



<u>Decision Ref:</u>	2020-0221
<u>Sector:</u>	Investment
<u>Product / Service:</u>	Shares/Equities Investment
<u>Conduct(s) complained of:</u>	Fees & charges applied
<u>Outcome:</u>	Partially upheld

LEGALLY BINDING DECISION OF THE FINANCIAL SERVICES AND PENSIONS OMBUDSMAN

Background

The complaint involves an investment policy sold and operated by the Provider against which this complaint is made. The Complainants invested €1million in the investment fund in 2007. It is the Complainants' position that in 2009 they first sought information on the amount of fees deducted from their holding in the Fund. The Complainants state that the Provider's representative agreed to furnish the required figures in due course. The Complainants state that the Provider did not furnish the required figures in a timely manner. The Complainants also assert that there was a delay by the Provider in issuing a final response letter in order to allow a referral of the complaint to this office.

The Complainants state that the requested figures were not provided in 2009 and were requested again in 2016 and 2017. The Complainants submit that they have requested details and opinions from two firms of actuaries, one based in Ireland and one based in London, who both have advised that they *would not be surprised if the Complainants were incorrectly charged*.

The Complainants are seeking a refund of any overpayments made by them in fees to the Provider. The Complainants seek a recalculation of fees deducted from the Fund prior to any encashment that they withdrew from the Fund and say that this will require expert actuarial calculations.

The complaint is that the Provider failed to provide requested information on investment fees, to the Complainants, in a timely manner.

The Complainant had a previous complaint against the Provider and submitted a considerable volume of material about that complaint and other unrelated matters. The Complainants were informed on several occasions by this office that these matters do not form part of this investigation and are therefore not dealt with in the decision.

The Complainants' Case

The Complainants state that their complaint concerns the inability of the Provider to answer queries or issue the Final Response Letter. The Complainants say that this involves a €1 million investment in the Investment Fund, sold and operated by the Provider to which the Complainants' entry date was 1st February 2007.

The Complainants state that in 2009 they spoke with a Provider employee who was acting as a replacement Relationship Manager for the Relationship Manager of their Account. The Complainant states that on return from her holidays, the Relationship Manager for the Complainants' account contacted the First Complainant to hold a meeting with him in a Hotel. He states that this location was chosen by her rather than the Bank's office.

The First Complainant states that at the time of arranging the meeting he was under the impression the meeting was called for the purpose of discussing the report of the findings of the Complainants' Actuary and Accountant about management fees on another Investment Policy that they held with the Provider at the time. The First Complainant states that they discussed this item in depth.

The First Complainant states that as the Provider was deducting the Management Charges applicable to the Investment Fund, he required to know the amounts deducted from the Complainants' holding in the Fund. The Complainants state that the Relationship Manager agreed to provide the required figures, in due course.

The Complainants submit that time moved on and they heard nothing further from the Provider, but in 2016, the Provider issued legal proceedings in relation to a separate matter.

The First Complainant states that in January 2017, he wrote to the Provider. This correspondence was acknowledged and contained an indication that the information requested would be sent to him imminently. No reply was received by the Complainants regarding the deductions made from their investment Fund, as promised by the Provider.

The Complainants state that they then wrote to the Provider requesting these deductions. As Policyholders, they believed they were entitled to be advised of any deductions which had been made. The Complainants state that they requested details and opinion from two firms of Actuaries, one based in Ireland and one based in London. They state that both of these have stated *firmly* that *they would not be surprised*, that they *might* have been incorrectly charged.

The Complainants state that with the limited information available, the expert opinion is that there is and was, *a strong chance* of the Provider owing them money *if the Provider's overcharging exercise happened*.

The Complainant states that the recalculation of the Management Fees, that were deducted from the Investment Policy prior to any encashment that they withdrew from the Fund' will require expert actuarial calculations. The Complainants state that they required full accurate figures and not estimates.

It is the Complainants' position that the Provider *failed miserably* in its duty of informing them of deductions from their investments or accounts. The Complainants want these issues investigated and if errors are found, they want a refund.

The Provider's Case

It is the Provider's position that it is satisfied that the Complainants were advised from the outset, and during the time the money was invested, of what fees were to be deducted from the Fund.

