



<u>Decision Ref:</u>	2022-0170
<u>Sector:</u>	Investment
<u>Product / Service:</u>	Personal Pension Plan
<u>Conduct(s) complained of:</u>	Value of policy at surrender less than expected or projected Delayed or inadequate communication Fees & charges applied
<u>Outcome:</u>	Rejected

LEGALLY BINDING DECISION OF THE FINANCIAL SERVICES AND PENSIONS OMBUDSMAN

This complaint relates to the fees applied to the Complainant's pension plan.

The Complainant's Case

The Complainant took out a personal pension plan with the Provider in **1989**. He twice made a contribution of IR£1,000 (€1,270) (one thousand Punts or one thousand, two hundred and seventy Euro) in **1989** and in **1990**, respectively. The Complainant then joined an employer pension plan and ceased contributions to his personal pension. The Complainant states that the plan was then 'paid up'.

The Complainant submits that his pension fund was eroded due to a monthly policy fee of €9.69 (nine Euro and sixty-nine Cent), and a monthly management charge of 4.14%. As a result of this, the Complainant says that the final value of his pension is less than the value he paid into the scheme. He says that "*in real terms*", it is "*worth less than one third of the amount paid in*".

The Complainant states that he asked the Provider on several occasions over the previous number of years why the value of his pension was not increasing. He stated that he was constantly "*fobbed-off*", with no true explanation.

The Complainant notes that he paid in a total of £2,000 (€2,540) into the scheme, and the projected value of his pension in **1991**, after charges, was £5,347 (€6,791). The most recent projection of his pension value, at the time of making his complaint however was €2,320. At the time of the complaint, the Complainant calculated that the value that he had lost from his pension fund was €5,395.

The Complainant made further submissions to this office on **18 February 2020**. He states that the Provider's estimation of the gross pensions fund in **December 2019** was over €20,000. However, the net value of his fund was valued at €2,484.07. The Complainant therefore says that the administration charge of the Provider has equalled 88% of his pension fund.

The Complainant says that between **1989** and **2012**, the Provider's pension statements noted that that the Complainant's funds were invested in a manager S/1(A) fund. This is an accumulated units fund. From **2013**, the Provider began to divert portions of the Complainant's initial investment into the manager S/1(I) fund. This is an initial units fund. The Complainant states that this was done without explanation.

The Complainant made further submissions in response to the Provider's formal reply to the investigation of this Office. He noted at that point that he now sought €20,400 (twenty thousand, four hundred Euro) in compensation, based on the growth of the S/1(A) fund between **1989** and **2019**. He notes that the pension fund value after the management charge of .24% and a monthly policy fee would be €20,314 (twenty thousand, three hundred and fourteen Euro). The Complainant states that the s/1(I) fund had not grown due to the application of "*enhanced charges*". However, his fund should have been valued at €4,559 (four thousand, five hundred and fifty-nine Euro), following charges and fees, in **2019**.

The Complainant states that the "*extra-over charges and fees*" were deducted from his pension fund, due to the classification of his funds as S/1 (I), rather than S/1 (A).

The Complainant complains that the Provider had disguised charges in its terms and conditions, and he was not informed that the application of those charges would likely result in the "*entire increase in the value*" of the funds being retained by the Provider.

In response to the Provider's submission that the Complainant's funds were gradually switched to the S/1(A) fund, the Complainant says that this is "*at odds with the discretionary powers afforded to the Provider*". He further states that the Provider's benefit statement of **4 August 2006** states that all of the Complainant's funds had been transferred to S/1(A). The Complainant notes that he only learned in **2013**, that he still retained funds in S/1 (I).

The Complainant states that if the units had been 'gradually' transferred from S/1(I) to (A) between **1989** and **2006**, the value of his fund would be €19,474 (nineteen thousand, four hundred and seventy-four Euro).

The Complainant also says that the special offer included in his policy documentation of an "*Investment Factor of 125%*" in respect of the first pension contribution, was not applied to his fund.

The Complainant says that the Provider has responded that it owed no duty of care or obligation to provide advice or assistance to the Complainant with regard to the "*workings of the Plan*", due to the fact that a financial broker was involved in the original sale in **1989**. The Complainant says that this is an incorrect assertion.

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The Complainant notes that the Provider issued all initial documentation directly to the Complainant, and all of the correspondence in the intervening 30 years.

