



<b><u>Decision Ref:</u></b>	2019-0436
<b><u>Sector:</u></b>	Investment
<b><u>Product / Service:</u></b>	Shares/Equities Investment
<b><u>Conduct(s) complained of:</u></b>	Mis-selling (investment)
<b><u>Outcome:</u></b>	Partially upheld

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

#### **Background**

The Complainants' complaint relates to the sale of a Property Investment Policy. The Investment Policy was taken out in 2007 through an Independent Intermediary.

The Complainants' complaint is that the Provider did not correctly or reasonably explain the investment to them and that the investment was unsuitable for their needs.

***The Financial Services and Pensions Ombudsman Act 2017***, sets out the time limits for making a complaint about a "*long-term financial service*" within the meaning of the Act.

I note that the investment was an investment policy structured in a way whereby it was "*wrapped*" in life assurance and, consequently, I am satisfied that the product meets the definition of a "*long-term financial service*" within the meaning of the Act.

In those circumstances, it was open to the Complainants to make a complaint to this office within a period of 3 years from the earlier of the date on which they became aware, or ought reasonably to have become aware, of the conduct giving rise to the complaint.

The Complainants maintain that they only became aware of the alleged mis-selling when they sought to cash in the investment in May 2013. Accordingly, it was accepted by this office that the Complainants made the complaint within a period of about two months from the date upon which they became aware of the conduct giving rise to the complaint. Accordingly, I am satisfied that on the basis of the evidence available the complaint was made within the period permitted by the Act. This was communicated to the Complainants and the Provider.

### **The Complainants' Case**

In the Complainants' submission of 16<sup>th</sup> April 2018 the Complainants state the following regarding the sale of the investment to them.

The First Complainant states that the Provider failed to clearly explain the investment product to her when she contacted him about taking out an investment for her son (the Second Complainant) and herself. The First Complainant states that she clearly pointed out to the Provider that they were both cautious investors and did not want under any circumstances to lose any of their money. In 2007, the First Complainant was 59 years of age and the Second Complainant was 21 years old and was saving up for a deposit for a house. The First Complainant states that the Provider told her that the Second Complainant would have a huge deposit for his house after the end of the 6 year investment. The Complainants state that this was the investment that the Provider clearly recommended. The Complainants state that the Provider never met with the Second Complainant and that the Provider never explained to him what kind of investment that the Provider was selling to him and his mother.

The Complainants state that they repeatedly told the Provider that neither of them wanted to lose their money. It is the Complainants' position that the Provider insisted that neither of them could not loose with this investment and that they would all, including the Provider, be very rich after the six years investment. It is the Complainants' position that the Provider said he had invested his own life savings in the investment.

The Complainants alleges that the Provider clearly failed to explain the investment policy terms.

The Complainants state that the Provider did not carry out a Fact Find or a Risk Profile on either of them.

The Complainants submit that the concept of Gearing was never explained nor mentioned to them. The Complainants say that they did not know what it meant and still do not know what it means.

The Complainants state that the Provider's Statement of Suitability is very vague. The Complainants submit that in the Statement the Provider refers to recent telephone conversations and that he made his recommendations on those phone calls. In relation to this the Complainants state that recommendations should be made when meeting with a Provider and not from a telephone phone conversation.

The Complainants state that the Provider did not point out to them that they had a cooling off period and that they had a right to cancel.

It is the Complainants' position that they understood the investment was for a period of 6 years and it is now 11 years + and they cannot get access to the remaining, approximately three thousand euro of their investment. The Complainants say that they got in touch with

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the Fund Underwriter on several occasions since the six-year period expired with regard to withdrawing the remainder of the investment and the Underwriter has insisted throughout that time that their money cannot be accessed until the Fund which is now in Liquidation can be finalised and that it is estimated to take years.

It is the Complainants' position that they were sold a product that was unsuitable for their needs. The Complainants says that it was the only product that the Provider recommended to them.

The Complainants say that the Provider made misleading statements about the product, that it was for a 6-year period and that this was not true as it is now 11 years + since the investment and they cannot get access to their money. The Complainants state that the Provider also stated that this product lacked the volatility of equities.

The Complainant states that the Provider was obviously only interested in selling the product and in his commission.

It is the Complainants' position that the Provider was in a hurry to get the money as the Provider said the fund was closing and got the Complainants to sign the forms afterwards. The Complainants say that the Provider sent their money by courier to the Underwriter of the investment and signed the form on 04/04/2007 and left them with the Complainant to sign on 07/05/2007.

The Complainants say that if they had left their money in Saving Certs they would have access to it at any time and it would now be worth well in excess of €100,000.

