



<b><u>Decision Ref:</u></b>	2019-0340
<b><u>Sector:</u></b>	Investment
<b><u>Product / Service:</u></b>	Property Investment
<b><u>Conduct(s) complained of:</u></b>	Failure to process instructions
<b><u>Outcome:</u></b>	Substantially upheld

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

**Background**

The Complainant is unhappy with the level of service he received from the Provider in relation to the sale of units he held in a Property Fund.

The Complainant argues that the Provider had a responsibility to contact him or his financial adviser, once it became aware that a cancellation price would be applied to the sale, in order to inform him that the units would be sold at a lower price (cancellation price) than the published one. The Complainant maintains that had he or his financial adviser been aware that a lower unit price would be applied to the sale then it would have allowed the Complainant the opportunity to cancel the sale of the units.

The Complainant's complaint is that the Provider has failed in its responsibility to keep him and his financial adviser informed of the lower selling price of the units and that this has led to him being financially disadvantaged.

**The Complainant's Case**

The Complainant submits that through his Independent Financial Adviser, he instructed the Provider to sell his holding in a Property Fund. The Complainant says that the sale was executed by the Provider on 8 April 2016 at a unit price of £1.2628. The Complainant states however, that the published market price of the fund's units on that day, which he was expecting to receive, was £1.3243. The Complainant says that upon querying the position the Provider advised that it was contacted by the Property Fund Investors on 8

April 2016 and informed that the trade would receive a "Cancellation Price" of £1.2628 per unit. The Complainant states that the Provider then completed the sale without referring the change in pricing to either him or his Independent Financial Advisor. The Complainant's position is that if the Provider had notified him of the cancellation price he would not have proceeded to sell the units. The Complainant submits that he was unaware that a Cancellation Price had been introduced by the Property Fund Investors and remained unaware until he received the contract note from the Provider on 27 April 2016.

The Complainant says that the Provider claims that it was not obliged to contact him to advise him of the price change as the Provider does not provide financial advice. The Complainant disputes this, stating he could not have known that a Cancellation price would be applied from any publically available information and no published record of a Cancellation Price appears in any historic valuation record that he can find. The Complainant says that both the Morning Star and FT.COM reported the fund's price as £1.3243 per unit. The Complainant's position is that informing him that Cancellation Pricing had been introduced would not, in his view, constitute providing financial advice. The Complainant submits that it would have merely been communicating the facts of the situation i.e. that the published market price was not going to be applied.

The Complainant states that in the Provider's publication entitled "Treating Customers Fairly" it makes lots of statements about how it communicate with customers. The Complainant says that the document specifically says that: *"Consumers are provided with clear information and kept appropriately informed before, during and after the point of sale"*. It also states that: *"we communicate with our customers and their advisers clearly and accurately"* and *"we give customers the information they need to enable them to make informed decisions"*. The Complainant submits that he does not feel that the Provider has lived up to any of the claims it makes in the way that it handled the sale of his Property Funds. The Complainant says that in the Provider's letter dated 29 June 2016 to his Financial Advisor, it confirms that the Provider was contacted by a representative of the Property Fund Investors on 8 April and informed that the trade would receive a Cancellation Price. The Complainant states however, that the Provider decided not to communicate that fact to either their customer or his Financial Adviser, from whom the Provider had received the sale instruction. The Complainant submits that it is his view, that the Provider failed to communicate a material fact that, if known, would have resulted in his instruction to sell the units being withdrawn. The Complainant says he also believes the Provider's Complaint Handler inappropriately suggests that communication of that significant fact could be construed as providing financial advice.

The Complainant states that he believes the Provider should not have executed the sale order without referring the change in pricing methodology to either to himself or his Independent Financial Adviser. He is seeking compensation for his loss calculated as the difference between the price applied by the Provider and the published price of the units. The compensation claimed is calculated as  $£1.3243 - £1.2628 = £0.0615 * 749,676.64$  being the number of units held i.e. £46,105.11 (Pounds Sterling).