The Complainant says that the Provider does not have a “*defence*” to “*the charge of applying exorbitant charges*”. He states that it has relied upon its contractual right to do so, which is based on “*unfair terms and conditions*”. The Complainant states that any communications from the Provider which contradict the contract should trigger the application of *contra proferentem*, and the Complainant should be given the benefit of the doubt.

The Complainant queries an issue relating to disclosure from the Provider, stating that a recording of a call which took place on **27 November 2018** had not been provided. He states that during this call, the Provider’s Agent agreed that the charges to the Complainants account were “*unethical and outrageous*”.

In submissions to this Office on **7 April 2021**, the Complainant states that where the Provider has not addressed certain submissions he made, the Provider should be deemed to have admitted them.

In response to the Provider’s submission that he had made assumptions on the data to calculate the expected value of the funds, the Complainant says that he was unaware that a portion of his fund had been invested in the S/1(A) fund. He states that he was previously told that all investments had been deposited into the S/1(I) fund.

The Complainant notes that there may be a reference to how the units were to be allocated in the policy documentation, but that it is unintelligible to a layman. The Complainant states that this new information would increase his original evaluation marginally, so he is willing to leave the amount of compensation he is claiming, as it is.

He also advised that he no longer sought the phone call of **November 2018** to be furnished at this late stage.

The Provider’s Case

The Provider states that in **1989** a financial broker set up the Complainant’s plan with the original pension provider. This pension plan was transferred to the Provider in **1999**.

The Provider says that the broker’s role was to explain all aspects of the plan, including the applicable charges.

The Provider explains that the original provider sold a certain type of pension product up until the **late 1990s**, whereby initial units were used to recoup the charges associated with setting up a plan. This allowed charges to be spread evenly over the entire term of the plan.

The Provider states that generally, during the first two years of the plan, the funds were used to purchase 'initial units' (I), which have a higher annual management charge than 'accumulated units' (A). As a result, the initial units grow at a slower rate. After this, the customer's funds would be used to buy premium units, which carry a lower annual management charge. However, the initial units purchased continue to be held and have a higher charge attached. This structure was in the plan from its inception in 1989, and was not introduced by the Provider.

The Provider says that this mechanism allowed sufficient time to recoup charges associated with the plan gradually, rather than having a lump sum deducted from the plan in the first instance. The Provider set out a number of instances between **2016** and **2020** when the Complainant queried why the value of his plan was lower than he expected. The Provider states that on each occasion, it explained how the plan works, and the impact of the charging structure.

The Provider submits that it is obliged to administer the plan as per the terms and conditions of the contract. It notes that it was the role of the broker to explain the contract to the Complainant at the inception of the plan in 1989. The Provider states that it has made the Complainant aware of the charges on the plan since its inception, and has answered any questions that he had on the plan and its charges.

The Provider relies on Paragraph 19 and sections (i), (ii) and (iii) of the Terms and Conditions. This outlines that the Provider will calculate the bid and offer price of the fund units. In doing so, it will take account of the value of the assets and the expenses of managing the investments.

The Provider relies on Paragraph 39 of the contract, entitled '**Policy Charges**', noting that a policy fee shall be charged monthly, with a figure to be determined by the pension provider. Paragraph 2, and sections (ii), (iii), and (iv) outline the use of initial units and the investment factor used to purchase the initial units.

The Provider explains that the obligation to provide annual statements under the **Life Assurance (Provision of Information) Regulation 2001**, applies to plans issued after **February 2001**. The Provider points out that it was not obliged to issue statements for this type of plan until the implementation of the **Consumer Protection Code 2012** (CPC). However, it started sending the Complainant his statements in **2006**.

The Provider notes that during the phone calls it had with the Complainant, he never indicated at the end of the calls that he required further information about the charges. Although he was unhappy with the performance of the plans, he did accept the explanations provided during the calls. The Provider is satisfied that it has met its obligations under Provision 4.1 CPC.

The Provider notes that similar queries were raised by the Complainant in **1997**, with his then pension provider. On **8 October 1997**, the then provider wrote to the Complainant to explain the different charging structure between initial and accumulated units.

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On **24 October 1997**, it wrote to the Complainant again to explain why the fund value may not be meeting the Complainant's expectations.

The Provider made submissions to this Office in response to the Complainant's additional arguments. The Provider notes that the Complainant set out his own estimated revised value, based on information that the Provider had given on the growth rates of the funds in an email of **11 December 2019**. It notes that a number of assumptions were made in that regard.