### **The Provider's Case**

The Provider's position is that the complaint against it is without merit and it is satisfied that the information/documentation submitted will verify that the Provider acted on the clients' informed instructions in a professional and efficient manner at all times.

The Provider states that the conduct complained of relates to the alleged mis-selling of a Property Fund to the Complainants.

The Provider submits that the First Complainant alleges that: *"I did not understand the concept of gearing and did not think I was investing my hard earned money in a high risk investment". "At my age I should have been advised to invest my money in a safe investment and not what [the Provider] sold me"*

The Provider's response to the above allegation is that Product Brochure given to the First Complainant when they met (and acknowledged as having been received and read by the Complainants) clearly stated the Risk Factors that needed to be considered by prospective investors in this Fund.

As regards the First Complainant stating she did not understand the concept of gearing, the Provider refers to the "Risk factors" on page 23 of the Product Brochure. The Provider states that the Gearing Risk was clearly explained here. It stated as follows:

*"The .. Fund will exhibit stabilised gearing of 60% when fully invested. Although gearing can increase the potential returns to an investor, Investors should be aware that gearing can also erode invested capital. In particular, a geared Fund will translate any increase in capital values into a disproportionately greater increase in the return on investor's equity. Conversely, it will have the opposite effect if the value of properties is falling".*

The Provider states that under the heading Fund Features on page 21 of the Product Brochure it stated as follows:-

*"Investors should note the Fund includes gearing. It is therefore suitable for investors who understand how borrowings in the Fund increase its risk profile and who understand that the Fund is not guaranteed"*

The Provider states that a Suitability Statement was issued to both Complainants under cover of letter of 04 May 2007. In this letter the Provider stated as follows:-

*"I would be grateful if you could please read over the Suitability Statement and if in agreement with the contents sign where indicated and return in the prepaid envelope enclosed"*

The Provider states that both Complainants signed the Suitability Statement to confirm that they had read the Provider's recommendation and reasons for investment and that they had received the Product Brochure and Key Features Document.

The Provider submits that the concept of gearing was again explained in the Suitability Statement. It stated as follows:-

*"The ... Fund will exhibit gearing of 60% when fully invested. This increases your exposure and potential return. Conversely, it could have the opposite effect if property values were falling."*

The Provider says that the Suitability Statement also confirmed the Provider's understanding following the meeting that the Complainants were: *"prepared to take on board the risks associated with investment in European Commercial Property"*.

The Provider states that these risks were again highlighted on page 23 of the Product Brochure under the headings:

*"Property Returns"*

*The overall performance of the individual targeted European property markets over the short to medium term cannot be accurately predicted*

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- *Leasing Risk*
- *Construction Risk*
- *Default Risk*
- *Gearing Risk*
- *Interest rate Risk*
- *Liquidity Risk*

The Provider submits that the Complainants were also issued with a "Cooling Off" Notice shortly after they made their investment.

The Provider says that the Cooling Off period of 30 days gave the Complainants ample time to consider the contents of the Suitability Statement and to change their mind if they were unhappy about their investment.

The Provider submits that in its many years as a Financial Advisor it has always acted in what it considered to be the best interests of clients. The Provider's position is that the First Complainant came to the Provider looking for an investment product. The Provider says it did not solicit the Complainants' business. The Provider states that the Complainants were very happy to invest in this Commercial Property Fund at the time and it was presented to the Complainants in a fair and honest way. The Provider's position is that the risks associated with the investment were pointed out and the Complainants signed a Suitability Statement confirming that they were prepared to take on board the risks.

The Provider states that it was not commission driven and as a goodwill gesture 1% of the standard 3% commission was foregone in order to give the Complainants an extra 1% investment allocation.

As regards the speed at which the investment was made, the Provider submits that as the fund was about to close it would have been remiss of the Provider not to have pointed this out. The Provider says that the Complainants were eager to invest in the fund and the Provider did all that it could to ensure that the investment would be accommodated in the most expedient way possible.

The Provider asserts that it did not state that the investment of €50,000 would yield a return of €125,000 and states that this allegation is not true.

The Provider refers to Table 1 in the Disclosure Notice that was issued to the Complainants prior to their decision to invest. The Provider states that the Notice illustrated the projected benefits and charges assuming a gross growth rate of 6% per annum. It also stated that the returns were not guaranteed and that the returns the policy would achieve would depend on future investment conditions.

The Provider states in its submission of 31 May 2018 that coupon payments totalling €20,504.29 have been paid on the policy to date and that the policy had a value of €3,878.69 as at 02 March 2018. The Provider submits that the joint losses therefore amounted to €25,617.02 as of that date. The Provider states that relative to the performance of many other property funds during this period of unprecedented global upheaval and economic downturn the Fund held up reasonably well.

