Financial Ombudsman Service

summary of complaint

Mr and Mrs R (represented by Mr V) complain that the actions taken by MetLife Limited (formerly AIG Life) around September 2008 (including its actions in relation to unit pricing) were unfair and were not accordance with the terms and conditions of the investment.

Mr and Mrs R further complain that, when deciding whether to switch to the Enhanced Variable Rate Fund (***the Enhanced Fund***), they (together with Mr V) relied on statements made by MetLife that were misleading.

my final decision

I issued my provisional decision on 30 October 2012, in which I explained why I was not minded to uphold this complaint. Both parties have responded to my provisional decision.

MetLife's legal representatives agreed with my provisional decision and made no further comment.

Mr V did not accept my provisional decision. In summary, Mr V argued that: a) Mr and Mrs R (together with himself), relied upon the emails *and* the product literature when deciding to make the switch; b) MetLife did not provide adequate risk warnings, and in particular, failed to caution that there was a market risk to the fund; c) MetLife's description of the differences between the Enhanced Fund and the Standard Variable Rate Fund (***the Standard Fund***) was not clear; and d) MetLife's pricing system was unfair and misleading.

Mr V also sent us copies of MetLife's maturity letters dated 4 July 2012. Mr V stated that MetLife appear to have acknowledged there was *'a problem with the fund that was their responsibility and they now invite claims/complaints in respect of it.'* Finally, Mr V requested a hearing to help *'clear up some of the apparent confusions on the case [sic]'*.

On 29 January 2013, one of our adjudicators issued a view in response. The adjudicator set out my provisional view as to why a hearing is not required. The adjudicator considered that Mr and Mrs R, together with Mr V, relied on emails of 7 and 8 August 2008, and not the other statements in MetLife's literature when deciding to switch. And in any event, whilst elements of the literature did not describe the extent of certain risks as fully as they could have done, a more detailed description of the risks at the time of sale would not have resulted in Mr and Mrs R making a different purchasing decision. The adjudicator added that MetLife did not mislead Mr and Mrs R and Mr V in the way it communicated the unit pricing of the funds.

MetLife's legal representatives responded to Mr V's submissions and to the adjudicator's view. It provided reasons as to why none of the points made by Mr V had merit. It further agreed with the conclusions reached by the adjudicator in his view dated 29 January 2013.

Mr V provided us with his final submissions on 16 April 2013, in which he repeated many of the submissions he had made previously. Mr V explained that MetLife misled Mr and Mrs R (and himself) by stating that *'the risks associated with the fund, were ones of default on the underlying assets, and that indeed the worst case scenario was that you could <u>either</u> have your money immediately with a reduction to take account for costs of having to sell the assets early <u>or</u> you could wait 3 months and get your money back without these reductions [original underlining]'*. Mr V emphasised that he and Mr and Mrs R relied on the literature and the email exchange of 7 and 8 August 2008. He added that the literature failed to: a) mention that there was a market risk to the funds; and b) explain clearly the differences between the Enhanced Fund and the Standard Fund. Mr V stated that the previous ombudsman made conclusive findings that the literature was misleading in certain respects.

Mr V elaborated his submission about unit prices. He stated that MetLife should have informed Mr and Mrs R (and himself) that the unit prices did not reflect the market values of the assets held within the Enhanced Fund. If MetLife had done so, this would have *'rung alarm bells'* for himself and Mr and Mrs R. He added that MetLife should have allowed Mr and Mrs R to sell their assets at the *'artificially high level'* on which they entered the Enhanced Fund. Mr V has alleged that MetLife's actions amount to fraud, and he has referred the matter to the Serious Fraud Office.

Finally, Mr V repeated his request for a hearing, which he considered *'necessary to establish the truth, i.e. for Met Life/AIG to answer the relevant questions, and to clear up what you may consider to be inconsistencies in our submissions.'* I have dealt with this hearing request at section (d) below.

I have carefully considered afresh all the information and evidence submitted by both sides (including the submissions and evidence received following my provisional decision) in order to decide what is, in my opinion, fair and reasonable in all the circumstances of this complaint.

background to complaint

a) events leading up to the complaint

On 28 November 2007, following advice from their independent financial adviser (***IFA***), Mr V, Mr and Mrs R applied for a Premier Access Bond (Plan Number PAB00025609) (***the PAB***) and invested £999,843.57 in the Standard Fund. The PAB was a product provided by MetLife.
In early August 2008, Mr V and Ms M (a Relationship Manager at MetLife) had a conversation about the prospect of Mr and Mrs R switching their investment into the Enhanced Fund. On 7 August 2008, Ms M sent Mr V an email, in which she drew his attention to two statements in the product literature (albeit for the similar Premier Growth Plan) with regards to switching between funds. On 8 August 2008, Ms M responded to Mr V's follow up query about worst case scenarios.