The Provider explains that the email of **11 December 2019** showed the Complainant the difference between unit prices of a fund on two set days. The Complainant has not taken account of when his payments were made, or the amount invested in each fund. The first payment that was made, when setting up the plan, was fully invested in the initial fund only. The second payment was mainly used to purchase initial units, with a small portion used for the accumulated fund. This was in accordance with the plan schedule as set out in the Terms and Conditions.

The Provider says that it is satisfied that the value of the plan is correct. The funds did grow, but the appropriate fees to be deducted over a 31-year period must be accounted for.

The Provider states that the initial units were correctly held in this fund until they were converted to accumulated units in **February 2019**. The values quoted in the annual benefit statements showed the net value of the fund. Later annual benefit statements showed the value of individual funds and then the net value of the funds.

The Complaint for Adjudication

The complaint is that the Provider wrongfully applied inappropriate fees to the Complainant's pension plan thereby causing him financial loss.

The Complainant seeks compensation from the Provider.

Jurisdiction Determination

As the Complainant's pension plan was commenced in **1989**, the jurisdiction of the FSPO to investigate this complaint was considered by this Office, noting that the pension plan falls within the definition of a "*long-term financial service*" within the meaning set out in the ***Financial Services and Pensions Ombudsman Act 2017***, as amended. The conduct complained of however, is limited to continuing conduct which occurred during or after **2002**, in respect of the application of charges to the plan.

The Complainant outlined a number of complaints that related to the selling of the plan, and the terms of the plan. As the Complainant entered into the pension contract before **2002**, the issue of selling or mis-selling in 1989, falls outside the jurisdiction of this Office.

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The Complainant sought to rely on the **European Communities (Unfair Terms in Consumer Contracts) Regulations, 1995** in submissions, arguing that the terms of his contract were unfair. These Regulations, as amended, are applicable to contracts created after **1994** and, consequently, do not apply retrospectively to the Complainant's pension plan provisions.

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 **27 April 2022**, 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.

I note that the Provider's letter to the Complainant, dated **4 July 2002**, states the following:

“

Projection Date	...	Estimated Maturity Value assuming 6% p.a. gross unit growth
14-Feb-2009	...	€2,191
14-Feb-2014		€2,281
14-Feb-2019		€2,301

ASSUMPTIONS

- *The future growth rates quoted above are before management charges.*
...”

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I have considered the policy provisions governing the contractual arrangement which the Complainant entered into in 1989 and I note the following terms:-

“DEFINITIONS

...

“Initial Unit” shall mean a First Series Initial Unit of a fund to which the Company permits the benefits of this policy to be linked.

“Accumulation Unit” shall mean a First Series Accumulation Unit of a fund to which the Company permits the benefits of this policy to be linked.

...

GENERAL

The Personal Pension Plan is an Annuity Contract approved by the Revenue Commissioners under Section 235 of the Income Tax Act 1967 and no alteration shall be permitted unless approved by the Revenue Commissioners.

...

(ii) *Allocations will be made to Initial Units in respect of a proportion of each Relevant Pension Premium while the amount of the premiums received by the Company in respect of the corresponding Relevant Premium is not greater than twice the annual rate of such Relevant Premium. The proportion of the Relevant Pension Premium in respect of which allocations will be made to Initial Units shall, while the amount of the premiums received by the Company in respect of the corresponding Relevant Premium is not greater than the annual rate of such Relevant Premium, equal the First Proportion specified in Table 1 of Schedule 2 relating to the Relevant Pension Premium. The proportion of the Relevant Pension Premium in respect of which allocations will be made to Initial Units shall, while the amount of the premiums received by the Company in respect of the corresponding Relevant Premium is greater than the annual rate of such Relevant Premium and is not greater than twice the annual rate of such Relevant Premium, equal the Second Proportion specified in Table 1 of Schedule 2 relating to the Relevant Pension Premium. Allocations will be made to Accumulation Units in respect of the balance of each Relevant Pension Premium while the amount of the premiums received by the Company in respect of the corresponding Relevant Premium is not greater than twice the annual rate of such Relevant Premium and thereafter allocations will be made in respect of the full amount of each Relevant Pension Premium to Accumulation Units.*

(iii) *The amount allocated to Initial Units in respect of a Relevant Pension Premium shall be the product of*
(a) the proportion of the Relevant Pension Premium as determined above in respect of which allocations are made to Initial Units,
(b) the Investment Factor specified in Table 2 of Schedule 2, and

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- (c) *the corresponding Relevant Premium of such part thereof as is received by the Company.*
- (iv) *The amount allocated to Accumulation Units in respect of a Relevant Pension Premium shall be the product of*
 - (a) *the proportion of the Relevant Pension Premium as determined above in respect of which allocations are made to Accumulation Units,*
 - (b) *the Investment Factor specified in Table 2 of Schedule 2, and*
 - (c) *the corresponding Relevant Premium or such part thereof as is received by the Company.*

...

