likely explanation for the Complainant’s details being held by the Provider is by reason of him having made an enquiry with it at some point in 1999/2000 when he retired.

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I note that this error was in fact discovered by the Provider in 2013. It explains in its submissions:

"In April 2013 the firm contacted [the third party provider] regarding [the Complainant] and [the third party provider] advised that they could not find any record of the client.

The Firm identified that the record it held with respect of [the Complainant] was not supported by information provided by [the third party provider]

We did not contact [the Complainant] at the time"

[Emphasis added]

I consider this failure to contact the Complainant when the issue was discovered, and instead leaving it up to him to notice that he was no longer receiving valuations and to chase the matter up himself (as he ultimately did in 2015) to be a most serious failure on the part of the Provider.

This failure, in addition to the admitted error on the part of the Provider in issuing valuations to the Complainant over a period between 2004 and 2012 are such, that I believe that the Provider has a case to answer to the Complainant.

I am satisfied on the evidence before me that the Provider wrongfully:-

- Issued valuations in error to the Complainant between 2004 to 2012 relating to a policy which apparently did not in fact exist.
- Failed to inform the Complainant of the error promptly, when it was discovered in April 2013, or at all, until the Complainant himself made enquiries in 2015.

Whilst I note that the Provider offered a gesture of €2,500 to the Complainant to settle this complaint, I am not satisfied that this is adequate, in circumstances where the valuations issued over a period of so many years, thereby creating an expectation on the Complainant's part in respect of this "phantom" investment, that he held an asset which varied in value from time to time from what appears to have been €7,749 at its lowest, to some €12,300 at one point many years ago in December 2007.

Accordingly, taking all of the evidence into consideration, I am satisfied that this complaint should be partially upheld.

Conclusion

- My Decision pursuant to **Section 60(1)** of the **Financial Services and Pensions Ombudsman Act 2017**, is that this complaint is partially upheld, pursuant to **Section 60(1)** of the **Financial Services and Pensions Ombudsman Act 2017**, 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 Complainant in the sum of €4,500, to an account of the Complainant's choosing, within a period of 35 days of the nomination of account details by the Complainant 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.

MARYROSE MCGOVERN
DIRECTOR OF INVESTIGATION, ADJUDICATION AND LEGAL SERVICES

30 August 2019

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.