The Provider states that the Complainants were provided at the outset of the investment with the following documents:

- The Investment Prospectus dated 1st November 2006 ("Prospectus")
- An Investment Supplement dated 1st November 2006 ("Supplement")
- The Investment Fund Brochure ("Brochure")

The Provider explains that fees that would be deducted from the Fund were comprised of the following and were set out in the above documents as detailed below:

- Investment Management Fee:
Supplement page 9 under heading "Manager's Fees" - "up to 1.5%"
Brochure under heading "Fund Details" — "Management Fee of 1.5% per annum"
- Trustee Fees:
Supplement page 11 under heading "Trustee Fees"- "up to 0.025%"
- Administration Fees:
Supplement page 11 under heading "Administration Fees" — "up to 0.1%"
- Transaction and other costs:
Supplement page 11 under heading "Trustee Fees" — "*The Trustee will also receive out of the assets of the Sub-Fund sub-custodial fees, transaction charges and expenses as shall be agreed with the Manager from time to time which shall be at normal commercial rates.*"

The Provider states that on 16 January 2007, prior to the investment, the Complainants completed and signed an application form containing a confirmation they had read and understood the section of that form called "Understanding Your Investment". That section, at point 3 on page 3, set out details of the cost of investing.

As regards the Complainants' awareness of the fees during the time the money was invested, the Provider states that fees to be deducted remained applicable as set out above throughout the period of the investment in the same way as advised from the outset.

The Provider accepts that information about fees was not provided in a timely fashion in response to the Complainants' request made on 7 February 2017. The Provider accepts that the Complainants sent reminders in relation to that request on 8 August 2017, 16 August 2017 and 19 August 2017. The Provider accepts that it did not provide the information until 6 February 2018. The Provider states that the request for information related to an investment which took place many years ago and the Provider had to undertake significant work to be able to respond. The Provider states nevertheless, it is accepted that the information about fees was not provided in a timely fashion. The Provider has apologised for this delay on a number of occasions.

The Provider's position is that it does not accept that there was a delay in issuing a Final Response letter to the Complainants. The Provider states that it treated the Complainants' communications from February 2017 to August 2017 as a request for information, rather than as a complaint. The Provider states that the Complainants refer to the request for information in such terms in letter dated 19 August 2017.

The Provider submits that once the communications took the form of a formal complaint it issued a final response letter without delay. This occurred when the Complainants made a formal complaint dated 12 January 2018 to this office and that complaint was received by Provider, from this office, on 23 January 2018. The Provider then issued a final response letter to the Complainants on 6 February 2018.

The Provider states that it is satisfied that it has fully examined the allegation that excess fees were taken by the Provider and has furnished its fullest response to this.

The Provider submits that the Complainants were made fully aware of all the fees that would be deducted from the investment at the outset. The Provider states that it completely denies any allegation that excess fees were taken in regard to this investment. The Provider states that its letter dated 6 February demonstrates that fees were deducted in line with those agreed at the outset and its letter provides the Provider's fullest response to the allegation.

In its letter of response to the complaint dated 6 February 2018 the Provider states that:

"Given the unitised nature of the investment, this is our best estimate of the fees deducted but it is a fair reflection of costs as they applied to your investment."

The Provider was asked by this office to further clarify what it meant by this statement and to further explain why it could not give an exact calculation for the deducted fees.

The Providers response is that the fees in the Investment Fund are calculated and accrued at the fund level, not at an individual level. The Provider states that this means, that the fund's Net Asset Value ('NAV') moves lower as fees are accrued. The Provider explains that each client holds units in the fund and therefore their fees are reflected in the overall value of their holdings (i.e. Units Held* NAV = Value (Net of Fees)). The Provider states that this approach is consistent for all investors in the Investment Fund.

The Provider states the Complainants' request related to an investment which took place many years ago, involving different legacy systems of the Provider. The Provider states that it was unable to rely on a 'system' generated calculation and instead had to manually extract the NAV's and unit holdings over the period in question. In this regard, the Provider states it classified its calculation as an 'estimate' and it believes that it gives an accurate account of the fees charged on the Complainants' account. The Provider believes that any differences between this and a system generated calculation would be immaterial.

The Provider summarises its responses to the complaint as follows:

- The Provider accepts that it did not reply to the Complainants' request for fee information in a timely manner
- The Provider does not accept that the Complainants were in any way 'double-charged' as suggested by the complainants.
- In response to much of the material submitted by the Complainants, the Provider submits that the matters raised are either irrelevant to the current complaint or have already been dealt with under a previous complaint.
- The Provider denies providing fabricated or false evidence.

Current status of the investment

The Provider states that the investment is no longer 'in force'. The Complainant invested €1 million in the fund in 2007 and was completely divested by September 2013 (having received €961,305).