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

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The Provider points out the following extracts of the "key features document" which it states support the position being adopted by the Provider in relation to the complaint, that the client understood the nature and risks of this type of investment product and that it was a matter for him in conjunction with advice from his financial adviser to make decisions in relation to his chosen investment funds:

- Page 3 under '*Your commitment*' states, 'seek ongoing financial advice. If you don't, your decisions may not be appropriate', 'ensure you are satisfied that you understand the important aspects of your plan and the permitted assets you choose, especially around associated risks and charges'
- Page 3 under '*Risk factors*' what the client needs to be aware of 'the value of your plan can go down and you may get back less than you invested', 'the level of risk and potential investment performance depend on the permitted assets you choose'.
- Page 5 '*Is the [Provider's] International Portfolio Bond right for me?*' it may be right if you 'understand and accept the risks of this type of investment'

The applicable Terms of Business

At clause 5.4 it states:

*'there shall be no relationship of agency between the Intermediary (financial adviser) and the Product Provider ([the Provider])'*.

The Provider states that this confirms that the financial adviser is an independently regulated entity responsible for dealing in and advising on investment products for the client. The Provider says that this is not the remit of the Provider in respect of this Portfolio Bond product.

The Provider states that there are a number of relevant clauses in the Terms and Conditions which support its position that they operate as an execution only service placing trades on receipt of valid instructions, and it is for the client to choose assets in which to invest in, as follows:

- *'6.2. You choose assets held in your plan entirely at your own risk and you or your adviser should make any checks or seek any independent advice that you consider necessary. You are responsible for ensuring that you have read the prospectus or equivalent document for any mutual fund chosen or the relevant information or terms and conditions for any insured fund or deposit account in your plan'*
- *6.3. You are responsible for ensuring that you are aware of all charges that will apply to a permitted asset before you instruct us to buy it'*.

The Provider submits furthermore, that in relation to buying and selling of assets, the terms and conditions state:

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- *'6.15. Our instruction to a fund manager to buy or sell a permitted asset will be to buy or sell at the next available price. There may be a delay between our instruction being placed and the instruction being completed by the fund manager or deposit account provider. The instruction may be completed in stages by the fund manager or deposit account provider. This could arise, for example, for mutual funds or insured funds that are not priced daily or if the fund manager has placed restrictions on purchases or sales. It could also arise for deposit accounts where there are restrictions on when cash can be withdrawn from the account';*
- *In clause 6.16 it states that: 'the prices at which permitted assets are bought or sold by us will be determined solely by the prices at which the trade is completed by the fund manager... this may be at different times and at different prices to what you expect;*
- *At clause 6.17 it states that: 'once we have placed a buy or sell instruction with a fund manager, you cannot withdraw or alter your buy or sell instruction in any circumstances';*
- *'19.1. We do not provide any advice about the assets in your unit fund. The fact that a permitted asset is available for investment does not imply that it is necessarily suitable for you. You should seek your own advice from a suitably qualified person'.*

The Provider states that as set out above, the Terms and Conditions at clause 6.2 state: *'you choose assets held entirely at your own risk and you or your adviser should make any checks or seek any independent advice that you consider necessary',* it also places the responsibility on the client *'for ensuring that you have read the prospectus...'*

The Provider states that it rejects the Complainant's complaint for the following reasons:

The Provider states that the imposition of the "Cancellation Price" for the Fund is at the discretion of the fund manager and is not something that the Provider has control over. The Provider says that the terms and conditions of the Property Fund allow the fund manager to reduce the unit price during times of market volatility if large trades are placed in order to protect the other investors. Page 34 of the fund prospectus sets out the dual pricing structure of the fund and that a cancellation price can be imposed. The Provider also refers to clauses 6.2 and 6.3 of the terms and conditions which state that it is the client's responsibility to read the fund prospectus.

The Provider says that it does not agree with the Complainant's assertion that it should have contacted him or his financial adviser to confirm the unit price reduction. The Provider states that it provides an execution only trading service and places buy/sell instructions on receipt of a valid instruction. The Provider states that it does not contact clients or financial advisers to ask if they wish to proceed with a trading instruction after it had been submitted. The Provider says furthermore, when it has placed a buy or sell

instruction with a fund manager, the client cannot withdraw or alter the buy or sell instruction in any circumstance (terms and conditions - clause 6.17).

The Provider submits that while it did receive a call from the fund manager on 8 April 2016 to confirm that the unit price for the Fund would be lower than the published one, this was for the Provider's information purposes only and it was not obliged to contact the client or financial adviser to confirm this was the case. The Provider states that it understands that the client was aware of the potential for a "Cancellation price" to be imposed and this was also clear from the prospectus. The Provider submits that it was not the responsibility of the Provider to inform a client or their financial adviser that one would be imposed. The Provider's position is that in any event, the client could not have withdrawn the request to sell units at that stage, in accordance with the terms and conditions of the product.

