



<u>Decision Ref:</u>	2018-0119
<u>Sector:</u>	Investment
<u>Product / Service:</u>	Shares/Equities Investment
<u>Conduct(s) complained of:</u>	Failure to provide product/service information Value of policy at surrender less than expected or projected Product not suitable
<u>Outcome:</u>	Partially upheld

LEGALLY BINDING DECISION OF THE FINANCIAL SERVICES AND PENSIONS OMBUDSMAN

Background

The Complainants held a portfolio of investments with the Provider since 2013. In May 2015 the Complainants received a recommendation to change the make up of the portfolio which involved putting most of their monies into the Provider's Investment Fund.

The complaint is that the Provider incorrectly and unreasonably advised the Complainants to alter their portfolio, in particular in relation to putting more of their monies into the Provider's investment fund.

The Complainants state that they made a loss on the Provider's Investment Fund, and incurred further losses on what could have been achieved with their original portfolio. The Provider refers to a 10.5% loss over the period, which it calculates at €25k+.

The Complainants' Case

The First Complainant had received a sizeable High Court settlement for a permanent disability which curtailed his mobility and employment capacity, and in addition to being newly married to his Co-Complainant who was then an associate in a Medical Practice and were in the course of starting a family. The First Complainant states they primarily required capital security, together with a conservative income. A portfolio of investments were recommended by the Provider in 2013.

The First Complainant states that the Provider criticised the investment profile of his previous provider, for not investing a capital secure product and advised that it was not "product suitable" for his purposes, and advised the First Complainant that he should close his account with that other provider, and that he should open up an "advised" Client Account and not just an "Execution only Account" whereby the Provider would supervise it with paid and qualified professionals in accordance with his requirements, and it was invested in bonds, fixed income, deposit account and various small amounts in equities.

At a meeting with the Provider's representatives in May 2015 the Complainants received a recommendation to re-arrange their portfolio, by leaving some of the monies in cash and the remainder to be invested in the Provider's own investment fund.

The First Complainant states that with the benefit of hindsight, he sees that he was brought to the meeting on 28th May 2015 to review his portfolio and now believe that the ulterior motive was ultimately to get him out of this portfolio and to invest in the Provider's own "in-house" fund, culminating in him being brought to their offices where he was of the belief that he was being introduced by Mr S as his Retiring Relationship Manager to Mr M, a new Manager. The Complainant states that it was in the course of that meeting that the Provider representatives convinced him that in accordance with their trusted advice and expertise, that he should close off all his holdings position and invest the entire proceeds (save and except £100,000 which had been outlined to them he required to complete an apartment purchase) entirely in their Fund as being more suitable for his requirements. The Complainants submit that this was done without any client profile review or re-evaluation of circumstances.

The First Complainant states that with the benefit of hindsight, it was a hard sell, and relying on what he was told and with the benefit of hindsight he believes that he was simply being "churned" for the Provider's self-serving motives i.e. to build up a capital investment profile in its own "in-house fund" which the Complainant says he presumes did enable it to show other potential investors of an increase in the "Seed Capital Investment".

The Complainants state that the matter was further compounded and it was, and is, their belief, that no evidence has been adduced at this late stage that Mr M was the regulated/qualified person to give such advices to them "as an advised client". The Complainants says that to compound matters, the Manager then acknowledged at the meeting on the 29/2/2016 that he never read the Complainants' file and was not aware of "The Know Your Client Details". The Complainants state that immediately on becoming aware during the course of this meeting, that the Complainants should never have been invested into the fund, the Advisor stated that it had to be liquidated, which he did forthwith for this reason.

The Complainants say that this is further compounded by reason of the fact that, the Provider has been conveniently factually incorrect in vital key components about this process.

The Complainants submit that their complaint is clearly substantiated under the Provisions of relevant Legislation which, is clearly to protect/safeguard against what has occurred to them by reason of the Provider's mis-representation, taking a perfectly well performed Portfolio into a non-performing Portfolio with substantive losses, by unqualified and unregulated personnel whom the Complainants placed their full reliance as advised Complainants with the Provider.

The First Complainant states, that in essence, the gravity of the Provider's conduct clearly goes to the core and the Provider cannot rely on some form of small print, even if it was applicable in their Terms and Conditions as the breach was so fundamental. The Complainants question how the Provider can rely on a contract so tainted and for that matter its Terms and conditions when it knowingly acted out of process.

The Complainants' position is that the Provider failed to keep itself abreast by ongoing risk profiling and to ensure that its staff were fully acquainted with them. The Complainants state that they went to the Provider in good faith and feel that the Provider has not behaved in a transparent and honest way with them.

The Complainants state that the Provider was negligent, breached the contract, misled them, and misrepresented benefit of investing in the fund. The Complainants consider that there was a breach of duty to them and that the Provider did not comply with the Law and Regulations.

