



Decision Ref: 2019-0270

Sector: Investment

Product / Service: Cash Investment

Conduct(s) complained of: Early withdrawal penalty

Outcome: Rejected

LEGALLY BINDING DECISION
OF THE FINANCIAL SERVICES AND PENSIONS OMBUDSMAN

Background

The Complainant purchased an investment product from a Tied Agent of the Provider in **July 2014**. The Complainant submits that although he was advised verbally about the existence of an Early Withdrawal Penalty, which he incurred when he encashed the Bond in 2016, he was not provided with an opportunity to see this in writing.

The Complainant's Case

The Complainant submits that he was only made aware verbally that there was an early exit charge applicable to the investment, which he entered into in 2014. Whilst he had opted to have the policy information and documentation issued to him online, he submits that he *"was not in a position ever to view the terms and conditions in writing"*.

The Complainant submits that while he did opt for online access to the policy documentation, that *"this was really with a view to environmental considerations"* and that having experienced technical difficulties in accessing his account online, he *"gave up trying to sort out online access because it was just as easy, if not easier to get a valuation over the phone."*

The Complainant submits that he accessed his account online once and that while he acknowledged that he could have *"viewed anything and everything on that occasion...my*

priority was to try and set up ongoing access, which I thought I managed to do. As previously stated, the password failed to allow me access for the 3rd time, despite my having changed the password to one of my own within the time limit as instructed. I didn't persist partly due to frustration and the fact that my priority was to access ongoing progress of the fund, which I subsequently did by phone."

The Complainant submits that during a welcome call with the Provider on **25 August 2014** he referred to the technical difficulties he was experiencing, and that at that time he had just managed to access online. The Complainant submits that following this, however, *"whatever way the system worked it subsequently failed to let me in subsequently. I don't know why to this day. However I wasn't too concerned because my main motive was to check the value of the fund, which I did by phone for the following months."*

The Complainant submits that having listened to the audio recordings of calls furnished by the Provider as part of the investigation of this complaint he submits that, *"Listening back to the conversations I have been very consistent. I did previously agree that the early exit charge was said to me verbally. However, nothing in writing."*

The Complainant submits that although the Provider has submitted that its position is that it is, *"fully satisfied that the existence of this early withdrawal penalty...was clearly communicated both at the point of sale and in all subsequent documentation"*, the Complainant argues that, *"there was no subsequent documentation, not that I could access."*

The Complainant further submits that the Provider also responded to his complaint by stating that *"The early withdrawal penalty was also noted in the [Investment Bond Product] Booklet...."* but the Complainant submits that he is *"not quite sure why they said that because I never saw this booklet."*

The Complainant submits that the one item of documentation which was given to him at the point of sale was a receipt and that if anything more had been given to him, he would be in possession of it, because he files everything. He submits that he had regard to a 6 page brochure of the Provider relating to the investment product and that he relied on this when deciding to enter into the investment in question.

The Complainant submits that, *"In short, owing to the reasons above, I was only informed of an early withdrawal penalty verbally, I think just twice. Once was by [Agent] within the context of approx 30 or so other considerations. The other time was in the phone call on 25/8/2014."*

The Complainant submits that it had not been in his mind that he would encash early and that the monies in question were an inheritance money left to him by his late mother and that *"In my mind it was always earmarked for my children, or grandchildren – not me"*.

The Complainant submits that in January 2016, he was advised by his Financial Advisor to transfer his assets to a different Policy, which was also one of the Provider's products. He submits that it was requested of the Provider to waive the early exit charge, in the very particular circumstances where he simply wished to use the funds to invest in another of

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the Provider's products. The Complaint submits that the Provider unreasonably refused this request however.

The Provider's Case

The Provider submits that the Complainant has accepted that the existence of the early withdrawal penalty was brought to his attention by the Tied Agent responsible for the sale of the product to the Complainant, at the point of sale. The Provider submits that the Personal Financial review which was conducted with the Complainant included drawing his attention to the Early Exit Penalty. The Provider submits that this is verified by the notes recorded by the Agent at the time, in the "Free Text Box" on page 13 of the Personal Financial Review Report, which states:

[Complainant name] you have decided [Name of Product] for your investment as you wish to have a wider range in the Emerging Market Shares. You understand this is a higher level of risk than we have recommended to you, but you accept this higher level of risk. You understand [product] is a non-capital protected product, we have discussed the management fees and early encashment charges and you are also aware of the 1% government levy and the exit tax and are happy to proceed.