On 12 August 2008, following further advice from Mr V, Mr and Mrs R went ahead and switched their investment from the Standard Fund to the Enhanced Fund.

On 15 September 2008 (the day Lehman Brothers filed for Chapter 11 bankruptcy protection) MetLife suspended withdrawals from the Enhanced Fund for three months. It took that action in response to the large number of withdrawal requests it had received following media speculation over the weekend of 13/14 September about the financial viability of American International Group, the American insurer which owned MetLife. This meant that an attempt by Mr and Mrs R to withdraw money from the investment on 16 September 2008 did not succeed.

MetLife subsequently announced that it would close the fund at the end of the three-month suspension – on 15 December 2008 – because of the large volumes of withdrawal requests.

Following the announcement MetLife divided the fund in two, moving the first half (the cash elements of the fund) into the Standard Fund which investors could withdraw – known as the *‘initial switch’* – and offering investors a choice about what to do with the second half.

Investors could:

- surrender their investment or move it to the Standard Fund (known as the *‘exit plan’*) by selling assets early at the best achievable market prices, which because of market conditions meant investors would receive less than the paper value of their investment. Investors could withdraw their money from the Standard Fund if they wished; or

- keep their investment (known as the *‘maturity plan’*) in a new fund – the Protected Recovery Fund (***the PRF***), with a guarantee that on 1 July 2012 policyholders would receive at least the full value of their investment as at 14 December 2008.

Mr and Mrs R opted for the maturity plan, and so the second half of their investment remained in the PRF.

b) the complaint and the firm’s response

In my provisional decision dated 30 October 2012, I summarised the relevant correspondence under this heading. I do not consider it necessary to repeat that summary in this final decision. I would, however, emphasise that Mr V made several submissions about what material he (and Mr and Mrs R) relied upon when switching into the Enhanced Fund. I detail those submissions (at section (c) below) when I make findings about that aspect of this complaint.

my findings

I have included only a brief summary of the complaint (above), but I have read and considered all the evidence and arguments available to me from the outset, in order to decide what is fair and reasonable in all the circumstances.

a) relevant considerations

When considering what is fair and reasonable, I am required to take into account relevant: law and regulations; regulator's rules, guidance and standards, and codes of practice; and, where appropriate, what I consider to have been good industry practice at the time.

As we are concerned with the provision of information about a regulated investment (a whole of life policy and therefore a *'packaged product'*) in 2008, it is important to note the relevant regulatory regime that applied at the time.

The Financial Services Authority (***FSA***), the name of the industry regulator at the time, issued principles which apply to all authorised firms, including MetLife. Of particular relevance to this complaint are:

- Principle 6
  'A firm must pay due regard to the interests of its customers and treat them fairly.'

- Principle 7
  'A firm must pay due regard to the information needs of its clients, and communicate information to them in a way which is clear, fair and not misleading.'

In addition, where investment information is provided, the more detailed FSA's Conduct of Business Sourcebook (COBS) rules apply. These came into force on 1 November 2007 and before that date the Conduct of Business (COB) rules applied, which provide similar guidance. Of particular relevance to this complaint are:

> *'COBS 4.2.1R*
> *(1) A firm must ensure that a communication or a financial promotion is fair, clear and not misleading.*
>
> *COBS 14.2.1R*
> *A firm that sells:*
> *(1) a packaged product to a retail client, must provide a key features document … to that client…'*

The requirements of a Key Features Document are set out at COBS 13:

> *'COBS 13.3.1R*
> *A key features document must:*
> *(1) include enough information about the nature and complexity of the product, how it works, any limitations or minimum standards that apply and the material benefits and risks of buying or investing for a retail client to be able to make an informed decision about whether to proceed; …*

COBS 13.3.2

A key features document for a packaged product must: …
(2) describe the product in the order of the following headings, and by giving the following information under those headings: …

'Risks' The material risks associated with the product, including a description of the factors that may have an adverse effect on performance or are material to the decision to invest'

I also have to consider the general legal position – including the law relating to negligence, misrepresentation and contract (including the express or implied duty on professional advisers to give advice with reasonable skill, care and diligence). Broadly, a misrepresentation is a statement of material fact before the contract – by one party to the contract to the other – which is false or misleading and which induced the other party to enter into the contract.

In this case, it appears that there is not only a substantive dispute between the parties about MetLife's acts or omissions. There is also a procedural dispute about the nature of Mr and Mrs R's complaint.

MetLife accepts that Mr and Mrs R have complained about whether the actions taken by MetLife around September 2008 (including its actions in relation to unit pricing) were fair and in accordance with the terms and conditions of the investment. However, it denies that Mr and Mrs R have complained that they (together with Mr V) had been misled.

