An tOmbudsman Seirbhísí Airgeadais agus Pinsean
Financial Services and Pensions Ombudsman

Decision Ref:	2019-0368
Sector:	Investment
Product / Service:	Shares/Equities Investment
Conduct(s) complained of:	Delayed or inadequate communication Failure to provide product/service information Failure to inform of drop in value
Outcome:	Rejected

LEGALLY BINDING DECISION
OF THE FINANCIAL SERVICES AND PENSIONS OMBUDSMAN

Background

The Complainants invested in an insurance-based investment product with the Provider in 2011 through a Cypriot-based insurance intermediary/adviser. In 2012, the Complainants appointed a new insurance intermediary/adviser. The underlying investments selected by the Complainants and their second adviser did not perform well and the Complainants' policy decreased in value. The second adviser was investigated by the competent authority in Cyprus for certain irregularities and has had its registration cancelled.

The Complainants' Case

The Complainants' complaint concerns the fact that the Provider failed to send quarterly valuation reports to them from 2013, which would have alerted them to the fact that the value of the policy had dropped. The Provider received returned post from the Complainants' address in 2013. The Complainants argue that the Provider should have made more of an effort to contact them and to establish the new address details. The Provider argues that it attempted to contact the Complainants through an email address and through their advisor when the returned post was received. It further argues that it was incumbent on the Complainants to notify it of a change of address which they failed to do. The Provider is of the view that it made reasonable efforts to contact the Complainants and their advisor but no response was received.

In their complaint, the Complainants argue that the Provider did not try hard enough to find their current address. They confirmed that they were dealing with the Provider through a named financial advisor of the insurance intermediary that was appointed by them in 2012.

The Complainants state that they moved house, so post from the Provider was returned to it. They note that the Provider then tried to email them with the wrong email address. They accept that the Provider then emailed the insurance intermediary several times and got no response. They argue that having received no response from the Complainants or their financial advisor, this should have alerted the Provider that something was wrong and it should have investigated further. Due to this inefficient behaviour, the Complainants allege that the value of their investment dropped from €50,000 to just under €17,000 because they did not have knowledge of what was going on. They seek compensation to reflect the drop in value of their policy.

In subsequent correspondence to this Office, the Complainants have raised a vast array of additional complaints in relation to the Provider which are unrelated to the initial complaint regarding communication. These additional complaints concerning the following issues:

- that the insurance intermediary in question was dealing as agent of the Provider and not of the Complainants;

- that the insurance intermediary is an insurance broker only and is not a financial advisor;

- that the insurance intermediary had authority from the Cypriot competent authorities only to advise on insurance products and not to give advice on investments or pensions;

- that the Provider ought to have carried out a risk assessment and suitability of product assessment in respect of the Complainants' investment since the Complainants' business was introduced by an insurance intermediary and not an entity licenced to provide pension or investment advice;

- that the Provider accepted dealing instructions from an insurance advisor as authority to sell and purchase investments which had nothing to do with insurance. As the insurance intermediaries were authorised only to give insurance advice, the Provider should have rejected the instruction or communicated directly to the Complainants that the Provider in question was not authorised to give financial advice or act on investments;

- the insurance intermediary had no professional indemnity insurance to cover it in giving pension investment advice;

- that the Provider entered into an agency or a license agreement with the insurance intermediary in question to promote and sell the Provider's products in 2008 and

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either paid (or caused to be paid by third parties) significant commissions to the insurance intermediary;

- that the Complainants' contract with the Provider is based in Dublin and hence their claim is in Ireland even though they were living in Cyprus between 2010 and 2018 and are now UK-based;

- that the structured notes which their funds were invested in are unsuitable and have been the focus of warnings from the UK and Irish regulators in recent years;

- that there was a lack of due diligence by the Provider in allowing an insurance advisor to act as a financial investment advisor and to invest in unsuitable structured products; and

- the structured note investment was not a permitted investment in the context of their policy as illiquid assets were not permitted.

The Provider's Case

The Provider accepts that it received returned post from the Complainants' address in 2013. The Provider argues that it acts on an execution-only basis and does not monitor the performance of client portfolios. It notes that the value of the policy in question primarily depends on the performance of the underlying assets of the fund which are chosen by the Complainants and that its literature notes that these can fall as well as rise. Any choice of fund is made by the policyholders or their advisors, if applicable. Investments are therefore made at the policyholder's own risk and it is the responsibility of the policyholders and their advisors to monitor the portfolio of investments.

