



<u>Decision Ref:</u>	2021-0453
<u>Sector:</u>	Insurance
<u>Product / Service:</u>	Car
<u>Conduct(s) complained of:</u>	Rejection of claim - non-disclosure
<u>Outcome:</u>	Partially upheld

LEGALLY BINDING DECISION OF THE FINANCIAL SERVICES AND PENSIONS OMBUDSMAN

This complaint concerns the decision of the Provider in **October 2018** to void the Complainant's motor insurance policy, on the basis that the Complainant did not disclose a previous claim, at the time when the policy was incepted.

The policy was incepted through a broker, but this complaint concerns only the conduct of the Provider, as the insurer. The Complainant has not sought to maintain a complaint against the broker.

The Complainant's Case

The Complainant says that in **August 2018**, he purchased the policy through a Broker, at which time he provided all details requested of him by the Broker. The Complainant says that prior to submitting the proposal for motor insurance to the Provider, he discussed all relevant matters with the Broker, including that fact that he had previously been a named driver on a third party's motor insurance policy, in the period from **4 November 2015**, and also that there was an open claim on that policy since **2016**.

The Complainant says that when he received the relevant proposal documentation from his Broker, he understood that details of that open claim had been included. The Complainant says that it was on that basis that he signed the documentation.

The Complainant says that on **15 October 2018**, he received a letter from the Provider advising him that his policy was now void. He says that the Broker later requested further details about the 2016 claim, which he made available.

The Complainant says that he asked the Broker whether he was covered to drive his vehicle, as he had received the insurance disc from the Provider and he contends that the Broker responded that he was covered to drive the vehicle until **14 October 2018**, as a letter of cancellation had not been received from the Provider at that time. The Complainant contends that there must have been some miscommunication.

The Complainant says that according to the Provider's letter of **15 October 2018**, the policy was to be treated as if it had not existed at all. The Complainant contends that he disclosed all details requested of him at the time when he signed and returned all insurance documentation to the Broker, so that the policy could be incepted at that time.

The Provider's Case

The Provider points out that at the time of policy inception, in **August 2018**, it permitted a 20% introductory No Claims Bonus, on the basis that the Complainant had been claims free as a named driver.

The Provider says that subsequently, on **12 September 2018**, it checked details available on Insurance Link, and noted that there was an active claim regarding the Complainant arising from an accident on **24 July 2016**.

The Provider sought details of the active claim from the broker within a period of 21 days, and although the Provider was given to believe that the details would be forthcoming, it received no response.

The Provider says that as a result, on **4 October 2018**, it issued a letter to the broker, advising that cancellation would be invoked. A letter to the Complainant advised that cover would cease at **midnight on 14 October 2018**.

The Provider sent a letter on **15 October 2018**, to the Complainant saying:

"Because of your failure to disclose these facts your policy is void from the date that it started. This means that all legal rights that you would have under your policy have ended and that all claims made to date and into the future against your policy will be treated as if the policy had not existed. You are required to pay back to us any amounts we have already paid or may have to pay".

In its Final Response letter dated **2 April 2019**, the Provider said that:

"We have reviewed the details of your case in relation to disclosure of a claim. Our investigations have concluded that the claim was not disclosed on the statement of fact submitted for this policy. We have also contacted the Broker office where the policy was taken out and have received confirmation that a claim was not disclosed.

Unfortunately, this has resulted in cancellation of your policy from inception, due to non-disclosure of material facts."

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The Complaint for Adjudication

The complaint is that in **October 2018**, the Provider wrongfully voided the Complainant's motor insurance policy.

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 **2 November 2021**, 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.

The Provider has referred to the Statement of Fact, signed by the Complainant, which contains the following warning:

"Accuracy and honesty warning:

You have applied for a contract of insurance between you and [the Provider]. The information you have given us is the basis of this contract. Please read this information carefully and make sure it is correct. If the information is incorrect, [the Provider] may declare the contract void, cancel your policy or refuse to pay any claim in addition to any other rights [the Provider] may have under the policy. As a result you may also find it difficult to arrange this type of insurance in the future.