The Provider submits that the Early Withdrawal Penalty was also noted in the Product Booklet, which was provided to the Complainant under the heading on page 31: "Your questions answered", Early Withdrawal Charge.

The Provider submits that the "Brochure" which the Complainant has referred to and which he says that he relied upon as providing the relevant details of the investment product, is a promotional leaflet introducing a new range of the Provider's funds which were launched in 2013. The Provider submits that it has not been able to verify if this brochure was supplied by the Tied Agent at the point of sale or whether the Complainant obtained this leaflet prior to his engagement with the Agent. The Provider says it is important to note that these new funds would have been accessed across a range of Investment Products and across a number of different sales channels and that each would have had its own charging structures including early withdrawal penalties which would be clearly itemised within the specific product literature and customer information booklets available at the point of sale.

The Provider submits that the Early Withdrawal Penalty was also noted within the Complainant's Plan and Documentation which were available to him via his On Line Services Account and which the Provider submits the Complainant was able to access on **19 August 2016**, following some issues with his password. The Provider submits that no hard copies of these documents were issued to the Complainant at the request of the Complainant who chose the paperless option during his application.

The Provider submits that its records show that when the Complainant accessed his On Line Account at 8.00pm, on Tuesday **19 August 2014**, he viewed his Fund Value, checked

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the daily Unit Price of his chosen Fund and accessed a Fund Performance Graph. The Provider submits that there would have been no reason why he could not also have accessed his Plan Documents (Investment Bond Product Booklet, Customer Information Notice, Welcome Pack and Terms and Conditions), at that time, once he had access to his account.

The Provider submits that during a telephone call from the Provider's Welcome Team on **25 August 2014** the various charges, including the Early Withdrawal Penalty were mentioned and the Provider submits that he was asked if he was satisfied that the Agent had explained the plan detail, the Complainant replied "Yes". The Provider submits that the Complainant was then recommended to view his Plan Documentation online to ensure that he was satisfied with his investment.

The Provider submits that, if the Complainant was unable to view these important documents, its expectation would have been that he would have reported this to the Provider, either to rectify whatever technical issue he was experiencing or to request to have the important documents posted to him, so he could review and verify that the product chosen met his expectations and requirements. The Provider submits that there is no record of any further queries regarding his online access.

The Provider says that it does not accept the Complainant's inference that his inability to access these important documents was due to the Provider's failure to provide him access. The Provider submits that when the Complainant reported an incident of access issues with his password, it responded with a resolution and in the absence of any further contacts in relation to his On Line Account, the Provider submits that it had no reason to believe that the Complainant had continued to be unable to access his On Line Account or to view his documents.

The Provider notes that the Complainant has stated that at the time he made the decision to invest in the product it was never his intention to encash this bond "early" (before the five year penalty period) as he considered this a long term investment for his children / grandchildren. The Provider submits that this attitude to a long term commitment to invest would have been one of the reasons why this particular Bond would have been recommended.

The Provider submits that even if one accepts that the Complainant was unaware of the Early Withdrawal Penalty, when he agreed to invest in this bond, it submits that by his own admission this would not have been a deciding factor as to whether he would proceed, as clearly it was his intention to remain invested for longer than the five year penalty period..

The Provider submits that with reference to the Complainant's comments regarding the 6 page Fund Brochure of which 4 pages were submitted to this office by the Complainant, the Provider's point is that this was a standalone flyer introducing a range of new funds available and not a description of the product that the Complainant ultimately chose as

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the investment vehicle for these funds. It is the Complainant who is relying on this document to support his contention that he was not made aware (in writing) about the existence of an Early Withdrawal Penalty.