The Provider's Case

A summary of the Provider's response is as follows:

The Provider states that the performance of the Fund over the relevant 9 month period was reasonable given market conditions and the investment objectives/attitude to risk of the Complainants. The Provider submits that the Complainants did not stipulate capital preservation as a requirement. The Provider says that the Complainants completed a detailed Investor Profile which indicated a medium risk tolerance. The Provider states that the Complainants demonstrated an appetite for risk and their medium risk tolerance was reconfirmed on a number of occasions.

The Provider says that the Complainants are experienced business people. The Provider submits that the Second Complainants had stated that, prior to opening an account with the Provider, he had previous experience of making a mis-selling allegation against another provider. The Provider states that accordingly the Complainants were well aware of the importance of completing an accurate Financial Questionnaire and of the significant difference between capital preservation and medium risk.

The Provider states that the Complainants had a pre-existing holding in its Fund and hence were familiar with the investment and that all relevant risk details of the Fund were provided to the Complainants. The Provider says that regular suitability reviews were carried out with the Complainants over the course of their relationship with the Provider. The Provider's position is that the Fund was a suitable investment for the Complainants.

The Complainants decided to withdraw from the Fund, a medium term investment, after just 9 months.

The Provider states that the key dates are as follows:

28 January 2013 — the Complainants completed and signed the Provider's account opening documentation.

1 May 2013 — the Provider met with the First Complainant and he requested the purchase of €20,000 Apple shares.

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11 July 2013 — at this time the Complainants held a portfolio valued at €406,000 comprised of fixed income and equity securities.

21 November 2014 — the Complainants made an initial investment of €50,000 in the Fund.

28 May 2015 — the Complainant met with Mr S (relationship manager) and Mr M (investment manager) to review the Complainants' portfolio.

3 June 2015 - the Complainants sold their individual equity and bond holdings; they withdrew €100,000 from their portfolio and invested the balance of €184,000 in the Fund.

29 February 2016 - the First Complainant met with Mr M and his colleague Mr C to discuss the Complainant's concerns re the performance of the Complainants' portfolio. It was agreed to sell the Complainants' entire holding in the Fund.

21 April 2016 - the First Complainant emailed details of his complaint to the Provider.

Decision

During the investigation of this complaint by this Office, the Provider was requested to supply its written response to the complaint and to supply all relevant documents and information. The Provider responded in writing to the complaint and supplied a number of items in evidence. The 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 30th July 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 issue for investigation and adjudication is whether the Provider correctly and reasonably advised the Complainants to alter their portfolio, in particular in relation to putting more of their monies into the Provider's investment fund.

The Provider submits that in early 2015 it had concerns regarding the outlook for investment markets and hence it advised the Complainants to review the level of their exposure to markets. The Provider states that against this background, it met with the Complainants on 28 May 2015 and recommended that the Complainants diversify their portfolio across a wider range of assets. The Provider says that the First Complainant was met by his relationship manager Mr S who had asked his colleague, Mr M investment manager, to accompany him to the meeting. The Provider states that Mr M's role at the meeting was to provide an overview of the Provider's view on investment markets and to review the performance and composition of the Fund. At that time Mr S, who is no longer employed with the Provider, was the Chief Investment Officer and a Director of the firm.

The Provider states that in May 2015 the Complainants were holding relatively large positions in some individual securities. In the Provider's view it was prudent to reduce exposure to such individual securities and to broaden the spread of the Complainants' portfolio. The Provider states that accordingly Mr S recommended that the Complainants sell their individual holdings and invest the proceeds in the Provider's Fund. The fund provides exposure to a wide range of securities diversified across a number of different asset classes. The Provider contends that its recommendation not only broadened the exposure of the Complainants' portfolio but also served to reduce the stock specific risk in their portfolio. The Provider's position is that at this time the Complainants were familiar with the Fund as they were already holding a smaller position in the fund. The Provider says that as part of its risk reduction recommendation it also suggested that the Complainants should withdraw €100,000 from their portfolio and place these funds on longer term bank deposit. The Provider says that in summary the Complainants' investment in the Fund formed part of a recommended risk reduction strategy which included:

- Risk reduction via withdrawing c.€100,000 from the market and placing on bank deposit.
- Reducing stock specific risk via disposal of higher risk individual bond and equity holdings.
- Portfolio diversification across multi assets via further purchase of Fund.
- Sale of the Complainants' large EBS position.

The Provider's position is that this recommendation was made in good faith and in the Complainants' own best interests. The Provider submits however that as it could not guarantee that all of its recommendations would be financially beneficial, particularly over a short period of time.

Suitability

The Provider says that under Suitability, the First Complainant confirmed his risk tolerance as medium. The Complainant has contended that the Complainants' further investment in the Fund in May / June 2015 was not suitable for them. In addition at Section D of the

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FSOB Complaint Form the Complainant stated that: *"It was agreed that the capital could not be put at risk as this was my only savings and there was no way for me to ever regain any capital losses"*.