The Provider asserts that the nature of the investment and pitfalls were fully explained. The Provider says that the Complainants made no attempt to either contact the Provider or seek clarification regarding any aspect of the proposed investment. The Provider says that it did not solicit the business. The Provider states that it facilitated the Complainants'

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investment having fully informed them both of the nature and risks involved in the Fund. The Provider says that it also recommended that the Fund be considered for investment of a portion of the Complainants' surplus funds only.

The Provider states that the Complainants acknowledged that they had read the Suitability Statement and that they agreed to the recommendation made therein. The Provider submits that the Complainants also confirmed receipt of the Product Brochure and Key Features Document which explained the risks and nature of the investment.

As regards the claim for a refund of €50,000 plus interest, the Provider states that it is without merit, as the joint losses amounted to €25,617.02.

The Provider states that the Complainants invested in a Property Fund with full knowledge of the risks involved. The Provider states that the Complainants received a Suitability Statement, Product Brochure & Key Features Document confirming the risks involved and they signed a Suitability Statement knowing the risks involved. The Provider states that 1% of the 3% commission earned was rebated into the Policy.

As regards the encashment query raised by the First Complainant in her e-mail of 09/05/2018 this is addressed in the "Liquidation Date" paragraphs in Section 1 of the Policy Conditions and "Cashing in Your Policy" paragraphs in Section 4.

The Provider states that it is important to note that the actual loss in this complaint is significantly less than the sum being claimed (approximately 50% less).

### **Additional submissions**

9 May 2018 – Complainants to FSPO

*"We did not realise that we had been mis-sold the investment until I tried to cash in the investment after the 6 years had expired and was told by [Underwriter] that I could not cash in the investment until they decided to repay it. I have been told that continuously since then. I understood that the investment was for a term of six years only".*

15 June 2018 – The Complainants' response to the Provider's submission

*"I wish to state that my letter of 16th April stands and I would like to add that [the Provider] has now added a Factfind /Review which I never saw before. It did not form any part of the documentation that I have in my possession. It would appear that that statement of fact was done when he made contact with me [regarding a] with Profits Bond 1st October 2007. No Factfind was done for the [Property] Fund .*

*He also states that he explained the investment and the pitfalls to us which is untrue .*

/Cont'd...

*Never in my wildest dreams would I have invested in such a fund. I understood that I would have my big payout in six years which would be in the year 2013. Our money could not be touched for what is now eleven years and there is absolutely no way we would have invested in such a fund”.*

## **Evidence**

Suitability Statement signed by the Complainants and dated 8<sup>th</sup> May 2007

*“I refer to your recent telephone conversations and note that you have surplus funds available for investment. In this regard I would recommend that you consider investment of a portion of these funds in [Underwriter’s Fund]. I make this recommendation for the following reasons:-*

- *You can afford to invest for a 6 year period*
- *You wish to invest in an asset class with potential for strong capital appreciation that lacks the volatility associated with equities*
- *The ... Fund will exhibit gearing of 60% when fully invested. This increases your exposure and potential return. Conversely it could have the opposite effect if property values were falling*
- *You are prepared to take on board the risks associated with investment in European Commercial Property*
- *The fund is well diversified throughout key Western European countries and there is an excellent mix between Office, Retail, Logistics and Distribution.*
- *The cost of borrowing within the fund will be competitive as the fund manager will undertake a tender process with potential lenders in respect of each property acquired*
- *The Fund is targeting to return an average coupon of 4% to 5% per annum commencing at the end of the second year and semi annually thereafter. It should be noted however that this coupon is not guaranteed*
- *The Fund offers competitive investment terms and there is no bid/offer charge. There is an entry charge of 3.75% which will be reduced to 2.75% courtesy of a commission rebate. There is an annual fund management charge of 0.76% of the property value, an administration fee of 0.65% of the net asset value of the fund and an arrangement fee of 1.75% of the property value. There are early encashment penalties if you encash your investment before the sixth year anniversary date. Details on these are set out in the Disclosure Notice on page 26 of the Brochure.*
- *The European Economy performed strongly in 2006 and the outlook remains positive*
- *The Managers of the Fund ... have a local market presence across Europe with subsidiary offices in every capital city throughout Europe. There are co-investing €35m of the overall equity investment which will ensure an alignment of interest with Irish Investors. They manage over €30bn of property and last year executed €4bn of transactions.*

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- *European property yields remain relatively high and well above debt funding costs providing strong surplus rental cashflow and good capital appreciation for Investors”.*