The Provider submits that the Complainant has confirmed that his Broker was also aware that a substantial penalty would be incurred, if he chose to withdraw from this investment in 2016, but that it was his Broker's recommendation that any loss incurred as a result of the penalty would be worth it, in terms of future tax efficiency with a new pension plan. The Provider submits that the Complainant appears to have acted on his Broker's advice and made a conscious decision to suffer the penalty for apparent long term gain.

The Provider notes that that the Complainant has accepted that when he came to make the decision to "cash out" of this investment bond in 2016, he had been made aware of the Early Withdrawal Penalty by the Provider. The Provider submits that it was therefore the Complainant's, own decision, in the full knowledge that a penalty would be incurred, to encash the investment within the first five year penalty period.

The Provider submits that it is at a loss as to the basis for the Complainant's insistence that he be refunded the legitimate Early Withdrawal Penalty, which he admits he accepted, on the recommendation of his Broker and after considering it for several days.

The Complaint for Adjudication

The Complainant's complaint is that he was not made aware in writing by the Provider of the existence of an Early Exit Penalty, which applied to the Investment Bond, which he entered into in 2014.

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.

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A Preliminary Decision was issued to the parties on 09 July 2019 outlining the preliminary determination of this office in relation to the complaint. The parties were advised on that date, that certain limited submissions could then be made within a period of 15 working days, and in the absence of such submissions from either or both of the parties, within that period, a Legally Binding Decision would be issued to the parties, on the same terms as the Preliminary Decision, in order to conclude the matter.

In the absence of additional submissions from the parties, within the period permitted, the final determination of this office is set out below.

I note that the Complainant's complaint does not relate to the suitability or otherwise of the Investment Bond that was recommended to him but rather the Complainant's complaint is that he was not provided with documentation in 2014 prior to his entering into the investment, that set out the Early Withdrawal Penalty.

The Provider's position is that the relevant product brochures and documentation were made available to the Complainant at the point of sale with its Tied Agent on 23 July 2014. I note in this regard that the Provider is fully responsible for any acts or omissions on the part of a Tied Agent, when acting on its behalf.

I note that following timeline of events from the submissions made by the Complainant and the Provider.

23 July 2014 - The Complainant visited a branch of the tied agent and entered into an Investment Bond, in the amount of €149,360.00. (€147,881.19 plus government levy of €1,478.81)

24 July 2014 - The Provider issued a copy of the Complainant's Personal Financial Review and a copy of his electronic application to him.

13 August 2014 - The Complainant's application was accepted by the Provider.

15 August 2014 - As the Complainant had opted for the "paper free" option, his plan documentation was made available by the Provider for viewing online.

15 August 2014 - The Complainant attempted to access his online account but encountered difficulties and sent an email to the Provider's Customer Service Dept.

19 August 2014 - The Provider's Customer Service Dept. emailed the Complainant with its response and the Complainant logged onto his On Line Account.

25 August 2014 - A Customer Service Agent made a "Welcome Call" to the Complainant, and asked the Complainant to confirm that all of the details of his new investment were correct. The Complainant confirmed that he had not read the documentation at that point and the Agent encouraged him to do so.

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January 2016 - The Complainant's Broker recommended to the Complainant that he encash the Investment Bond in question, and to transfer the proceeds into a new pension plan, with the Provider.

17 February 2016 - The Complainant contacted the Provider by phone to request that the 5% early withdrawal penalty be waived on the basis that he was moving his investment to a Pension Plan of the Provider. The Provider subsequently declined this request.

24 February 2016 - the Complainant's Broker contacted the Provider by phone and in the course of requesting a surrender value, requested that the early withdrawal penalty of €7,429.67 be waived.

The Complainant's Broker proceeded to submit a signed Surrender Form to encash the Investment Bond in question.

25 February 2016 The Provider processed the transfer request and transferred €141,183.86 to the Complainant's nominated bank account.

29 February 2016 the Complainant lodged a complaint in writing with the Provider regarding its decision not to waive the Early Withdrawal Penalty fee of €7,429.67.