Evidence and Additional Correspondence from the parties

The Provider's estimated fee figures

"Appendix

Investment – [the Complainant]

Investment management fee 1.5% €68,131

Trustees fees 0.025% €1,136

Administration fees 0.1%	€4,542
Transaction other costs 0.1%	<u>€4,542</u>
	€78,350"

Policy Provisions

"Investment Trust – Supplement

"Fees And Expenses

Manager's Fees

The Manager is entitled in respect of Class A Units, to charge a fee of up to 1.5% (together with any applicable VAT) per annum of the Net Asset Value of the Sub-Fund accrued and payable monthly in arrears out of the assets of the Sub-Fund together with properly vouched expenses. No management fee shall accrue or be payable in respect of Class M Units.

A performance related fee (the "Performance Fee") is also payable to the Manager. The Performance Fee is calculated in arrears in respect of each performance period, accrues monthly and is payable annually. A performance period will comprise each accounting period of the Fund (the "Performance Period"), with the first Performance Period commencing on 15 November 2006 and ending on 31 December 2007. ..

Trustees Fees

The Trustee is entitled to an annual fee out of the assets of the Sub-Fund, accrued monthly and payable monthly in arrears of up to 0.025% of the Net Asset Value of the Sub Fund ...

Administrative Fees

The Administrator is entitled to an annual fee out of the assets of the Sub-Fund, accrued monthly and payable monthly in arrears, of up to 0.10% of the Asset Value of the Sub Fund as of each Dealing Day, together with VAT, if any. This fee is subject to a minimum fee of up to €8,500 per month".

Further Submissions

The complainants engaged in a considerable volume of correspondence with this office over an extended period throughout the investigation of this complaint. This included correspondence and submissions made by the Complainants on the following dates:

- 18 September 2018
- 02 October 2018
- 14 November 2018
- 25 February 2019
- 08 October 2019
- 18 October 2019
- 20 October 2019
- 6 November 2019
- 12 November 2019
- 26 November 2019

- 23 September 2020

The majority of the content of these submissions did not relate to the complaint under investigation, rather most of the content related to other complaints or a previous complaint adjudicated by this office.

The Provider responded to some of the Complainants further submissions on 25 September 2018, 18 February 2019 and 11 November 2019. The main thrust of the Provider responses in those submissions was to point out that many of the matters raised by the Complainant were irrelevant to the complaint and that the content of the submissions had been dealt with in a previous legally binding Finding from the Financial Services Ombudsman.

The Complaints for Adjudication

The complaint is that the Provider failed to provide requested information on investment fees, to the Complainants, in a timely manner.

Throughout the investigation of this complaint the Complainants referred to matters relating to other complaints and a previous decisions of this office. It was made clear to the Complainants throughout the investigation that those matters would not be considered as part of the investigation and therefore are not dealt with in this decision.

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 were 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 **24 April 2020**, 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.

A Submission dated **13 May 2020** from the Complainants was received after I issued my Preliminary Decision to the parties. This submission was exchanged with the Provider and an opportunity was made available for any additional observations arising from that additional submission. There was no post Preliminary Decision submission, or responses, received from the Provider.

The Complainants' post Preliminary Decision submission states, among other things:

"We, as the policy holders in this case, are aware of persons that were Double Charged fees on their Investments. Although continuously doubted by the same Financial Provider, the effected person I knew about, told my father of the overcharging he was subjected to. To dispel the Providers willingness to co-operate in that matter, I know personally the Bank official that drew up the settlement terms in that case. Moreover, my first cousin is married to the brother of the effected person in that case, who has confirmed the wrongdoings of the Financial Provider at that time which was relevant to the overcharging."

The Complainants also refer, in their post Preliminary Decision Submission, to statements of a former Financial Services Ombudsman.

These are not matters I can take into account in determining this complaint.

The Complainants have not provided anything in their post Preliminary Decision submission that has persuaded me to alter my view. My final determination is now set out below.

Analysis

The Complainants assert that there was a delay by the Provider in furnishing a final response letter so as to allow a referral of the complaint to this office.

The Provider's response to this aspect of the complaint was that it does not accept that there was a delay in issuing a Final Response letter to the Complainants. The Provider states that it treated the Complainants' communications from February 2017 to August 2017 as a request for information, rather than as a complaint. The Provider states that the Complainants refer to the request for information in such terms in their letter dated 19 August 2017.

The Provider submits that once the communications took the form of a formal complaint it issued a final response letter without delay. This occurred when the Complainants made a formal complaint dated 12 January 2018 to this office and that complaint was received by

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Provider, from this office, on 23 January 2018. The Provider then issued a final response letter to the Complainants on 6 February 2018.

I accept this explanation by the Provider. Furthermore I note that in the Complainants' submission dated 18 September 2018, the Complainants also accept the Provider's position in relation to the issuance of Final Response Letter.