The ombudsman service does not require consumers to make *'pleadings'* as a court would (and in my view, MetLife should not treat complaints on that basis either). Our *'inquisitorial'* remit means that I will consider all points that are material to the outcome of the complaint – and not necessarily those constrained by the sometimes quite narrow way in which consumers may put their submissions. We will consider the wider background to the dispute to see whether or not the firm has acted fairly.

Having said that, as Mr and Mrs R are complaining about MetLife (the product provider), and not Mr V (their IFA), I cannot determine this complaint on the basis of whether or not the investment was suitable for Mr and Mrs R or whether it had been *'mis-sold'*.

In this case, it is clear that there is, in addition to any considerations about whether the actions taken by MetLife around September 2008 (including its actions in relation to unit pricing) were fair and in accordance with the terms and conditions of the investment, a complaint that MetLife misled Mr and Mrs R and Mr V into switching into the Enhanced Fund.

For example, in their complaint form dated 24 December 2008, Mr and Mrs R complain about specific statements made by MetLife (in Ms M's emails of 7 and 8 August 2008) before they switched to the Enhanced Fund. Mr V's correspondence of 3 October 2008, 19 February 2010, 9 May 2011 and 13 August 2012 (set out above) repeated the statements that Mr and Mrs R complain they relied upon, and which they say misled them and Mr V. In Mr V's latest correspondence, he has submitted that he and Mr and Mrs R also relied on other statements in the MetLife's product literature when deciding to make the switch.

It therefore seems to me that this complaint concerns two aspects:

i) whether the actions taken by MetLife around September 2008 (including its actions in relation to unit pricing) were fair and in accordance with the terms and conditions of the investment;

ii) whether the statements made by MetLife that Mr and Mrs R, together with Mr V, relied upon in deciding whether to switch to the Enhanced Fund were misleading.

b) actions taken by MetLife in September 2008

I consider first the events of September 2008 and the steps MetLife took to restrict withdrawals from the Enhanced Fund. MetLife has told us that, ordinarily, it would have expected to receive withdrawal requests from the Enhanced Fund totalling somewhere in the region of £20 million each day, which would usually be met from the cash reserves contained within the Enhanced Fund.

MetLife has pointed out that on 15 September 2008 – most likely owing to negative press coverage about the stability of its US parent company – it received an exceptionally high number of withdrawal requests. It says that on 15 and 16 September 2008 alone it received withdrawal and switch requests totalling £2 billion. In the days that followed, it says these requests increased to around £4 billion. To put this in context, MetLife's marketing material suggests the fund had around £5.77 billion under management at this time. A significant portion of this was held in assets with more than six months to maturity, with some having to be held for four years.

It therefore appears that MetLife was facing an exceptional demand for withdrawals that could not have been fully met from just the cash reserves within the Enhanced Fund. In the circumstances, it seems likely that the only way that MetLife could have complied with the volume of withdrawal requests it received would have been to dispose of assets in advance of their maturity. In doing so, however, it is likely these assets would have had to be sold at a reduced value – or in some cases it may not have been possible at the time to sell the assets. Clearly these circumstances placed the Enhanced Fund under exceptional stresses and strains. It seems to me that attempting to meet demand for withdrawals may not have been physically possible or at least could only be achieved by a set of actions that would have crystallised very significant losses across the Enhanced Fund.

In a situation where MetLife could not fully comply with all of the withdrawal requests it had received, I do not believe it was unreasonable for MetLife to conclude it needed to take action to meet the demands as fully as possible, while at the same time safeguarding the interests of investors remaining in the fund.

First, MetLife decided to defer withdrawal and switch requests from the Enhanced Fund for a period of three months. This does not appear to have been an unreasonable course of action in the circumstances and is one that was specifically allowed for within the terms and conditions of the investment. Section 8.3 of the investment conditions stated:

> *'If large numbers of switches and/or withdrawals are made from the same Fund at the same time, the Fund may incur costs in selling assets to meet these encashments. Alternatively, the Company may defer switches and withdrawals for up to three months if it considers that this would be more beneficial to Policyholders generally. It is likely that this will only happen in exceptional circumstances.'*

Subsequently, MetLife decided to close the Enhanced Fund. This course of action is also permitted within the investment conditions. Section 6.2(b) stated:

> *'Subject to Condition 6.3, the Company may from time to time … withdraw an existing Fund from availability under these Conditions'*

Section 6.3(c) stated:

> *'In the event of withdrawal of a Fund, the Company will give not less than one month's notice to the Policyholder and will provide information regarding the Funds then available and ask for instructions before the end of such period of notice. If no instruction is received within that time to cancel the Units for switch or withdrawal, the Units of the Fund being withdrawn will be automatically cancelled and the proceeds allocated to Units in the Standard Variable Rate Fund on the Pricing Date immediately following the expiry of that time.'*

MetLife then wrote to all investors (and in the case of Mr and Mrs R, it also wrote to Mr V) at the start of October 2008 confirming the available options now it had decided to close the Enhanced Fund. By moving funds into the Standard Fund at the beginning of October 2008, and before the one month notice period had elapsed, it could be argued that MetLife was in breach of the investment's terms and conditions. Once money had been transferred into the Standard Fund, however, it allowed investors immediate access to that part of their capital and I do not believe it could reasonably be argued that this was detrimental to the interests of investors.