16 March 2016 The Provider issued its Final Response Letter to the Complainant.

Early Withdrawal Penalty

The Complainant acknowledges that he was twice informed verbally of the early withdrawal penalty, including at the point of sale, but submits that it *"failed to register with him"* and that he did not see any mention of this charge, in writing.

The Complainant has referred to a 6 page brochure that he submits he relied on it as providing a *"reasonably fair and reasonably complete summary of the scheme"* and which did not contain any reference to an Early Withdrawal Penalty. The Provider, meanwhile, has submitted that the brochure that the Complainant refers to is a flyer which introduced a range of new funds and was not a description of the product that the Complainant ultimately chose as the investment. It submitted that as the Early Withdrawal Penalty applied at product level, rather than fund level, the flyer must be read in conjunction with the product documentation through which the Funds would be accessed.

I have had regard to this document which the Complainant furnished. It comprises 5 pages and purports to introduce 5 new Funds which the Provider had developed. It gives a brief overview of the features of each of the Funds. Whilst it stated on the Cover Page, that, *"The funds are available across our pension, investment and savings plans"* it did not provide details of any particular investment product however and I accept that details such as charges and fees would be more reasonably expected to be set out in the documentation applicable to a particular investment product.

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The Provider's position is that its Tied Agent has confirmed to it that the Early Withdrawal Penalty was cited in the Investment Bond Product Booklet and the Customer Information Notice at point of sale and that the Complainant confirmed that he was provided with these, when he signed Section 3 of the Customer Application Booklet.

The Provider submits that the Penalty was also cited in writing in all the Complainant's Policy Documents (Investment Bond Product Booklet, Customer Information Notice, Welcome Pack and Terms and Conditions) which he chose not to have posted to him but be made available to him electronically, via his On Line Account.

Documentation

A copy of the Complainant's Personal Financial Review and a record of his Electronic Application were issued to the Complainant on **24 July 2014**

- The cover letter states as follows:

Dear [Complainant]

Thank you for your recent application.

Please find enclosed a summary of all questions and answers submitted in relation to this application.

If any of the information in the enclosed application form is not true and complete you must contact us in writing as soon as possible, correcting any inaccurate information...However if the information in the application form is true and complete then you do not need to contact us or take any other action.

Within the document, "Application Details", under the heading "Paper Compliance", it states:

You have stated that you have satisfied the following requirements: [original emphasis]

Terms of Business Letter presented to the customer

Customer Financial Review Completed

Online Application Declaration completed by you

Cheque/Monies received

Money laundering regulations record form

Money laundering Customer Identification requirements et

Customer Information Notice given to the customer

Product Terms and Conditions given to the customer.

[emphasis added]

I do not have any record of the Complainant having issued a response to this letter and it therefore seems that he did not take issue with the information set out.

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- A second letter dated **24 July 2014** which issued to the Complainant enclosed the Financial Review, from the Agent he had dealt with, and stated as follows:
Dear [Complainant]

Thank you for completing a Financial Review on 23 July 2014.

The review covered your current financial arrangements, what your financial goals are for the future and whether you are on target to meet them. I hope you found the review to be time well spent.

It is important that you read your report.

The enclosed report outlines what we covered in our review.

...

Your Options – for each of the financial areas that we covered, I have outlined the type of plan and benefits I recommended and what you considered.

[Original emphasis]

I note that within the “Your Options” section there is a shaded panel, which states:

[Complainant] you have decided [Investment Product Name] for your investment as you wish to have a wider range in Emerging Market Shares. You understand this is a higher level of risk than we have recommended to you, but you accept this higher level of risk. You understand [Investment product] is non capital protected product, **we have discussed the management fees and early encashment charges and you are also aware of the 1% government levy and the exit tax and are happy to proceed.**

[emphasis added]

(I have set out further below the details of a conversation which took place between the Provider and the Complainant on **25 August 2014**, in which he confirmed that he had reviewed this Financial Review document and was satisfied with the contents.)