The Provider states that the Complainants did not stipulate that their capital could not be put at risk. The Provider says that in 2013 the Complainants completed a detailed Investor Profile questionnaire which it says clearly indicated the Complainants' medium risk tolerance.

The Provider says that some of the relevant questions and responses include:

Q1: *How would you rate the degree of risk that you are willing to take in your financial affairs?*

A: **"Medium Risk"**

Q3: *What is more important to you in the context of investments - the risk or the potential gains?*

A: **"I usually focus on the potential gains rather than the risks".**

The Provider states that this indicates a higher risk tolerance.

Q5: *What degree of risk do you wish in your FUTURE financial decisions?*

A: The Complainants selected **"Moderate amount of risk" rather than "Very small amount of risk" or "Small amount of risk"**.

Q6: *We are advised that investments can go up or down and we should prepare for market downturns. How upset would you be if the value of your investments fell by the following amounts in one year?*

A: In response to a fall of 10% the Complainants selected 2 on a scale of 1 to 5, with 1 indicating **"not at all upset"** and 5 indicating **"very upset"**.

Q7: *What sort of spread of investments would you find most appealing?*

A: The Complainants indicated **20% High risk/return — 60% Medium risk/return — 20% Low risk/return.**

Q9: *I can tolerate the risk of large losses in my investments in order to increase the likelihood of achieving high returns.*

A: The Complainants selected **"I neither agree or disagree"** rather than **"I strongly disagree"** or **"I disagree"**.

The Provider states that the above answers clearly demonstrate, at a minimum, a medium risk appetite.

The Provider states that over the period of its relationship with the Complainants they demonstrated that they were comfortable with medium/high risk investments. The Provider says that the following examples serve to confirm this point:

In the Complainants' submission to the FSOB titled "FAO 06-072016" it was stated *"I was happy with all dealings up until May 2015, they were to be sensible investments. Investec Bond, EBS Bond, DAX ETF, Fund, Cash. Other funds were bought and sold between 2013-2015 and I had no complaints"*.

The Provider submits that in the period prior to May 2015 the Complainants held a number of medium risk equity and bond securities and they were comfortable with such investments.

The Provider states that it met with the First Complainant on 4 March 2013 to review its original investment proposal. The minutes of the meeting state:

"Given recent Fx movements [the First Complainant] felt that he should spread his risk and have some exposure to £ and the \$. [The First Complainant] also questioned the ELG EBS 2015 and felt that he was prepared to increase the risk on the portfolio".

The Provider's position is that this demonstrates the First Complainant's investment knowledge and his desire for higher risk. The Provider says that the EBS bond was a lower risk instrument that was guaranteed under the ELG scheme. The minutes then recorded that the Complainants would not invest in the EBS bond and would take increased exposure to equity and dollar ETFs.

The Provider states that it met with the First Complainant on 1 May 2013 to review the Complainants' portfolio and its original recommendations. The minutes of the meeting,

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state: *"From the original proposal [the First Complainant] requested exposure is taken in Apple stock and that he was fully aware of the volatility in the stock. €20k to be invested".*

The Provider states that this demonstrates an appetite for high risk.

The Provider says it received an e-mail from the First Complainant on 3 September 2014 in which he requested to be given some share recommendations i.e. *"could you send me the companies you think may be worth watching share wise like the Potash Co."*

The Provider's view is that this further demonstrates an appetite for medium/high risk.

The Provider states that it is also worthy of note that in a further email of 3 September 2014, regarding the Complainants' initial investment in the Fund, the Complainant stated:

"I have posted back the completed form for the fund, the only thing that concerns me are the various charges on the fund".

Confirmation of Medium Risk Classification

The Provider's position is that the Complainants received a number of valuations, over the period, which confirmed their medium risk classification. The dates of the relevant valuations are;

- 28 May 2015,
- 18 September 2015,
- 27 November 2015,
- 31 December 2015, and
- 9 February 2016

At the front of each valuation it was stated that: *"The recommendation included in the presentation is for a medium risk client. From answers in your risk profiling you have been deemed suitable to be classed as a medium risk client".*

The Provider states that during the course of various meetings with the Complainant, the Complainants 'Know Your Client' ("KYC") profile was revisited in order to determine if any changes had taken place in the Complainants' circumstances and to confirm their continued suitability for the investments held in their portfolio. The Complainants' KYC profile and medium risk mandate were confirmed, and recorded as follows:

- Meeting 1 May 2013, minutes state: *"KYC updated no material change noted".*
- Meeting 14 February 2014, minutes state: *"KYC no material change noted".*
- Meeting 21 August 2014, minutes state: *"KYC update, no change. Risk Profile, no change to mandate".*

- Meeting 28 May 2015, minutes state: *"Paul pleased to continue with his risk profile of medium risk"*.