In the three months after withdrawals were suspended on 15 September 2008, investors had the opportunity to select a maturity option for the other half of their capital – i.e. wait for it to be returned in full in July 2012, or an exit option – i.e. withdraw it immediately with a significant deduction.

I appreciate that, following the end of the three month period of suspension, the options offered by MetLife carried a different pricing system to that which was set up under the Enhanced Fund. Mr V considers that, as MetLife did not continue to value Mr and Mrs R's assets according their *'book value'*, it treated them unfairly.

These options (and the different unit pricing they applied) were not specifically mentioned in the investment terms and conditions. As stated above, however, MetLife was in a particularly unusual situation and had to find an appropriate outcome for all investors, including those who remained in the Enhanced Fund. In the circumstances, I believe the options offered by MetLife were a reasonable attempt to ensure an orderly closure of the Enhanced Fund. As an alternative, it could have simply sold all of the assets within the Enhanced Fund and paid out to all investors at a significantly reduced value, in accordance with the terms and conditions. Again, I do not believe it could be argued that the decision to allow investors an alternative option was detrimental to their interests.

In making that finding (and whilst I place no reliance on this point), I observe that the FSA chose not to take regulatory action in relation to MetLife's different system of unit pricing under the exit plan and the maturity plan.

I appreciate that developments at the end of 2008 must have been very distressing for Mr and Mrs R. For the reasons I have outlined, however, I am satisfied MetLife acted broadly within the terms and conditions of the investment and in a way that was designed to be as fair as possible for all investors.

I think it is also relevant to note that even if this assessment of the rights provided to MetLife under the rules of the fund is incorrect or otherwise it was the case that the fund managers failed to comply with the fund rules, it is difficult to see what alternative steps MetLife should have taken. MetLife clearly faced in my view exceptional circumstances that warranted it taking action to protect the overall interests of fund investors. Allowing some but not other withdrawals was not a realistic option. So whilst I am very conscious that investors have lost out as a result of these events, I do not see that the fund manager could in September 2008 have avoided those losses in the circumstances – indeed I can see that the losses could have been more significant than they have in fact already been.

So, whilst I have sympathy with the circumstances Mr and Mrs R find themselves in, I do not consider it fair and reasonable to hold MetLife responsible for the losses they have incurred on the basis of its actions in first suspending then closing the Enhanced Fund.

c) statements made by MetLife

Having concluded that the actions taken by MetLife around September 2008 were fair and reasonable in the circumstance, I now need to consider the second limb of Mr and Mrs R's complaint.

At the outset, it is important to note that these products were sold through advised channels - that is the customers only entered into the PAB (and the Enhanced Fund) having received independent financial advice to do so.

As such, when deciding whether to switch to the Enhanced Fund, Mr and Mrs R did not simply rely on the product literature that MetLife had provided. Mr and Mrs R acted upon the professional advice of Mr V. MetLife are right to point out that it was Mr V's role to assess the level of risk posed by the Enhanced Fund, and advise Mr and Mrs R as to whether that level of risk was suitable for their objectives.

Accordingly, before concluding whether this element of the complaint should succeed, I would need to be satisfied that:

- Mr and Mrs R, *together with Mr V*, reasonably relied upon statements made by MetLife before they decided to switch to the Enhanced Fund;
- those statements were false or misleading; and
- if MetLife had not made those misleading statements Mr and Mrs R (again taking account of any advice they received from Mr V) would not have invested in the Enhanced Fund.

From their initial complaint to MetLife (set out in Mr V's email to an employee of MetLife dated 3 October 2008), and in all their submissions to this service before my provisional decision, Mr V maintained that he and Mr and Mrs R relied upon Ms M's emails of 7 and 8 August 2008 (and the sections of the literature she referred to) when making the decision to switch into the Enhanced Fund.