- I have had regard to the Application Form, and under the heading “Declaration in relation to investment advice process” it states:

Particular focus and attention were given to the following matters when arranging the product:

- ***Product booklet and Customer Information Notice***
- *Setting aside money for expected and any unexpected short term needs and also for emergencies*
- *That the investment is a long term commitment and we recommend that it is held for a minimum of 3 to 6 years*
- *The nature and limit of any guarantees that are included in the product*
- *The risk that attaches to their investment*
- *Any restrictions on encashments if applicable*
- ***Any encashment penalties included in the product***

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- *Fund value payable on death may be less than the amount invested if applicable*
- *Setting up a will and policy under trust*
- *Offer to have a second person at the review (If applicable)*

[emphasis added]

This was signed by both the Complainant and the Agent, and dated **24 July 2014**.

- The Provider's position as to what the Complainant was provided with the point of sale, as per the Agent's recollection of this, is set out in an internal email of the Provider, dated **10 March 2016**:

I spoke to [Agent who sold the policy] on this earlier today.

Her answers to the questions posed by Customer Complaints are:

- 1) The brochure given to [the Complainant] before he left the meeting was [Named Investment Product].*
- 2) [Agent who sold the policy] cannot recall specifically mentioning the cooling off period but she did point out the Customer Information Notice in the brochure which refers to the cooling off period.*
- 3) [Agent who sold the policy] made the customer aware that he would need to view the documents online. [The Complainant] confirmed to [the Agent] in his recent phone call to her that he had viewed the documents online.*
- 4) The customer was made aware of the early withdrawal charge during the meeting and this was recorded on the Full Financial Review report.*

This review was carried out in August 2014 so [the Agent] has tried to recall the detail as much as possible.

The Complainant has submitted that he did not receive any such documentation, as if he had received it he would have filed it in his filing cabinet. However, I note that he also indicated during a phone call to the Provider on **04 November 2014** that he had lost "some paperwork" and that all he could find at that date, was the receipt furnished to him by the Provider.

- *The Policy Documents*

With regard to the Product Booklet, which the Provider submits was given to the Complainant at the point of sale, I note that within the "Your questions answered" section of the booklet, beginning at page 30, the following information is set out as regards charges applicable to the product:

What are the charges?

...

Early withdrawal charge

This investment is designed for an investment period of five years or more. You can withdraw all or part of your investment before then, but you would have to pay an early withdrawal charge on the amount you withdraw"

A table below then sets out details of the charges.

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On page 32 the question “Can I cash in part of my investment?” is answered with:

Yes, you can cash in part, or all of your investment. You will have to pay the early cash-in charge if you do this during the first five years of any investment in [Product] (please see the charges on page 30).

The Complainant’s Investment Documentation, which was made available to him online, which the Complainant has submitted he could not access, comprised an Investment Schedule, Terms and Conditions Booklet, Fund Guide, Customer Information Notice and details about the Provider’s customer information and online services.

- Online “Welcome Pack” Documentation

The online cover letter of **15 August** advises:

Please read the terms and conditions of your investment carefully and make sure that it meets your needs...[Investment product] is a specialist investment which aims to meet your medium to long term investment requirements. However, if you decide you do not wish to proceed with this investment, you may cancel it by writing to [the Provider]. If you do this within 30 days from the date we send this letter we will refund your investment less any decrease in the value of your investment from the time it started.

- Customer Information Notice

On the front page of the Customer Information Notice the issue of “WHAT HAPPENS IF YOU WANT TO CASH IN THE POLICY EALRY OR STOP PAYING PREMIUMS” is addressed.

[original emphasis]

It advises that if the plan is cashed in within the first five years and early withdrawal charge will apply, which charge is equal to 5% of the amount in years one to three.

- The “Terms and Conditions” Booklet

An explanation of what the cooling off period is, is set out on page 2 of the terms and condition:

Cooling-off period

If, after taking out this investment, you fell that it is not suitable, you may cancel it by writing to us at the address shown above. If you do this within 30 days from the date we send you your welcome pack (or a copy) we will refund your payment, subject to taking off any losses that may have been incurred as a result of falls in the value of assets relating to the investment for the period that it was in force.

The matter of “**Cashing in your investment**” is dealt with in Section 9 of the booklet:

Cashing in your investment

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These sections explain how to withdraw all or part of your investment, and what happens when you do this.