Experience of the Complainants

The Provider states that the Complainants are experienced business people, that the Second Complainant has her own medical practice while the First Complainant indicated his occupation as "self employed". The Provider says that it understands that the First Complainant had his own business at the time of opening the account with the Provider.

The Provider states that the Complainant has stated that, prior to opening an account with the Provider, he had previous experience of making a mis-selling allegation against another provider. The Provider says that accordingly the Complainant was well aware of the importance of completing an accurate Financial Questionnaire and of the significant difference between capital preservation and medium risk.

The Provider submits that it is also important to note that the Complainants also had considerable prior experience of investing in equities, bonds and property. The Provider states that on page 12 of the Investor Profile completed by the Complainants in 2013, the Complainants indicated that they had more than 7 years' experience of investing in equities, bonds and property. Specifically the Complainants disclosed that they had previously invested in Standard Life risk based funds including European Equity, UK Smaller Companies and Absolute Return Strategy (a Standard Life hedge fund).

The Provider states that over the period of its relationship with the Complainants, the First Complainant demonstrated a good understanding of the investments within their portfolio and he stated on a number of occasions that he tracked his investments on Bloomberg.

The Provider says that it is clear from all of the above that it went to considerable lengths to ensure that it was fully apprised of the Complainants' medium risk investment objective and that its recommended investments were suitable for the Complainants. The Provider states that in relation to the Fund and the specific complaint it is important to note:

- The multi asset Fund involved lower risk than the 3 individual securities previously held by the Complainants.
- As part of the Provider's recommendation on 28 May 2015 it suggested that the Complainants should withdraw €100,000 from their portfolio and place these funds on longer term bank deposit.
- As at 28 May 2015 the Complainants were pre-existing holders of the Fund and were familiar with its objectives, risk and diversified structure.
- On page 2 of the Fund recommendation document presented to the Complainant on 28 May 2015 it was stated:

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"The recommendation included in the presentation is for a medium risk client. From the answers in your risk profiling you have been deemed suitable to be classed as a medium risk client. The recommended portfolio would have a target return of 8% - 10%. This is consistent with a medium risk portfolio".

Investment Loss

The Provider submits that the Complainant stated in an email to the Ombudsman of 16 January 2017 that it sold the Complainants' holding in the Fund *"without either verbal or written authority and as a result crystallised the loss"*. In this regard, the Provider says that on 29 February 2016 the First Complainant met with Mr M and Mr C to discuss the Complainant's concerns about the performance of the Complainants' portfolio. During the course of this meeting the First Complainant stated that they should not be holding a medium risk investment. The Provider says that accordingly Mr M recommended that the Fund should be encashed and the First Complainant agreed. The Provider states that in a follow up email to the Complainant on 4 March 2016 titled " Fund redemption" Mr C stated: "Just to confirm you redeemed at a NAV of 94.786546" and the Complainant replied on 7 March 2016 *"Thanks for the update"*. The Provider submits that it is clear that there is no basis for the Complainant's contention that the Fund was sold without the Complainants' consent.

The Provider states that having adopted a low risk tolerance, the Complainants decided to dispose of their entire position in the Fund after only retaining their increased holding in the fund for just 9 months, At the time of their investment in the Fund it was made clear that the fund was a medium term investment in keeping with the Complainants' investment time frame. The Provider's position is that it is never recommended to withdraw from a medium term investment fund after just 9 months.

The Provider says that the Complainants' decision to dispose of their holding in the Fund resulted in a loss. The Provider reiterates that investment recommendations cannot be guaranteed and that this is particularly the case over a short time period. The Provider submits that it should be noted that the Supplement to the Prospectus document for the Fund, provided to the Complainants, stated at section 6:

"The Fund is suitable for investors seeking long-term capital growth through exposure to ..."

The Provider's Loss Calculation:

Value of the Complainants' portfolio 3 June 338,709.73 (Prior to further purchase of May 2015 Fund)

Cash withdrawal	<u>100,000.00</u>
Net portfolio value 3 June 2015	238,709.73
18/12/2015 Sale of 121 units	12,049.55
17/02/2016 Sale of 109	10,000.00
02/03/2016 Sale of 2,020.45 GAA units	<u>191,511.48</u>
Total value of Sales	213,561.03
Loss over the period	25,148.70
Loss %	10.5%

The Provider's position is that the loss incurred of 10.5% should be viewed against the background of the Complainants' response to Question 6 of the Investor Profile, i.e.

Q6: We are advised that investments can go up or down and we should prepare for market downturns. How upset would you be if the value of your investments fell by the following amounts in one year?

A: In response to a fall of 10% the Complainants selected **2** on a scale of **1** to **5**, with **1** indicating "**not at all upset**" and **5** indicating "**very upset**".

Annual Benefit Statements issued to the Complainant/s in relation to the investment.

Half yearly valuations issued to the Complainants.