The Provider says that given the open architecture and *factory-gate* pricing nature of the product, it believes that all clients in conjunction with their financial advisers have a contractual responsibility to ensure that they are fully aware of the risks of investing in certain assets/funds before doing so. The Provider states that it does not take any responsibility for any financial loss incurred by the client as a result of a cancellation price imposed by the fund manager.

The Provider submitted some of the additional product documents which were available to the financial adviser in relation to the policy which it says clearly articulate the nature of the product on offer.

Page 6 of the Plan Summary states that:

- *'The plan has been designed to be highly flexible and provides you and your clients with a wide range of investment options to choose from, to enable you to implement the most suitable investment strategy for their circumstances. This choice also gives you a high level of control by allowing you and your client, or a nominated discretionary asset manager, to make the day-to-day decisions to buy, hold or sell the assets with the plan'.*

Page 1 of the 'Investment choices that put you and your client in control' states that:

*'Together, you and your clients, or a nominated discretionary asset manager, will make the day-to-day decisions to buy, hold or sell assets within the plan — and our asset-trading facility gives you the flexibility to change those assets at any time. It's your and your clients' responsibility to ensure the right investment decisions are made and they understand the level of investment risk they are taking'.*

#### Additional Submissions from the Complainant and the Provider

##### **The Complainant's submission of 16 April 2017**

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The Complainant questions whether the Provider has an obligation to treat customers fairly, in the regulatory context and if so how can a customer be expected to make an informed decision if they are not furnished with the facts?

The Complainant states that it is his understanding there is an obligation on financial institutions to provide clear information to enable customers to make informed decisions in a timely manner.

The Complainant submits that surely it is unreasonable of the Provider to say that his instruction to sell was irrevocable when he had no knowledge or expectation when he submitted the instruction that a non market price would be applied to the transaction.

The Complainant says that there was no publicly available information that he could have referred to that would have suggested that he might receive anything other than the quoted market price of the units, which was his expectation.

The Complainant questions whether the Provider could have cancelled the trade at the point of the Property Investor advising it that the published price was not going to be applied. The Complainant states he believes that the Provider could have done so and contends that his instruction was to sell units at the current market price and not to sell units at a cancellation price.

The Complainant submits that the Provider appears to wish to hide behind the letter of their Terms and Conditions in which they say that once an instruction to sell is received it cannot be withdrawn or altered in any circumstance. The Complainant states that he does not believe that the Provider's generic Terms and Conditions, which appear to be designed to cover a multitude of different securities and investment instruments were specifically intended to cover this situation.

The Complainant submits that neither his Independent Advisor, nor himself could have made an informed decision as to whether to sell / hold the units as they did not know that the Property Investors were going to apply a cancellation price. The Complainant states that reviewing current historical price information for this fund it still shows a unit price 132.43 for 8 April 2016 rather than the 126.28 that was applied to his trade. The Complainant says that he cannot find any publicly available reference to the price that was actually applied. The Complainant states that he does not employ a Discretionary Asset Manager and was therefore relying on the Provider to act as his agent, and therefore expected the Provider to communicate openly with him.

The Complainant refers to the following E-mail from a Provider employee dated 15 June 2016 11.49

*"The agent has reverted to advise that the deal was originally placed, however, this was cancelled and rebooked at the request of [Property Investor's] Head Office under id 5643\*\*\* using the NAV Bid price of 126.28".*

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The Complainant states that the above e-mail suggests that the transaction was booked at the market price and then re booked and replaced with a second transaction, given a new dealing number and executed at the unpublished cancellation price requested by the Property Investor.

The Complainant questions whether the terms of the trade were altered retrospectively and that the Provider had no authority from him to complete this second transaction.

E-mail from Provider employee of 15 June 2016 16.47

*“Also we note below from the email trail at the very bottom from [the Property Investor] that the client was successfully contacted to warn that there would be a special price and elected to proceed”.*

The Complainant’s position is that this is simply untrue and that nobody contacted either his Financial Advisor or him at anytime.

E-mail reply of 16 June says:

*“On days where we have exercised a Cancellation Price, we have tried our utmost to contact the Agent attached where it is possible to identify. In this case, J.. kindly passed me contact details for S.. who I contacted on the afternoon of 8 April to inform him this trade would receive a Cancellation Price”.*

As regards the above e-mail the Complainant states that he does not know who S... is but he does not represent him (the Complainant) nor did he communicate this critical piece of information either to his Independent Financial Adviser or to him. The Complainant says it appears he accepted the price without seeking any confirmation as to whether the sale should be executed or not.