You may cash in your investment at any time, subject to any delay period that may apply (see below), by writing to us at the address given in the introduction to this document. Once you have given us notice that you wish to cash in your investment you cannot change your mind.

If you take your money out more than five years after you put it in, we will pay you the full fund value, less any tax that may be due.

The cash in value you receive will be based on the value of your units at the end of any notice period.

However, if you want to cash in your investment less than five years after putting your money in, we will reduce your fund value by taking off our 'early withdrawal' charge. This charge is a percentage of your fund value which depends on the number of years (or part of a year) between the date that you take your money out and the fifth anniversary of the date you put it in. This means that if you have made extra investments, you may different early withdrawal charges on different parts of your fund value. We don't make this charge if you cancel during the cooling off period which we refer to in the introduction.

[emphasis added]

The percentages are as follows:

Year *	Early-withdrawal charge as a percentage
1	5%
2	5%
3	5%
4	3%
5	1%

*This refers to the anniversary of the date you put the money in.

The Complainant has submitted that as he was unable to log on to the Provider's Online Account area he was unable to view these documents.

On **15 August 2014**, the Complainant attempted to access his online account but encountered password problems and so contacted the Provider's Customer Services by email.

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On **19 August 2014** the Provider's Customer Services responded and the Complainant logged onto his account.

I note that the Complainant spoke with an Agent of the Provider about his online account on two occasions, the first on **25 August 2014** when he received a call from the Provider to confirm that everything was in order and the second, on **04 November 2014** when the Complainant contacted the Provider about his log in details.

- Telephone Calls

Call 1:

On the call of **25 August 2014**, the Agent advised the Complainant that the purpose of the call was to confirm details, check that he had received the documents and that he was happy with the plan. I note the following extract:

Agent: *...This Bond [Complainant's name], it doesn't have a fixed term but an early exit penalty applies if it is cashed in during the first five years, so we do recommend that you consider it to be a long term investment. So, are you happy that [Agent's name] who sold the plan] explained the plan in detail to you?*

Complainant: *Yeah.*

A: *I know [C.], I was just looking at your file before I rang you, you did have a bit of an issue with the online service, that you had to contact our Customer Service Department, is that right?*

C: *That was only a password issue.*

A: *And has that been sorted out for you?*

C: *Yep, because I went in and changed the password. You have to do it within 5 days.*

A: *That's correct, before the password expires. Oh well, that's grand. So, you should have found then your product booklet, a copy of the product booklet terms and conditions and your investment schedule online. We do ask that you thoroughly read through them, just to make sure that you fully understand the plan but also to check that your personal details are correct. So, have you had a chance to check through that information,*

C: *Ehh (laughs) You know the answer, don't you?*

A: *Okay, whenever you have the time if you can just check through. If you find that any of the personal details need to be updated or if any of the information needs*

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to be updated, just give us a call back here and we'll look after it for you. Is that okay?

C: *That's grand, yeah.*

A: *Brilliant. Now, there was also a financial review report sent to you by email as a PDF attachment that was just a summary of the meeting that you had with [Agent's name]. Do you know if that arrived as well?*

C: *Oh it did yeah, yeah.*

A: *Okay, well again [Complainant's name] we ask that you check through that just to make sure that the details in the report match what was discussed during the meeting.*

C: *Yeah, yeah, no, that was fine.* [my emphasis]

Call 2:

On **05 November 2014** the Complainant contacted the Provider seeking his log in details and I note the following exchange:

Complainant: *I just logged on there to get a valuation and obviously what I've got is wrong. I recorded, I got some message, you see, I seem to have lost paperwork here. I have a password and I have a PIN number, a 6 digit PIN Number but the thing is asking for me, for an Online Services ID and I don't know what that is and I'm wondering how do I find out?*

Agent: *Okay do you have your plan number there?*

C: *I don't. This is the trouble, I don't seem to have anything. I don't seem to have anything. I have the receipts from [Provider]. That's all I can find.*

[my emphasis]

The Agent advised the Complainant that she would send out a new password and User ID number which he would need to log in, in future.