If you are in doubt whether certain facts are important and should be notified to [the Provider], please ask us or your Insurance broker (if any). Protecting personal information is very important. Please read our Data Protection notice & Privacy statement which outlines how we use, share and protect your information.”

[My underlining for emphasis]

Furthermore, within the Statement of Fact, I note the following declaration:

“12. Declaration

This Statement of Fact contains information that you have given, read it carefully and make sure that it is correct. If there are any errors or you consider there is some additional detail we should be aware of now or over the term of your policy please contact your broker immediately. Insurers may share information to prevent fraud.

I declare that the particulars in this proposal are true to the best of my knowledge and belief. I also declare that if anything on this form was written by another person, He/She acted as my Agent for this purpose. I agree that this proposal and declaration shall be the basis of contract between me and [the Provider].”

[My underlining for emphasis]

The evidence made available to this Office includes the Broker’s terms of business, although these date from **2019**, the year after the events giving rise to this complaint.

These 2019 terms of business make clear at page 5:

“DUTY OF DISCLOSURE TO INSURERS AND DUTY OF UTMOST GOOD FAITH

It is your responsibility to provide complete and accurate information to Insurers when you take out your Insurance Policy, throughout the life of that policy and when you renew your insurance. It is important that you ensure all statements made on proposal forms, statement of facts, claim forms and other documents are to your knowledge accurate, this includes any information provided to any member of staff in person or over the telephone. Failure or delays in disclosing any material information to your Insurers could invalidate your insurance cover and could mean that all [or] part of a claim may not be paid and could have serious consequences going forward when procuring insurance protection in the future. The misrepresentation of a material fact voids a policy.”

It is useful to consider the chronology of events leading up to this complaint.

Chronology

- **21 August 2018:** The Complainant incepted a motor insurance policy with the Provider through the Broker. The Broker sent the Complainant a letter seeking outstanding documentation to complete the purchase of the policy, and requesting the Complainant to *“read through / complete and sign the attached Proposal Form, Fact Find and terms of business”*, and to sign where highlighted. This letter asked the Complainant to return a number of completed documents to the broker, including the completed and signed proposal form, and a *“letter of driving experience showing 2 years claim free driving”*.
- **28 August 2018:** A letter from a different insurer was issued addressed to a different broker, advising of the Complainant’s driving experience and referring to an open claim from July 2016.
- **12 September 2018:** The Provider discovered an active claim against the Complainant and wrote to the Broker asking for information in relation to the claim.
- **14 September 2018:** The Broker wrote to the Provider and said that it would get the information and would send it on, once received. The Broker telephoned the Provider regarding the non-disclosure, initially saying that the Complainant had not mentioned the claim at the time of the policy inception.

The Broker then told the Provider’s agent that the Complainant did in fact mention the claim at the inception of the policy, but he had pointed out that the accident was not his fault. The broker said that the Complainant didn’t mention there was still money outstanding on that claim.

- **27 September 2018:** The previous insurer (for the policy in respect of which the Complainant had been a named driver) wrote to the Broker with an update in relation to the claim against the Complainant.
- **4 October 2018:** The Provider wrote to the Broker and advised that the Complainant’s cover would be cancelled, as it had received no response. The Provider also wrote to the Complainant that day and advised that his cover would cease from midnight on 14 October 2018.
- **9 October 2018:** The Broker told the Provider, that it would send on the requested documents.
- **15 October 2018:** The Provider received a letter from the previous insurer advising that there was an active claim against the Complainant, and it wrote to the Complainant voiding his policy on the basis of a failure to disclose information, at the time of his insurance proposal.

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- **16 October 2018:** The Complainant emailed a letter of complaint to the Provider.
- **25 October 2018:** The Complainant's policy was cancelled.
- **19 November 2018:** The Provider processed a refund of the premium the Complainant had paid.
- **2 April 2019:** The Provider issued its Final Response Letter to the Complainant.