As regards the Provider’s letter to his Financial Advisor dated 29 June 2016, the Complainant says that in the fourth paragraph of the letter L... says: *“as an Execution only provider [the Provider] acts on customer instructions and does not provide any financial advice. We are therefore not obliged to contact your client to inform them of events such as this prior to placing any trades”.*

The Complainant’s comment on the above is that communicating the Property Investor’s proposal to impose a Cancellation price is not advice it is merely communicating a fact that was fundamental to changing the outcome of his original instruction to sell units at the published market price. The Complainant states that he does not understand how the communication of a fact could be construed as providing financial advice.

The Complainant states that he believes the Provider could have prevented a loss by simply communicating facts to him, their client. The Complainant contends that the Provider did not execute his original instruction, which was to sell the units at the published market price, which was his expectation. The Complainant’s position is that the Provider sold his units and then rebooked a separate transaction to sell the units at the

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cancellation price requested by the Property Investors. The Complainant contends that when the Provider rebooked the transaction without seeking any ratification from him it breached its mandate as it held no instruction from him to sell the units at an undisclosed cancellation price. The Complainant says that in addition the Provider's failure to furnish relevant information to him and to suggest that it has no obligation to do so demonstrates the Provider's disregard for the principle of treating customers fairly.

### **The Provider's submission of 19<sup>th</sup> May 2017**

The Provider states it produced a Key Features document and plan Terms and Conditions (among others) to enable policyholders to make informed decisions in relation to the suitability of the product for their needs. The Provider says this documentation was made available to the Complainant and his independent financial adviser before the Complainant entered into a binding contract. The Provider says that the content of this literature makes it clear that it is for the policyholder in conjunction with their financial adviser to inform themselves of the underlying investment and how this operates. The Provider states that in this instance the prospectus for the fund has been made available to the Complainant.

The Provider states that it is not responsible for the funds prospectus however it notes it states that a price for shares in the fund can be based on a valuation calculated either on an 'issue '(or 'creation' basis) or on a 'cancellation' basis and explains the difference between them. The Provider submits that the subscription (offer) and redemption (bid) price applied in a dual-priced fund such as this will be based on a valuation calculated on an issue or cancellation basis depending on circumstances including the net trend direction of transactions (i.e. whether the fund is buying or selling properties on a net basis). This the Provider says is to be fair to all clients including remaining clients in the fund. The Provider states that the method of calculation of either price option is clearly set out on page 34 of the fund prospectus. The Provider states that it is noteworthy in particular that it states: *'for large deals, being for these purposes redemptions in excess of £15,000, the ACD may redeem at the cancellation price.'*

The Provider submits that the possible imposition of a cancellation price once the bid is submitted was clearly articulated in the fund prospectus made available to the Complainant and was a feature of the fund chosen. The Provider says that its product literature made it clear that fund selection and information on funds was a matter for the policyholder and their financial adviser.

The Provider states that in addition and to reiterate, the Terms and Conditions expressly state at clause 6.17 that: *'once we have placed a buy or sell instructions with a fund manager, you cannot withdraw or alter your buy or sell instruction in any circumstance.'*

The Provider submits that in advance of selecting the fund it is a matter for the policyholder and their financial advisers to inform themselves of the pricing structure in place for the fund and the fact that the price for shares in the fund can be based on a

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valuation calculated on a cancellation basis was a possibility. The Provider notes that the fund prospectus also states at page 35, that the: '*ACD deals on a forward pricing basis. A forward price is the price calculated at the next Valuation Point after the purchase or redemption is deemed to be accepted by the ACD.*' The Provider also refers back to the Terms and Conditions at clause 18.1 which it says clearly states that mutual funds are operated and managed by fund managers and not managed by the Provider. The Provider's position is that it is not responsible for the actions and decisions of any fund manager or any provider of custodial services. The Provider says that the fund manager retains full discretion in relation to management of the fund and imposition of a cancellation price.

As regards the audio tape of the telephone conversation from the Property Investor in which it advised that a cancellation price would be applied, the Provider states that it has made every effort to obtain a copy of this audio recording however this call was not recorded by the Provider and it has also been advised by the Property Investor that they only retain audio recordings for a period of 6 months.