### Property Bond Policy Schedule

*“Investment Instructions*

*As instructed your bond will be invested in the ... Fund”*

### Policy Conditions

*“Encashments*

*Any part of the original investment taken out on the policy prior to the maturity date.*

*...*

*The Liquidation Date*

*The ... Fund is a geared property fund. The Liquidation Date of a geared property fund will be the date on which all of the property assets of the fund have been sold and any outstanding loans have been settled.*

*..*

*The Liquidation Date will be determined by us based on the market for the property / properties in the fund and the investment aims of the fund. After the Liquidation Date you will have the option of either surrendering any remaining units or switching them to other funds as described in Part 13 of these conditions (Additional Fund investment).*

*Early Encashment Penalty*

*Is a charge, which will be applied to the value of your units held in any investment fund where all or any of those units are cancelled on your instruction within the first 6 years from the Commencement Date”.*

*Section 4 Options and Benefits*

*12. Cashing in Your Policy*

*You can cash in your entire policy at any time after the Liquidation Date.*

*Early Encashments prior to the Liquidation Date will not be allowed except in exceptional circumstances at the discretion of [Underwriter].*

*If you encash your policy early, we will cancel all the units added to your policy and the policy itself. The encashment value will be equal to the bid prices of all the units added to your policy. We will use the bid prices calculated at the next Valuation Date of the funds after we receive your instructions as outlined in Section 3 of these conditions (Funds & Unit Linking).*

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*An Early Encashment Charge will apply to any encashments made before the 6<sup>th</sup> anniversary of the policy, as outlined in Part 16 of these conditions (Early Encashment Charges).*

*On surrenders or on Early Encashment the growth elements of the proceeds of your policy are subject to exit tax. At the start date this tax is equal to the standard rate of income tax plus 3%. This exit tax is deducted at source and we pay you the net proceeds.*

#### *16. Early Encashment Charges*

*..*

*After 6 years Penalty = 0.00%*

*“No surrender penalty is applied on or after the 6<sup>th</sup> anniversary”*

#### *19. Delaying cancelling units*

*..*

*Where the value of a unit depends, either directly or indirectly, on the value of real property (land and buildings), we may delay cancelling units for six months.*

*If we do this, we will use the bid prices on the Valuation Date immediately following the end of the period of delay”.*

### Product Brochure

*“Prospective investors should be aware that the value of investments may fall as well as rise. Any financial projections include in this document are for illustrative purposes only and your attention is specifically drawn to the “Risk Factors” section set out in this document.*

#### *5. Fund Features*

##### *5.1 Who can invest?*

*The Fund is suitable for Investors seeking capital growth and asset class diversification as part of their overall investment strategy”*

##### *5.2 Investment Term*

*The investment term is six years, subject to prevailing market conditions. It is expected that properties in the Fund will be held for a term of c 4 years.*

*However, should opportunities present themselves during the period to realise enhanced value. [The Underwriter] may decide to sell properties with a view to optimising investor returns.*

*..*

*5.8 Exit Mechanisms The Fund will operate as a closed fund until the 6<sup>th</sup> anniversary or until the Fund has been fully liquidated (there is a provision for two one-year extensions to the life of the Fund, if market conditions do not favour a disposal of remaining assets at that time). For single premium life assurance policyholders, early withdrawals will not be permitted, except in the event of a death or at the sole discretion of [the Underwriter]. An encashment penalty of 5% will apply on non-death exits, reducing by 1% per annum from Year 3 onwards..."*

*The Fund will operate*

*"Risk factors" on page 23 of the Product Brochure. It stated as follows:*

*"The .. Fund will exhibit stabilised gearing of 60% when fully invested. Although gearing can increase the potential returns to an investor, Investors should be aware that gearing can also erode invested capital. In particular, a geared Fund will translate any increase in capital values into a disproportionately greater increase in the return on investor's equity. Conversely, it will have the opposite effect if the value of properties is falling".*

*"Warning: The value of your investment may go down as well as up. The income you receive from this investment may go down as well as up".*

#### Disclosure Notice

*"Nature of Commitment*

*The policy is intended as a 6 year investment. Unless you are fully satisfied as to the nature of this commitment, bearing in mind your needs, resources and circumstances, then you should not enter into the commitment. .. By using borrowings, the .. Fund has the potential to deliver higher returns but here are associated risks. If property values rise, an increase in capital values translates into a greater increase in the return on equity. Conversely, if property values fall, the return on the investment will be disproportionately affected on the downside, i.e. some of your original investment could be eroded"*

*..*

*What are the projected benefits under this policy*

*The projected benefits and charges are illustrated in Table 1 below.*

*Are Returns Guaranteed*

/Cont'd...

*The returns shown in the illustrative table are not guaranteed. The returns this policy achieves will depend on future investment conditions.*

..