I do not have any record of the Complainant having contacted the Provider again in this regard or having put it on notice of his having any issues logging in.

Analysis

I consider that there was a reasonable onus upon the Complainant to have reviewed the Policy documentation which had been provided to him. If he had an ongoing issue with

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his login details he should have readdressed this with the Provider or could have asked to have a copy of the Policy documentation issued to him in hard copy. I note that the Complainant's application had been accepted by the Provider, on **13 August 2014** and had he read the documentation, he could have availed of the cooling off period to consider his position and cancel the policy without financial penalty, had he so wished.

The Complainant's difficulties in accessing his account, do not appear to have arisen from technical defects on the part of the Provider but rather appear to have been related to login detail issues, which the Provider sought to assist the Complainant with when requested. In circumstances where the Complainant had opted for online documentation, I believe that there was a responsibility upon the Complainant, concomitant with any responsibility of the Provider to facilitate access, to have notified it that he could not successfully log in, apart from on **19 August 2014**. Indeed, upon that date, the Complainant could have reviewed the documentation in question when he logged in.

I note that the issue of the Early Withdrawal Penalty became an issue on or about the time that the Complainant was advised by his Brokers to encash the policy and reinvest the proceeds into a pension plan offered by the Provider.

Encashment of the Policy

28 January 2016 – The Complainant's Broker enquired over the phone about the fund value of the Complainants policy.

17 February 2017 – The Complainant spoke with the Provider and indicated that he had "just managed to register online". He went on to discuss the Early Withdrawal Penalty and how he had not been aware of it:

"I'm not pleased with [the Provider] because my fund manager [name] of [Broker Firm] is investing all our life savings in [Provider] pension funds. And he is actually going to decide which category for us from now on that main element of our savings. However, this is still in my remit and I'm not letting go because of the 5% exit charge. The reason I am not too impressed is that I wasn't told about that exit charge upfront and there is nothing on your glossy brochure of 3 pages double sided that warns about that. It just says at the bottom, warning, if you invest in this fund you may lose some or all of your money. You invest, which is bad grammar but anyway. But nowhere does it specify that there is a 5% exit charge ... the reason my attention is drawn to it is that [Broker's name] wanted me to sell out of this and now I find, well, last August it was worth 185, okay tax considerations there with the 41 % or whatever it is, but now it's worth less than I paid for it but not only that the 5% kicks in which I wasn't told about it."

During a Second call of **17 February 2017**, he spoke of it again, as follows:

Complainant: *"I'm in the [Fund] thing. My attention was drawn to it because I'm working with a guy called [Name and Firm] and he's consolidating all our investments into a pension fund or at least the ones I am allowing him. And, em, so it's my intention that*

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the [Fund] has been battered in the last 6 months and he was keen to get me out of that. So, I said well fine, he's going to manage it. Thing is [the Provider] wouldn't waive the 5% exit fee even though he was proposing to re-invest it directly back into [the Provider]

Anyway, I mentioned this fee, well they mentioned it to me and I said well would you not ask [the Provider] to see would they waive it considering we are investing straight back into [the Provider].

Agent: *Right.*

C: *So, both [Broker's names] immediately thought yes that's likely and a good idea. So I asked and the answer was no. Now, I'm just wondering how long does this 5% exit fee stand on the thing, is it permanent?*

A: *No. Let me double check. It usually reduces as the years go by. I'm just going to double check your terms and conditions here.*

...

Yeah, so the first 3 years its 5%, in the fourth year its 3% and in the fifth year 1%. So there's an early withdrawal penalty in the first 5 years, basically.

