



<u>Decision Ref:</u>	2018-0023
<u>Sector:</u>	Investment
<u>Product / Service:</u>	Endowment mortgage
<u>Conduct(s) complained of:</u>	Value of policy at surrender less than expected or projected Failure to provide warning re. Nature of investment
<u>Outcome:</u>	Rejected

LEGALLY BINDING DECISION OF THE FINANCIAL SERVICES AND PENSIONS OMBUDSMAN

Background

The complaint concerns an endowment mortgage plan.

The Complainants' Case

The Complainants submit that in 1991, they took out an endowment mortgage policy with the Provider in the sum of €85,000. In 2011 the policy matured and the proceeds failed to meet the Complainants' outstanding mortgage by approximately €37,000.

The Complainants' state that the Provider is responsible for this shortfall. They submit that the Provider aggressively promoted endowment mortgages in the late 1980s and early 1990s. They state that in 1991, they were informed that the underlying mortgage would be fully paid at the end of the primary term and that a surplus would be paid. They state that they were not warned of the possibility of a shortfall at the time of purchase.

The Complainants state that the Provider informed them on a number of occasions prior to maturity "*of the likelihood of a shortfall... and requested an increase in monthly payments*". They state that they refused to do this as they understood "*that the investment strategies being pursued would surely be revised to mitigate such losses*".

The Complainants submit that the shortfall of approximately €37,000 is "*an incredible reflection on mismanagement and flawed investment strategy*". They state that they were not "*consulted at any time on the investment policies adopted*" and they conclude that the

Provider is *“solely responsible for the shortfall in question”*. They state that the Provider had 20 years to revise its investment strategies but it failed to mitigate the losses in question. The Complainants state that they have invested in *“various markets and funds over the years and experienced volatility – we have in excess of Eu 3 million in such long term investments – and none of them have had such an abysmal outcome as ... this case. Shortfall of 5%-10% could be understood over this time... but shortfall excess of 33% speaks volumes for the abysmal failure of the investment managers”*.

The Complainants also state that the Provider received management fees which added to the losses suffered.

The complaint is that the Provider wrongfully managed the Complainants' endowment policy which resulted in a shortfall of approximately €37,000 at the end of the policy term. The Complainants are willing to pay the sum of €10,000 towards the shortfall and are looking for the Provider to take responsibility for the balance.

The Provider's Case

The Provider states that the Complainants commenced their Endowment Plan on the 8 August 1989 with a premium of €130.75 per month for a term of 20 years and life cover benefit in the sum of €57,138.21. It states that the policy conditions outlined the nature of and charges associated with the Complainants' policy. It states that the endowment plan is a *“unit-lined policy”* and a detailed description of its operation was provided in the policy conditions.

The Provider states that the Complainants have been issued with a number of statements regarding the policy including Annual Benefit Statements and policy reviews. It states that these statements advised that the policy value was determined by the value of the units allocated to it and that the value was not guaranteed *“and could fall as well as rise”*.

The Provider states that it also wrote to the Complainants *“outside of our normal review process”* advising them of the current status of their policies and that *“unit process could fall as well as rise”* and that the value of the policy *“was not guaranteed”*.

The Provider submits that the Complainants' policy was reviewed in 2001, 2004, 2006, 2008, 2009 and 2010. The Provider states that the fall in value of the policy was due to exceptionally volatile market conditions. It states that in 2001 it recommended that the Complainants *“increase your monthly premium in order to fund your target value at maturity”*. It contends that in 2004, 2006, 2008, 2009 and 2010 it wrote to the Complainants confirming that the *“monthly premium would automatically increase ... to ensure... will be on course to meet your target maturity value”*. It states that the Complainants, however, requested that it not proceed with the increases to the monthly premium.

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

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information. The Provider responded in writing to the complaint and supplied a number of items in evidence. The Complainants 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 26 February 2018, outlining the preliminary determination of this office in relation to the complaint. The parties were advised on that date, that certain limited submissions could then be made within a period of 15 working days, and in the absence of such submissions from either or both of the parties, within that period, a Legally Binding Decision would be issued to the parties, on the same terms as the Preliminary Decision, in order to conclude the matter.