*Your benefits explained*

*The value of the fund will be the returns achieved by the .. Fund. ..*

*Term of this policy*

*This policy has an intended term of 6 years. However, provision has been made within the contractual basis to extend this for up to 2 additional 1 year periods. This is necessary due to the nature of the underlying assets & the timeframe involved in their liquidation”.*

5 June 2007 – Letter with Cooling Off notice

*“What you have is a medium to long term contractual commitment and it is very important make sure that your policy meets the needs you had in mind when you decided to take out an investment policy.*

*We also want to be sure that this policy is the right one for you. For this reason we enclose an information document (or you may have already received this document) which explains the key features of your policy and highlights the areas we feel you should pay particular attention to, including a specific illustration of projected benefits and charges on your policy.*

*You have 30 days in which you can ‘change your mind’ about this policy. Please refer to the section “Cancellation rights and Complaints Procedure” on your personal illustration. If you decide cancel your policy, we will immediately refund any premiums you have paid us less any adjustment for any downward movement in market values or underlying assets”.*

Illustration

*“Your personal illustration ..*

..

*Nature of commitment:*

*By using borrowings the ... Life Policy has the potential to deliver higher returns but there are associated risks. If property values rise, an increase in capital values translates into a greater increase in the return on equity. Conversely, if property values fall the return on the investment will be*

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*disproportionately affected on the downside, i.e. some of your original investment could be eroded. ...*

*There is no guarantee that the withdrawal value of your policy will be as high as your original investment. ..*

#### *Illustrative Table of Projected Benefits And Charges*

*Important: These illustrations assume a gross return of 6.00% per annum. This rate is for illustration purposes only and is not guaranteed. ... Actual investment growth will depend on the performance of the underlying investments and may be more or less than illustrated”.*

*“Are returns guaranteed?*

*The returns shown in the Illustrative Table are not guaranteed. The returns this policy achieves will depend on future investment conditions”.*

*“Note on this illustration*

*This is an illustration for a policy underwritten by ... and must be read in conjunction with the .. Policy brochure and Policy Conditions. This illustration is based on ... Policy terms and conditions as at 08/05/2007, which may change from time to time. ..”*

The illustration also sets out – contribution details: *“What Intermediary / sales remuneration is payable?”*

Suitability Statement – signed by the Complainants and dated 08/05/2007.

*“I refer to our recent telephone conversation and note that you have surplus funds available for investment. In this regard I would recommend that you consider investment of a portion of these funds in ... Fund. I make this recommendation for the following reasons:*

- *You can afford to invest for a 6 year period*
- *You wish to invest in an asset class with potential for strong appreciation that lacks the volatility associated with equities*
- *The .. Fund will exhibit Gearing of 60% when fully invested. This increases your exposure and potential return. Conversely it could have the opposite effect if property values were falling*
- *You are prepared to take on board the risks associated with investment in European Commercial Property*
- *The fund is well diversified throughout key Western European countries and there is an excellent mix between Office, Retail, Logistics and Distribution*
- *The cost of borrowing within the fund will be competitive as the fund manager will undertake a tender process with potential lenders in respect of each property acquired*

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- *The Fund is targeting to return an average coupon of 4% to 5% per annum commencing at the end of the second year and semi annually thereafter. It should be noted however that this coupon is not guaranteed.*
- *The Fund offers competitive investment terms and there is no bid / offer charge. ... There are early encashment penalties if you encash your investment before the sixth year anniversary date. Details on these are set out in the Disclosure Notice on page 26 of the Brochure.*
- ..
- ..
- *European property yields remain relatively high and well above debt funding costs thereby providing strong surplus rental cashflows and good capital appreciation for Investors”.*

*“We have read and agree to the above recommendations and confirm that we have received a product brochure and key features document”*

Both of the Complainants signed the above declaration.

#### Disclosure Notice for the Policy

##### *“Nature and commitment*

*The policy is intended as a 6 year investment. Unless you are fully satisfied as to the nature of this commitment, bearing in mind your needs, resources and circumstances, then you should not enter into the commitment. ... By using borrowings, the .. Fund has the potential to deliver higher returns but there are associated risks. If property values rise, an increase in capital values translates into a greater increase in the return on equity. Conversely, if property values fall, the return on the investment will be disproportionately affected on the downside i.e. some of your original capital could be eroded.*

..

