



<u>Decision Ref:</u>	2019-0370
<u>Sector:</u>	Investment
<u>Product / Service:</u>	Shares/Equities Investment
<u>Conduct(s) complained of:</u>	Miscellaneous
<u>Outcome:</u>	Rejected

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

Background

The complaint is made by the sole trustee of a discretionary family trust which is referred to in this Decision, as the Complainant.

The Complainant invested €4,000,000 in a 5 year, fixed term deposit based investment product, commencing on the **26th October 2010** and maturing on **26th October 2015**. The product was structured so that a gross coupon of 7% would be available at each 'Year end' if a particular investment condition was met. This Condition was that the annual closing ('Final') price of each of 12 identified stocks, must be no less than 60% of the price on the start date. In the event that the Condition was not met, the interest would not be paid for that year, but the missed interest could be recouped in a subsequent year if the Condition was met in that subsequent year. No withdrawal was allowed before the end of the 5 year investment term.

The Complainant submits that in correspondence received from the Provider dated **17 November 2014**, the Complainant was advised that

'...as per the Final Prices at 27th October 2014 all stocks in the Stock Portfolio were above 60% of their respective Start Price and therefore the investment Condition has been satisfied for the fourth year of the Account and consequently a gross coupon of 7% has been earned in respect of the fourth year, that will be paid at maturity'.

In a letter dated the **11th of November 2015**, the Provider then notified the Complainant of an adjustment to the interest earned for the previous year ending the 17th October 2014. The Provider advised in that regard that, this adjustment having been made

'..by the third party data provider in May 2012 to the Start Price of [Company] had the effect of lowering the Start Price from the official Start Price of €19.225 to €18.68143. Comparing this adjusted price to the final price of [the Fund] on 27th of October 2014 of €11.26002, the performance of [the product] to 27 October 2014 is -39.73%'

Therefore no interest was earned for the 'year end' **27th October 2014**. In correspondence to the Provider on the **24th November 2015**, the Complainant requested that the Provider honour the 7% coupon for the year ending 27th November 2014, noting the following:

1. *By letter from your office dated in or around the 17th November 2014, [the Provider] confirmed that "a gross coupon of 7% has been earned in respect of the fourth year that will be paid at maturity", the fourth year being to the 27th October 2014.*
2. *At clause 5a of your terms and conditions it is stated "interest payable on the account will be determined at each year end."*
3. *Almost one year later, in or around 11th November 2015, your bank upon maturity alleged "no interest was earned" for the year ended 27th October 2014.*

The Complainant says that

'..if an error has occurred which caused [the Provider] to declare an annual coupon when it shouldn't have then we suggest that they may seek recourse against that third party. Our client's contract is with [the Provider] only.'

The Complainant's representative has set out the complaint in detail by way of letter dated the **10th of November 2016** to this office:

"1. On the 26th of October 2010 [the Complainant] invested €4,000,000 with [the Provider] in their "Lock-in Plus Account" account [number]. The investor is a discretionary family trust and [named company], of which I am secretary is the sole trustee of this trust.

2. When the investments were originally made [Accountancy firm] were the sole trustees but they subsequently resigned as trustee and were replaced by [named company].

3. On the 17th of November 2014, the [Complainant] received a letter from [the Provider], a copy of which is attached and is self-explanatory. The content of these letters are disputed by [the Provider].

4. Subsequently a year later on 11th November 2015 the [Complainant] received a letter from [the Provider] relative to the maturity of the five year investment maturing on 26th October 2015, a copy of which is attached. The content of this letter is not disputed by [the Provider].

5. Obviously our clients were shocked by the contents of [the Provider's] letter of 11th November 2015. On 24th November 2015 we sent a letter to [the Provider]

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disputing their position and seeking payment of annual coupon for the year ended 26th October 2015 as declared in writing by [the Provider] on 17th November 2014. A copy of this letter is also attached.”

The Complainant’s representative goes on to list the copy documents attached, then goes on to summarise the position:

“The amount of money now being denied to our client is by any reasonable person’s standards extremely substantial, at a loss of €280,000.

In addition our clients have had to engage and pay for legal and accounting advice to secure their legitimate payments. The correspondence from [the Provider] suggests that incorrect information may have been supplied to them by a third party which they now allege was [the third party/data provider]. Our client has been unable to satisfy itself as to the accuracy or legitimacy of this claim, nor is it their role to do so.

If an error has occurred which caused [the Provider] to declare an annual coupon when they shouldn’t have then we would suggest that they seek recourse against that third party.