As regards the evidence of compliance by the Provider with the provisions of regulatory obligations, relevant to the complaint, the Provider refers to Statutory Instrument 60/2007 — European Communities (Markets in Financial Instruments) Regulations 2007 which contains a number of sections which are relevant in the context of this complaint — details are set out below.

Section 34(1)(d) states that an investment firm shall employ personnel with the skills, knowledge and expertise necessary for the discharge of the responsibilities allocated to them.

In the above regard the Provider states that the Complainants' relationship manager was Mr S. The Provider explains that in early 2015 Mr S was the Chief Investment Officer and a Director of the firm. The Provider states that it is fully satisfied that Mr S was appropriately qualified and had the necessary knowledge and experience. The Provider submits that Mr M accompanied Mr S to the meeting with the Complainant on 28 May 2015. The Provider says that Mr M provided the Complainant with information on investment markets and the

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Fund and that it is fully satisfied that Mr M was appropriately qualified and had the necessary knowledge and experience.

Section 76 deals with conduct of business obligations when providing investment services to Complainants. The Provider states that the paragraphs within this section that are relevant to this complaint are those dealing with obligations on investment firms to act honestly/fairly; to provide Complainants with information that is clear and not misleading so they can understand the risks involved and make informed decisions; to obtain all necessary information from a client in order to be in a position to make a suitable investment recommendation.

It is the Provider's position that it is clear from its file note of the meeting of 28 May 2015, and from its Final Response Letter, that it acted honestly and fairly in its dealings with the Complainants.

The Provider says that it is evident from the information that it provided to the First Complainant regarding the Fund on 28 May 2015 and on previous dates that the Complainants were furnished with data that was clear and not misleading. The Provider states that the Complainants were fully aware from such documentation that they were investing in a medium risk multi asset fund.

The Provider submits that it obtained all necessary details regarding the Complainants' investment objectives, attitude to risk and investment timeframe when they completed the account opening documentation in 2013. The Provider states that in addition it supplemented this initial information with frequent Know Your Client updates over the course of its relationship with the Complainants.

Section 94 deals with assessment of suitability and appropriateness. This section expands on certain aspects of Section 76 relating to the process whereby an investment firm obtains all relevant information from a client in respect of their investment objectives. Section 94(7) states that "An investment firm, when assessing whether an investment service as referred to in Regulation 76(5) and (6) is appropriate for a client, shall determine whether that client has the necessary experience and knowledge in order to understand the risks involved in relation to the product or investment service offered or demanded".

The Provider submits that the Complainants had made a previous investment in the Fund; and that accordingly they were fully aware of the medium risk nature of the Fund. The Provider states that the portfolio recommendation document provided to the First Complainant on 28 May 2015 clearly set out the medium risk nature of the Fund. The Provider says that at the time that the Complainants made their further investment in the Fund in 2015 they had been Customers of the Provider since 2013 and had demonstrated a good understanding and knowledge of investment markets.

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The Provider says that the Complainants had considerable prior experience of investing in equities, bonds and property. In this regard the Provider refers to page 12 of the Investor Profile completed by the Complainants where they indicated that they had more than 7 years' experience of investing in equities, bonds and property.

The First Complainant had stated that, prior to opening an account with the Provider; he had previous experience of making a mis-selling allegation against another provider. The Provider submits that accordingly the First Complainant was well aware of the importance of completing an accurate Financial Questionnaire and of the significant difference between capital preservation and medium risk.

The Provider states that it appreciates the Complainant's unhappiness at suffering losses on their withdrawal from the Fund after 9 months. The Provider says however it is satisfied that its recommendation of the Fund to the Complainants was suitable, fully explained, made in good faith and in the Complainants' best interests. The Provider states that it understands that the Complainants wish to recover their losses however there is no basis for attempts to apportion blame on its firm for such losses.

Complainants' submission on Provider's response – 30th August 2017

As regards its summary of the dispute the Complainants state that the Provider did not give a true picture of fund, which carried on making loss until eventually it was liquidated.

With regard to capital preservation the Complainants have unsuccessfully requested minutes of initial meeting with Mr S.

It is the Complainants' position that the investor profile was completed by Mr S, risk tolerance reconfirmed by referring to discussions, rather than actions.

The Complainants question how they are seen as experienced business people and that it is because of their lack of experience that they paid to be advised rather than execution only. The Complainants state that the Provider is actually incorrect in that they argue that it was the Provider that advised them that they were mis-sold a financial product.

The Complainants states that no review was undertaken of them since January 2013.

The Complainants state that they did not decide to withdraw from the fund, but Mr M sold the fund without written or verbal authorisation and in doing so crystallised the losses.

As regards the timeline of events, the Complainants state the following:

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There are three key dates missing from start of 2013.

As regards the 1st May reference, the Complainants state that it is factually incorrect as they never purchased Apple shares, and never had any contract notes relating to Apple.