In the Complainant's formal letter of complaint to the Provider, dated **16 October 2018**, he stated that:

"At the inception of the policy with [the Broker], I gave all details asked of me and during this conversation my driving experience of 2 years on [X's] Policy was determined as the best way to keep insurance costs down and I was asked to put [X's] name down for this purpose. I stated then that there was an open claim on her policy to which [X] was a party to, being on speaker phone at the time. The Broker said it (open claim) should not be a problem. Since this conversation, I have spoken to the broker, [broker name], and he now claims not to have discussed this...

....

It is not my intention to cast blame on [the broker] or the Brokerage but I feel there must have been a miscommunication somewhere during these conversations to which no real benefit would be accrued to myself or to [X]. As I have already stated there was never intentions of [X] driving the van anyway".

I note in the Provider's Final Response Letter dated **2 April 2019**, the Provider stated that:

"We have reviewed the details of your case in relation to disclosure of a claim. Our investigations have concluded that the claim was not disclosed on the statement of fact submitted for this policy. We have also contacted the Broker office where the policy was taken out and have received confirmation that a claim was not disclosed.

Unfortunately, this has resulted in cancellation of your policy from inception due to non-disclosure of material facts."

Furthermore, in the Provider's submissions to this Office, the Provider stated that:

*"The broker has no record of the claim being disclosed to them at inception of the policy. The active claim from 2016 was not disclosed on the statement of fact signed by the Complainant which contained an **"Accuracy and Honesty Warning"** which states*

"Please read this information carefully and make sure it is correct. If this information is incorrect, [the Provider] may declare the contract void, cancel your policy...If you are in any doubt whether certain facts are important and

should be notified to [the Provider], please ask us or your insurance broker (if any)".

I accept the Complainant's submission in his letter of 16 October 2018, that in August 2018, he disclosed the previous claim to his Broker at the inception of the policy. I note the following during a telephone call between the Provider and the Broker dated **14 September 2018**:

- [The Broker] advises

"I spoke with [the Complainant], there was an incident, a 3rd party incident that he didn't mention at the time but it wasn't [identity redacted] fault. But when I spoke with him this morning he said that the money from [the previous insurer] was paid, but they were in the process of obtaining that back from the 3rd Party because they were at fault. He didn't explain that at time of inception, so I've asked him to go and get paperwork from [the previous insurer] to say exactly what happened, to say there was a 3rd party incident and that it was an ongoing claim due to no fault of her own. I think it is with the solicitor now. I will get the paperwork and send it into you".

- [The Provider's agent]

"Yes do that. But I know you're saying it wasn't their fault but it's still a claim on that policy that wasn't declared. Get it all in writing and well get UW to have a look at it."

- [The Broker] adds

"You see at inception he did mention it but he said it wasn't her fault but he didn't actually mention the fact the money was still outstanding today. It was money taken from her policy to sort it out in the meantime. It is still a claim, which I did explain."

- [The Provider's agent]

"which you have to declare"

[Underlining added for emphasis]

It appears from this evidence that the Complainant did indeed disclose to his Broker that there had been a previous claim.

I note the following within the Statement of Fact:

“Accuracy and honesty warning:

*You have applied for a contract of insurance between you and [the Provider]. The information you have given us is the basis of this contract. Please read this information carefully and make sure it is correct. If the information is incorrect, [the Provider] may declare the contract void, cancel your policy or refuse to pay any claim in addition to any other rights [the Provider] may have under the policy. As a result you may also find it difficult to arrange this type of insurance in the future. **If you are in doubt whether certain facts are important and should be notified to [the Provider], please ask us or your Insurance broker (if any).** Protecting personal information is very important. Please read our Data Protection notice & Privacy statement which outlines how we use, share and protect your information”.*

I am satisfied that in August 2018, the Complainant had notified the Broker of the previous claim, as discussed during the telephone call on **14 September 2018**, when the Broker told the Provider’s agent:

“You see at inception he did mention it but he said it wasn’t her fault but he didn’t actually mention the fact the money was still outstanding today. It was money taken from her policy to sort it out in the meantime. It is still a claim, which I did explain”

I also note the following term within the Statement of Fact:

“12. Declaration

This Statement of Fact contains information that you have given, read it carefully and make sure that it is correct. If there are any errors or you consider there is some additional detail we should be aware of now or over the term of your policy please contact your broker immediately. Insurers may share information to prevent fraud.