C: *So, it's always, the minimum even if I hold it there its always going to be 1%, after 5 years.*

A: *After 5 years its nothing.*

C: *Oh, right.*

A: *Yeah but in the first 5 years there's a penalty.*

C: *Okay, right. Fine [the Provider] is entitled not to waive that fee but I think it's bad form given that [Brokers] gave assurances that it was going to be immediately reinvested into [the Provider] I just think that's a fact. 5% of 147,000 is about 7,000...*

A: *Yeah 365.57*

C: *So, [the Provider] wants €7,000 from me for shuffling a few bits of paper, just because I'm in a contract. That's just that way it is. I can do nothing about this and I'm not going to sell out of this with any transaction charge if I can help it. Meanwhile [Broker] is trying to do his best for me. That's just the way it is. I would like to request waiving that fee. Would you send it up the line, I'm actually going to write in, in well obviously writing, who should I address it to?*

(Agent gives address and explains that there is no need for him to mark it for the attention of any particular person but to include the policy number, so they know which file they need to scan the correspondence onto).

C: *...Why should [the Provider] just take 5%, a good portion of my life savings just because they are shuffling a few bits of paper.*

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A: *I know. It's the type of plan you took out, it's to help people save more rather than take out of it...that's just the type of plan it is...*

Regarding the charge, he acknowledged that it was *"quite possible that the lady who sold it to me in [agent] did tell me but you don't take every bit of information verbally."*

The Agent pointed out that *"Sadly when you sign something though, it is a legal document"*.

The Complainant indicated that he was not happy with the situation:

C: *I used to know somebody senior in [the Provider] but I shouldn't need to know people.*

A: *No, of course not.*

C: *It's not just me, both [Broker name] and [Broker name] thought it was perfectly reasonable that the fee be waived...*

He indicated that he would be following up on the issue.

22 February 2016 – The Complainant completed a Savings Withdrawal Form.

24 February 2016 – The Complainant's Broker emailed the Provider, and attached a copy of the Saving Withdrawals Form and requested encashment.

25 February 2016 – Letter issued to the Complainant confirming that €141, 163.86 would be credited to his account and available within 4 days.

29 February 2016 – The Complaint lodged a formal complaint with the Provider.

Having had regard to all of the evidence and submissions of each party, I am satisfied that the Complainant was on notice of the existence of the Early Withdrawal Penalty when he was advised of it verbally on **24 July 2014**, at the point of sale, as well as at the beginning of the "welcome call" which the Provider placed to the Complainant on **25 August 2014** (which verbal advices the Complainant accepts he received). During that same call, he confirmed to the Agent that he had received and reviewed a copy of the Financial Review, which document referred to the existence of an early exit charge.

Within the Application Form, signed by both the Complainant and the Agent, the Complaint confirmed that:

"Particular focus and attention were given to the following matters when arranging the product" including "Product booklet and Customer Information Notice" and "Any encashment penalties included in the product."

The Plan Documentation which was available to the Complainant online from **15 August 2014** (the Provider having accepted the Complainant's application on 13 August 2013) contained written details of this Early Withdrawal Penalty. I do not accept that he was not provided with an opportunity to view these documents and he successfully logged in to his

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account on **19 August 2014**, at which time he could have availed of the cooling off period if he did not wish to proceed, on the basis of the existence on the early exit penalty.

It was, of course, open to the Complainant to request the Provider to waive the Early Withdrawal Penalty which applies to all policyholders. I am satisfied that, in February 2016, after both the Complainant and his Broker had requested the Provider to do so but without success, it was then a matter for the Complainant as to whether or not he wished to continue with the encashment of his investment, in the knowledge that this would incur a penalty of €7,429.67. In the event, he elected to proceed.

I appreciate that the Complainant believes that this was an unjust charge for what he considered to be the Provider simply “shuffling bits of paper around”, however, I am satisfied that the Provider was entitled to enforce this as part of the terms and conditions of the Product which the Complainant agreed to. The investment entered into the Complainant in 2014 was designed for a period of at least 5 years but the Complainant elected to withdraw from that investment after only 18 months and he thereby incurred the contractual Early Withdrawal Penalty which had been discussed with the Provider’s Tied Agent in July 2014, prior to the Complainant proceeding with the investment. Accordingly, on the basis of the evidence available, this complaint cannot be upheld.

Conclusion

- My Decision pursuant to **Section 60(1)** of the ***Financial Services and Pensions Ombudsman Act 2017***, is that this complaint 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
DIRECTOR OF INVESTIGATION, ADJUDICATION
AND LEGAL SERVICES**

2 August 2019

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.