An tOmbudsman Seirbhísí Airgeadais agus Pinsean
Financial Services and Pensions Ombudsman

Decision Ref:	2019-0003
Sector:	Insurance
Product / Service:	Commercial
Conduct(s) complained of:	Mis-selling
Outcome:	Rejected

LEGALLY BINDING DECISION OF THE FINANCIAL SERVICES AND PENSIONS OMBUDSMAN

Background

The Complainant is a property developer. He has advised that he purchased a premises, in **1992**. The property in question was for a mixed use (residential and commercial) development. This development was an ongoing project 20 years +, and the Complainant has for the most part carried out the work himself.

The Complainant has advised that the Provider acted as his insurance broker from **1993** to **2012**. The Complainant has advised that from **1993** to **2012**, the Provider recommended and arranged Employer's Liability and Public Liability Policies, and from **1993** to **September, 2001** a Contractors All Risks Policy. He has advised that in **2001**, the Provider ceased supplying the Contractors All Risks policy, and replaced it with a "significantly more costly" Policy. This policy remained in force until **2008**.

The Complainant has advised that in **2008**, the Provider quoted a premium figure of approximately €13,000 for the Policy. The Complainant could not afford this. Instead, he effected a Property Owners Policy through H Insurer for €10,840, saving €2,160. However, in **September, 2012**, H Insurer closed their walk in shops, and the Complainant engaged a new insurance broker to arrange his insurance cover. At that time, his new broker arranged a "Self-Build" insurance policy through F Insurance Ltd. The cost involved was €2,928.

The Complainant has claimed that the Provider should have recommended a Self-Build Insurance policy from 1993 onwards, instead of the Contractors All Risk policy, and the new Policy, which came into place in 2001. The Complainant has further submitted that if

the Provider was not able to source or secure a Self-Build policy, they should have continued with the Contractor's All Risks policy from 2001 onwards, instead of recommending the Owner's liability policy.

The Complainant has been advised that this office is precluded from investigating any complaint concerning conduct which occurred more than 6 years before the complaint in this instance was made in May 2015, i.e. prior to May 2009. **Section 51.** (1) of the Financial Services and Pensions Ombudsman Act 2017, provides as follows:

> *"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".*

However, the Complainant considers that the conduct of the Provider, which occurred prior to May 2009, is conduct which should be considered to be of a continuing nature for the purposes of the Financial Services and Pensions Ombudsman Act, and consequently within the jurisdiction of the Financial Services and Pension Ombudsman's office, for the purpose of the adjudication of the complaint.

The Complainant has claimed that the policies provided, recommended, or arranged by the Provider, for his benefit, from that time on, were not suited to his circumstances and needs, and were too expensive, in comparison to alternative cover that was available at the time. The Complainant is looking to be compensated for the loss he says he suffered as a result of the Provider's alleged breach of duty in this regard.

The inclusion of, or reference to, events going back to 1993, does not mean that an examination of the alleged conduct has taken place for the extended period, but that the references to events going back to that time are merely set out here as a background to the examinable complaint and to put matters into context.

<u>The Complainant's Case</u>

The Complainant's submission of 27/10/2016. The Complainant states:

> *"In the Provider's letter dated 16th December 2015 it stated that "the Complainant was initially a client of C** brokers from 1993 to 1997 and was first instructed by the company at that time".*
> *I state that yes C** brokers started insuring [premises]. I did not mention C** brokers to the Ombudsman Bureau in my previous correspondence because of [the Provider's] statement dated 17th October 2005 they gave details of my insurance cost from 1993 to 2005. In that statement they did not mention C** brokers so I assumed that C** brokers and [the Provider] were business partners at that time. I noticed that [the Provider] did not acquire C** broker until 1997.*
>
> *By [the Provider] acquiring C** brokers they acquired C** brokers liability also. When [the Provider] acquired C** brokers the staff of C** brokers who were dealing with my*

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insurance started working for [the Provider] and continued dealing with my insurance. There was no change to my insurance policies.

*In [the Provider] letter dated 16th December 2015 they stated that "[the Provider] acquired C** in 1997 and was first instructed by the complainant at that time."*

I did not instruct [the Provider] to make any changes to my policies at that time.

In [the Provider's] letter dated 16th December 2015 [it] stated that "this policy was cancelled by the [Underwriter] insurance in 2001 to 2004 due to non payment of premium".

