



<u>Decision Ref:</u>	2019-0373
<u>Sector:</u>	Investment
<u>Product / Service:</u>	Investment
<u>Conduct(s) complained of:</u>	Failure to provide correct information
<u>Outcome:</u>	Rejected

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

Background

The complaint concerns the administration of a 5-year fixed-term investment.

The Complainant's Case

The complaint is made by the sole trustee of a discretionary family trust. The trust itself will be described as the Complainant. In **October 2010**, the Complainant invested €2,000,000 with the Provider in a 5-year fixed-term investment. The terms of the investment provided for an annual payment of 7% interest (described as a 'coupon') in the event that a certain '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 states that on **17 November 2014**, it received a letter from the Provider "*confirming a 7% coupon would be earned on maturity on the 25th of October 2015*" in respect of the fourth year of the investment (ending October 2014). Subsequently, the

Provider wrote on 11 November 2015 "*confirming that no interest had been earned up to 27th October 2014*".

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 Complainant seeks "*interest as notified @ 7% plus any costs*". The Complainant notes the value of the 7% interest at €140,000.00 and also makes reference to "*legal and accounting services*" which it has been compelled to pay for "*to secure [its] legitimate payments*". The Complainant also seeks interest on the "*amounts incorrectly withheld*".

The Provider's Case

The Provider maintains that the condition was not in fact met, in respect of the 4th year of the investment in circumstances where one of the 12 stocks closed at 58.57% of its price, as compared to the start date. The Provider states that it had previously confirmed the correct start price of the stock in question to the Complainant and that this information is, in any event, publicly available information that can be independently verified.

The Provider acknowledges that contradictory information was provided in the letter of 17 November 2014. It seeks however 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 insists that the adjustment "*has not been recognised by the relevant exchange*". The Provider 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% or €420,000.00.

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

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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.

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

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'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.

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'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

- (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.

Analysis

There is very limited factual dispute between the parties in this complaint. The Provider accepts that it sent the letter of 17 November 2014 advising that the 7% coupon would be payable in respect of the fourth year of the investment. The Provider says that this letter was based on inaccurate information supplied to it by a third party (a screenshot of an email from the third party appears to confirm the adjustment by the third party). It says that the

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correct position was in fact that the 7% coupon would **not** be payable in respect of the fourth year of the investment, due to the failure to meet the Condition for that year.

The Complainant does not appear to dispute that there was a failure to meet the Condition in respect of the fourth year of the investment; the Complainant does not take issue with the stated actual share 'start price' of the stock in question. Indeed, the 'start price' had been communicated in a letter of 8 November 2010.

Rather, the Complainant argues that the Provider should be bound by the content of its letter of 17 November 2014 and that, insofar as any third party may be to blame for the inaccurate content of that letter, the Complainant should seek recourse from that third party.

In its letter of **11 November 2015**, the Provider referred to an unnamed third party data provider's "*adjustment*" to the share price as the source of the error in calculations, before continuing in the following terms:

We regret that the price information previously relied upon was incorrect and indicated a potential higher overall return on the Account than is in fact the case.

We wish to apologies for the delay in resolving this and to confirm that the value date for the proceeds of your investment has been back-dated to the due payment date of 2 November 2015.

The Provider was very slow to provide any sort of further detailed explanation for the error. Following an exchange of correspondence, and following two explicit requests for the information, the Provider finally furnished this explanation in correspondence of 16 September 2016:

The adjustment made to the [Company name] stock price by [the third party] was based on an incorrect interpretation of a dividend paid by [Company name] that was described by the company as a 'special' dividend. 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. However, the Madrid Stock Exchange determined that the substance of the 'special' dividend in this case was not exceptional but formed part of the regular cash dividend. Consequently, no adjustment was made to the historical price by the Madrid Stock Exchange. [The third party] subsequently acknowledged its incorrect interpretation and deleted the adjustment to reflect the official price recorded on the Madrid Stock Exchange.

At the outset, I must confirm that I am satisfied that the Condition for the earning of the coupon for year 4, was not met. In such circumstances, the Complainant has no contractual right to the 7% in respect of the fourth year of the investment, by reference to the terms of the account. 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*

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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. This error was 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, upon realising the error.

The Complainant 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, 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

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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.