In Mr V's email dated 19 February 2010, he made it very clear which statements he and Mr and Mrs R had relied upon. Mr V wrote that:

> *'Prior to making the switch* ***we relied upon*** *the statements made in AIG key features document (and repeated by their representative prior to making the switch that the worst case scenario was that they would have to wait three months for their money without any reduction in the unit price being made. Safety of capital was of prime*

> *importance, nowhere was it mentioned that the assets could fluctuate in value or that they might have to wait a longer period of time for their money. Had these risks been outlined Mr & Mrs [R] would have stayed in the standard fund. [my emphasis and underlining]'*

In their letter dated 26 April 2011, MetLife's legal representatives sent a detailed submission to this service, in which it addressed the other statements in MetLife's product literature (including the Key Features document and the *'fund* choices' section of the PAB brochure). Crucially, in Mr V's reply of 9 May 2011, he stated:

> *'[MetLifes's legal representatives] and the KPMG report they have commissioned seem to be very selective on the sections of the AIG literature they are commenting on. In particular <u>they don't comment on the sections of the literature Mr & Mrs [R] have complained about, and which were reconfirmed to us prior to making the investment by a senior member of the AIG staff [Ms M],</u> **<u>and relied upon</u>** <u>before making the investment, namely</u>:*
>
> > *"Your investments are only at risk if any of these financial instruments fail to meet their obligation"*
> >
> > *and*
> >
> > *"If large numbers of Bonds are encashed at the same time, the funds may incur costs in selling assets prior to their intended maturity date to meet these encashments, and these costs may cause a fall in the unit prices and therefore the return on your Bond. Alternatively, AIG Life may defer encashments for up to three months if it considers that this would be more beneficial to Bondholders generally. This would only happen in very exceptional circumstances"*
>
> *This has obviously turned out not to be the case as there was a market risk to the investments, which AIG knew about at the time but did not disclose.*
>
> *We feel the failure to comment on these points, renders the report in particular of little value.* [my emphasis and underlining]*'*

However, Mr V now suggests that he (and Mr and Mrs R) also relied upon the *other* statements in MetLife's product literature before they decided to switch to the Enhanced Fund.

I have carefully considered this submission. There is no contemporaneous evidence to suggest that Mr and Mrs R, together with Mr V, did rely upon that material – whereas such evidence does exist in relation to Ms M's emails of 7 and 8 August 2008. Those emails were: a) in response to Mr V's queries about making the switch into the Enhanced Fund; b) sent just four days before the switch took place; and c) the last communication from MetLife before the switch.

In addition, it is important to note that Mr V has made contradictory submissions on this issue in the past (as set out above) and he made his recent submission about reliance at a very late stage in our process, and in response to my provisional decision.

As such, I remain satisfied that Mr and Mrs R, together with Mr V, relied upon Ms M's emails of 7 and 8 August 2008 (and the sections of the literature she referred to), and not the other statements in MetLife's product literature when making the decision to switch.

It follows that the relevant question for me to consider is whether those statements were false or misleading.

I have therefore considered Ms M's emails of 7 and 8 August 2008 in detail.

Following a conversation between Mr V and Ms M about the prospect of Mr and Mrs R switching their investment into the Enhanced Fund, Ms M sent Mr V the following email on 7 August 2008:

> *'Further to our conversation, I'm attaching the Key Features and Policy Conditions for the Premier Growth Plan.*
>
> > *I would draw your attention to the following in respect of fund switches:*
> >
> > *Key Features – third from last paragraph under Risk Factors*
> >
> > *If large numbers of Plans are encashed at the same time, the funds may incur costs in selling assets prior to their intended maturity date to meet these encashments, and these costs may cause a fall in unit price and therefore the return on your Plan. Alternatively, MetLife may defer encashments for up to three months if it considers that this would be more beneficial to Planholders generally. This would only happen in very exceptional circumstances.*
> >
> > *Policy Conditions – Section 14.2(g)*
> >
> > *The Company reserves the right to defer or decline a request to switch where, in the reasonable opinion of the Company, such a switch would be detrimental to other policyholders of the Company.'*
>
> *Under normal circumstances the switch will be carried out on the business day following receipt of the written request.'*

On 7 August 2008, Mr V responded to Ms M's email with the following query:

> *'Does this mean the worst that could happen would be that the client would need to wait 3 months before the monies were moved to the standard fund?'*

Ms M replied on 8 August 2008:

> *'Yes that's correct. But the absolute worst case scenario would be that the unit price could be reduced also if underlying assets defaulted. This has never happened.'*

The immediate difficulty with this email exchange is that Ms M was referring to the Premier Growth Plan. There is an initial doubt as to whether it was reasonable for Mr V, together with Mr and Mrs R, to place any reliance upon these representations when deciding whether to switch between the funds in their PAB. I note, however, that Mr and Mrs R did hold a Premier Growth Plan on a different account, and the wording of the statements in the product literature of the PAB is similar in all material respects.

In this case, at the end of the three month period (15 September 2008 to 15 December 2008), Mr and Mrs R's investment was divided into two. MetLife switched half of the investment into the Standard Fund, and Mr and Mrs R could have chosen (by opting for the exit plan) for the remaining half to be switched into the Standard Fund as well. This means that, if Mr and Mrs R had chosen the exit plan, their entire investment would have been switched to the Standard Fund before the three month period. As such, Ms M was correct to state that three months was the maximum amount of time investors would need to wait before switching the funds from the Enhanced Fund to the Standard Fund. It follows that I am not persuaded I can reasonably conclude that Ms M's statements, and the sections she referred to in the product literature, were false.

