



<u>Decision Ref:</u>	2019-0432
<u>Sector:</u>	Investment
<u>Product / Service:</u>	Pension Transfers
<u>Conduct(s) complained of:</u>	Failure to provide product/service information Mis-selling
<u>Outcome:</u>	Rejected

**LEGALLY BINDING DECISION
OF THE FINANCIAL SERVICES AND PENSIONS OMBUDSMAN**

Background

This complaint relates to the transfer of the Complainant's pension into a retirement scheme.

The Complainant's Case

In August 2014, the Complainant was contacted by a third party to discuss his personal finances and in particular his pension. The Complainant had a defined benefit pension through his employer and also a personal contributory pension. On **21 August 2014**, the Complainant had a meeting with the third party representative to discuss his pensions further and potential investment opportunities that were available. The Complainant resides in the UK and the meetings took place there.

On **22 August 2014**, the Provider contacted the Complainant confirming that the meeting had taken place between the third party and the Complainant and furnished a report to the Complainant that set out its recommendations of how the Complainant might invest his pensions in order to maintain their value and to ensure that the Complainant had sufficient resources in the future. The recommendations noted that an investment in a five year retirement scheme that operated in Malta was available which could benefit the Complainant. The particular scheme intended to invest 50% of the pensions into a German property investment, while the remainder would be placed in a separate fund. On **3**

September 2014, the Complainant signed a form confirming that he wished to proceed with the retirement scheme.

On **27 March 2015**, the Complainant signed a consent form furnished by the pension trustee which moved his investment into a recently authorised fund, but the substance of the investment remained the same.

On **1 November 2016**, the Complainant wrote to the pension trustee of the retirement scheme setting out his grievances, which primarily related to the nature of the advice that he had been given by the Provider. The Complainant felt that he never should have been advised to move his pensions into the retirement scheme and that he was worse off financially now.

The essence of the Complainant's case is that he has been mis-sold and poorly advised in respect of transferring his pensions into the retirement scheme recommended by the third party and the Provider. In August 2014, and in the course of the meetings with the third party's representatives, the Complainant asserts that he was told to transfer his defined benefit pension and contributory pension into one, as his employer more than likely would not have enough funds to pay his defined benefit pension. The Complainant asserts that he was not informed of the risks involved in the investment or in the exit fees that apply in the event of wishing to leave the scheme early, which the Complainant states are £15,000. The Complainant says that no one told him that the scheme lasted five years. The Complainant says that he was given the document to sign without properly having a chance to read it. The Complainant states that his investment is unregulated and that if he had known this he never would have signed up. The Complainant states that the total value of his pensions that were transferred was £212,563.87 and that the value of his transferred pension as of **30 September 2016** was £205,301.09.

The Complainant asserts that the Provider did not take account of his medical position at the time. The Complainant states that he was depressed and not in a right state of mind at the time when he was asked to move his pensions into the retirement scheme. The Complainant notes that there should have been more of an attempt to identify whether he was a suitable candidate in light of his medical position.

The Complainant seeks his pensions to be transferred back to a scheme in the UK and to be compensated for any financial loss that he has suffered as a result of the actions of the Provider. The Complainant wishes to be placed back in the position that he was in before transferring to the retirement scheme.

The Provider's Case

The Provider asserts that it did not mis-sell or provide incorrect advice to the Complainant. The Provider notes that the Complainant was interested in maintaining the value of his pensions and that the nature of the investment was set out in detail in the report delivered to the Complainant on **22 August 2014**. The Provider notes that this report was predicated

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on the risk profile of the Complainant and also on the Complainant's specific financial position.

The Provider asserts that the nature of the information contained within the recommendation was sensible and at no time guaranteed the return that it set out. The Provider notes that the recommendation went to great lengths to set out the uncontrollable risks that existed, particularly with respect of the portion of the investment in the Germany property fund. The recommendation noted certain frailties in defined benefit schemes and how the Complainant had a shortfall in his pension funding, which required the Complainant to either contribute more or increase investment returns. The Provider notes that the Complainant signed the recommendation form on **3 September 2014** confirming that he had read and understood it. On **27 March 2015**, the Provider notes that the Complainant agreed to persist with the investment, but to move it into a separate fund, which would be regulated by the Maltese authorities, but had the consequence of reducing the liquidity of the investment. The Provider asserts that the retirement scheme operated in Malta was at all times an appropriate retirement scheme for the Complainant and that it was approved by the UK's revenue authority as a qualified registered overseas pension scheme. The Provider notes that the investment was for five years, which was explained to the Complainant, and that the Complainant has decided to encash his entitlement before that date, which incurs an early encashment fee.

In respect of the Complainant's vulnerability, the Provider notes that it had no indication of any vulnerability and if it had done, then the vulnerable client policy and procedure would have been invoked. In an assessment form filled out by the Complainant at the material time, it is noted that the Complainant selected 'good' as a description of his health. The Provider states that it cannot do anything about the Complainant's medical position if it is entirely unaware of it. It would seem as well that the third party who attended with the Complainant was not an employee of the Provider. The Provider notes that the third party representative was not paid on a commission basis.

In respect of loss, the Provider notes that the investments are five year investments which have not yet matured. As such, it is not possible to assess whether or not the Complainant is financially worse off or not. The Provider notes also that there has been growth of 3.5% in the investment and that the Complainant's employer's defined benefit scheme has since changed in such a way that disadvantages the employees. The Provider notes that the Complainant, therefore, could have been worse have had he stayed in with his original pension arrangement. The Provider has stated that it is attempting to transfer the Complainant's interest back into a UK scheme, but that since March 2015 when the Complainant signed the consent form to enter the new fund that his investment is far more illiquid, which makes this more difficult. The Provider has stated that it will transfer the Complainant's investment back to a UK based scheme once that is possible.