I declare that the particulars in this proposal are true to the best of my knowledge and belief. I also declare that if anything on this form was written by another person, He/She acted as my Agent for this purpose. I agree that this proposal and declaration shall be the basis of contract between me and [the Provider]”.

I am not satisfied that the Complainant or his broker disclosed the previous claim on the Statement of Fact, which was sent to the Complainant by the broker on 21 August 2018, in a covering letter advising that:

“Please read through / complete and sign the attached Proposal Form, Fact Find & Terms of Business (Please sign where highlighted).”

It is clear that the Statement of Fact in question did not disclose that earlier claim and was therefore not accurate in its contents.

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I accept that in cancelling the Complainant's policy due to his non-disclosure of a previous claim, the Provider acted in accordance with the terms and conditions of his motor insurance policy. In addition, I note from a call between the Provider and the Broker on **14 September 2018**, that the Broker informed the Provider's agent that the Complainant had disclosed certain details of the previous claim to the Broker at the inception of the policy, but a misunderstanding appears to have arisen regarding outstanding monies, as a result of which it seems, the Provider was not told of this claim.

Whatever the explanation for that misunderstanding, it is clear that the previous claim was not disclosed to the Provider when the proposal for cover was made. The signed Statement of Fact received by the Provider did not disclose any previous claims notwithstanding the "*Accuracy and honestly warning*" and the declaration that the particulars were true to the best of the Complainant's knowledge and belief.

In the course of the adjudication of this complaint, I considered it appropriate on 18 January 2021, to write to the Provider, noting that the Statement of Fact appeared to comprise 4 separate pages (which were not numbered). I pointed out that it was only the first page entitled "***Van Insurance Statement Of Fact***" which contained a signature on the face of a stamp on the document which noted:

"I HEREBY DECLARE THAT ALL DETAILS ENTERED ON THIS PROPOSAL ON MY BEHALF ARE TRUE AND ACCURATE. SIGNED: [the Complainant]"

Accordingly, I asked the Provider to explain the basis upon which it believed that the contents of the other pages had been verified by the Complainant, given that the signature in question, for reasons unknown, appeared on the face of one page only, under the section headed "4. VEHICLE USE".

I also referred to the Provider's Final Response Letter dated **2 April 2019**, which had advised that the Provider had received confirmation from the broker which incepted the policy, that a claim was not disclosed by the Complainant, at the time of policy inception.

I asked the Provider to review the audio evidence with particular reference to the telephone call between the Provider and the broker on 14 September 2018, and I sought confirmation as to whether the Provider agreed, that although the broker initially told the Provider that the Complainant had not mentioned any claim at the time of policy inception, the Broker subsequently advised the Provider that the Complainant had in fact mentioned the claim in question, but had explained that the accident had not been his fault, without however mentioning that the claim remained open and active, or that there was money outstanding. In that context, I asked the Provider to confirm whether the contents of its letter dated 2 April 2019 had in fact been accurate.

When the Provider responded on **9 February 2021**, it advised that it had considered the points raised and had further engaged with the Broker. As a result, The Provider confirmed that it now accepted that there had been a mention of the claim to the Broker when the policy was incepted. As a result, the Provider proposed to note its records that this was not a case of “non-disclosure”. In addition, it offered to pay redress of €1,000 to the Complainant, as a gesture of goodwill, and advised that it was hopeful that this would resolve the matter and would be acceptable to the Complainant and to this Office.