I would add that Ms M could not have known (in mid-August 2008) the full extent of the actions that MetLife later took in response to the exceptional demand for withdrawals (in mid-September 2008). And Ms M (or MetLife) cannot be criticised for failing to inform Mr V of something she could not have known at the time.

In the course of the email exchange, Ms M did mention that MetLife was able to defer withdrawals for up to three months if it considered this to be more beneficial to investors generally. Ms M also mentioned that MetLife reserved the right to defer or decline a request to switch where, in its reasonable opinion, such a switch would be detrimental to other investors. As such, Ms M left open the possibility that MetLife may take other action in response to any *'absolute worst case scenario'*.

Since I have found that Ms M's statements and the sections she referred to in the product literature were not false, I am unable to conclude that Mr V, together with Mr and Mrs R, were misled by them.

For completeness, however, whilst I do not consider that Mr and Mrs R and Mr V relied on the other statements in MetLife's product literature when deciding to switch, I have also reviewed this other material in order to consider whether or not that information was capable of misleading Mr V and Mr and Mrs R.

In doing so, I am conscious that the ombudsman who issued the first and second provisional decisions found certain statements in the product literature to be *'potentially misleading'*, and I note that he made no final conclusions on that issue.

MetLife produced a brochure about the PAB. As might be expected the document is re-assuring about MetLife ('*one of the UK's leading providers of flexible investment solutions*') and its investments ('*combining strong performance with an emphasis on secure investment, we offer a wide range of funds, using AIG's financial size and strength to negotiate the best rates from the financial markets on behalf of our policyholders'*).

In its description of the fund MetLife explained:

> *'The Premier Access Bond is a single premium life assurance Bond offering a range of unit linked funds that invest in a variety of financial and money market instruments in order to generate gross equivalent returns that are competitive against bank and building society deposits.'*

MetLife included a Key Features Document in the brochure. The purpose of such a document is to provide key headings outlining the product, its aims, the investor's commitment, risks, general questions and answers and charges. I would emphasise that when reviewing this document (and others in the brochure), it is important to bear in mind that Mr and Mrs R received professional advice from Mr V, whose role it was to ensure that Mr and Mrs R understood the nature of the investment, and the associated risks and that it was suitable for them.

The Key Features Document described the *'Risks Factors'*, which included the following:

- *Your investment, and the return from it, is only as secure as the selected range of assets purchased by the funds you choose. Your investment is only at risk if any of these financial instruments fail to meet their obligations.*

- *The value of your investment can go down as well as up and you may get back less than you put in.*

- *If large numbers of Bonds are encashed at the same time, the funds may incur costs in selling assets prior to the intended maturity date to meet these encashments, and these costs may cause a fall in the unit prices and therefore the return on your Bond. Alternatively MetLife may defer encashments for up to three months if it considers that this would be more beneficial to Bondholders generally. This would only happen in very exceptional circumstances.*

The brochure also provided the following information about the Enhanced Fund:

> *'The Enhanced Variable Rate Fund ("the Enhanced Fund") is similar to the Standard Fund but is aimed at achieving a slightly higher growth rate by investing in more sophisticated assets issued by a wide range of companies. The fund offers a high degree of safety by holding the highest quality assets commensurate with its enhanced yield.*
>
> *The fund's main objective is to produce a competitive return by investing in a wide range of high quality assets, while maintaining a high degree of safety. Unsurprisingly, the fund will contain many of the same names as the Standard Fund, with most of the fund invested in assets issued by financial institutions. The Enhanced Fund will contain exposure mainly to AAA and AA rated assets, with the reminder in A rated assets, and will use a wide range of high quality instruments issued by the companies identified.*
>
> *The fund should achieve a higher yield than the Standard Variable Rate Fund because it has access to:*
>
> *(i) a wider range of companies…The companies are subject to strict quality checks and are still considered to be very safe investments.*
> *(ii) a wider range of instruments issued by the companies identified. These assets will have a slightly higher yield as they have a smaller target market and may be more difficult to sell before they mature. However, as the fund usually purchases assets to hold until maturity, it is in a position to take advantage of any yield enhancements.*
> *(iii) a greater amount of sophistication …*
> *(iv) assets with slightly longer periods to maturity. This enables the fund manager to take advantage of a positive sloping yield curve which rewards longer investments with higher yields.*
>
> *Although the fund carries slightly more risk than the Standard Fund it should still be considered to be a cautious fund. Although the criteria are clearly wider than those of the Standard Fund, the fund places high importance on the preservation of capital.'*

MetLife also published information about the fund make up in regular updates, which would have been available to Mr V but perhaps not to Mr and Mrs R – these amongst other things gave further information about the make up of the funds. I note that Mr V requested and obtained a second copy of the May 2008 update on 21 July 2008.

