



<u>Decision Ref:</u>	2018-0028
<u>Sector:</u>	Investment
<u>Product / Service:</u>	Personal Pension Plan
<u>Conduct(s) complained of:</u>	Failure to provide correct information Delayed or inadequate communication Dissatisfaction with customer service Fees & charges applied Failure to advise on key product/service features
<u>Outcome:</u>	Partially upheld

LEGALLY BINDING DECISION OF THE FINANCIAL SERVICES AND PENSIONS OMBUDSMAN

Background

This is a Personal Pension policy. The policy commenced on 30/08/2011 with the policyholder investing €25,300. There was also a Single premium injection of €10,746 on the policy on 27/08/2012. The policy was encashed on 9/2/2016 with a then current value of €42,884.99.

The complaint is that the wording of the policy documentation was contradictory and misleading and this resulted in confusion as to the correct payments that should have been made by the Company.

The Complainant's Case

The Complainant's position is that he took out a Personal Pension Plan with the Provider and paid two years contributions into it. The Complainant states that there was a direct conflict about "early exit penalties" in the Provider's paperwork. The Complainant states that the Provider argued the position, but eventually relented and agreed to operate the wording more beneficial to him. The Complainant states that he accepted this. The Complainant says however, that in spite of reminders and reassurances from the Provider, it still applied a penalty. The Complainant states that he complained, and the Provider offered him a "gesture" of €200 which he neither accepted nor refused. The Complainant's position is that the reason to put this on hold was that he was now very suspicious of the

Provider's *cavalier attitude* to the meaning of English, so he resolved to check everything, and re-check it, himself (as did his Agent/Broker, who he says agreed with him). The Complainant states that he discovered that the Provider was ignoring a clear commitment in their paperwork to calculate the "safety-net" guarantee as it was written. The Complainant states that the Provider operates only one of two calculations and concluded that the guarantee did not apply. The Complainant states that he argued this. The Complainant states that the Provider's denial of what it means is so groundless as to be insulting. The Complainant submits that the version of words the Provider uses is quite "plain". He says that however, the Provider tried to assign different meanings to clear English in its counter-arguments.

The Complainant states that he wants his ARF to have more on transfer, and he wants a further recalculation of his Tax-Free element.

The Complainant states that the figures are + €3,679 into his ARF and +€1,226 in his Tax-Free lump sum. Total amount sought is €4,905.

The Provider's Case

The Provider's position is that it does not agree with the Complainant's viewpoint.

The Provider stated that it accepted that the particular wording in the Factsheet could possibly have been clearer to avoid any potential misinterpretation if read in a particular way and in isolation. The Provider stated however that the following number of factors that must be also taken into consideration:

1. The wording on the Factsheet could also be interpreted to give its true intent that 85% of any increases are also locked into and included in the Protected Price.
2. The Provider's position is that the policy brochure and the policy documentation issued to the Complainant are very clear on this point. The Provider states that this is particularly so when you review the example calculations of the Protected Price provided within these documents.
3. The Provider states that the Complainant received values on this policy throughout including the Annual Statements and there is no evidence of the Protected Price being described or values amended to take account of the Complainant's version of how this Protected Price should be calculated.
4. The Provider's position is that if there was any uncertainty from the Fund Factsheet on the Complainant's interpretation he should have referred to the policy documentation and / or referred to the Provider or his Financial Advisor.
5. The Provider submits that it is also completely illogical based upon the nature of this investment and the policy documentation issued, that the Complainant would receive a double counting of the actual growth in the Fund. The Provider says that if the final value was based upon both the Protected Price and a further 85% of all the fund growth then this

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would result in a figure over double the actual return. The Provider considers that this is simply not possible. The Provider states that the encashment value was based upon the then current unit price as that was higher than the Protected Price.

The Provider states that it believes that it has been reasonable and fair with the Complainant and offered commensurate *ex-gratia* amounts for the matters involved here.

Evidence

Policy Conditions

“Basis of contract

This Policy consists of the Application Form, Policy Schedule, these Policy Conditions and any Supplementary Conditions or Notices that you may receive and is evidence of a contract between you and us. Under this contract we agree to pay you the benefits described in this Policy as long as you have met all the conditions.

..

Early Encashment Charge

The Policy Schedule for this Policy will show whether an Early Encashment Charge applies or not.

An Early Encashment Charge is a charge that may be applied to the Fund Value when all or any of the Fund Value is withdrawn within a set period of time from the Commencement Date or from the Effective Date of Additional Single Contributions”.

Personal Illustration dated 30/08/2011

“We will charge an early surrender charge to the value of your investment funds if you terminate your policy, except on death, within the first three years from the policy start date. The amount of the early surrender charge and the period of time for which it applies will be shown on your policy schedule.

...