I do not have any records of above but due to the high cost of the insurance I assumed that the building was fully insured at that time. As I know very little about insurance I was dependant on [the Provider] to keep the building fully insured. I am surprised that [the Provider] did not notify [his Bank] that the policy was cancelled, [the Bank], would have notified me and asked me to pay the premium or pay the premium themselves and added the cost of the insurance to my loan, rather than leave the building underinsured. I would like an explanation to the following;

From 1998 to 2001 inclusive, I had both combined liability insurance and contractors all risk insurance, costing up to €6,080.33 per annum.

The following four years, 2001-2004 inclusive I had only the combined liability insurance, [the Provider] had cancelled the contractors all risks policy. Although I only had one form of insurance, combined liability insurance, it cost up to €10,496.00.

I would like to know why I paid an excess of €4,415.67 between 2001 to 2004 per annum, when I only had one insurance policy, combined liability insurance, on the building.

In [the Provider's] letter dated 16th December 2015 [it] stated that "the option to continue the contractors all risks policy was declined by the insurer at this time. A fire insurance policy was incepted with [new Insurer]".

The above is not true. I did not ask [the Provider] to replace the contractors all risks policy with fire insurance only. The contractors all risks policy was sufficient for [the Bank] and I, as it insured the building in the event of a fire and also, the contractors all risks policy was much cheaper than the fire policy.

In [the Provider's] letter dated 16th December 2015 they stated that "the complainant decided to place the fire insurance policy direct with [new Insurer] on a direct basis so as to avail of a premium saving in December 2008 we understand that the cover remained exactly the same when he placed the policy direct with the insurer. "

Above is not true. I did avail of a premium saving on 1 August 2008. I got a quotation for fire insurance from [the Provider] insurance for the year 1st September 2008 to 31st

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August 2009, costing €12,047.22. … I also got a quotation from [another broker] for the same fire insurance which I accepted.

Cost: *€10 597.17*

A saving of: *€ 1, 450.05*

In [the Provider's] letter dated 16th December 2015, in the summary it stated that [the Provider] replaced the Contractors All Risks Policy with a Property Owners Policy in 2001.

I enclose the insurance policy for 2008, dated 27th August 2008 in that renewal it is not called Fire Insurance Policy. [The Provider] refers to it as a Property Owners Policy renewal 2008 (above is only one example.) it also shows that I paid €12,047.22 for the policy with an excess of €5,000.00 on each and every claim. I would like it to be noted that I never had a claim at [the premises].

In [the Provider's] letter dated 2nd November 2012, it stated that with reference to above "we confirm that having cancelled the above policy with effect from 27th October 2012 due to you defaulting with M Finance .. (2nd November2012.)"

The above is not true. I phoned [the Provider] and cancelled the policy myself on the 24th September 2012. I got a quotation from C.. Insurance for the self building policy which was much cheaper than [the Provider's] policy and I accepted …

I then cancelled [the Provider's] policy as I did not need it, [the Provider] and M Finance claimed that I owe them €193.77 which I am disputing. [The Provider] never followed up on above.

In [the Provider's] letter dated 16th December 2015, [the Provider] are very critical of the self build property policy that C Insurance put into place for me on the 24th September 2012.

A copy of the self build policy was given to [the Bank] and they were satisfied that the insurance policy was adequate.

I also stated the insurance policy was adequate…."

As regards the Complainant's view on the continuing nature of the complaint and the Ombudsman's jurisdiction, the Complainant states:

"I believe that I have been overcharged by [the Provider] continually from 1993 to 2012 and also by [the new insurer] from 2008 to 2012.

I believe that the conduct in question can be considered to be conduct of a continuing nature under .. the [Financial Services and Pensions Ombudsman Act 2017]. There is a clear series of conduct which creates continuing responsibility.

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Under the .. Act conduct that is of a continuing nature is taken to have occurred at the time when it stopped and conduct that consists of a series of acts or omissions is taken to have occurred when the last of those acts or omissions occurred.

Therefore, [the Provider] had a continuing responsibility between 1997 and 2012 and it lasted until the insurance policy was actually cancelled by me.