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

The Complainant was informed, by way of letters dated 15 March 2017 and 3 July 2017 that this office "*operates a six year jurisdictional time limit. Therefore any conduct (sic) you may have in respect of conduct of the Provider which took place prior to six years before the complaint was made to this office... falls outside the remit of the ... Bureau*". This time limit operated pursuant to Section 57BX (3) (b) of the **Central Bank and Financial Services Authority of Ireland Act, 2004** which provided that:

*"A consumer is not entitled to make a complaint if the conduct complained of-
...
(b) occurred more than 6 years before the complaint is made,"*

This provision, however, was changed by Section 51 of Financial Services and Pensions Ombudsman Act 2017 which came into effect on 1 January 2018, and sets out, among other things, the following:

51. (1) *A complaint in relation to conduct referred to in section 44(1)(a) that does not relate to a long-term financial service shall be made to the Ombudsman not later than 6 years from the date of the conduct giving rise to the complaint.*
- (2) *A complaint in relation to—*

(a) conduct referred to in section 44(1)(a) that, subject to the requirements specified in subsection (3), relates to a long-term financial service, or

(b) conduct referred to in section 44(1)(b), that is subject to the requirements specified in subsection (4),

shall be made to the Ombudsman within whichever of the following periods is the last to expire:

(i) 6 years from the date of the conduct giving rise to the complaint;

(ii) 3 years from the earlier of the date on which the person making the complaint became aware, or ought reasonably to have become aware, of the conduct giving rise to the complaint;

(iii) such longer period as the Ombudsman may allow where it appears to him or her that there are reasonable grounds for requiring a longer period and that it would be just and equitable, in all the circumstances, to so extend the period.

(3) The requirements referred to in subsection (2)(a) are that—

(a) the long-term financial service concerned has not expired or otherwise been terminated more than 6 years before the date of the complaint, **and the conduct complained of occurred during or after 2002**, or

(b) the Ombudsman has allowed a longer period under subsection (2)(iii).

[my emphasis]

I note from the evidence that in this instance the policy was initially sold in 1989 and the Complainants increased their level of cover in 1991. Accordingly, as the policy was sold to the Complainants prior to 2002, and as the evidence has not disclosed reasonable grounds on which I believe it would be just and equitable to extend the period, I am of the view, pursuant to Section 51 of the 2017 Act, that this office cannot examine any component of the complaint which occurred prior to 2002; the sale of the policy to the Complainants in 1989 and 1991 is not within the jurisdiction of the Financial Services and Pensions Ombudsman.

1989

The Complainants' "Assurance linked Mortgage Plan" 20 year policy commenced on 8 August 1989 for the sum of €45,000. The policy terms and conditions included the following:-

“,,, Regular Policy Review

At such times as the Company shall determine, but not less frequently than once every five years, the Company shall review the amount of Benefits in force and the amount of regular Contribution payable and shall notify the Policyholder of any increase in the amount of such regular Contribution such as may in the opinion of the Company be required to maintain the level of Benefit under this Policy. ...

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...

Powers of the Company in relation to the Funds

The Company shall have all powers of investment (whether or not so as to produce income), management, sale, exchange, partition, mortgage, leasing, insurance, protection, improvement, equipment, dealing and disposition and all other powers of an absolute beneficial owner of the funds, and its powers shall not be restricted by any principle of construction but shall operate according to the widest generality of which the foregoing words are capable... “,

1991

In 1991 the Complainants extended the term of their policy by 2 years and increased the cover on the policy to €85,000. I note the “*Endowment Plan Quotation*” (undated) included the following:-

“This illustration assumes the following:

...

The Projected Fund Values of the Plan are based on a rate of growth in unit prices of 7.5%... In practice these may be higher or lower and unit prices can fall as well as rise...”.

On the 3 September 1991 the Complainants’ Bank, which is not a party to this complaint, wrote to them enclosing a copy of the mortgage terms and conditions which included:-

“3. REPAYMENT OF PRINCIPAL

Principal repayment will normally be effected from the proceeds of the Endowment Assurance Policy at maturity. In the event of these proceeds not being available or being insufficient to discharge the total amount due, for any reason, the Borrower shall be liable for repayment of the outstanding amount, including interest”.