The FSA's Final Notice in respect of Coutts & Company (dated 7 November 2011) provides a helpful summary in slightly more accessible terms about the make up of the Enhanced Fund:

> *'The Fund was invested in financial and money market instruments, including certificates of deposit, bank deposits and commercial paper. However, unlike a standard money market fund, it was seeking to deliver an enhanced return by investing a material proportion of the Fund's assets in:*
>
> *(1) asset backed securities. These comprised on average 27% of the Fund's assets between 6 July 2005 and 28 December 2007 and reduced to between 23% and 15% in the period 1 February 2008 to 8 August 2008, varying over the Sales Period between approximately 31% and 14%. They were primarily backed by UK residential and commercial mortgages;*
>
> *(2) floating rate notes. These comprised on average 38% of the Fund's assets between 6 July 2005 and 28 December 2007 and reduced to between 30% and 27% in the period 1 February 2008 to 8 August 2008, varying over the Sales Period between approximately 51% and 27%; and*
>
> *(3) assets which had terms to maturity of between 3 and 5 years. Again, these comprised on average 54% of the Fund's assets between 6 July 2005 and 28 December 2007 and reduced to between 41% and 15% in the period 1 February 2008 to 8 August 2008, varying between approximately 65% and 15% of the Fund's assets.'*

In my view, it is (and was) clear from MetLife's own description and from the other information readily available about the fund, that the Enhanced Fund was not a standard money market fund. The fund presented some risk to capital. Investors could lose money if MetLife failed, if the financial instruments failed to meet their obligations, or if it became necessary for the fund to sell assets prior to their intended maturity date to meet the encashment demands on the funds.

I accept that the extent of those risks was not described as fully as they could have been as the quality of the underlying investments was not clear. However, given the nature of the underlying investments and the significant holdings held, it should ordinarily have been apparent to a professional adviser that liquidity issues could arise, thereby preventing investors accessing their funds in certain circumstances. Of course, that possibility was at least in part reflected in the term that allowed MetLife to defer payments in exceptional circumstances.

Even if the detail of these issues was not apparent to those outside MetLife itself, the special nature of the funds and the opacity of some of the investments was (or at least should have been) clear to any professional adviser. In my view, these factors were (or should have been) sufficient to place a professional adviser on notice that this was not a normal *'cash'* fund suitable as an alternative to normal deposit accounts, but something distinctly more *'exotic'*.

These investments would not – and should not – have appeared to a professional adviser to represent a risk-free approach, nor would they have been suitable for investors looking to invest in cash, or for investors looking for instant access who were not prepared to accept the possibility that they might have to wait to access their money.

Indeed, one of the reasons that investors obtain financial advice is to help them look behind the generalised assurances of product documentation in order to consider whether the particular investment is suitable for their individual investment needs and circumstances. Having obtained advice, it is normally that advice that is critical in the customer's decision making process rather than in isolation any documentation from the provider.

So whilst I have found that elements of MetLife's documentation did not describe the extent of certain risks as fully as they could have been, I am not satisfied that a more detailed representation of the risks of the fund at the time this sale was made would have resulted in Mr and Mrs R making a different purchasing decision. In reaching this conclusion I am in particular mindful that Mr and Mrs R received professional advice on the transaction from Mr V. In any event, I am not satisfied that Mr and Mrs R can be shown in all probability to have relied on that information and that it was this that persuaded them to make the switch into the Enhanced Fund.

For the avoidance of doubt (and whilst the following does not detract from my findings about reliance), I also have considered Mr and Mrs R's complaint about the description of the valuation of the funds in the brochure. Under the heading *'How it works'*, the brochure stated:

> *'All the funds are split into units which are purchased by your investment. You may select one fund or several (subject to any minimum investment amounts).*
>
> *On any day the price of the units reflects the value of the assets held within the fund. These unit prices are calculated daily after deducting a variable charge from the fund's gross return. The value of your Bond can be found at any time by totalling the number of units multiplied by the unit price, for each of the funds held.'*

The relevant sections of the *'Fund Rules'* document provided as follows:

> *'**Investment strategy***
>
> *3.3 The Variable Rate Funds aim to produce a steady and competitive return by investing in a range of high quality assets which will generally be held until their maturity to avoid any short-term market fluctuations. The range of assets, and the risk profile of the assets, may be adjusted to offer more than one Fund.'*
>
> ***Unit pricing and fund charges***
>
> *3.4 The Unit Price changes on a daily basis at a rate derived from the return achieved on the underlying assets less a deduction for charges, which may be varied by the Company on a daily basis.*
>
> *…*
>
> *3.6 The minimum values of the Unit Prices of the Variable Rate Funds are not guaranteed in any way. The Unit Prices will vary from time to time and can go down as well as up.'*

Given that MetLife stated that: a) the assets were to be held until maturity in order to produce a steady and competitive return; and b) it would set the rates in advance, it should have been clear to Mr and Mrs R (and particularly Mr V) that MetLife was to determine the units according to the *'book value'* rather than their *'market value'* of the assets. Indeed, Mr V has told us that he understood that, under the Enhanced Fund, the unit prices did not reflect the market value of the assets.