##### *Are returns guaranteed?*

*The returns shown in the Illustrative table are not guaranteed. The returns this policy achieves will depend on future investment conditions”.*

4 May 2007 – The Provider to the Complainants

Acknowledging receipt of completed Application Form and cheques and that they were sent to the Underwriter of the Investment Fund. The Provider enclosed, a Section 30 receipt, Suitability Statement, Terms of Business and the Provider advised:

*“I would be obliged if you could please read over the Suitability Statement and if in agreement with its contents sign where indicated and return in the prepaid envelope enclosed”.*

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### Fact Find / Review

(a 1 page document - unsigned and undated)

*"Referred by T... - plays cards with T..  
Name: [First Complainant]  
Marital Status: Married  
Employment Status: Retired  
Address: ..*

*Husband's details ...*

*Son [Second Complainant]: ... in employment  
Date of Birth: ...  
Age ..*

*Assets: ...  
Mortgage Loans:*

#### **Immediate Objective**

*Investment of a portion of surplus fund held on deposit in a medium term investment*

#### **Attitude to risk:**

*Likes property as an asset class and prepared to take on board the risks associated with a geared property for a portion of her surplus funds"*

### The Provider's Statement of Recollection

- *[First Complainant] sought my advice having been referred by a long standing client T..*
- *I did not seek [First Complainant] as client. She approached me.*
- *She asked if I could meet her at her home which I agreed to do in late April 2007.*
- *[First Complainant] had surplus funds on deposit earning very little interest.*
- *The investment products discussed at that meeting were the [Underwriter' Plan] and [a Life With Profit Bond].*

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- *Like so many others at the time [the First Complainant] was favourably disposed to investment in property and expressed particular interest in the .. Fund.*
- *I explained that [Underwriter] had a good track record in Property Investment and that one of their recent UK geared Property Funds had performed very well. People who had invested in that fund had used borrowing to boost their investment exposure and this had magnified their returns. Conversely the borrowing would have magnified their losses had UK property not performed. The [Fund] offered similar potential as it was a geared fund with borrowing involved. It also came with the risks associated with investment in a geared property fund. I suggested that it might be suitable for a portion of her surplus funds.*
- *The [Fund] Brochure given to [the First Complainant] at that meeting highlighted the Risk Factors (Page 23) of that investment including the Gearing Risk. It also highlighted the following Warnings:-*

*Warning (Page 1)*

*These figures are estimates only. They are not a reliable guide to the future performance of the investment.*

*Warning (Page 3)*

*Any projected figures are estimates only. They are not a reliable guide to the future performance of this investment*

*Warning (Page 5,8,9,14)*

*Past performance is not a reliable guide to future performance*

*Warning (Page 23)*

*The value of your investment may go down as well as up. The income you receive from this investment may go down as well as up.*

*In the Suitability Statement that I prepared following that meeting I sought confirmation from [the First Complainant] and her son [the Second Complainant] that they were prepared to take on board the risks associated with investment in European Commercial Property [the .. Fund] and a fund that would exhibit 60% gearing when fully invested. I also explained that gearing would increase their exposure and potential return but would have the opposite effect if property values were falling.*

*In the Suitability Statement I recommended that they consider investment of a portion of their surplus funds in the .. Fund.*

*The Complainants signed the Suitability Statement confirming that they had read the Brochure and Key Features Document and that they wished to proceed with their investment”.*

May 2008 – Annual Statement

*“Current fund value of your policy: €43,763.96*

*Please note that values are not guaranteed as fund values can rise or fall”.*

May 2009 - Annual Statement

*“Total net surrender value: €35,119.17*

*Please note that values are not guaranteed as fund values can rise or fall” . . . This is a geared property investment using debt and equity to finance the acquisition of the underlying investment. Introducing debt can amplify the returns on equity an investor receives. Should the value of an asset acquired with debt and equity increase, the value of the equity will increase by a greater proportion than the asset. Conversely, a negative movement in the value of an asset will have a corresponding greater negative impact on the value of the equity”.*

2010 Annual Statement

*“Total net surrender value: €25,588.61*

*Please note that values are not guaranteed as fund values can rise or fall”.*

Cover letters accompanying later Annual Policy Statements

*“We encourage you to review your statement and always recommend that you regularly review your financial needs with your financial broker / advisor ...”*

10<sup>th</sup> December 2012 – The Second Complainant to the Provider

*“I never met you nor did I know what kind of investment I was taking out with you. I now know that I have lost my €20000 and I now am aware that you should have explained all the pitfalls to me. I am now seeking compensation for the loss of my money”.*

18 January 2013 – The Provider to the Complainants

In this letter the Provider refers to the Brochure and to what was stated therein regarding risks and warnings of rises and falls in value. The Provider also referred to the Disclosure Notice that was issued and to the Suitability Statement. The Provider concluded as follows:

*“Based on all of the information furnished I am satisfied that the nature of the investment and pitfalls were fully explained. If however having considered the*