As regards the 28th May review portfolio the Complainants state that it was the Provider who had requested it and it was not requested by the Complainants. The Complainants state they also received advice that Mr M would be replacing Mr S as his portfolio manager.

As regards the 29th February reference, the Complainants state that the reference is factually incorrect, as they had not agreed to sell the fund, but Mr M could no longer allow them to remain in the fund.

As regards an explanation of the conduct the Complainants refers to the Provider's comments on the recommended risk reduction. The Complainants state the Provider was factually incorrect when stating that they withdraw 100,000 euro, and put it in a long term bank deposit, the Complainants state that it is clearly documented that they requested the monies to purchase an investment property. The Complainants state that no part of this was their risk reduction strategy.

As regards suitability the Complainants question why the Company has not supplied minutes of his initial meetings with Mr S where it was discussed where the source of funds came from i.e. High Court settlement, the First Complainant's medical disability and incapacity, and problems ongoing. Also their need for capital preservation.

The Complainant states that in 2013 an Investor profile questionnaire was filled out by Mr S.

As regards the classification of Medium / High Risk the Complainant refers to the following:

- meeting 4th March, the First Complainant states they had general discussions only, he says "*as you would being an advised client*". No actions followed.

- meeting 1st May the Complainant states that as regards this date the Provider is factually incorrect, as they never bought any Apple stock and that this does not show appetite for high risk.

- email 3rd September – The Complainant asks why would they not watch shares out of interest, but not purchase them. The Complainants submit that Mr S had previously mentioned Potash Co and this does not show appetite for high risk. The Complainants state that this is a very poor attempt to twist facts to try and suit the Provider for a complete untruth.

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The Complainant states that the Risk profile in January 2013 was deemed to be low/medium. The Complainants ask why the risk profile changed to be deemed medium in May 2015, while still relying on 2 year old profile with no updates to personal circumstances or the fact the value of the portfolio had changed.

The Complainants state that the "Know your Client" document – was never updated even though discussed changes in Complainants daily life.

As regards the Provider's assertion that the Complainants were Experienced Business People, the Complainant states:

- Factually incorrect in stating that the Complainant was an employed associate professional, in a medical practice.
- The Complainant state they had told Mr S that he hoped to start a business importing cars from the UK (never materialised), but at the time of opening the account and at present is still on invalidity pension. The Complainant states that on the application Mr S advised to put down 'self employed'.

The Complainants state that Mr S was well aware of this and should have updated their file.

As regards the mis-sale of a previous investment by another provider, the Complainants state that it was factually incorrect, as there was no previous experience of mis-selling. In this regard the Complainants state that Mr S advised them that a financial product that they had entered was mis-sold by a previous provider and say that this should be noted in the minutes of the meeting they had with Mr S, in 2013.

The Complainants questions the statement of having considerable prior experience – in that his 7 years experience consisted of investing in one bond, one house and a few share dealing at €1000 at a time.

As regards the reference to previously invested in Standard life funds, the Complainant states that his pension is invested in these, and that he did not personally invest in any of the funds. The Complainant states that this is another attempt to twist facts to suit the situation.

The Complainants' position is that it is clear that the Provider did not carry out a proper appraisal of their client, nor did they update any details from 2013 onwards.

The Complainant states that there was further factually incorrect information in that he did not advise that he put 100,000 on longterm deposit, but as can be seen in documents supplied by the Provider that he had requested the withdrawal for an investment property.

As regards the Investment Loss, the Complainants refer to the absence of the minutes of the meeting 29th February, and say that the notes provided by the Provider do not suffice as official minutes of the meeting and are factually incorrect. The Complainant also questions

the absence of a Redemption request from him in that all other transactions required written instruction by him.

It is the First Complainant's position that Mr M took it upon himself to sell the fund, stating the Complainant should not be in the fund and knowing what he knew, he could no longer allow him to stay in the fund.

As regards the Provider's "Loss Calculation" the Complainant states that the Provider had not provided a comparison to the portfolio, with the previous holdings pre May 2015 and did not include the following in its calculations:

- loss of income from fixed return bonds.
- loss of interest
- fees and performance fees
- equalization factor of 2113.18
- opportunity costs

As regards the Providers evidence of compliance with regulations etc., the First Complainant states that:

- He would doubt Mr M was appropriately qualified to replace Mr S to handle his portfolio and give him proper advice.
- The Complainant requested that he be provided a copy of Mr. M's C.V to see if he has the relevant knowledge, experience and qualifications to advise him.
- The Complainant's position is the Provider failed to suitably update initial client information, and Know Your Client updates were not recorded with information that was known to the Provider.
- It is the First Complainant's position that he did not have considerable prior experience in investing.

As regards the Provider's Responses, the Complainants state that the Provider's responses were anything but timely.

Submissions from the parties on the Agreement to the sale of the Provider fund

The Provider's position is that there was no requirement for a written sale agreement of the Provider's Fund.