Cancellation Rights and Complaints Procedure

When you receive your policy documentation we ask you to read it carefully. If you feel the policy is not suitable for your needs you may cancel it by sending written instructions to [the Provider] at the address below within 30 days from the policy issue date. ...

Note on this illustration

This is an illustration for a policy underwritten by [the Provider] and must be read in conjunction with the ... Personal Pension Plan brochure..”.

Personal Illustration dated 27/08/2012

“We will charge an early surrender charge to the value of your investment funds if you terminate your policy, except on death, within the first three or five years from the policy start date.

Cancellation Rights and Complaints Procedure

When you receive your policy documentation we ask you to read it carefully. If you feel the policy is not suitable for your needs you may cancel it by sending written instructions to [the Company] at the address below within 30 days from the policy issue date. ...

Note on this illustration

This is an illustration for a policy underwritten by [the Company] and must be read in conjunction with the .. Personal Pension Plan brochure..”.

Information Brochure

“Key features

- Low to medium risk investment*
- 85% of the highest price ever achieved by the fund is protected*
- Up to 75% of the fund may invest in international equities providing unlimited growth*
- A simple investment strategy applied to conventional assets*
- Full flexibility to enter or leave the fund.*

85% Price Protection

This is one of the most important features of the PE+3 Fund. Whilst participating in stock market performance you can rest assured that if the markets fall steeply, your investment will not feel the full brunt of this fall. In fact there is a “cap” on the amount you can lose.

The Price Protection ensures that the unit price of your investment will never fall by more than 15% from the highest value it ever achieves. This means that if the fund grows in value the level of protection you get also increases. An example will illustrate this point.

<i>Investment Date</i>	<i>Unit Price</i>	<i>Protected Price</i>
<i>Month 1</i>	<i>1.000</i>	<i>0.850</i>
<i>Month 2</i>	<i>1.030</i>	<i>0.876</i>
<i>Month 3</i>	<i>1.045</i>	<i>0.888</i>
<i>Month 4</i>	<i>1.020</i>	<i>0.888</i>
<i>Month 5</i>	<i>1.040</i>	<i>0.888</i>
<i>Month 6</i>	<i>1.055</i>	<i>0.897</i>

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...

During months 2 and 3, the fund grew and the Unit Price would have increased to a high of 1.045. As the Price Protection is 85% of the highest price achieved, it would also have grown to 0.888 (1.045 X 85%) and the investors level of protection has increased accordingly.

...

About the Price Protection

The protection per unit price, which is set at 85% of the highest ever unit price, is provided by ...

Charges

The Fund has a management charge of 1.35% per annum. Additional product charges will also apply. Please refer to the specific product brochure and talk to your Broker or Financial Adviser. It is important to note that the PE+3 Price Protection is that the Unit Price will not fall below 85% of its highest value. The Unit Price incorporates the annual fund management charge of 1.35% per annum, but not any additional product charges”.

Policy Schedule as at 30 August 2011

“This policy is issued on the basis of the application made by the policyholder and comes into force when the first contribution payment has been made.

The schedule below sets out details of the contribution and benefits which apply to this policy. You should read this with your policy conditions.

...

Early Encashment Charges

If you cash in all or part of your policy in the first 5 years the following percentage charge will be deducted from the bid value of the units.

<i>Year</i>	<i>1</i>	<i>2</i>	<i>3</i>	<i>4</i>	<i>5</i>
<i>Charge</i>	<i>5.0%</i>	<i>5.0%</i>	<i>5.0%</i>	<i>3.0%</i>	<i>1.0%”</i>

On line Fund Factsheet

“Fund Summary

This is a unit linked fund investing in international equities and cash. It provides dynamic asset allocation with daily rebalancing between asset classes. There is a price protection in that the fund bid price cannot fall below 85% of its highest ever value. 85% of any increases are also locked in”.

Updated wording of Factsheet (for Prices as at 31st March 2013)

“Fund Summary

This is a unit linked fund investing in international equities and cash. It provides dynamic asset allocation with daily rebalancing between asset classes. There is a

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price protection in that the fund bid price cannot fall below 85% of its highest ever value”.

The disputed last sentence: **“85% of any increases are also locked in”** was removed by the Provider.

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 16th January 2018, 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.

Submissions dated 5th February 2018 from the Provider and submissions dated 15th February 2018 from the Complainant, were received by the Financial Services and Pensions Ombudsman after the issue of a Preliminary Decision to the parties. These submissions were exchanged between the parties and an opportunity was made available to both parties for any additional observations arising from the said additional submissions. I have considered the contents of these additional submissions for the purpose of setting out the final determination of this office below.

The issue for investigation and adjudication is whether the Provider correctly and reasonably communicated information about the operation of the policy to the Complainant.