I believe that [the Provider] had a duty under [the Act] for the following reasons:

1. *I believe that [the Provider] had a responsibility to contact [the Bank] in 2001 and explain in detail why there was a significant increase in the premium and that I would no longer be covered for contractor's liability insurance.*
2. *The policy was cancelled by [A] insurance in 2001 for non payment of premium, I believe that [the Provider] should have contacted me and in particular [the Bank. and give us an opportunity to either make a payment or make a decision not to insure the property. The building was left underinsured.*
3. *I entered into a contract with [the Provider] to insure my premises and by paying a premium trusted that [the Provider] would alert me and [the Bank] to any changes in the policy. I believe that by [the Provider] not contacting me and [the Bank] that they failed in their duties which are of a continuing nature under the [Act].*
4. *[The Provider] claimed the development work was near completion in 2001, and replaced the all risks policy with Property Owners Policy. The development work was not near completion, I submit that [the Provider] should not have assumed this and this is a clear failure of their continuing responsibility to me as their customer.*
5. *I also believe that [the Provider] had a responsibility to inform me as their customer of the self build policy. There is a clear series of conduct that creates a continuing responsibility and the fact that [the Provider] insured me for a number of years indicates a continuing reasonability towards me.*

[The Provider] should have put a self build insurance policy in place or continued insuring the building with the contractors all risks policy which includes fire cover. Instead they discontinued the contractors all risk policy which has been in place for several years.

[The Provider] replaced it with a very expensive fire insurance policy only. The fire insurance policy continued from 2004-2012 and under [the Act] there is a clear series of conduct which creates continuing responsibility. I believe that [the Provider] have failed in their responsibilities to me as their customer.

If [the Provider] had contacted the [Bank] they could have sourced alternative insurance, even with a surcharge it would have been cheaper than the premium I was charged by [the Provider].

The Complainant provided details of the cost of the last four years Insurance as follows:

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Purchase Date	Year	Total Cost
24/09/2012	2012/2013	€2,982.00
10/09/2013	2013/2014	€3,145.00
01/09/2014	2014/2015	€3,247.50
03/09/2015	2015/2016	€3,377.32

He believes that he was overcharged and requested a refund for the overcharged amount of the insurance policies from [the Provider] and [Underwriter] with compound interest added.

The Complainant argues that If the Provider and Broker insurance costs were as competitive as C Insurance costs, he would have sufficient funds of his own to complete six apartments by the beginning of September 2009. He is seeking compensation from the Provider and the Broker for the loss of rent, from the beginning of September 2009 with compound interest added.

The Provider's Case

The Provider's response is that in 1993, it arranged insurances on the contract works at the Complainant's property and the insured's liability as Building Contractor. It is the Provider's position that a packaged "self build" product would not have been appropriate at that time.

The Provider states however, that the covers arranged by the Provider, albeit under two separate policies, were similar to the basic cover provided by a self-build policy — contractors all risks and liability insurance. The Provider states that whilst the client is dissatisfied that it did not arrange a packaged "self build" policy, the cover was similar. The Provider says that furthermore, it would not have been possible to obtain a packaged "self-build" policy to run for over 10 years. It argues that even if it had arranged such a policy for the first year of the contract works, it would not have been possible to continue such cover on an ongoing basis so that the premium savings that the Complainant has envisaged could not have materialised.

The Provider submits that for the period where Contractors All Risks cover was in force, it negotiated strongly on the Complainant's behalf to arrange cover for the contract works at the Complainant's property with insurers. The Provider says that contract works on a single property development are usually expected to be short term and it was only through the continued negotiation with insurers by the Provider that the insured was able to avail of contract works cover for many years on one development. The Provider submits that at various renewal dates throughout the cover period, the expected completion date was indicated as within the next 6-12 months but this was not completed

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as specified and each renewal was difficult for the Provider but it persisted with insurers on the Complainant's behalf.

The Provider points out that the covers arranged by the Provider and the new Broker, take a similar path.

The Provider states that it would appear that the Self build policy with C Insurance was only availed of by the Complainant for 1 year from 2013 to 2014 and that it then followed the same route as the cover the Provider arranged with A Insurer in 2005, being Combined Liability and Property Insurance under separate policies. The Provider's position is that this would reinforce its view that the insured would not have been able to avail of a selfbuild packaged policy for 18+ years. The Provider says that the fact that the Complainant is paying less now for Fire cover than he paid in 2008 is purely as a result of the insurance cycle and the current competitive and wider property insurance market.

The Provider states with regard to the comments relating to conduct of a continuing nature is as follows:

> *"We have responded to the queries raised by the Financial Services Ombudsman in good faith in relation to the years prior to May 2009. We do not believe that the conduct in question can be considered to be conduct of a continuing nature for the purposes of.. the Act. The insurance practice in the market place in Ireland is for insurance to be renewed on an annual basis. Accordingly, the insurance requirements of clients are reviewed and considered on an annual basis. In this case, the Complainant's insurance requirements were separately reviewed every year that he was a client of [the Provider]. Each year, [the Provider] looked at the risk, assessed the market, assessed the existing covers, assessed the requirements of the Complainant's bank as to what it required, and liaised with the Complainant to assess what its requirements were for that year, based on what the market had to offer. This conduct could not be considered to be conduct of a continuing nature, as each year, the Complainant's requirements would have to be reviewed afresh. If for example the building works had been completed, this would have significantly changed the nature and type of insurance the Complainant required. As it happened, the Complainant did not complete the works over 18 or more years. The fact that the works were not completed impacted on the insurance required by the Complainant but did not impact on the conduct of [the Provider]. [The Provider] had a duty to the client, which was discharged on an annual basis. For this reason, we do not believe that the Financial Services Ombudsman should be reviewing the period prior to 2009".*