In respect to the Complainant's position that the Provider could have cancelled the trade upon being advised that the published price was not available, the Provider says that the instruction was to sell the assets in accordance with the trading instruction provided. The Provider says that it places the instruction with the fund manager and in accordance with the Terms and Conditions (clause 6.15), that is, the instruction to the fund manager is to sell a permitted asset at the next available price. The Provider submits that as indicated above, it is a matter for the fund manager to establish whether to apply an issue or a cancellation price in a particular instance and the Provider has no control over this. The Provider submits that as set out in clause 6.16 of the Terms and Conditions:

*'the prices at which permitted assets are bought or sold by us will be determined solely by the prices at which the trade is completed by the fund manager...This may be a different prices and at different times to what you expect.'*

As regards the Complainant's position that the Provider appears to wish to hide behind the letter of their Terms and Conditions, the Provider's response is that the Terms and Conditions state clearly how the product operates. The Provider says it is explicit in stating that policyholders are required to satisfy themselves in relation to the permitted assets in which they wish to invest and any specific terms and conditions which may apply in relation to those assets, including any prospectus. The Provider state that Clause 6.2 of the Terms and Conditions clearly set out that:

*'you are responsible for ensuring that you have read the prospectus or equivalent document for any mutual fund...'*

The Complainant's position is that neither his Financial Advisor or himself could have made an informed decision as to whether to sell / hold the units as they did not know that the Property Investor was going to apply a cancellation price. The Provider's response is that the Bond is designed to be flexible and provides a range of investment options, and

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that this is reflected in the fact that there are a large number of permitted assets available to invest in. The Provider says it cannot control the way in which the underlying funds in which investors choose to invest are administered. The Provider submits that it is a matter for the client and their financial adviser to be satisfied that this fund was suitable and appropriate.

The Complainant has stated that upon reviewing current historical price information for this fund it still shows a unit price 132.43 for 8 April 2016 rather than the 126.28 that was applied to his trade. The Complainant says he cannot find any publicly available reference to the price that was actually applied.

In response to this the Provider says it cannot comment on why the Property Investor do not make this information public. The Provider says that as it understands the position, either the issue or the cancellation price could have been applied at a particular time on a particular day depending on the size and nature of the transaction and how this may affect the remaining investors in the fund.

The Complainant has stated that he does not employ a Discretionary Asset Manager and was therefore relying on the Provider to act as his agent, and therefore expected it to communicate openly with him. The Provider's response is that it is a provider of the product that the client choose to invest in. The Provider however says it is not acting as an agent for policyholders and does not provide any information or advice regarding suitability. The Provider submits that the product documentation make it clear that policy holders (or, if relevant their financial adviser) are responsible for understanding the nature of the fund being invested in and to ensure that it is suitable for their needs. The Provider says it makes no assurances that a client will be communicated with when the imposition of a cancellation price is being applied. The Provider states that in any case, in this instance, the redemption request could not be withdrawn and the fact that this could arise was expressly provided for in the fund prospectus. The Provider says it understands that the calculation of prices on a cancellation basis, occurs from time to time reflecting the pattern of net redemptions from the fund.

The Provider's response to Questions regarding copy Emails contained within the Provider's formal response.

Re Email dated 15 June 2016 11.49:

*"The agent has reverted to advise that the deal was originally placed, however, this was cancelled and rebooked at the request of [Property Investor] under id 56432808 using the NAV Bid price of 126.28".*

The Provider states that it did not cancel and re-book the transaction. The Provider says it understands this was done for operational reasons by the Property Investor.

Email from agent 15 June 2016 16.47

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*“Also we note below from the email trail at the very bottom from [Property Investor] that the client was successfully contacted to warn that there would be a special price and elected to proceed”.*

The Provider says that reference to 'client' in this instance is to itself, the Provider. The Provider submits that as set out in the product documentation, the Provider is at all times the beneficial owner of the investment with the underlying fund. The Provider explains that the Complainant as policy holder is entitled to an income stream that is directly linked to the performance of the underlying fund. The Provider says that unfortunately, the purpose of this call appears to have been misrepresented in this email as the nature and timing of this call was by way of a courtesy call only and not a call seeking permission to proceed.