In relation to requested information on the investment fees, I consider that if there had been better communication by the Provider in relation to the amount of fees that were deducted from the investment, this complaint might not have arisen.

As regards the provision of information to a consumer the Consumer Protection Codes require that a regulated entity must ensure that all information it provides to a consumer is clear and comprehensible, and that key items are brought to the attention of the consumer. The method of presentation must not disguise, diminish or obscure important information. A regulated entity must supply information to a consumer on a timely basis. In doing so, the regulated entity must have regard to the following: (a) the urgency of the situation and (b) the time necessary for the consumer to absorb and react to the information provided.

It is accepted by the Provider that the standard of service in relation to the provision of the information in relation to the fees was not adequate. Neither was it in line with what would reasonably be expected of a financial service provider, as required by the regulatory codes.

The Provider accepts that information about fees was not provided in a timely fashion in response to the Complainants' request made on 7 February 2017. The Provider accepts that the Complainants sent reminders in relation to that request on 8 August 2017, 16 August 2017 and 19 August 2017. The Provider accepts that it did not supply the information until 6 February 2018.

The Complainants' position is that they also requested the investment fee information as far back as 2009, but say that this information on the fees was not provided then.

As regards the Complainants' position that Provider's employees had previously been asked by them in 2009 for a breakdown of fees, the Provider states that it has no record of the requests for information from the named Provider representatives, nor of any response to such requests. The Provider however, apologises if such requests were not responded to. This office has been provided with no evidence of these interactions.

I accept that the Complainants would have reasonably wanted, and were entitled to expect, to be correctly informed about the fees that were deducted from the investment fund, and to be correctly informed in a timely fashion, particularly where such information was specifically requested by the Complainants and where they were advised that the information would be provided.

It is particularly disappointing is that the Provider's delay in providing the information continued for a considerable period of time. I accept this information should have been available to the Complainants when requested, in order to allow the Complainants to deal with their finances on the basis of the correct and full information about their investment.

It is particularly important that timely and accurate information is made available in relation to investment products and I accept that the Provider should have responded better to the Complainants' request for the information concerned and that the delay in supplying the information was not acceptable.

In relation to the accuracy of the information supplied, the Provider states that it believes that any differences between the manually generated calculation (which it provided the Complainants) and a system generated calculation (which it states it was not able to provide), would be immaterial.

The Complainants' position, in this regard, is that from their previous experiences of the Provider in relation to calculations, they lack confidence in the Provider and for this reason they require full and accurate figures rather than estimates.

The Complainants state that they do not work on the basis of 'estimates' and did not request an estimate of charges. The Complainants state that what might be classed as *immaterial* to a multi-billion Euro financial provider cannot be deemed as true or accurate.

While I accept that the Complainants would reasonably want full and accurate figures and not estimates, the Complainants did not submit corroborating evidence to support the allegation that they were overcharged fees on the investment despite this office requesting the Complainants to furnish any evidence they have in this regard.

In their submissions, they point to two firms of actuaries which they state have advised that they would *not be surprised* that the Complainants *might* have been incorrectly charged and that there is a *strong chance* of the Provider owing them money *if* the Provider's overcharging exercise happened.

I arrive at my decisions based on an examination of the evidence. I cannot arrive at a legally binding decision based on suppositions or a mere suspicion. I have been provided with no evidence that the Complainants were overcharged fees. Therefore, there is no basis for directing a refund of fees.

That said, I consider that a compensatory payment is merited for the delay by the Provider in giving the Complainants the information they specifically requested in relation to, the investment fees that were paid by them, in respect of the investment.

Having regard to all of the above, I partially uphold the complaint and direct that the Provider pay the Complainants a sum of €500 (five hundred euro) in compensation for the inconvenience caused by the delay in providing the information sought.

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) and Section 60 (6)** of the **Financial Services and Pensions Ombudsman Act 2017**, I direct the Respondent Provider to make a compensatory payment to the Complainants in the sum of €500, to an account of the Complainants' choosing, within a period of 35 days of the nomination of account details by the Complainants to the Provider. I also direct that interest is to be paid by the Provider on the said compensatory payment, at the rate referred to in **Section 22** of the **Courts Act 1981**, if the amount is not paid to the said account, within that period.
- The Provider is also required to comply with **Section 60(8)(b)** of the **Financial Services and Pensions Ombudsman Act 2017**.

The above Decision is legally binding on the parties, subject only to an appeal to the High Court not later than 35 days after the date of notification of this Decision.



GER DEERING
FINANCIAL SERVICES AND PENSIONS OMBUDSMAN

12 June 2020

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.