An tOmbudsman Seirbhísí Airgeadais agus Pinsean
Financial Services and Pensions Ombudsman

Decision Ref:	2019-0250
Sector:	Insurance
Product / Service:	Term Insurance
Conduct(s) complained of:	Failure to provide correct information Failure to process instructions
Outcome:	Partially upheld

LEGALLY BINDING DECISION OF THE FINANCIAL SERVICES AND PENSIONS OMBUDSMAN

Background

The Complainants entered into a joint life policy with the Provider on **14 May, 2007**, ("policy") to serve as security for the sum of approximately €200,000 that they had borrowed from a third party ("TP") for property investment. By deed of assignment dated **2 July, 2007,** ("deed of assignment") the Complainants assigned the benefit of the policy to TP. In **January 2014,** the Provider sent a letter to the Complainants that advised there were some proceeds to be distributed from the policy and this sum was distributed to TP and the Complainants are unhappy with this.

The Complainants' Case

The Complainants submit that, by letter dated **January 2014** (no day is specified on the correspondence) from the Provider to the Complainants, they were advised that the Provider was in a position to make a distribution of proceeds from the policy. The letter stated the following in relation to the distribution of the proceeds;

> '*IMPORTANT: As this is an Assigned Policy, we must receive a joint instruction signed by both the policyholder and the assignee. Please liaise with* [TP] *to progress this matter.*'

TP claimed the proceeds of the partial encashment on **25 November, 2014**. By letter dated **8 December, 2014,** the Provider informed the Complainants that it had processed a partial

encashment of €171,162.54 and paid that sum to TP. The Complainants never gave a joint instruction to do that.

The Complainants say that they never gave their instruction to distribute the proceeds and therefore, in light of this correspondence, the proceeds should not have been distributed to TP.

The Complainants further say that because they were advised that a joint instruction from them and TP was necessary to allow the proceeds to be distributed, they believed that they could use their required authorisations as leverage to negotiate a settlement with TP, which they had been doing when the proceeds were paid out. The distribution of the partial encashment proceeds directly to TP completely compromised these negotiations. At this stage TP called in its loan and the total payment due to TP was €948,895.54.

The Complainants therefore seek compensation in the sum of €948,895.54 from the Provider.

The Provider's Case

The Provider says that it was obliged to distribute the proceeds of the policy to TP under the deed of assignment as, per the deed of assignment, all rights to the proceeds of the policy were relinquished to TP.

It says that the provision in the letter of **January 2014** was nothing more than a commercial decision on its part and cannot override the terms of the policy and the deed of assignment.

The Provider states that the letter of **January 2014** does not have the meaning and effect claimed by the Complainants and it says that even if the meaning of the provision in that letter is as the Complainants say, the Provider did not have to obtain a joint instruction before distributing the proceeds.

The Provider states that the Complainants are claiming that the Provider is liable for losses amounting to €948,895.54, which represents the total liability owed by the Complainants to TP. The Provider submits that it could not possibly be responsible for this liability as the Complainants were aware this payment was due and were already in discussions with TP in respect of this. It submits that the Complainants are stating that the Provider compromised the Complainants' negotiating power – however, it states that it was obliged to make the payment to TP under the deed of assignment.

The Complaint for Adjudication

That the Provider wrongly released the partial encashment proceeds to TP in circumstances where it had represented that it would not do so without a joint instruction, and had not received such an instruction and that poor and incorrect communication caused loss and inconvenience to the Complainants.

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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.

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 20 June 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.

On 2 July, the Complainant made a further submission which was exchanged with the Provider.

On 16 July, the Provider made a further submission which was exchanged with the Complainant.

Following the consideration of all the evidence and submissions made to this Office including the additional submissions from the parties, my final determination is set out below.

At paragraph 1.1 of the deed of assignment, the parties to this complaint agreed:

> '*For good and valuable consideration the* [Complainants] *covenants to discharge on demand the* [Complainants'] *Obligations and as a continuing security for such discharge and as legal and beneficial owner assigns to* [TP] *the Policy and all money that may become payable under the Policy to hold unto* [TP] *for the payment and/or discharge of all monies and liabilities covenanted under this deed to be paid or discharged by the* [Complainants] *subject to re-assignment on redemption in accordance with this deed.*'

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The deed defines the Complainants' obligations as:

> '*All monies obligations and liabilities of the* [Complainants] *to* [TP] *… on any account and in any manner whatsoever.*'

Clause 4.3 of the deed of assignment provides:

> '*The* [TP] *may without restriction sell or surrender the policy or convert it into a paid up policy and/or exercise any rights conferred by the policy.*'

The policy conditions provide, at paragraph 12:

> '*You can cash in your entire policy at any time after the Liquidation Date.*'

The deed of assignment and policy are clear in their terms. As the liquidation date had passed and the policy was assigned to TP, all monies becoming payable under the Policy were to be held for TP. It further provides that it will discharge <u>on demand</u> the Complainant's obligations. Therefore, if the proceeds of the Policy were demanded by TP, the Provider was obliged to pay the proceeds to TP. The Provider submits that this demand was made by letter from TP dated **25 November 2014**.