Email reply of 16 June says:

*“On days where we have exercised a Cancellation Price, we have tried our utmost to contact the Agent attached where it is possible to identify. In this case, J... kindly passed me contact details for S.. who I contacted on the afternoon of 8 April to inform him this trade would receive a Cancellation Price”.*

The Provider's comment on the above is that the Provider and its staff do not assume any role in communicating information in relation to the operation of a fund. This responsibility it says sits with the policyholder and their advisers. The Provider submits that it will be appreciated that many pieces of information are issued by fund managers across the many funds which are available under this product and it would not be practical nor within the Provider's authority to track policyholders to advise them of all such information or play any role in the decision to execute or not. The Provider states that the product is offered on this clear basis.

Re Provider letter to Financial Advisor dated 29 June 2016. In this letter it was stated:

*“as an Execution only provider [the Provider] acts on customer instructions and does not provide any financial advice. We are therefore not obliged to contact your client to inform them of events such as this prior to placing any trades”. The Complainant has stated: “I do not understand how the communication of a fact could be construed as providing financial advice”.*

The Provider's position is that the decision to invest in this fund was entirely at the Complainant's own risk, and that the imposition of a cancellation price was probable based on the terms of the fund prospectus and the Complainant should have been aware of this.

**The Complainants submission of 26<sup>th</sup> May 2017**

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The Complainant states that he simply disagrees with the Provider's position. The Complainant says that the Provider's attempt to defend themselves by hiding behind a tome of terms and conditions that he received when he first signed up for the Portfolio Bond in 2011 and which the Provider expect him to understand in great detail. The Complainant submits that frankly, he feels it is unreasonable for the Provider to say that they had no obligation to make any contact with him in this unusual situation, where he had issued an instruction to sell a security where his expectation and the all publicly available information suggested that he could expect to achieve the published price. The Complainant states that only the Provider and the Property Investor knew that a cancellation price was to be used for his transaction before the sale was settled and the contract note issued. The Complainant states that as he has said all along, if he had known that cancellation pricing was to be applied he would simply not have issued an instruction to sell any units in the fund.

The Complainant says that he accepts that the Property Investor has the ability to introduce cancellation pricing. He says however, he did not know nor has any reason to suspect that the Provider was going to do so at that point. The Complainant states that he can find nothing to suggest that up to that point the Property Investor had introduced cancellation pricing of their fund in recent times. The Complainant submits that the Provider suggest that he was obliged to deal blind by virtue of the type of investment that he had decided to purchase and its T&C's which say he must issue irrevocable instructions. The Complainant believes this is unreasonable and unfair. The Complainant says that in the absence of any direct communication he had no opportunity to make an informed decision. The Complainant states that the Provider's failure to communicate openly with him demonstrates they have not treated him fairly in the spirit with the statements they make in the Treating Customers Fairly document.

The Complainant says that he does not expect the Provider to provide him with financial advice but he does expect the Provider to furnish him with factual relevant information to enable him to make informed decisions. In this situation they did not.

The Complainant states that the Providers says it does not act as agents for policyholders and says surely it must have acted as his agent, given that it, alone, executed the sale, on his behalf.

As regards the Provider's statement that in the context of the Property Investor he is the client and that the Provider is the beneficial owner of the investment in the underlying fund, the Complainant says he disagrees. The Complainant submits that the Provider is the legal custodian of his investment, and questions how can the Provider possibly be the beneficial owner of the investment. The Complainant contends that whilst the Provider is the legal owner of the investment that does not give the Provider the right to act as the beneficial owner. The Complainant says that surely the Provider must have some duty of care to him as the beneficial owner.

As regards the Provider's statement that it did not cancel and rebook the transaction "*this was done for operational reasons by [the Property Investor]*", the Complainant refers to the e-mail of 15 June 2016 "*that the deal was originally placed. However, this was*

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*cancelled and rebooked at the request of [the Property Investor]”, the Complainant says that this sounds like two events to him, an adjustment being made subsequent to the original transaction. The Complainant states that he suspects the original trade was booked at the published market price with a second trade being booked at the cancellation price.*

#### **The Provider’s submission of 2<sup>nd</sup> June 2017**

The Provider states that as set out previously, it is merely the product provider in this instance.

The Provider states that the Complainant invested in the Provider’s Portfolio Bond which is a unit-linked insurance contract. The Provider says that the Complainant’s entitlement under that contract was to a money flow. The Provider says that the amount of the Complainant’s return under that contract is, at all times, linked to the performance of the underlying permitted assets invested in by the provider. The Provider states however, at no time, does the Complainant have ownership of the underlying permitted assets.