On the 24 September 1991 the Provider confirmed to the Complainant that “*the revised details are as follows:*

<i>Premium</i>	<i>IR£175.97 per month</i>
<i>With effect from</i>	<i>08/10/1991</i>
<i>Guaranteed Sum Assured</i>	<i>IR£85,000.00 with immediate effect ...”.</i>

1997

On the 29 June 1997 the Provider wrote to the Complainants confirming that “*your plan has performed well to date and is currently on target to achieve the required maturity value...*

...

3. Your Plan Projection

What we project your Plan to be worth between now and maturity at 08/08/2011

NB see the notes in section 5 of this review

<i>Date 29/6/1997</i>	<i>@7% growth</i>	<i>@8% growth</i>
<i>08/08/1999</i>	<i>£23560.30</i>	<i>£23,858.30</i>
<i>08/08/2004</i>	<i>£44,768.70</i>	<i>£46,574.50</i>

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08/08/2009	£75,932.90	£81,216.30
08/08/2011	£92,571.80	£100,060.00

...

5 IMPORTANT NOTES ...

In making the projections in this review we assume that-

...

(C) The units allocated to your plan grow in value by 7.3% each year or 8% each year (net of 1% fund management charge)... The growth rate of these units is not guaranteed and may fall as well as rise, which will affect the value of your Plan..."

2001

The Provider states that it recommended an increase in monthly premiums to the Complainants in its 2001 review letter to "ensure the policy remained on course to meet the target maturity value", however, it has been unable to furnish a copy of this letter.

2004

On the 13 August 2004 the Provider wrote to the Complainants as follows:-

"... the projected maturity value assuming a growth rate of 3.9% p.a. is €77,048. This is less than your target balance... We are therefore proposing to increase your monthly premium to €546.08 with effect from 08.10.2004. With this in mind we enclose a quotation... showing that if you increase your monthly premium to €546.08 it should help to ensure that your plan will be on course to meet your target maturity value. Without this increase you may be left with a shortfall against the original target maturity value when your mortgage comes due for payment.

A plan change request form is enclosed... If you do not return this form we will increase your premium as outlined above ..."

The "Plan Change Request Form" included the following options:-

"a) Please increase my monthly premium to €546.08 to help ensure that my plan will be on course to meet my target maturity value of €107,928. Please note: This option will apply unless you indicate otherwise.

b) Please keep my premium at the current level. I understand that based on current assumptions the projected maturity value assuming a growth rate of 3.9% p.a. is €77,048..."

The Complainants signed the "Plan Change Request Form" on the 30 August 2004. They ticked option B on the form and included the following instructions:-

"We are not happy with your proposition above. Please note you are not authorised to change any payments except with our consent. Absence of response ... will not authorise you to do anything".

2006

2 years later on 19 July 2006 the Provider wrote to the Complainants as follows:-

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"... Your policy

... aims to build an investment fund equal to the Sum Assured at the end of the policy. This amount is then available to repay your mortgage.

It is important to note that there is no final guaranteed amount and that the maturity value of your policy is dependent on the contributions paid and on the investment returns achieved.

...

How is your policy performing?

This review indicates that based on current assumptions the projected maturity value, assuming growth of 3.8% p.a. is €84,010. This is less than the amount required to repay your mortgage and there are a number of options available to you to reduce your potential mortgage shortfall including:

- *Increasing your monthly contribution to €585.76... this will put your policy on course to repay your mortgage at maturity ...*

It is important that you take action as soon as possible we will increase your premium as described above if you do not advise us of your intention to avail of any of the other options which include:

- *Contacting your lender to explore extending the term of your mortgage to allow more time for the projected shortfall to be made up.*
- *Cashing in your endowment policy and use the proceeds to reduce your mortgage and take out a repayment mortgage to cover the balance.*
- *Paying a lump sum to reduce your mortgage now if you have access to cash.*
- *Starting a separate savings plan to cover the projected shortfall.*

We'd like to explain how automatic fund switching works on your policy.

