



<u>Decision Ref:</u>	2021-0473
<u>Sector:</u>	Investment
<u>Product / Service:</u>	Bonds
<u>Conduct(s) complained of:</u>	Failure to provide correct information Failure to process instructions in a timely manner
<u>Outcome:</u>	Partially upheld

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

This complaint concerns the Complainant's instruction to transfer funds to a specific investment fund. The Complainant is being assisted in the making of this complaint by a financial advisor ("the Complainant's financial advisor").

The Complainant's Case

The Complainant submits that he instructed the Provider in respect of a fund switch on **22 April 2020** at 10.20am. He states that the Provider processed the fund switch at 10.05am on **23 April 2020**.

The Complainant submits that the deadline / cut off time for the fund switch was 10.00am. He states that if the Provider had processed it before 10.00am the purchase would have been at the price of "10.35". He states that the Provider processed it after the cut off and that the price was "10.47". He contends that the Provider should have known the cut off was 10.00am and ensured that it was processed before that time. The Complainant submits that the Provider's delay in processing the fund switch resulted in him paying a higher fund price.

The Complainant states that he also received an email in 2015 from the Provider which, he says, had confirmed that if the Provider received a *“fund switch before 12.00 [it] will process it by 5.30 on the day”* and he states that the Provider failed in this regard.

The Complainant’s financial advisor states the Complainant’s understanding in this regard, as his email to the Provider on **1 May 2020** states *“He wants [the Provider] to guarantee in future to adhere to the agreed timescale, which is to always execute any fund switch instruction received before 12.00 on the same day”*.

The Complainant’s financial advisor received the Provider’s Final Response Letter by email on **15 May 2020**.

The Provider's Case

In its Final Response Letter email of **15 May 2020**, the Provider states that its understanding of the complaint is that the Complainant is unhappy that a switch request he sent in before 12 noon was not processed in accordance with the Provider’s procedures; that the Complainant is disappointed as he feels that his instructions were not dealt with in a timely manner because the Provider’s trading teams are busy and this cost him money; and, that the Complainant requests that the purchase price be backdated to the date before (that is, **23 April 2020**).

The Provider states that its records show it received a switch instruction on **22 April 2020** at 10.20am for *“50 of Cash”* to be invested in the fund. It states the request was entered in its systems at 13.41 that same day. It states that the trade request was sent to its custodian bank at 10.05am on **23 April 2020**. It states that the cut off for the fund is 10.00am each working day and that the trade was completed by its custodian and fund manager with prices of **24 April 2020**, that is, by the next available cut off of 10.00am.

The Provider asserts that it is satisfied that it processed the Complainant’s trade request within its current processing standard timescales.

It states that the date and time the request was received determines the two day timescale to place the trade. It states that its timescale for dealing with switches is as follows:

“If a trade request is received before 12:00 noon, this is considered to be “Day 1”, the trade with then be completed by the next available cut-off (which would be 12:00 noon the following day) at the latest”.

The Provider contends that the Complainant's instruction was received on Day 1 (before 12 noon on **22 April 2020**) and therefore placed by 12 noon on **23 April 2020**.

The Provider submits that as it could not find any errors or delays on its part it is not in a position to backdate the trade to **23 April 2020**.

The Complaint for Adjudication

The Complainant's complaint is that the Provider failed to execute his trade instructions, in respect of a fund switch, correctly/effectively and/or in a timely manner and that this resulted in the trades being completed/purchased at a higher price.

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 14 September 2021, outlining my preliminary determination 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.

/Cont'd...

Following the issue of my Preliminary Decision, the Complainant's representative made a submission by email. A copy of the Complainant's representative's email was transmitted to the Provider for its consideration.

The Provider has not made any further submission.

Having considered the Complainant's representative's email and all submissions and evidence furnished by both parties to this complaint, I set out below my final determination.

The Complainant, through his financial advisor, invested in a bond with the Provider. The bond is a life assurance arrangement which is set up with a single initial investment. The bond permits investment into external funds and deposits which have been approved by the Provider. The Complainant invested in the bond, which commenced on **7 November 2001** with a single premium investment of USD\$295,153.30.