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*above you wish to make a formal complaint to the Financial Services Ombudsman his address and contact details are as follows .....*

13 May 2013 – the Second Complainant to the Provider

*“With reference to your letter of the 18<sup>th</sup> Jan 2013 regarding the above Investment I wish to reiterate that I never met you and that you never explained to me what kind of Investment that you were selling to me and my mother [the Second Complainant]. The concept of gearing was not explained to me nor my mother. I know nothing about it. You left forms for me to sign in your absence after the Investment was made. You never made any attempt to meet or make any contact [with] me. If you had met with me and explained what you were selling me I would never have invested my money with you in such a high risk policy.*

*I was only 21 years old at the time and I needed that money for a deposit on a house.*

*You collected the cheques from my mother in a hurry and you sent them by courier to [the Underwriter of the Fund] on 4<sup>th</sup> May 2007 because you said the Fund was closing. Then on the 7<sup>th</sup> May you left forms for me and my mother to sign in your absence. It would appear to us that you were only interested in selling the Investment. I feel that you mis-sold this product to me. I am now looking for a refund of my €20,000.00 without any further delay.*

*If I do not get a satisfactory reply from you I will be contacting the Financial Ombudsman”.*

13 May 2013 – the First Complainant to the Provider

*“I am satisfied that you mis-sold the Policy to me as it was not a suitable investment for a woman of 59 years of age. I did not understand the concept of gearing and did not think I was investing my hard earned money in a high risk investment. At my age I should have been advised to invest my money in a safe investment and not what you sold me. .... You were in a hurry to get the money as you said the fund was closing and you got us to sign the forms afterwards. You sent our money by courier to [Underwriter] and you signed the form on 4/5/2007 and you left them with me to sign on 7/5/2007.*

*You told me that you were investing your life savings in that policy and that we would all make a fortune and that our investment of €50,000 would yield a return of €125,000. We have at this point in time only €16,619.22 left out of our investment of €50,000. You did not tell me how gearing works and that it would wipe out our investment”.*

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27 May 2013 – The Provider to the Complainants

*“As already pointed in my letter of 18 January 2013 the concept of gearing was well documented and explained in the Product Brochure and Suitability Statement issued at the time of your investment.*

*You were also issued with a Cooling Off Notice shortly after you made your investment. The Cooling Off period of 30 days gave you ample time to consider the contents of the Suitability Statement and to change your mind if you were unhappy about your investment”.*

8 May 2014 – Underwriter to the Complainants

*“The [policy] is intended as a medium to long term investment. You should ensure that your fund choice continues to meet your investment needs”.*

4 March 2015 – The Underwriter to the Complainants

*“I fully understand your disappointment with the performance of the Fund. As discussed and as outlined in the bi-annual investor reports, this is primarily due to the global economic downturn and the impact this had on international property markets, coupled with the impact of the gearing in the fund, which was outlined in the brochure.*

*I understand from [the First Complainant] that you believe that you were missold the product, based on (i) your age at the time of the investment, when combined with the term of the Fund; (ii) the fact that the Fund is illiquid and you cannot access your investment (except for the coupon payments, when available) until the properties are all sold; and (iii) the level of gearing in the Fund. [The First Complainant] explained that she has raised these grievances with your financial advisor, ..., and due to delays in receiving responses, you missed the deadline to file a complaint with the Financial Services Ombudsman (FSOB). This is not a matter for [Underwriter], and should be revisited with the parties involved, namely your financial advisor and the FSOB”.*

August 2015 - Investor Report

*“Life Policyholders*

*Todate, .. Policyholders (or their lending bank where the policy is assigned) have been repaid approximately 36% of their net investment premium through 10 distributions (known as coupon payments), the most recent of which was in April 2015. The payments to Life policyholders (which are not guaranteed), and can only be made when sufficient surplus cash is available, predominately from net*

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*sales proceeds) are a repayment of policyholder equity (i.e. returning a portion of their original initial cash invested). At commencement, policyholders received an allocation of investment units in the Fund based on their net investment premium amount, after commission. As such, when initial equity is returned to Life policyholders by way of distribution, units with corresponding value have been cancelled at the prevailing unit price at the time of distribution. 69% of units have been cancelled to date, meaning the remaining 31% of units are valued at the current unit price of €0.483. The actual performance of your investment is the amount of equity repaid to date plus the current value of your remaining investment amount. For life policyholders, this is currently c0.51 times your net initial investment premium. ....*

#### *Conclusions*

*..*

*Given the original strategy for the Portfolio (to acquire properties with active management angles), performance has suffered as the value-add initiatives have not fully materialised. The future unit price (and the effective blended return for policyholders of coupon payments to date, plus value of residual units in the Fund) will depend on the sales prices achieved on the remaining properties.*