The Complainants' response to the above is that all other sale of funds required written instruction.

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The Provider refers to e-mails between the Provider and the First Complainant regarding the change of funds, in particular the First Complainant's e-mailed acknowledgment of same.

The First Complainant states that he replied to the information about the change of fund with the 3 words *"thanks for the update"* and that he fails to see the Provider's point.

As regards the meeting of 29th February 2016 and the steps taken to sell the shares in the fund, the Provider refers to the minutes in support of decisions made at and after that the meeting.

The Complainants' response is that Mr M formed an opinion on the day to sell and he was told the fund was being redeemed immediately. The Complainant states that he was never supplied with minutes of meeting.

The Provider made a statement about the First Complainant's affinity for risk, in particular his purchase of Apple stock, the purchase of an investment property and his interest in share recommendations.

The First Complainant's response is that his limited interest in alternative investments is in line with the aim to Diversify to reduce risk not increase risk and as % of his overall portfolio and that the Provider should know this.

The Provider refers to the Investor Profile Document and that it was the client's responsibility to read over same and that as experienced business people the Complainants should have been aware of the significance of signing such a contractual document.

In the above regard the Complainants question the absence of minutes of the first 3 meetings which would have added to the evidence of their investment objectives. The Complainants dispute the reference to them as experienced business people.

The Provider also referred to the First Complainant's Experience as a Car Dealer in this regard the Complainant states that the Provider formed this opinion, yet have not supplied any minutes of meetings where this was discussed. The Complainants say that in all their 1,106 pages submitted they cannot find any mention of this significant business, that the Provider has only now come to mention. The Complainants agree that the business was established in 2014 and dissolved in 2016, and the car purchases mentioned by the Provider were in relation to family cars. The Complainant states that this is proof that the Provider have no idea who their client is and failed in the requirement to "Know Your Client".

In response to the above the Provider accepts that having a broad range of risk based investments can reduce the risk of the overall portfolio. But say, however that such a strategy is not compatible with the First Complainant's contention in his complaint that: *"It was agreed that the capital could not be put at risk as this was my only savings and there was no way for me to ever regain any capital losses"*.

The Complainants' response to this is that the Provider is only putting forward a hypothetical scenario regarding risk strategy which has no relevance to the actual facts of the case.

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Analysis

- The evidence shows that the Complainants would have been familiar with the workings of the Fund and the likely performance of same, as they had been investing in that Fund previously. An initial investment of €50,000 having been made in the fund in 2014.
- The report that followed the meeting of 28th May 2015 advised in its Disclaimer that: *“Not all recommendations are necessarily suitable for all investors and [the Provider] recommends that specific advice should always be sought prior to investment, based on the particular circumstances of the investor”*
- The short period that the Complainants were measuring the Fund’s performance, has also to be noted. 9 months into its investment, would not be a reasonable time to expect the level of performance from the Fund that they had expected.
- The Fund was not a guaranteed fund where returns would be guaranteed to be provided. Therefore, the Fund was not a “risk free” Fund and I accept that this was made clear in the documentation. Security of capital was not a feature of this Fund. I accept that the risks that could lead to possible losses on the investment were clearly spelt out in the documentation.

On the other hand I have noted the following:

- It appears that the recommendation that was made regarding the change to the investment portfolio and the acceptance of same, all occurred over a matter of days. It is unclear whether the Complainants were urged to take time to think over what was being recommended.
- There is dispute between the parties as whether the newly appointed Investment Manager read over the file before making the recommendation to the Complainants to further invest in the Provider’s fund. The Complainants says that the new Investment Manager stated he had not read the file, while the Provider states that the Manager only stated that he had not seen a “low risk” profile in the file. I consider that in any event it would be reasonable for the Complainants to expect that the new Manager was familiar with the file before making a recommendation. I also consider that it would have been reasonable for this to have been communicated to the Complainants, that is that the new Manager was familiar with his file.
- As per the Provider’s minute of the meeting with the Complainant on 28th May 2015, the main reason for putting all the Complainants’ monies into the Provider’s Fund was that in a volatile market it could be difficult to manage a client’s portfolio when they are holding a lot of positions. Combined with the fact that a new Manager was coming on board it is difficult not to expect the Complainants to have some

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reservations as whether the change was necessary and whether or not it was for their benefit.