As regards the Complainant’s position that it looked like two events occurred, *“the original trade was booked at the published market price with a second trade being booked at the cancellation price”,* the Provider’s response is that as set out previously, this was a matter for the fund manager being the Property Investor once the Provider had placed the trade with them.

#### **The Complainant submission 9<sup>th</sup> June 2017**

The Complainant states that the Provider says his entitlement under the unit-linked insurance contract was to a money flow. The Complainant’s response is that yes, the money flow being directly attributable to the value of the underlying investments held in the portfolio bond that had been selected by him. The Complainant says that if the beneficial interest in the money flow is his then he fails to see how he is not the beneficial owner (as opposed to the Legal Owner) of the underlying investments.

The Complainant submits that irrespective of the technical description of the ownership of the investments the money flow in this transaction, received by him, would not have crystallised a loss had he been informed by the Provider that the published market price he reasonably expected to receive could not be achieved. The Complainant says that if, rather than trading at a unpublished cancellation price the Provider had communicated openly with him and given him the opportunity to withdraw the sale instruction no loss would have been crystallised. The Complainant says that the Provider should have realised that his original expectations could not be met and in his view failed to treat him fairly by continuing to transact without referral.

The Complainant submits that in his view, the Provider is not merely the product provider, it is a professional financial services company that intermediates in the purchase and sale of unitised investments on his behalf and it alone trades with fund managers to whom he

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is given no direct access. The Complainant says that consequently, he believes the Provider has a responsibility to communicate unusual or unpublished events to their clients that effectively change the circumstances that existed when it first received the clients instructions.

### **The Provider's response of 16<sup>th</sup> June 2017**

*" .. to reiterate the factual position for the purpose of completeness; [the Complainant] held a contract with [the Provider] and in accordance with that contract may have been entitled (subject to performance of the underlying permitted assets) to a money flow. [The Complainant] had no beneficial interest in the underlying units in which [the Provider] was invested. Additionally, [the Provider] are the product provider and not an intermediary as suggested by [the Complainant]"*.

Email referred to above:

10 June 2016 – e-mail from Provider's agent

*"We would have called [the Provider] to explain a cancellation price was to be applied"*

This e-mail sets out a note that appears to be from the agent's systems, which states:

*"Client contact advised cancellation price was to be applied. Client successfully contacted to warn they would be special price and elected to proceed"*

21<sup>st</sup> August 2019 – The Complainant's comments on the above e-mail.

*"[The Provider's agent] contacted his client [the Provider]. He did not contact me or my IFA ... It is clear that the Provider asked [the Provider's agent] to carry on and execute the transaction without first seeking instruction from either me or my IFA. .... It is very odd that [the Provider] did not request copies of the telephone recordings made between themselves and [Agent] before the recordings were deleted after 6 months because my IFA ... wrote to [the Provider] on 8<sup>th</sup> June 2016, ... and specifically asked if [Agent] had informed [the Provider] "that the price was going to be lower than the published price of this deal prior to the deal being placed." .. my expectation was simply that I would receive the published price and not a cancellation price which had been introduced without any public notification."*

### **The Complaint for Adjudication**

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The complaint is that the Provider failed in its responsibility to keep the Complainant and his Financial Adviser informed of the lower selling price of the units and that this has led to him being financially disadvantaged.

### **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 10<sup>th</sup> September 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, within the period permitted, the final determination of this office is set out below.

### **Analysis**

I have considered all the submissions and evidence supplied in relation to this complaint. I consider that it is particularly unfortunate that the Provider was unable to submit the telephone recording of the telephone call it had with the Fund Manager in relation to the price that would be used. The Provider's agent advised that on the date in question (8<sup>th</sup> April 2016) call recordings were being made and kept for a period of 6 months before being automatically deleted, and that the call retention period was in line with regulations at that time.

It is noted that the Complainant had queried this on 8<sup>th</sup> June 2016, which was well before the recordings would have been deleted. In a letter to the Provider dated 8<sup>th</sup> June 2016 the Complainant's representative stated:

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*"I am writing to instigate an investigation into the recent sale of .. Property Funds within [the Complainant's] bond. The price at point of sale differed by 5 % to the price quoted on the valuation [the Complainant] received 31<sup>st</sup> March, even though at the time of sale the quoted price had not changed on the markets – [the Complainant] had been following this on MorningStar. The difference amounted to £45,055.55 which is of course substantial. This was raised originally ... on 27 April; ..."*

I believe that it would have been prudent of the Provider to have retained the recordings, once it had received the query/complaint from the Complainant relating to the placing of the deal at the lower price.