The Provider states that this is a unit linked investment Fund that provides for an exposure to international equities and cash. The Provider states that the Fund provides an 85% Capital Protection Guarantee of premiums invested. The maximum downside was therefore 15%.

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The Provider says that there is the opportunity to lock-in growth, the protected price is set at 85% of the highest ever unit price of the Fund since launch irrespective of when invested.

The policy commenced on 30/08/2011 with the policyholder investing €25,300. There was also a subsequent Single premium injection of €10,746 into the policy on 27/08/2012.

The Provider states that the unit bid prices on the fund at the commencement date and early maturity date of the policy were €0.9215 and €1.1356 respectively. The Provider says that the highest price obtained by the fund over the period of investment was €1.2881 resulting in a guaranteed price of €1.094885 ($€1.2881 * 85\% = €1.094885$).

The Provider submits that therefore the price used on the encashment of the policy on 09/02/2016 was €1.1356 (the maximum of the current price or 85% of the highest price obtained over the period of investment). This resulted in an encashment value of €42,884.99.

The Provider states that this represents a 19% total return on capital invested over a 3.5 to 4.5 year investment term.

The Provider says that the Complainant is looking for a 32.6% return over the same investment term.

On 27th August 2013 the Provider responded to the Complainant's complaint that there was a conflict in the wording between the Policy Schedule and the Personal illustration for both single premium investments in 2011 and 2012.

The Provider's position is that the legal contract, namely the Policy Schedule and Policy Terms and Conditions, refer to a five year period within which an Early Encashment Charge would apply if the policy was encashed within five years from the date of entry on a sliding percentage scale. The Provider accepts that the Personal Illustration referred to an incorrect three year period.

The Provider states that it detailed its position in the letter dated 27th August 2013. Whilst not legally obliged to agree with the Complainant's viewpoint, the Provider says it took a customer focused view. The Provider states that this matter was resolved with an *ex-gratia* concession to allow the Complainant to encash the investment after three years without an Early Encashment Charge. The Provider says that it also agreed and paid a small gesture of €200, with its letter dated 16th September 2013, to resolve this matter. The Provider says this offer was accepted by the Complainant to close this matter.

The Provider's submission is that the policy was encashed on the fourth policy anniversary year from the first investment and the policy Early Encashment Charge was waived amounting to €428.85.

Second complaint

The Provider states that on 21st March 2016 it responded to the Complainant's complaint that the encashment value should be a higher amount based upon his calculations and interpretation of the wording from an online Fund Factsheet.

The Provider states that it understands that this Factsheet was viewed some years after the Complainant invested and was not part of the policy documentation or information provided at point of sale in 2011 and 2012.

The Provider submits that it does not agree with the Complainant's interpretation and says that it failed to see any grounds for the payment of an additional amount as calculated by the Complainant based on his interpretation on the Fund Factsheet. The Provider states that it did however acknowledge that the Complainant's correspondence had assisted the Provider in improving its online communications and offered an *ex-gratia* payment of €800 to resolve this matter.

The Provider pointed out in its complaint submission to this office that no other customer took this interpretation on how the Protected Equity Fund should be valued.

Third complaint

On 7th April 2016 the Provider responded to the complaint that it deducted the Early Encashment Charge when administering the claim on the 4th policy anniversary year when the policy was encashed. The Provider states that it rectified this immediately when the Complainant notified it and paid out the balance amounting to €428.85. The Provider states that it also offered a further €200 *ex-gratia* payment which was not accepted as the second complaint arose.

The Provider states that the Complainant has received the correct encashment value for this policy in 2016 based upon the policy documentation he received in 2011 and 2012. The Provider says that the Complainant has also received or has been offered a total *ex-gratia* amount of €1,200 and a write off of €428.85 for any service issues / problems caused by his interpretation of the wording in the documents.

The Provider states that it should be noted that there is no financial loss to the Complainant nor, in its view, is there a reasonable expectation of receiving such a significant 32.6 % return based upon all the documents issued.

The Provider submits that the Complainant has previously accepted its offer to resolve the issues that arose within complaint point number one. The Provider states that complaint point three is a relatively small administration issue. The Provider submits that the key point in dispute, complaint point two, is the online Fund factsheet and whether the Complainant is entitled to the benefits he has calculated based upon his interpretation of the wording in this factsheet.

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The Provider says that there is an *ex-gratia* amount of €1,000 which has not been accepted by the Complainant and the Provider says it would like to increase this by €500 to €1,500 to hopefully bring a resolution.