A consequence of the units being valued according to the book value of their underlying assets was that the units were linked to the return on those assets. I find that MetLife gave Mr and Mrs R and Mr V sufficient information to understand that this return might be affected by a number of factors, including adverse market conditions and the possibility of needing to sell assets prior to their intended maturity date to meet the encashment demands. MetLife explained that the minimum values of the units are not guaranteed, and that the unit prices can go down as well as up. I do not therefore consider the material relating to unit pricing could have misled Mr and Mrs R and Mr V.

As I said at the beginning of this decision, I have reviewed this case afresh and I have made my own findings of fact and drawn my own conclusions on the complaint. I have reached three conclusions:

- I do not consider it fair and reasonable to hold MetLife responsible for the losses Mr and Mrs R have incurred on the basis of its actions around September 2008 (including its actions in relation to unit pricing).

- I have found that the information that Mr and Mrs R and Mr V relied upon when making the switch (namely, Ms M's statements and the sections she referred to in the product literature) were not false. And so I am unable to conclude that Mr and Mrs R and Mr V were misled by them.

- Whilst elements of MetLife's other documentation did not describe the extent of certain risks as fully as they could have been, I am not satisfied that a more detailed representation of the risks of the fund at the time of sale would have resulted in Mr and Mrs R making a different purchasing decision.

I note that Mr V has drawn attention to MetLife's maturity letters, in which it stated that it would consider any complaints or claims about the Enhanced Fund. I do not consider that this amounts to any admission of liability on its part, and it does not affect the findings that I have made in this final decision.

d) procedures

During the course of this complaint, both parties have voiced strong views about the fairness of our procedure. I have added this section to respond to some of those concerns. This section does not affect my findings as to the merits of this complaint.

In Mr V's responses to my provisional decision and the adjudicator's view dated 29 January 2013, he explained that he was dissatisfied with how we handled Mr and Mrs R's complaint.

Mr V is aware that the ombudsman service has a special procedure for handling complaints about the level of service we provide. This is separate from the process that applies to a disagreement with our views on the merits of a complaint. It is not therefore appropriate for me to deal with these issues in this final decision.

I understand that Mr V has raised similar concerns with our Chief Executive and Chief Ombudsman and our Principal Ombudsman and Legal Director. In our Principal Ombudsman and Legal Director's response, she explained that Mr V's service complaints should not interrupt our progression of Mr and Mrs R's complaint.

The final stage of our service complaint procedure is to contact our Independent Assessor. I understand that Mr V has already taken that step. The Independent Assessor has provisionally reached the same view as our Principal Ombudsman and Legal Director. I have duly pressed on with this final decision, to avoid any further delays.

In Mr V's final submissions, he requested that an ombudsman provide a further provisional decision before issuing a final decision.

I do not consider that a further provisional decision is necessary or appropriate in the circumstances. I am satisfied that, before this final decision, both parties have been informed of the case against them and they have been given ample opportunities to provide submissions and submit further evidence. In particular, the parties have been provided with our response to Mr V's submissions dated 21 December 2012. Whilst I accept that our response was provided by an adjudicator, rather than an ombudsman, I do not consider that this has caused any procedural unfairness to either party.

I have considered whether any further enquiries and/or a hearing with the parties might help me, in reaching a fair conclusion on this matter. After over five years, memories of discussions will be fading and inevitably may be significantly influenced by subsequent events.

However, I understand I have all the relevant written material that has been retained by either party from 2007, and I am satisfied that this provides a reasonable basis for my decision. And an oral hearing with the parties would not in my view draw out any new information about the issues that I have identified above. Accordingly, my final view is that further enquiries by our service and/or hearings are not necessary – and would not be appropriate and proportionate in the circumstances of this case.

In response to my provisional decision, I note that Mr V made several requests for information, which have been dealt with by our Information Rights Officer. If Mr V remains dissatisfied with the way in which we have dealt with those requests, he may ask for an internal review. Mr V should contact our Information Rights Officer (informationrightsofficer@financial-ombudsman.org.uk) in the first instance.

my final decision

For the reasons set out above, I do not uphold this complaint against MetLife.

Caroline Mitchell
ombudsman