The Provider states that returned post was received from the Complainants' address on **26 September 2013**. On **1 October 2013**, an email was sent to the Complainants at a particular address confirming that the Provider had received returned post and requesting confirmation of their new address details. The email was returned undelivered. The incorrect email address that was entered by the Provider contains an underscore rather than a dot, as this is how the Provider read the email address from the application form. After this email was returned, the Provider states that it sent an email to the Complainants' financial advisor confirming that it had received returned post and requesting confirmation of the Complainant's new address. No response was received from the advisor and a further email was sent to it two days later on **3 October 2013**. No response was received to this email either. A third and final email was sent to the advisor on the **15 October 2013** and again there was no response. The Complainants' address details were then updated with "returned post" to ensure that no further correspondence was issued to the original address. Copies of the relevant emails have been provided.

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The Provider argues that while it is sympathetic to the Complainants' concerns, it is the responsibility of the policyholders or their advisors to inform interested parties such as the Provider of a change of address.

This is clear from the relevant terms of the policy, section 24.2 of which states that:

> "*We can accept no responsibility for any failure by you to notify us of any change of address*."

The Provider argues that it made reasonable efforts to contact both the Complainant and the financial advisor but received no response.

In relation to the additional complaints raised in the course of the investigation process, the Provider points out that the relevant dealing instructions from October and December 2012 were signed by the Complainants and sent by the insurance intermediary. They note that the insurance intermediary in question was appointed as a broker by the Complainants and that it was not appointed by the Provider as fund adviser. The Provider states that it has not paid any fund adviser fees to the insurance intermediary in question. The Provider therefore argues that the fact that the intermediary in question is not licensed as a fund adviser is not relevant. The Provider also clarifies that the life insurance contract in question is deemed to have been sold in the territory where the financial adviser and client were based at the time (that is, Cyprus) and therefore the Irish Consumer Protection Code requirements do not apply for the sale of the insurance contracts in question as they were sold outside the state. The Provider further reiterates that it operates on an execution only basis and does not provide advice to clients and was therefore under no obligation to notify the Complainants on the lack of diversification of the investments instructed by them through their adviser.

The Provider argues that the professional indemnity insurance position of the insurance intermediary is not relevant to the Provider and that its due diligence confirmed that it was regulated in Cyprus as an insurance intermediary. The Provider therefore does not accept the suggestion that the insurance intermediary question was not authorised provide insurance advice to the Complainants. Further the insurance intermediary in question was appointed only as the Complainants' broker and not as the fund adviser and as such no fund adviser fees were paid to the broker in relation to the investments placed on the dealing instruction signed by the Complainants.

The Complaint for Adjudication

The complaint for adjudication concerns an alleged failure of communication by the Provider. The Complainants allege that that did not receive regular valuation statements in relation to the investment and thus they were unaware of the drop in value of the investment.

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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 11 July 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.

Following the issue of my Preliminary Decision dated 11 July 2019, the Complainants made a further submission to this Office by e-mail dated 31 July 2019, a copy of which was transmitted to the Provider for its consideration. The Provider advised this Office by e-mail dated 15 August 2019 that it did not wish to make any further submission.

Following consideration of the Complainants' additional submission, together with all of the evidence submitted by the parties, I set out my final determination.

In is important to note at the outset that the provisions of the Consumer Protection Code (CPC) do not apply to this complaint. The CPC applies in respect of customers and consumers in the State and does not apply to services provided by regulated entities to persons outside the State. By their own admission, the Complainants lived in Cyprus at the relevant time and are now living in the UK. The Complainants are not therefore entitled to the protections of the CPC in the context of this complaint.

In that regard, I note the Complainants, in their post Preliminary Decision submission of 31 July, state:

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> *"This Office has erred in law under EU regulation, the Ombudsman's charter and the Consumer Protection Code 2012. While they accept that the CPC only applies to customers in the State, they assert this is discriminatory on the basis that their residence in another country disadvantages them.*
>
> *They assert the Preliminary Decision ignored the requirement to treat citizens equally since an Irish citizen resident in the State would receive better terms. Therefore the Ombudsman has, 'ignored Irish and EU law'".*

I have not ignored Irish or EU Law but the fact is that the Central Bank of Ireland Consumer Protection Code 2012 is only applicable to people living in the Republic of Ireland.

In my Preliminary Decision, I stated that it was clear from the policy documentation that the contract was concluded in Cyprus where the policyholders were located.

In their post Preliminary Decision of 31 July, the Complainants state that:

> "*The offer of a contract may have been made in Cyprus but the acceptance happened in Dublin; therefore the contract should be interpreted as being established in Dublin and therefore all of the dispute is subject to Irish Law*".