The Complaints for Adjudication

The complaint for adjudication is whether the Complainant was properly advised about signing up to the retirement scheme as set out in the recommendations by the Provider and

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whether the Provider took the Complainant's personal circumstances into account when doing so.

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 12 November 2019, 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, within the period permitted, I set out below my final determination.

It is important to note that the Complainant's complaint relates to the conduct of the Provider and not in respect of any other of the entities involved. In particular, it is notable that the third party that attended and communicated with the Complainant is not a regulated entity within this jurisdiction and, therefore, the conduct of its representatives cannot be considered.

In determining whether or not the Complainant was given bad advice by the Provider, it is necessary to examine the lengthy recommendation given by the Provider to the Complainant and the financial risk analysis that took place beforehand. Initially the Complainant provided financial information in a questionnaire dated **5 August 2014**. In that questionnaire the Complainant set out his financial position and indicated that he could be happy with a minimum monthly income of £1,200 in his retirement. Subsequently the Complainant was analysed using an assessment tool, which was completed by the

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Complainant on **11 August 2014**. The assessment is ten pages long and concludes that the Complainant had a risk tolerance of 4 out of 7.

The Complainant answered a series of questions in order to ascertain what risk profile suited him best. On that basis and on the basis of the financial information provided, the recommendation was drafted by the Provider.

The recommendation is a lengthy documents that goes into detail surrounding the particulars of the suggested investment, and the particular investments required in order for the Complainant to obtain the minimum monthly sum of £1,200 to retire. The cover letter to the report dated **22 August 2014** sets out that the analysis does not show whether signing up to the scheme was advisable or not, but that it does indicate that the scheme could outperform the Complainant's current pension arrangement. The report then goes on to cite the financial information furnished by the Complainant. The Complainant had an annual salary of £38,000 and 13 years left of work with two dependents.

The value of the Complainant's pensions were £146,028 (occupational) and £29,793.50 (personal) with an overall total of **£175,821.50**, and it was noted that the Complainant desired a minimum of £1,200 per month for retirement. Accounting for inflation, the Provider determined that the Complainant required **£496.264.98** in order to reach the Complainant's required goal, which required £320,442.48 to be made in the next 13 years. The report then details the nature of defined pension schemes and the risks that exist in respect of them and compares the potential benefits of the proposed scheme with the Complainant's existing defined benefit pension.

The report then considers the returns that could hypothetically be made if the Complainant's pension obtained various different rates of return, but states at the foot of the page *'returns are not guaranteed, past performance is no guarantee of future performance.'* The critical page is the portfolio recommendation made by the Provider. It advises that the Complainant should invest 50% of his pension in a German property fund and the remaining 50% in two separate large lower risk funds. There is a proviso that the figures provided on that page are estimates based on previous and anticipated returns and that they are not guaranteed. The report notes that the Complainant expressed an interest in an alternative investment, as opposed to different asset classes such as stocks or bonds. It was noted that these types of investments tend to be difficult to determine the value of and tend to be more illiquid. The report sets out that the German property fund was the only alternative investment that the Provider recommended. The property fund was involved in constructing, purchasing and managing building in Germany. The report noted that the length of the investment was for 5 years with an expected return of between 9% and 12%. As such, a sample investment of £100,000 would yield a return of £62,465. I note, however, that the report states that the investment opportunity is only available to those who are willing to accept the risks associated with the investment. The report sets out 17 separate risks that existed with respect to the investment and that they were outside the control of Provider. Finally the proposed charges the Complainant would have to pay were then set out, including certain early transfer fees that would apply if the Complainant moved his investment. The report concludes by reiterating that the investment was a 5 year

investment and that the Provider felt that there was a shortfall in the Complainant's existing pension arrangements.

In all of the circumstances, I find that the report was balanced, fair and set out the risks associated with the investment. From the financial data provided by the Complainant, it was apparent that a significant shortfall would arise in his pension arrangements in order to reach the monthly pension payment that he desired. In order to reduce this shortfall, the Provider was correct that the Complainant must either contribute more each month to his pension or increase the return of his investments. In that regard and in keeping with the risk profile that was established, the advice to invest in a medium risk venture (the German property fund) and two lower risk funds does not seem unreasonable. It is notable that the report never guarantees any particular return and only sets out anticipated returns, which are expressly subject to a variety of risks that could not be controlled. The report also clearly sets out the length of the investment and the fact that it is for the Complainant to decide whether or not to go ahead with it. It is important to note too that the report is written in relatively plain English and is not written in jargon.

There are some technical terms used, but the subject matter is by its very nature technical and it is impossible to avoid using such terms.

With respect to the other matters raised in the complaint, I find that the retirement scheme was properly regulated in that it was approved by the HRMC in the UK. As of **27 March 2015** the Complainant consented to transferring his investment into a new more highly regulated fund. While the scheme may not have been administered in the UK, it was made clear from the documentation furnished that it was a retirement scheme operated by a pension trustee in Malta. With respect to the allegation of loss, I note that the five year investment has not yet matured, but is due to mature imminently. Due to the nature of the investment and its maturity date, it is not possible to say whether or not the investment has performed poorly or not. With respect to the Complainant's health, I note that the third party appears to have conducted the personal communications with him and I cannot find that the Provider should have known that the Complainant may or may not have been suffering from health difficulties unless these were disclosed. In the questionnaire I note that the Complainant set out that his health was '*good*'. It cannot be the responsibility of the Provider to investigate whether or not a Complainant is healthy or not unless there are some indications that a particular customer is not fit or capable to enter into the transaction.

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

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**

5 December 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.