- It is also noted from the minute of 28th May 2015 that the Provider's representatives began that meeting with a review of its own fund and dealt with how it was doing – *"Firstly we reviewed the performance of the [the Provider's] Fund YD, noting that is currently up over 4%"*.
- There is a distinct lack of independent advice, particularly where the product in question is concerned. It would be reasonable to expect to see greater evidence of Mr M and Mr S advising the First Complainant directly that he should seek independent advice on the recommendation, but this is not evident here.
- The Providers recommendation of 28th May 2015 stated a target return of 8% - 10%. It is not clear what period such figures were targeted over. In its complaint response the Provider' position was that the targeted return was over a 3 to 5 year period. While I accept that such growth figures were more appropriately targeted over an extended investment period as opposed to a 9 month period, I do not see evidence of the projection being specifically advised to the Complainants for the Provider's stated 3 to 5 year period. In this regard it is noted that the Recommendation that was prepared for the Complainants merely refers to "8% - 10%" but does not specify over what period.
- There is no evidence of a recommendation from the Provider at the 28th May 2015 meeting with the Complainants, of any alternative products / mix of funds for the Complainants to choose from.
- The Provider refers to "Know Your Customer" Reviews having occurred over the years, but I would have expected to see more information of these Reviews having taken place and that the Complainants had been actively involved in same.
- Mr S had been the Complainant's adviser for some years and I accept that for such a difference in advice / recommendation to come at the same time as the introduction to the new Manager, could reasonably cause the Complainants to question the recommendations.
- It must be noted that the portfolio that the Complainants were already in was providing them with some return on their investments and this change in outcomes with the new arrangement, particularly not providing the expected return, would also be a reasonable concern for the Complainants.
- The First Complainant's circumstances, that is health issues and being on a Disability Pension, were circumstances where losses on the investment would reasonably not be welcome, and from the information available I am not satisfied from the evidence submitted that the possibilities of same were adequately highlighted to him at the investment meeting or soon thereafter. Indeed evidence of these matters being

communicated to the new Manager, would also have been expected to be recorded on the file.

In the Complainants' initial Investor Profile the Provider had asked:

"Please provide details of other personal circumstances that you consider may be relevant when we are providing you with advice (for example, if you have any health concerns likely to impact your objective and circumstances)"

The First Complainant's response was that:

"Ongoing back problems due to spinal fusion"

A regular income of €20,000 was indicated as being needed.

I would therefore also have expected to see some review done at the May 2015 meeting to gauge where the Complainants were in respect of health and stream of income (if any) at that time.

I consider that it may also have been beneficial for the new Manager to refer the Complainants back to documentation in relation to the Provider's Fund that they had received previously from the Provider, particular in relation to the non-guaranteed nature of that fund and how that would fit into their requirements and expectations.

- I consider that, if (as it is the Provider's position), that the Complainants' former Investment Manager (Mr S), was involved in the advice meeting in 2015 – which led to the placement by the Complainant of the substantial monies in the recommended Provider Fund, Mr S should also have signed off on that recommendation. I consider that this was reasonably necessary, as the investment arrangement was materially different to that which was already in place and for that to alter so soon after an introduction to a new Manager, warranted greater involvement from the Adviser who was departing. It appears that at the time of the changeover of Manager, the Complainants were merely advised or were of the understanding that the existing Manager was going to be still with the Provider, but working on a separate project. The Complainants were clearly surprised to be later told that he had left the Provider.

That said, I accept that the Complainant's expectation of achieving the level of returns so soon after entering the Fund was not reasonable, particularly given his knowledge of the Fund's objectives, risk profile and diversified structure, from having previously invested in same. I consider this is so, regardless of how that expectation arose.

- The recommendation that issued following the May 2015 meeting had a scoring as to tolerance for volatility and the Complainants score was 4 which meant that they were looking for *"average returns higher than deposit rates and inflation"*. What was not clear from this report was that the Provider was going to look at the portfolio

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position that pertained prior to the change of funds from a diversified mix of funds, to one where only the Provider's fund was in question, when providing its assessment on how the portfolio was doing. When the First Complainant contacted the Provider having noticed the fall in value of the Provider's fund, he was informed that his overall portfolio was in a positive situation. However, this was an assessment based on a Year to Date for the overall investment and not specific to how the new arrangement was progressing since the change. When questioned about this the Provider responded: *"Yes you are correct when say the 4.88% included some performance relating to the items sold prior to your further investment in [Provider's Fund]. However when we have looked back at your performance since you sold out of those positons in late May your portfolio is down approximately 9%"*.

I accept that the Complainants would have wanted an accurate position of their portfolio as it was performing as opposed to a historic look back of the portfolio when it had additional funds in the mix. I also accept that the Complainants reasonably questioned the information they were being given and would reasonably have doubts about the person giving the advice, when it was not as clear as expected. The Complainants stated that the Investment Manager was: *"trying to put a positive spin on my capital loss"*.

- The Complainants had direct contact with their previous Investment Manager and had not received the same level of contact from the new Manager. They had received the monthly reports from the previous Manager's personal assistant, but had expected a direct contact in relation to the falling values.

To conclude, having regard to all of the above and in order to do justice between the parties, it is my Legally Binding Decision that the complaint is partially upheld and I direct that a compensatory payment of €10,000 be paid by the Provider.

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 €10,000, 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**.

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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

10th September 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) ensures compliance with the Data Protection Regulation and the Data Protection Act 2018.