In response the Complainant states that in his letter to the Provider dated 27th December 2014 and subsequent follow up letters, he made a mistake and it should have read – if the Provider had insured the premises with a self build insurance policy or a very competitively

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priced employers liability, public liability and contractors all risks policies. He would not have needed the Provider's fire policy or the A Insurer's fire policy.

The Complainant enclosed detail's of his last four years insurance at the Complainant's property supplied by his present broker, to make comparison with the Provider's insurance and their costs. The Complainant contends that this comparison clearly indicates that he has been overcharged on his previous policies with the Provider.

The Complaint for Adjudication

The Complainant's complaint is that the Provider should have sourced and put in place a more suitable and cheaper insurance policy to provide cover in respect of his development property. The Complainant is arguing that this more suitable and cheaper cover should have been in place since 1993 and over the intervening years up to 2012. The Complainant argues that the Provider's failure in this regard is a continuing conduct which can be investigated and adjudicated upon by the Financial Services and Pensions Ombudsman.

Decision

During the investigation of this complaint by this Office, the Provider was requested to supply its written response to the complaint and to supply all relevant documents and information. The Provider responded in writing to the complaint and supplied a number of items in evidence. The Complainant was given the opportunity to see the Provider's response and the evidence supplied by the Provider. A full exchange of documentation and evidence took place between the parties.

In arriving at my Legally Binding Decision I have carefully considered the evidence and submissions put forward by the parties to the complaint.

Having reviewed and considered the submissions made by the parties to this complaint, I am satisfied that the submissions and evidence furnished did not disclose a conflict of fact such as would require the holding of an Oral Hearing to resolve any such conflict. I am also satisfied that the submissions and evidence furnished were sufficient to enable a Legally Binding Decision to be made in this complaint without the necessity for holding an Oral Hearing.

A Preliminary Decision was issued to the parties on 20th November 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.

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A letter was received from the Complainant on 5th December 2018 seeking an extension of time to make a further submission. A Submission dated 14th January 2019 was received from the Complainant. This submissions was exchanged with the Provider and an opportunity was made available for the Provider to make any additional observation arising from the said additional submission. On 16th January 2019 the Provider advised that it would not be making an additional submission.

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

Analysis

As stated above the inclusion of, or reference to, events going back to 1993, does not mean that an examination of the alleged conduct has taken place for this extended period, but that the references to events going back to that time are merely set out here as a background to the examinable complaint and to put matters into context.

The Complainant's complaint is that the Provider should have sourced and put in place a more suitable and cheaper insurance policy to provide cover in respect of his development property. The Complainant is arguing that this more suitable and cheaper cover should have been in place since 1993 and over the intervening years up to 2012. The Complainant argues that the Provider's failure in this regard is a continuing conduct which can be investigated and adjudicated upon by the Financial Services and Pensions Ombudsman.

Time limits for complaints to the Financial Services and Pension Ombudsman as set out in the Financial Services and Pension Ombudsman Act 2017, under the following sections:

> ***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;*

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(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).

(4) The requirements referred to in subsection (2)(b) are that—
(a) where the conduct occurred prior to the establishment day, that conduct occurred within the period between 13 April 1996 and the establishment day, or

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

(5) For the purposes of subsections (1) and (2)—

(a) conduct that is of a continuing nature is taken to have occurred at the time when it stopped and conduct that consists of a series of acts or omissions is taken to have occurred when the last of those acts or omissions occurred, and

(b) conduct that consists of a single act or omission is taken to have occurred on the date of that act or omission.

The key point is that conduct of an ongoing nature allows in certain circumstances a consideration of conduct which might initially have started or been caused by conduct that occurred beyond the 6 year period, but which continues up to a more recent point in time, which brings a complaint within my jurisdiction.