Our client’s contract is with [the Provider] only. [the Provider] declared a coupon of 7% in writing for the year ended 26th October 2015. Our client is fully entitled to that payment and now seeks the Financial Services Ombudsman’s assistance in recouping all legal and financial costs incurred in this matter by our client. We further seek interest since 27th October 2015 on amounts incorrectly withheld from our client since that date by [the Provider].

Whilst our current complaint is simply and specifically stated above our clients reserve all rights to contend many other aspects of this [the Provider] contract (to include how many closing figures have been calculated) by separate legal remedies.”

The complaint is that the Provider has wrongfully denied the Complainant the 7% interest promised in the letter of 17 November 2014, in respect of the fourth year of the investment.

The Provider’s Case

The Provider contends that the adjustment of the stock price for a particular company, by the third party/data provider, was based on an incorrect interpretation of a dividend paid by that company which was described by the company as a ‘special dividend’. The Provider states when a special dividend is paid, it is standard market practice to adjust the historical price of the company’s share price, to reflect an exceptional payment.

The Madrid stock exchange determined that the substance of the ‘special dividend’ was not exceptional. Consequently the Madrid stock exchange did not adjust the historical price. The third party subsequently acknowledged its incorrect interpretation and deleted the adjustment to reflect the official price recorded on the Madrid stock exchange.

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The Provider acknowledges that contradictory information was provided in the letter of 17 November 2014, however it seeks to explain this by reference to an “*adjustment*” made by a “*third party data provider*” in May 2012 which had the effect of inaccurately lowering the start price of the stock in question, thereby giving rise to the inaccurate calculation that formed the basis of the letter of 17 November 2014.

The Provider points out that the adjustment “*has not been recognised by the relevant exchange*”, and it expressly relies on Condition 5(e) of the Terms and Conditions of the account which it insists entitled it to make “*an adjustment to the calculation of interest for 2014*”. The Provider notes that the total interest earned on the account over its 5-year term, was 21% (less tax), which was paid to the Complainant on 11 November 2015.

The Complaint for Adjudication

The complaint is that the Provider has wrongfully denied the Complainant the 7% interest promised in the letter of 17 November 2014, in respect of the fourth year of the investment.

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 15 October 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.

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It is useful to set out certain relevant terms and conditions from the investment documentation.

Terms and Conditions

The Provider relies on an 'Account Summary' document which is said to include within it, the terms and conditions of the account. The first section of this document is entitled 'Introduction and Summary Features' and includes the following:

Potential High Return

Investors will earn interest of 7% each year (referred to as a 'coupon') if the Final Price of all Stocks in the Portfolio at the Year End is at or above 60% of their Start Prices. The maximum potential return that may be earned is therefore 35% before tax (6.18% CAR) and 25.2% after tax (4.60% CAR).

Memory feature

If no interest is earned in respect of any one year but is earned in a subsequent year, any 'missed' coupon from previous year(s) will be recouped and paid at maturity.

The sixth section of this document is entitled 'Terms and Conditions' and includes the following in the 'Definitions' subsection:

1. Definitions

'Year End' means 26 October 2011, 26 October 2012, 28 October 2013, 27 October 2014 and 26 October 2015.

...

'Condition' means that the Final Price of each of the 12 Stocks at any Year End is at or above 60% of its Start Price.

'Start Price' means the official closing price of each Stock on the Start Date.

'Final Price' means the average of the official closing price of each Stock on a Year End and on each of the four preceding business days.

...

'Term' means the duration of the Account, which is 5 years commencing on 26 October 2010 ('the Start Date') and maturing on 26 October 2015 ('the Maturity Date').

The 5th subsection of the 'Terms and Conditions' section is entitled '**Interest**' and provides as follows:

5. Interest

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- (a) *Interest payable on the Account will be determined at each Year End. Such interest earned is referred to as a 'coupon' in this brochure and these Terms and Conditions.*
- (b) *If the Condition is satisfied at a Year End, a coupon of 7% will be earned in respect of the year to that date. Otherwise, no coupon will be earned in respect of that year.*
- (c) *If the Condition is not satisfied at a Year End but is satisfied at a subsequent year end, the missed coupon(s) from the previous year(s) will be recouped. The total of all coupons earned will be paid at maturity.*
- (d) *Interest earned on the Account will be dependent on fluctuations in financial markets that are outside of the Bank's control. Historical performance is no indication of future return.*
- (e) *In the event of a corporate or other action fundamentally affecting the availability or valuation of any Stock, the Bank will be entitled to substitute the Stock or to make any adjustments that in deems appropriate in the calculation of Interest applicable to the Account.*

The Provider informed the Complainant by way of letter dated the **14th of November 2014** that the coupon of 7% had been earned in respect of the year to **27th October 2014**. This was based on stock price data received from the third party/data provider in relation to the performance figure for each stock. The third party, which is a reputable financial market information service, had made a historical adjustment in **May 2012** to the start price of one of the stocks in question which had the effect of lowering the start price from the original price.