The Complainant declined this settlement proposal referring to the fact that the vehicle had lain idle since late 2019, and the Provider’s offer would not even cover the depreciation on the vehicle, let alone the *“stress and anxiety and loss of freedom to travel and visit relatives in this time other than public transport, made more difficult in recent times.”* Although the Provider increased its offer to a figure of €1,500, the Complainant did not accept that settlement proposal.

In the course of this complaint investigation and in the context of further exchange between the parties, the Complainant supplied this Office with a signed copy of the Broker’s Terms of Business, though these terms appear to have been signed on 20 September 2018, approximately a month after the policy came into being. The Complainant advised that the Broker made clear within its Terms of Business that it holds Letters of Appointment from the insurance companies *“they work for and are paid by”*. The Complainant submitted in July 2021 that *“this is a contract between a company and people they employ meaning that [the Broker] are employed by [the Provider] while they conduct business for them, tied or not, that is how I view it, thank you.”*

The Provider has since advised this Office that the Broker was not and is not tied to the Provider for motor insurance policies. It has pointed out that the Broker in question has an agency with [the Provider], as it has with various other insurers. I note indeed from the Terms of Business supplied by the Complainant that the Broker appears to be a multi-agency intermediary with appointments from more than 50 different entities, for life assurance and non-life insurance cover. I do not accept in those circumstances, as the Complainant contends, that the Broker was acting on the behalf of the Provider in its interactions with the Complainant at the time when he proposed for cover with the Provider. Rather, I am satisfied that the Broker was acting on behalf of the Complainant in transmitting the Complainant’s proposal for cover to the Provider.

Motor insurance contracts, like all insurance contracts, are contracts of utmost good faith. The failure to disclose relevant information permits the Insurer to void the policy from the outset and to refuse or cancel cover. Once non-disclosure takes place, whether innocent, deliberate or otherwise, the legal effect of that non-disclosure can operate harshly, and it entitles an Insurer to, amongst other things, void the cover, as the Provider did in this instance. As the Provider was unaware of the Complainant’s previous claims history when it agreed to incept the Complainant’s policy, it is clear that the policy came into being on the basis of a false premise, and I am satisfied therefore that the Provider was entitled to maintain its position that the policy cover could not stand.

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In coming to that conclusion, I am conscious that the Courts have long considered the issues surrounding non-disclosure of material facts. In this regard, in *Aro Road and Land Vehicles Limited v. Insurance Corporation of Ireland Limited [1986] I.R. 403*, the Court determined that representations made in the course of an insurance proposal form, should be construed objectively, with Henchy J stating that a person “*must answer to the best of his knowledge any question put to him in a proposal form*”.

In *Coleman v. New Ireland Assurance plc t/a Bank of Ireland Life [2009] IEHC 273*, Clarke J held that a party could only be subject to having his or her policy of insurance voided because of the manner in which they answer a proposal form if he or... she failed to answer “*such questions to the best of the party’s ability and truthfully*”.

I am also cognisant of the views of the High Court in *Earls v. The Financial Services Ombudsman [2014/506 MCA]*, when it indicated, “*The duty arising for an insured in this regard is to exercise a genuine effort to achieve accuracy using all reasonably available sources.*” In examining the basis on which this policy came into being, and applying the terms and conditions of the contractual arrangement between the parties, to this complaint, I cannot reasonably conclude that the Complainant, through the Broker acting on his behalf, accurately answered the question put to him on the Statement of Fact document regarding “*details of any previous and current claims*” to the “*best of [his] knowledge and belief*”. Whatever misunderstanding occurred between the Complainant and the Broker, I am satisfied that the proposal for motor insurance cover came into being, on the basis of incorrect facts and this denied the Provider the opportunity to assess the actual risk attaching to the Complainant’s application for cover, and whether or not to provide cover in such circumstances and, in that event, on what terms.

Accordingly, having considered the matter, I am satisfied that the Provider’s conduct in refusing to admit the claim was reasonable, based upon the evidence available, details of which are outlined above.