I consider that the actions of the Provider when arranging cover at renewal date on an annual basis was not conduct of a continuing nature. At each renewal a new contract was entered into by the Complainant and the Provider merely recommended the cover that it considered was a suitable product for the Complainant's needs, at those particular times. At each renewal, the Complainant had the option of accepting or rejecting the recommended policy. The policy cover is sought and effected at a particular point in time each year and the act or omission can only be said to have occurred at that particular point in time, each year. This is so, as the effecting of cover at each renewal was a new and distinct matter based on the then prevailing circumstances and cover that was available and could be offered by the insurance market. While the Complainant considers he was not being provided with the best and cheapest policy over the years, any act or omission in relation to the procuring of the policies can only be seen as a single or distinct action by the Provider, at a certain point in time each year.

Therefore, I am confining my investigation and adjudication of this complaint to the alleged acts or omissions of the Provider occurring over the 6 year period prior to the date

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the complaint was submitted to this office, that is from May 2009 (the complaint having been submitted to this office in May 2015).

The cover that was in place and arranged through the Provider which forms the subject of this investigation and adjudication, is the Combined Liability Insurances taken out from May 2009. These Liability policies covered public and employer's / Contractors liability exposure.

The Complainant has argued that a Self Build policy would have been the more adequate and cheaper cover.

The Provider believes that the Complainant's interest was duly and professionally served based on (i) the insurance market place at the time, (ii) the complex risk presented to the Provider, (iii) the lack of development on the property over many years which complicated the risk assessment for insurers and for the Provider, (iv) the changing instructions in relation to the insurance requirements of the Complainant, as well as (v) the requirements of the Complainant's bank which were also given attention and factored into the advice provided.

The Provider is an Insurance Broker. An insurance broker acts as an intermediary between clients and insurance companies. Clients may be either individuals or commercial businesses and organisations. Brokers use their knowledge of risks and the insurance market to find and arrange suitable insurance policies. Insurance brokers, unlike tied agents, are independent and offer products from more than one insurer in order to get the best deal for their clients.

From the evidence submitted, I accept that the Provider acted in a professional and reasonable manner in relation to the Complainant's insurance as the Provider:

- gathered information from the Complainant, and assessed his insurance needs;
- built up and maintained an ongoing client relationship with the Complainant over the years;
- was proactive in arranging the Complainant's insurance needs, such as arranging his various policy renewals; and liaising with Insurers and the Complainant with regard to any requirements relative to the cover being sought;
- researched insurance companies' policies and negotiated with underwriters to find the most suitable insurance for the Complainant.

The Product Suitability Statements on file (unsigned) sets out the factors considered by the Provider before recommending the product, which is said to include, but not limited to the following:

- The Provider's understanding of the Complainant's requirements for the insurance protection.
- The price of the product.
- The security of the Insurer based on internationally accepted Credit Agency Ratings in consideration of the client's best interests, the Provider undertakes to not

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recommend the products of insurers who fail to meet the requirements of the Provider's Security Committee.
- Consideration of local accessibility to Insures.
- Problems associates with an Insurer entering or exiting the insurance market or a sector thereof.
- The extent and nature of technical expertise and services provided by the insurers.
- The advice from the client and their risk advisors regarding the nature and extent of probable exposures to loss.
- The client's philosophy with regard to the purchase of insurance.
- The clients ability and desire to carry self – insured deductibles.
- How the product complements the client's existing programme.

The Statement concludes as follows:

> *"We have made every effort to research suitable products available at the present time from insurers regardless of whether or not we hold an Agency Appointment from them – our review does not include the products of direct insurers and / or other insures operating in the insurance market who do not provide information on their products to the [the Provider]".*

The evidence shows that the fact that the Complainant had built up a relationship with the Insurer over the years it had assisted him in arranging his renewals from year to year.

In making his complaint assessment, hindsight appears to have played a significant part in the Complainant's assessment, but hindsight cannot be a factor in deciding such matters. For example - the fact that the product recommended by the Provider was more expensive than the policy the Complainant himself arranged, does *not* mean the Provider's recommendation was unsuitable. And the fact that this other product was on the market and provided similar cover for some time, does not make it the more suitable of the two products.

I accept that the level of insurance cover arranged by the Provider was appropriate to the Complainant's needs in relation his development works on an inner city commercial property. The fact that the works were ongoing for so many years without completion is also to be noted. The evidence shows that the Provider made successful representations to the Insurer on a number of occasions to reduce the cost of cover, having regard to the changing risk.

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

<u>Conclusion</u>

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

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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

21 January 2019

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

(a) ensures that—
(i) a complainant shall not be identified by name, address or otherwise,
(ii) a provider shall not be identified by name or address,
and
(b) ensures compliance with the Data Protection Regulation and the Data Protection Act 2018.