As an important feature of your policy we will automatically begin switching a proportion of your investment into the Security Fund from 08/08/2006. We will continue to do this until your policy matures.

Automatic fund switching is designed to protect your accumulated fund against any adverse changes in market conditions close to the maturity date of your policy. The investment returns from the Security Fund are generally lower but more secure than those achieved from your current funds.

What should you do if you do not wish to avail of automatic fund switching?

If you do not wish to automatically switch your investment into the Security Fund, please let us know as soon as possible".

I note that the "Lifetime Homeloan Endowment Plan Quotation" enclosed with this letter included the following warning

"THERE IS NO GUARANTEE THAT THE PROCEEDS OF THE INSURANCE POLICY WILL BE SUFFICIENT TO REPAY THE LOAN IN FULL WHEN IT BECOMES DUE FOR REPAYMENT".

On the 14 September 2006 the Complainants advised the Provider that "please note that you received a phone call ... advising you not to change anything. Please take this

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letter as written confirmation that of that phone call and be advised that NO change is to be made in anything unless you have it in writing from us”.

2007

The Complainants’ 2007 Annual Statement stated that the “total contributions paid to date” were €45,904.61 and the current policy value was €70,177.15. It included the same warning regarding the proceeds of the policy as on the “Plan Quotation” in 2006.

2008

On the 19 June 2008 the Provider wrote to the Complainants informing them that “the projected maturity value... is €78,397.00. This is less than the amount required to repay your mortgage ... number of options... to reduce your potential mortgage shortfall... increasing your monthly contribution to €1,009.65”. The Provider made similar suggestions to reduce the shortfall as made in its letter of the 19 July 2006, quoted above; the warning on the “Plan Quotation”, quoted above in 2006, was also stated.

On the 28 July 2008, the first Complainant emailed the Provider as follows:

“I have received your letter of June 19... I am extremely disappointed again that this ... product has fallen short.

However I want to state again as I have in the past that I DO NOT WISH that you will unilaterally increase premiums to cover this shortfall. I will take care of it otherwise...”. [my emphasis]

The Provider responded to the email asking for this instruction to be confirmed in writing and signed by both policyholders.

The first Complainant replied on the 30 July 2008:-

“I will say again – we have consistently (over the years) advised you that you are not authorised to adjust our payments unless/until we confirm it... Please do not attempt to change the payments in future unless you are specifically authorised to do so. How many times must we confirm the same thing”. [my emphasis]

The Provider responded stating that it was “obliged to review your policy every 5 years and annually in the last five years of your policy term... we are informing you of what target fund was set at the beginning of your policy and what premium is required to try to meet this fund”.

On the 30 July 2008 the Complainants confirmed in writing that “you are not authorized to increase payments now or at any time in the future unless we confirm such increases”.

2009

The Provider wrote to the Complainants on the 15 June 2009 informing them that “the projected maturity value... is €69,047.00. This is less than the amount required to repay

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your mortgage... increasing your monthly contribution to €1,812.16 with effect from 08/08/2009 ... It is important that you take action as soon as possible we will increase your premium as described above., if you do not advise us of your intention to avail of any of the other options ...". The Provider suggested similar options to reduce the shortfall as made in its letter of the 19 July 2006, quoted above. The warning on the "Plan Quotation", quoted above in 2006, was also stated.

On the 13 August 2009 the Provider wrote to the Complainants as follows:-
"... If you wish to leave your monthly premium at €223.44 please complete and return the enclosed Plan Change Request Form to us... Please note that you will be liable for any shortfall when your Plan matures in August 2011..."

The Complainants responded on the 20 August 2009 stating that *"I confirm again that I do not wish to adjust payments until the end of the policy"*.

On the 15 September 2009 the Provider confirmed that it would leave *"your monthly premium at €223.44 as requested. Please note that you will be liable for any shortfall when the policy ceases on the 8 August 2011"*.

2010

The Provider wrote to the Complainants on the 15 June 2010 informing them that the *"projected maturity value, assuming growth of 3.2% p.a. is €72,783.00. This is less than the amount required to repay your mortgage... increasing your monthly contribution to €3,158.64..."*. The Provider suggested similar options to reduce the shortfall as made in its letter of the 19 July 2006 and the warning on the "Plan Quotation", quoted above in 2006, was also stated.