While the Provider acted in accordance with its legal obligations under the deed of assignment and I do not find that the payment to TP was wrong, I can understand the Complainants' frustration at the Provider's decision to state in its letter sent in **January 2014** that their authorisation was necessary before the proceeds could be distributed to TP. The Provider should not have represented that the Complainants' authorisation was required to release the proceeds to TP. This reasonably gave the Complainants the impression that the proceeds would not be distributed to TP without their consent. It is not possible for this Office to adjudicate on whether the Complainants may have received a better outcome from their negotiations with TP had the proceeds of the Policy not been paid out to TP.

In its letter of January 2014, the Provider stated among other things:

> "***Please be advised that as you elected to assign your policy to*** [**TP**], ***you must liaise with them to proceed with this distribution proposal."***

In this letter the Provider also stated:

> ***"You now have three options on the portion of your policy allocated to the cash fund above:***
>
> 1. ***Part surrender:*** *You may surrender your allocated units in the cash fund only…*
>
> 2. ***Switch:*** *You may switch your allocated units in the cash fund into other [provider] funds…*

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3. ***Do nothing:*** *You may do nothing and leave the cash accumulated in the cash fund."*

In bold print the Provider stated:

> "***Until we receive instructions from you and the assignee, the cash relating to your policy will remain invested in the Cash Fund."***

Also in bold print, the Provider stated:-

> "***IMPORTANT: As this is an Assigned Policy, we must receive a joint instruction signed by both the policyholder and the assignee. Please liaise with [TP] to progress this matter".***

The above correspondence was both incorrect and misleading.

Attached to the letter of January 2014 was a form which also included in bold:

> "***IMPORTANT: As this is an Assigned Policy, we must receive a joint instruction signed by both the policyholder and the assignee. Please liaise with [TP] to progress this matter."***

I note at the bottom of this form it states:

> "***This form needs to be completed, signed by all the owners of this policy and returned to us, using the pre-paid envelope provided.***
>
> - ***As this policy is assigned,*** *the assignee and the assignor must complete the appropriate parts of the form indicating the investment choice."*

I note the Complainants' solicitor wrote to the Provider on 13 April 2015 questioning why the Provider had paid the proceeds of the partial encashment to TP without the consent of the Complainants, as it had outlined it would in its letter of January 2014. The Provider responded to the Complainants' solicitor in the following terms, by letter dated 27 April 2015:-

> "*I write to you following your letter of 13 April 2015 regarding the partial surrender of funds from the above policy as requested by the assignee* [TP].
>
> *As confirmed previously, when it became possible to make the majority of funds available to the policy owner or the assignee,* [the Provider] *wrote to each party making them aware that the funds could be withdrawn.*

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> *At that time,* [the Provider*] made a commercial decision to seek the joint instruction of the policy owners and if the policy was assigned, the assignee. This letter did not diminish the rights of an assignee under their assignment and in this case the assignee exercised those rights.*
>
> *The assignee supplied the original policy schedule and Deed of Assignment, which confirmed their entitlement to the policy proceeds and to act without notice to the policyholders. Therefore the proceeds were issued to* [TP]*.*
>
> *Upon signing the Deed of Assignment,* [the Complainants] *transferred their rights under the policy to the assignee.* [The Provider] *were obligated to act upon the instructions received and had no legal basis to withhold the funds from the bank.*
>
> *I note that you have advised that* [the Complainants] *were attempting to resolve certain issues with* [TP] *and that the payment of the partial encashment to* [TP] *has undermined this, we consider this to be a matter between your client and the bank to resolve."*

I find it very disappointing that the Provider has offered no explanation why the letter was sent to the Complainants in January 2014 with incorrect and misleading information. I note the Provider's statement that it made a "*commercial decision*" to seek the joint instructions of the policy owners and if the policy was assigned to the assigned.

If this was a commercial decision, then the Provider has neither followed through and implemented it nor explained why it took a completely different course of action.

If the letter of January 2014 was issued in error, I would have expected the Provider to say so and offer an apology. However, I have been provided with no evidence that the Provider has done so.

I find that the issuance of this correspondence in respect of the joint authorisation, without explanation as to the overriding nature of the Provider's obligations under the deed of assignment, was confusing and misleading for the Complainants and represents a failing in the level of service afforded to the Complainants.

For this reason outlined above, I partially uphold the complaint. However, I find the Complainants' request for €948,895.54 in compensation to be completely without merit. I direct a sum of €1,500 in compensation for the inconvenience caused.

I note the Complainants' solicitor, in a post Preliminary Decision submission dated July 2019 states:

> *"…We note it is intended to direct that the Respondent Provider pay the Complainants €1,500 in compensation. The compensation, under the Act, is paid to the Complainants for any loss, expense or inconvenience sustained by them as a result of the conduct complained of.*

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We would respectfully submit that the sum of €1,500 is derisory in the circumstances where our clients' complaint has been partially upheld and where further the costs alone of our clients to this Firm will be greater than the intended award…

Although our clients welcome the fact that their complaint is partially upheld, we would urge and request that the level of compensation be increased to a reasonable sum to allow them discharge both their legal costs and allow them a sum for the inconvenience caused".

I must point out that I do not hold the Provider responsible for the loss alleged by the Complainants. Furthermore, I must point out that this Office does not award costs in circumstances where parties opt to be represented when making a complaint to this Office. For this reason I believe a sum of €1,500 to be appropriate in all the circumstances.

Conclusion

My Decision is that this complaint is partially upheld pursuant to ***Section 60(1)(c)*** 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 Complainants in the sum of €1,500, 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.

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FINANCIAL SERVICES AND PENSIONS OMBUDSMAN

13 August 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

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