During the sale process for the bond, the Provider contends that the Complainant (and/or his financial advisor) would have received, amongst other things, documents entitled *Contract Conditions Booklet*; and [Provider's] *Service Charter*. This is not contested.

Although the policy documents state that they will be governed by the laws of England, both the Complainant and the Provider have consented to this complaint being assessed by this office in accordance with the laws of Ireland.

The *Contract Conditions Booklet* defines "custodian" as follows:

"custodian" or nominee means the organisation in whose name all assets in the Bond Fund may be held and (where appropriate) registered on our behalf. All dealings must be made in our name) or the custodian or nominee';

and contains the following terms regarding "Dealings":

"Dealings will be effected following receipt of investment recommendations which must be in writing (fax will be acceptable).

[...]

We will do our best to ensure that any dealing is at the best possible price for the Bond Fund but we are not liable in any way where it transpires that the deal could have been effected at a better price."

/Cont'd...

In the transaction at issue, the custodian is a bank that is not a party to the complaint.

It is of note that, although this complaint is essentially that the Provider effected a transaction too slowly, in **February 2020** the Complainant raised an issue with the Provider to the effect that it had processed a transaction too quickly. In that instance, two funds were involved which had different cut-off times (one at 10:00am and one at 12 noon). The instruction was received by the Provider at 9.42am on **28 February 2020**, the Provider booked the trade with the custodian at 11:30am, and while it was too late for that day's price in one fund, it was in time for that day's price in the other. The Complainant took issue with the fact that if the following day's price was applied to the purchase in both funds, he would have received a better pricing.

The Provider, in its response to that issue, advised the Complainant that its current (**2 April 2020**) processing timescales for executing trades were as follows:

“Complete and unambiguous trading instructions received before 12:00 noon in our Dublin Administration office will be placed by the next available fund settle CIS deal cut off, after 12:00 noon on the day following receipt”

However, the Provider continued:

“This is the timescale we follow, however as you are aware, instructions can be executed quicker than this depending on volumes of trades received in our office.”

The Provider also cited the contract terms set out above which state that it will not be liable in any way where it transpires that the deal could have been offered at a better price.

In **2015** the Complainant raised an issue about what he considered to be a delay in effecting a trading instruction. On that occasion, he was informed that *“If we receive a fax instruction prior to 12pm then this instruction will be completed before 5:30pm on the same day”*.

The Provider subsequently (by email on **23 January 2015**) stated that this should be taken to mean that it would have the instruction to the custodian by 5.30pm and the custodian would put it forward for the next dealing day (the following day).

The timeline for when instructions were received and processed (and the unit price of the fund into which the Complainant wished to invest) are not in dispute and is set out below.

On **22 April 2020** at 10.03am the Complainant emailed a fund switch to the Provider's trading team. The Complainant wished to sell 50% of the value held in "**Fund A**" and use 100% of the proceeds of that sale to buy units in "**Fund B**".

The Provider's trading team reviewed the instructions and processed the trade at 1.41pm that same day.

On **23 April 2020** at 10.04am the trade was approved by the Provider's supervisor. The Provider states that the custodian received the trade instruction at 10.05am and approved it at 10.08am (after the custodian's cut-off time of 10.00am to effect the purchase that day). Accordingly, the units in Fund B were purchased using the price applicable for the following day – **24 April 2020**.

The sale of 50% of the value held in Fund A yielded GBP£202,719.02.

On **23 April 2020** the price of a BGF share was GBP£10.35. If the funds from Fund A had been used to purchase units in Fund B on this date, 19,586.3787 units would have been purchased.

On **24 April 2020** the price of a BGF share was GBP£10.47. 19,361.893 units were purchased at this price – 224.4857 units fewer than the Fund A proceeds would have purchased the previous day.

Analysis

224.4857 units at €10.35 per unit is a cash value of €2,323.43. The Complainant would not be entitled to contend for a 23 April 2020 share price for the disputed transaction, but a different date's share price for the calculation of his loss. Accordingly, I am satisfied that the maximum loss that could be attributable to the Provider's conduct, were I to find its conduct had resulted in an unreasonable delay, is **€2,323.43**.

The "*Service Charter*" document is explicitly marked "*For Advisor use only – not approved for use with clients*". I infer from this that this document would, in the normal course, be furnished to a client's financial advisor in order that the advisor can explain product features to their client, as necessary.