The Complainants responded on the 2 August 2010 stating *"no change is authorised"*.

2011

The Complainants policy was surrendered on the 2 September 2011 at a value of €71,366.11.

The Complainants have made submissions regarding *"the performance"* of the Provider in respect of *"their endowment mortgages generally"*. It is important for the Complainants to be aware that the particular circumstances of each complaint made to this office are examined on their own individual merits as it is the particular contractual arrangement between the parties that is relevant when this office adjudicates on a complaint.

The Complainants submit that the Provider's investment strategy and management of the policy was flawed. They submit that the Provider has failed *"to say what they were doing to head off potential losses other than to look to the mortgage holders to increase premiums"*. They state that the Provider did not *"act quickly or diligently enough to mitigate the losses in that it alone had investment management control ... oversaw a shortfall of over 33% vs target over 20 years entirely on its own"*. They state that the *"only avenue offered to us*

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time and time again ... was to increase premia". They state that they refused to increase premia "based on our belief that the investment strategies being pursued would surely be revised to mitigate such losses".

The Provider contends that *"the Complainants had a duty to mitigate their loss however they failed to do so notwithstanding the Company clearly highlighted the risks to them". It states that "over the years the Company did provide the Complainants with a list of alternative options if they did not wish to increase their premiums however the Complainants clearly communicated their intention to take care of the projected shortfall by other means". The Provider states that "it was always open to the Complainants to contact the Company if they had any questions in relation to the policy".*

The position with this type of policy is that, for the most part, its final value depends on investment conditions which cannot be guaranteed in advance and it does not guarantee to repay the original mortgage amount. While the policy initially gained in value, by 2001 it was not on track to reach the expected maturity value. The Provider advised the Complainants on a number of occasions over the years (at reviews in 2001, 2004, 2006, 2008, 2009 and 2010) that it was likely that there would be a shortfall. It is clear from the Complainants' correspondence that they were aware of the possible shortfall. The Complainants were also regularly warned that the benefits payable were not guaranteed. I accept that the Provider suggested additional options to the Complainants to alleviate or prevent the shortfall at maturity, aside from increasing their monthly contribution. There is no evidence that the Complainants took the Provider's suggestions on board or that they suggested alternatives to the remedial actions proposed by the Provider. There is also no evidence of the Complainants making any enquiry about what other options were available, if they were unhappy with the suggestions made. By not taking on any of the recommendations the Complainants faced the situation whereby the value at maturity would be less than was needed to repay the original mortgage amount. There is no evidence that the Provider breached the powers of investment given to it in the terms and conditions of the policy or were negligent in its management. The policy did not guarantee the extent of the benefits payable at maturity and I consider that the information and warnings given by the Provider over the years was sufficiently clear in this regard.

I am of the view that the Complainant's decision not to act on the Provider's warnings from as early as 2001 that their policy proceeds may not be sufficient to pay off the mortgage at the maturity date and instead indicating that they would *"take care of it otherwise"* led to the situation of a shortfall arising. The return on this policy was never guaranteed in the policy documentation, all that was provided from the outset were assumptions on how the fund might perform. On balance, I accept that the Complainants had a duty to mitigate their loss and no wrongdoing can be attached to the Provider in respect of the Complainant's failure to do so.

Having regard to all of the above it is my Preliminary Decision that the complaint is not upheld.

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Conclusion

- My Decision pursuant to **Section 60(1)** of the **Financial Services and Pensions Ombudsman Act 2017**, is that this complaint is rejected.

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

**GER DEERING
FINANCIAL SERVICES AND PENSIONS OMBUDSMAN**

22 March 2018

Pursuant to **Section 62** of the **Financial Services and Pensions Ombudsman Act 2017**, the Financial Services and Pensions Ombudsman will publish legally binding decisions in relation to complaints concerning financial service providers in such a manner that—

(a) ensures that—

- (i) a complainant shall not be identified by name, address or otherwise,
- (ii) a provider shall not be identified by name or address,

and

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