The Complainants go on to state:

> "*We can find no legal proof to support the principle that a Life Insurance Contract is 'deemed sold' where the financial advisor and client are based. This is not a case where the Advisor is an agent of [the Provider] or otherwise authorised to 'sell' the product or conclude the transaction on the [Provider's] behalf".*

I would point to the European Communities (Life Assurance) Framework Regulations, 1994 which sets out the basis for the selection of appropriate governing law to such contracts. The 1994 Regulations provide that the applicable law shall be the law of the Member State of the commitment (meaning where the policyholder has his habitual residence), and also allows the parties to select the law of the Member State of which the policyholder is a national.

In that regard, I note the policy document at 29.1 states:

> "*The terms of this policy are to be interpreted in accordance with and are governed by the law of the Member State of the European Union or the European Economic Area in which the applicant for the policy is resident on the Contract Date unless we have agreed otherwise in writing or by endorsement to the policy signed by our authorised official. The country of residence shown in the application form for the policy should be conclusive proof of the residence of the applicant".*

I note from the copy of the application submitted in evidence that the Complainants' address is given as Cyprus and country of habitual residence is Cyprus. Nationality is given as British.

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It is clear from all of the above that the contract was concluded in Cyprus and the laws of Cyprus apply.

The Communication Complaint

I note that there was an obligation on the Provider to keep policyholders such as the Complainants informed by sending quarterly valuation statements showing the value of the portfolio. I further accept, however, that there was an obligation on the Complainants to appraise the Provider of any change of address.

This is clear from the relevant terms of the policy, section 24.2 of which states that:

> "*We can accept no responsibility for any failure by you to notify us of any change of address*."

The Complainants did not update the Provider with their new relevant address when they moved.

The email address provided by the Complainants is handwritten in two places on the relevant policy application form. I accept that the relevant address is written in such a way as to leave some doubt as to whether the relevant address contained an underscore or a dot at the relevant point. I further accept that the Provider read the relevant email address to contain an underscore. While this was an unfortunate error, I am not prepared to uphold a complaint on this basis. The Complainants failed to notify the Provider of their change of address. The Provider attempted to contact the Complainants when it received returned post both at their email address (which was noted incorrectly) and through their adviser on three occasions but no response was received.

I am of the view that Provider made reasonable efforts to contact both the Complainants and the financial adviser in 2013 but received no response.

The Additional Complaints

In relation to the additional matters raised by the Complainants in the course of investigation, I will make the following observations. The financial product that was sold to the Complainants in 2011 is an investment-based insurance product. Regulation at EU level in relation to such products has been strengthened in recent years (for example, by Regulation (EU) No 1286/2014 on key information documents for packaged retail and insurance-based investment products (PRIIPs)) but these provisions were not in force at the relevant time. I note that the Provider is authorised by the Central Bank of Ireland as a '*life insurance undertaking*' in respect of class III life insurance products (that is, contracts linked to investment funds). The insurance intermediary whom the Complainants dealt with was authorised at the relevant time by the Cypriot competent authority as an insurance adviser. While I understand that the Complainants are very frustrated by the poor service that they believe they received at the hands of the insurance adviser in question, the Provider against

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which this complaint is made cannot be held responsible for the actions of a third party, authorised insurance adviser.

Furthermore, I note that on the front page of the relevant application form for the policy in question, the Provider states that it "*only accepts business introduced by financial advisers. The financial adviser acts as an agent for the Applicant and is not an agent of*" the Provider. The policy brochure indicates that policyholders or other fund advisers can issue dealing instructions and that the policyholder should "*appoint a professional fund adviser to help*" design and monitor the portfolio. On **7 September 2012**, a fax was sent signed by the Complainants to the Provider informing it that they wished to transfer "*the brokerage*" of the investment to a new financial consultant.

On **19 September 2012**, the Provider wrote to the Complainants confirming that it had transferred servicing rights for the policy to the appointed intermediary. This was expressed by the Provider in terms of "*new financial adviser confirmation*". Dealing instructions thereafter were received by the Provider from the new adviser's email address but signed by the Complainants. It is difficult in such circumstances to see how the adviser in question could be anything other than the agent of the Complainants.

For the reasons set out above, I do not uphold this complaint.

Conclusion

My Decision pursuant to ***Section 60(1)*** of the ***Financial Services and Pensions Ombudsman Act 2017***, is that this complaint is rejected.

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

12 September 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.