Analysis

The Provider offered a €200 payment in respect to “complaint three” outlined above. The Complainant advised that this complaint is something that would need to be resolved when the main argument (“complaint two”) is resolved. In its submission dated 5th February 2018 the Provider clarified its 2nd June 2017 offer of €1500 as follows:

“[I]n relation to the compensation amounts offered, we originally offered €800 for ‘complaint point 2’ and a further 200 for ‘complaint point 3’. We then increased this total compensatory amount of €1000 to €1500 in our letter dated 2nd June 2017 together with the waiving of €428.85 for ‘complaint point 1’. The intention of this €500 uplift was a pro rata increase over complaint 2 & 3”.

The Provider questioned the uplift to €1800 on its offer of €1500.

In the Complainant’s submission dated 15th February 2018 he stated that:

“I intend to re-visit Complaint Point 3 directly with [the Company] with a view to finalising it and disposing of it. As we did with “Complaint Point 1”, I am confident that two sensible people approaching this with goodwill should be able to do that, and the uplift to €300 now clarified is a help along the way in the right direction.

...

Albeit not fully what I argued for, I think the “Partially Upheld” finding vindicates me, and the uplift of €1000 to €1800, as a compensatory amount is realistic and reasonable in that overall context”.

Therefore, the only complaint requiring a resolution here is in relation to “complaint two”. In that regard I accept that the Provider correctly interpreted the policy in relation to the 85% Protection.

However, I consider that it is not acceptable or reasonable that the Provider gave conflicting / misleading information in documentation / correspondence that it issued to the Complainant in relation to how this provision operated.

The Illustrations that were provided to the Complainant did refer to a three year period while the contract terms / policy schedule were clear that a five year period applied. The Provider resolved this matter to the Complainant’s satisfaction, but the Complainant refers to this in his complaint as an example of the Provider’s use / misuse of language in relation to the contract.

In relation “complaint two” I accept that the Provider issued / published a Fact Sheet which provided misleading information to that which the contract provided in relation to the 85% protection. The Provider specifically advised in this Fact Sheet that: “85% of any increases

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are also locked in". As the Provider points out this could have a meaning that 85% of any increases are also locked into and included in the Protected Price, but unfortunately the wording in the Fact Sheet was not stated so clearly. I accept that the Provider also correctly points out that the policy documentation issued to the Complainant at the start of the investment is clear as regards the workings of the Protected Price. It must be pointed out that the Fact Sheet cannot be read in isolation and that an interpretation of same cannot be made without reference to the Terms and Conditions set out in the Policy document which I find are clear regarding the application of the Protected Price.

In conclusion I consider that a compensatory payment was the correct resolution to this complaint, but at a higher amount than that offered by the Provider. Under the Consumer Protection Codes *a regulated entity must ensure that all information it provides to a consumer is clear, accurate, up to date, and written in plain English*. I consider that it is particularly important that a Provider does not confuse or mislead a policyholder in relation to such important information on life policies or pension products. Here I accept that confusion was likely to arise from the wording used by the Provider in the Fact Sheet. It is noted that the Provider stated in its complaint response letter to this office dated 26th June 2017 that: *"no other customer has taken this interpretation on how the Protected Equity Fund should be valued"*. In a letter dated 21st March 2016 that: *"[It] requested that the Fact Sheet be amended as you have noticed online. This was because a customer had interpreted the sentence in the way you had and it was only prudent to make this amendment"*.

In its post Preliminary Decision submission the Provider clarified that the Complainant was the customer referred to in its letter of 21st March 2016 and that it was only the Complainant who raised an issue with the wording.

It is my Legally Binding Decision that the complaint is partially upheld and I direct that the Provider pay the Complainant a compensatory payment of €1,800 (one thousand and 800 euro) in relation to the Protected Price complaint. This payment is instead of the €800 initially offered in relation to the Protected Price complaint and which was later uplifted by the Provider.

The Provider considered that its uplifted offer was reasonable, however, I must reiterate that I consider that it is particularly important that a Provider does not confuse or mislead a policyholder in relation important information on life policies or pension products, and it is for this reason that I considered a greater payment was merited in this complaint.

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)**.
- Pursuant to **Section 60(4)** of the **Financial Services and Pensions Ombudsman Act 2017**, I direct that the Respondent Provider pay compensation in the amount of €1,800 (one thousand and eight hundred euro), as detailed above, to the Complainant.
- Pursuant to **Section 60(6)** of the **Financial Services and Pensions Ombudsman Act 2017**, I 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**, where the amount is not paid within 35 days of the Provider receiving account details from the Complainant.
- Pursuant to **Section 60(8)** of the **Financial Services and Pensions Ombudsman Act 2017**, the Respondent Provider is now required, not later than 14 days after the period specified above for the implementation of the direction pursuant to **Section 60(4)** of the **Financial Services and Pensions Ombudsman Act 2017** to notify this office in writing of the action taken or proposed to be taken in consequence of the said direction/s outlined above.

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 OMBUDSMAN

27th February 2018

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) in accordance with the Data Protection Acts 1988 and 2003.