Although the Provider voided the policy in October 2018, I note that in the context of additional queries raised with the Provider in January 2021, it confirmed that because it accepted that there was in fact mention of the claim to the Broker at the time of the proposal, it was willing, in ease of the Complainant’s position, to note its records that this was not a case of “*non-disclosure*” and instead to record a voluntary cancellation of the policy, in addition to making a redress payment of €1,000 to the Complainant as a gesture of goodwill.

In a submission of 16 February 2021, the Complainant advised that the offer was not acceptable to him as it would not “*even cover the depreciation of the vehicle lying idle for 2 years 3 months - €2,000 approx., I have also endured stress and anxiety and loss of freedom to travel or visit relatives in this time other than public transport, made more difficult in recent times. I am at least happy they have admitted that the claim was notified at inception to their agent, even though this information was unavailable to them at all times, I do not accept their offer is adequate to cover my loss.*”

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I note that, subsequently, the Provider advised that it would increase its compensatory payment proposed to resolve the complaint to the sum of €1,500, taking account of the Complainant's circumstances. This improved offer was also declined by the Complainant.

I am satisfied, for the reasons outlined above that any failure on the part of the Broker to transmit accurate information to the Provider was an error made on the Complainant's behalf as the Broker was acting for the Complainant. The Broker was not employed by the Provider nor was it acting on the Provider's behalf.

In those circumstances, I take the view that the Provider's offer to amend its records to note the termination of the policy as a voluntary cancellation, as distinct from the policy being voided for non-disclosure of material facts, is a very reasonable approach for the Provider to take and is appropriate in the circumstances, albeit that this offer comes somewhat late in the day. Such steps would of course be of considerable benefit to the Complainant who will otherwise be likely to be required into the future, to always disclose that he has had a policy of insurance voided, when proposing for cover, irrespective of the nature of the insurance policy being sought.

It is disappointing that the Provider's original review of the situation in the context of responding to the complaint, did not include an adequate consideration of the audio evidence available which casts significant light on the issue which had arisen. It seems likely that if the Provider had noted the content of that audio evidence at an earlier stage, the proposal which it subsequently put, might have been made available to the Complainant at an earlier stage, and might indeed have avoided the making of this complaint to the FSPO.

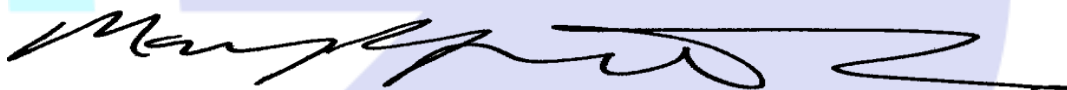
In all of the circumstances therefore, I consider it appropriate to partially uphold the complaint, and to direct the Provider to amend its records to note that the Complainant's policy was terminated on the basis of a voluntary cancellation.

I also consider it appropriate to direct the Provider to make a compensatory payment to the Complainant in the sum of €1,000, in order to conclude. Whilst the Provider could have more adequately investigated the circumstances giving rise to this complaint, I am satisfied that the Complainant himself bears a significant degree of responsibility for the manner in which he communicated his details to the Provider (via his Broker) as a result of which the policy of insurance came into being on the basis of incorrect information.

Conclusion

- My Decision is that this complaint is partially upheld, pursuant to **Section 60(1)** of the **Financial Services and Pensions Ombudsman Act 2017** on the grounds prescribed at **section 60(2)(f) & (g)**
- Pursuant to **Section 60(4) and Section 60 (6)** of the **Financial Services and Pensions Ombudsman Act 2017**, I direct the rectify the conduct complained of by amending its records to note that the Complainant's policy was terminated on the basis of a voluntary cancellation, and in addition I direct the Respondent Provider to make a compensatory payment to the Complainant in the sum of **€1,000** 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.



MARYROSE MCGOVERN
DEPUTY FINANCIAL SERVICES AND PENSIONS OMBUDSMAN

29 November 2021

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.