ALLOCATION OF UNITS AND UNIT PRICES

...

- (iii) *A monthly charge will be deducted from each Investment Fund in respect of each category of unit. The rate of charge in respect of each category of unit will be determined by the Company each month and the rate of charge may differ from one category of unit to another. The rate of charge in respect of First Series Initial Units will exceed the rate of charge in respect of First Series Accumulation Units by 0.325% per month."*

I note that the Complainant believes that the Provider has wrongfully applied inappropriate fees and charges to his plan. I note that the charges and maintenance fees were set out in the Complainant's policy conditions, as part of his contract with the original provider from 1989, and then subsequently with the Provider. I therefore accept that the Provider is contractually entitled to apply those fees and charges to the management of the policy.

I note that the Complainant subsequently contended that the Provider's decision to gradually switch his funds into the S/1(A) units was "*at odds*" with its contractual power. I accept that the Provider's decision to convert the units was permitted by the contract. Further, I do not accept that the Provider's communications on this point, conflict with the terms and conditions of the contract. As the contract's provisions on charges and fees in my opinion, are not ambiguous, I take the view that the principle of *contra proferentem* does not apply.

In those circumstances, I do not accept that the Provider wrongfully applied inappropriate fees to the Complainant's pension plan.

I have examined how the effect of those fees and charges was communicated to the Complainant. To support his position, the Complainant has relied on another decision of the FSPO, published under reference **2018-0162**, and accessible through the FSPO website at <https://www.fspo.ie/decisions/display.asp> In that decision, compensation was directed on the basis that there was a requirement for greater communication from the particular financial service provider, over the years investigated in that complaint, as clear communication was necessary in order for the Complainant to make plans, based on what funds he could expect as part of his policy.

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Insofar as this complaint is concerned, I note that on **4 July 2002**, in response to a query, the Provider wrote to the Complainant with an illustration of the projected values for the maturity of the fund. It was noted that these figures did not include management charges. In that event, the range projected in **2002** is approximately the maturity figure that the Complainant was provided with in **2019**.

I note that the Provider did not provide the Complainant with annual statements until **2006**, as it did not have a regulatory obligation to do so. Although the projected value of the fund as set out in the annual statements, varied throughout the following years, the range provided was generally in and around the maturity figure ultimately received by the Complainant in **2019**.

I note that the Complainant has complained that he was not adequately informed as to whether he held his funds in S/1(I) or S/1(A). The Provider's correspondence from **2006** notes that all of his funds are held in (A) units. However, correspondence from **2013** onwards, after the Consumer Protection Code 2012, came into effect, notes that the Complainant held funds in (I) and (A) units. I believe that the Provider could have been clearer in communicating to the Complainant, as to how his funds were held in different units. However, the Complainant's expectation of his fund value on maturity was not affected by these specific communications, which I note issued to the Complainant before the Provider was under any regulatory obligation to send annual updates.

On the basis of the evidence available, I take the view that the Provider consistently provided the Complainant with accurate projections of the maturity figure for his plan. The Provider communicated this to the Complainant in **2002**, and consistently from **2006** to **2019**. In those circumstances, I am satisfied that the Complainant was given the information necessary for him to make plans, based on the funds he could expect on the maturity of the policy. Accordingly, I do not accept that the Provider failed to communicate the effect of the charges and fees on the Complainant's pension plan, during the period of time relevant to this complaint. Consequently, having considered the evidence available, I take the view that there has been no wrongdoing by the Provider, and I do not consider it appropriate to 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.



MARYROSE MCGOVERN
Financial Services and Pensions Ombudsman (Acting)

20 May 2022

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PUBLICATION

Complaints about the conduct of financial service providers

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.

Complaints about the conduct of pension providers

Pursuant to *Section 62* of the *Financial Services and Pensions Ombudsman Act 2017*, the Financial Services and Pensions Ombudsman will **publish case studies** in relation to complaints concerning pension 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.