Comparing the adjusted price to the Final Price of the stock in question on the year end **27th October 2014** date the performance (- 39.73%) was equal to or above 60% of the 'Start Price'. It was then brought to the attention of the Provider that the adjustment made by the third party/data provider had not been recognised in the official list of the Madrid Stock Exchange and was therefore incorrect. The correct performance of the stock at year end **27th October 2014** (-41.43%) was not equal to or above 60% of the 'Start Price', and thus, no entitlement arose to a coupon for the year. The third party/data provider subsequently acknowledged the error and deleted the adjustment from its price file.

By letter dated the **30th of December 2011**, being the first annual statement to the Complainant, the Provider notified the Complainant that a gross coupon had been earned for first year. I note that in the footnote to the letter, it advised:

" Information relating to the performance of the underlying assets to which the structure is linked is provided only for indicative information purposes. Such information should not be taken as a guide to the actual terms on which the Account may be encashed (if early encashment is permitted) nor the level of interest that may ultimately be payable on maturity of the Account."

The Complainant seeks to rely on clause 5(a) of the Terms and Conditions whilst the Provider seeks to rely on clause 5(e), both of which are quoted above. These provisions are both relevant and, in my opinion, clearly demonstrate that in the normal course of events,

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the interest payable will be determined as each year end. The Provider however reserves the right to substitute or adjust as necessary if there is an action fundamentally affecting the availability or valuation of the stock. In this instance, a third party data provider, made available inaccurate information, which the Provider initially relied upon. The Provider upon realisation of the error, then rectified the situation to reflect the true and accurate value of the stock as per the Madrid Stock Exchange where the stock is listed, which the Provider was entitled to do. At no point was the adjusted historical price provided by the third party/data provider recognised by the Madrid Stock Exchange, the official stock exchange for the stock in question.

The Complainant contends that it has suffered loss, as a result of the Provider's original advice that a coupon had been earned for the fourth year of the investment. I don't accept this. The Complainant has earned the coupons which are prescribed within the terms and conditions and, in fact, the Complainant made a 21% return on the investment in question which was paid (less tax) to the Complainant on the **11th of November 2015**.

I am satisfied that the Condition for the earning of the coupon for year 4, was not met. In such circumstances, by reference to the terms of the account, the Complainant has no contractual entitlement to the additional 7% which it now seeks, in respect of the fourth year of the investment. Quite simply, the Complainant's investment does not qualify for this. On the contrary, Clause 5(e) of the Terms and Conditions of the account entitles the Provider, in the event of an "*action fundamentally affecting the ... valuation of any Stock*" to make "*any adjustments that in deems appropriate in the calculation of Interest applicable to the Account*". In the circumstances of this complaint, I am satisfied that the adjustment made by the Provider was both appropriate and reasonable.

That being the case, I must consider whether there are any other grounds (ie other than based on the terms and conditions of the investment) upon which the Provider might be compelled to pay out the interest, notwithstanding that the Condition was not met. I do not see that there are. The Provider made an error in the calculation of the annual closing position, as a result of incorrect information being posted by a reputable third party data provider. I am satisfied that the Provider has made available a reasonable explanation for the error and I am equally satisfied that it moved promptly to correct the position, once that error was realised.

The Complainant here has not been deprived of funds that it had already realised. Furthermore, the Complainant has not furnished any evidence of having suffered any loss by reference to the mistake, other than being deprived of the anticipated windfall. The Complainant has not, for example, provided any evidence of placing any reliance on the letter of 17 November 2014, which resulted in detriment to it upon the Provider correcting the position; consequently, I am satisfied that the Complainant's reference to "*promissory estoppel*" is, in fact, misconceived.

Whilst I have sympathy for the position of the Complainant, I do not see any grounds upon which it would be appropriate for this office to compel the Provider to pay over the disputed interest to the Complainant, whether by reference to the contract agreed between the parties or whether by reference to contract law or to common law. In light of the foregoing,

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and in the absence of evidence of wrongdoing by the Provider or conduct within the terms of **Section 60(2)** of the **Financial Services and Pensions Ombudsman Act 2017** that could ground a finding in favour of the Complainant, I am not in a position to uphold this complaint.

Conclusion

My Decision is that this complaint is rejected, pursuant to **Section 60(1)** 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

7 November 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.