/Cont'd...

It contains "*Service Standards*" which refer to instructions for various transactions that are received "*by 12 noon*" as being "*placed within one working day of receipt*".

It is unclear from this document whether "*one working day*" means within 24 hours (although that is specified for an unrelated transaction type) or by close of business (5:00pm) the following day.

In its formal response to this office and with reference to the transaction at issue in this complaint, the Provider consistently refers to a "*two-day*" service level agreement (SLA), whereby it submits that any trades received before 12 noon on day one will be sent to the custodian "*by 12 noon on Day 2*".

This deadline, as proffered by the Provider, is not entirely consistent with a Service Standard which professes to effect an instruction "*within one working day*" – as this could, depending on how the Service Standard is interpreted, mean that an instruction received at 10.20am on day 1 should be effected before either 10.20am on day 2 or 5:00pm on day 2.

On a plain reading of the Service Standards, it is not clear what the purported deadline is for effecting instructions that have been received. The instruction is considered effected once it has been passed to, in the context of this transaction, the custodian.

The Provider also notes that, apart entirely from its own Service Standards, a custodian will have its own cut-off times for trading. It also advised the Complainant's financial advisor (by email dated **6 May 2020**) that its SLAs only "*act as a guide as to when we will action a trade request, they do not in any way guarantee that a sale or purchase will receive that day's price*".

It is clear that transactions of this nature are complicated by the involvement of a custodian which has its own cut-off deadlines that may not coincide with the Provider's purported deadlines. In this transaction, the custodian's cut-off time was 10:00am each morning. This results in a scenario where, although the Provider may adhere to its own proffered deadline (whether it be by 12 noon on day 2, 5:00pm on day 2, or within 24 hours of receipt of the instruction) another day may pass before the transaction has in fact been effected. This appears to be what happened in this transaction.

Indeed, the Provider has submitted that it deals with numerous custodians with differing cut off times. This, coupled with the human element involved in processing and verifying an instruction means that a customer cannot expect to be guaranteed that his/her instruction will be finalised (and the shares in question purchased) at the minute/hour that, in retrospect, he/she would have preferred.

I must also take into account the fact that the contract between the Provider and the Complainant states that the Provider will not be liable in any way where it transpires that a deal could have been made at a better price.

The instruction was received by the Provider at 10.03am and the Provider completed its obligations with regard to processing that instruction at 10.04am the following day. I am not satisfied that the Provider has, in fact, breached any contractual obligation with regard to the processing of the Complainant's instructions or failed to process them within a reasonable period of time. Accordingly, I do not consider it appropriate to direct that the Complainant recover the loss that he contends he suffered by reason of the alleged unreasonable delay.

However, I am satisfied on the basis of the entirety of the foregoing that the Complainant received conflicting and confusing information about the deadlines that the Provider would strive to adhere to in processing instructions. Only from the responses that the Provider furnished to this office is it now apparent what timeframes the Complainant can expect the Provider to strive for. The *Service Standards* document, together with the emails sent to the Complainant in 2015 and January 2020 were unclear, confusing and contradictory. This constitutes a failure to provide information in a clear manner to the Complainant.

In my Preliminary Decision I indicated my intention to partially uphold the complaint and direct the Provider to pay compensation of €1,000 to the Complainant. Following the issue of my Preliminary Decision, the Complainant's representative advised, in an email to this Office dated 23 September 2021, that:

"[The Complainant] has asked me to request that the amount be increased. He feels the amount is not sufficient compensation for [Provider's] shortcomings".

I remain of the view that €1,000 is reasonable in the circumstances of this complaint.

For the reasons outlined in this Decision, I partially uphold this complaint and direct the Provider to pay a compensatory sum of €1,000 to the Complainant.

Conclusion

My Decision pursuant to **Section 60(1)** of the **Financial Services and Pensions Ombudsman Act 2017**, is that this complaint is partially upheld, on the grounds prescribed in **Section 60(2) (g)** – the conduct complained of was improper by virtue of the Respondent Provider’s failure to provide clear information to the Complainant.

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 €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.



GER DEERING
FINANCIAL SERVICES AND PENSIONS OMBUDSMAN

2 December 2021

/Cont’d...

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.