However, from the evidence submitted, I consider that the Provider is correct when it advised that the Complainant could not have influenced the outcome of the sale of the shares, even if he had known that the lower unit price was going to apply. In this regard clause 6.17 of the terms and conditions attaching to the Investment Bond specifically states that:

*"once we have placed a buy or sell instruction with a fund manager, you cannot withdraw or alter your buy or sell instruction in any circumstances"*

I also note that the terms and conditions of the Property Fund allow the Fund Manager to reduce the unit price during times of market volatility if large trades are placed in order to protect the other investors. At page 34 of the Fund Prospectus the dual pricing structure of the fund is set out and it is advised that a cancellation price can be imposed.

The cancellation price is the minimum bid price that the Fund Manager used here and the Prospectus specifically advised that that price could be used by the Fund Manager.

That said, I do consider that it was not unreasonable for the Complainant to expect some communication from the Provider following its receipt of information from the Fund Manager that it was going to be using the cancellation price. I particularly consider that such communication was necessary as it was going to be some time before the Complainant was going to be otherwise on notice of the effects of this action. In such transactions it would not be until receipt of the contract note that a client would be made aware of what price was or was not used. Here it is noted that the trading instructions were received by the Provider on 7<sup>th</sup> April 2016, and it was not until 18 days later on 25<sup>th</sup> April 2016 that a Contract note issued to Complainant, confirming the prices. I also consider that a greater explanation of the process, particularly in relation to the potential use of the Cancellation Price could have been set out in the documentation. I do not consider that a one line explanation in the Fund Prospectus is enough. The documentation could also have been clear as to limitation upon the Provider in regard to stopping / confirming the transaction upon receiving such advice from the Fund Manager.

While the documentation advises that the customer cannot withdraw or alter the buy or sell instruction it does not make it clear whether the Provider itself was restricted in taking any action. While the documentation is not clear on this point, I do not accept that the

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Provider had no discretion as to withdrawing the instruction upon being notified of the pricing decision. The correspondence relied upon by the Complainant does reasonably lead to this conclusion. In this regard the following correspondence was particularly noted:

E-mail from Provider employee of 15 June 2016 16.47

*“Also we note below from the email trail at the very bottom from [the Property Investor] that ‘the client was successfully contacted to warn that there would be a special price and elected to proceed’ ...”.*

The Provider advised that “the client” mentioned in this e-mail was the Provider itself, but says that the purpose of this call appears to have been misrepresented in this e-mail as the nature and timing of this call was by way of a courtesy call only and not a call seeking permission to proceed. Unfortunately, we do not have a copy of the telephone call to verify that this is correct.

I accept that the e-mail correspondence submitted by the Provider does indicate that the Provider did have some say in having the transaction processed on different terms / outcomes than originally requested. The Provider was unable to provide convincing evidence to disprove that it was given the option not to proceed with the transaction. While I could not interfere with a Provider’s discretion in relation to such matters, I do expect clarity from a Provider on the extent of its powers and abilities in relation to the exercise of such a discretion.

While I consider that the Complainant has not suffered a financial loss as a result of the lack of information from the Provider, that is because he could not have altered the outcome of the transaction (which is a restriction that he signed up to, with this contract). Nevertheless, I accept that the issues and the complaint that arose, would not have arisen if the Provider had been clearer in its documentation on its obligations in relation to such an event occurring, that is, whether it would communicate such information it received from a Fund Manager, and whether or not it could take any action itself by way of withdrawing from the transaction. While I accept that a Provider cannot include everything in its documentation that may or may not happen with an account, I consider that such an occurrence as this event would not be so unusual that some thought should have been given by the Provider to setting out what its obligations were to its clients on such an eventuality.

Having regard to all of the above, it is my Legally Binding Decision that the complaint is substantially upheld and I direct the Provider to make a STG£10,000 (ten thousand pound sterling) compensatory payment to the Complainant.

## **Conclusion**

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- My Decision pursuant to **Section 60(1)** of the **Financial Services and Pensions Ombudsman Act 2017**, is that this complaint is substantially 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 Complainant in the sum of STG£10,000, 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.

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**GER DEERING**  
**FINANCIAL SERVICES AND PENSIONS OMBUDSMAN**

4<sup>th</sup> October 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

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