*As set out in the product documentation, this is a closed-end fund and policyholders will not be able to withdraw their investment before liquidation date of the fund. [Underwriter] is currently planning a distribution in August / September following the sale of ... (July 2015) and is targeting to complete all remaining disposals by mid 2016, although this is not guaranteed. Thereafter [the Underwriter] will return any remaining equity to policyholders as soon as possible, following the unwinding of the investment structure”.*

17 December 2015 – Underwriter to the Provider

*“While the original term of this investment was intended to be six years commencing in 2007, this was subject to market conditions, with the Fund now progressing beyond its original expected maturity date. There are currently 14 properties remaining within the Portfolio. The underlying .. fund has now entered the liquidation phase and all of the remaining properties are being marketed for sale. ... Managers currently expect the sale of the 14 remaining properties to take a further 6-12 months to complete, however this is not guaranteed.*

*Please note that policyholders invested in the Fund may not surrender their investment before the liquidation date of the Fund, which is when all of the properties have been sold, any outstanding loans have been settled and the Portfolio structure has been wound up”.*

8 May 2017 – Annual Statement

Gross Policy Value as at 7 May 2017 €6,631.79”

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### **The Complaints for Adjudication**

The Complainants' complaint is that the Provider did not correctly or reasonably explain the investment to them and that the investment was unsuitable for their needs.

### **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 27 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, the final determination of this office is set out below.

### **Analysis**

The regulatory codes include a requirement that, when providing advice, financial providers must ensure that, having regard to the facts disclosed by the consumer and other relevant facts about that consumer of which the regulated entity is aware:

- a) any product or service offered to a consumer is suitable to that consumer;

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Therefore, a Provider has to find out the consumer's circumstances and needs before making a recommendation, and recommend only suitable investments for the consumer.

Before a person purchases an Investment policy, the financial adviser should go through a fact-finding process with the customer so that the customer understands what decisions are involved, the options available and their rights as a consumer.

The fact-finding process involves progressive stages, during which the financial adviser gathers information so as to identify and assess the customer's financial needs.

The Provider relies on the information the customer discloses to it, to assess the customer's investment needs and objectives. For the process to be effective, the customer should be as forthcoming as necessary and communicate what their goals and objectives are. Thereafter, the recommendations can only be appropriate to the extent that the customer was prepared to disclose to the Provider all relevant information.

When assessing whether a product was suitable for a customer, the Provider should have assessed the customer's circumstances and needs before making a recommendation.

The customer's needs and objectives could include, where relevant:

- i) the length of time for which the customer wishes to invest,
- ii) the need for access to funds (including emergency funds),
- iii) the need for accumulation of funds.

The customer's personal circumstances could include, where relevant:

- i) age,
- ii) health,
- iii) knowledge and experience of financial products,
- iv) dependents,
- v) employment status,
- vi) known future changes to his/her circumstances.

The customer's financial situation include, where relevant:

- i) income,
- ii) savings,
- iii) financial products and other assets,
- iv) debts and financial commitments.

The customer's attitude to risk must also be assessed, and where relevant, the importance of capital security should also be discussed.

The risk assessment can be a helpful indication of what the Complainant's "appetite" for investment risk might be.

It is expected that there should be a clear and understandable record from the investment sale, setting out the reasons why the risk was compatible with the customer's circumstances - and that the relevant issues were explained to the customer.

Providing product literature that explains the features and risks of the recommended investment does *not* absolve the Provider from its responsibility to establish if the investment was suitable given the customer's individual circumstances.

Clear documentation directed at the applicant personally - such as a "reasons why" letter or a suitability statement or a Personal Financial Review Report, which was signed off upon by the customer - can be persuasive evidence that the recommendation was suitable.

With this complaint and specifically in relation to the sale's process that was undertaken by the Provider, I note the following:

- The First Complainant made the first contact with the Provider with the objective to invest.
- The First Complainant was the primary contact and appears to have arranged the investment, on both her own, and the Second Complainant's behalf. The Second Complainant seems to have had no issue with the First Complainant taking this step on his behalf. The Second Complainant signed the documentation and cannot step back from what was done on his behalf, where it is clear that he gave some authority to the First Complainant to act on his behalf.
- The Complainants were advised that the Property Fund was categorised as a medium term investment, that it was a geared property investment and that no capital guarantee applied.
- The Complainants signed an Application Form in respect of their investment.
- The Underwriter of the Investment sent the Complainants policy documentation confirming the inception of their investment. This documentation referred to a 30 day cancellation ("cooling off") period that applied to the investment and the fact that they could change their mind and withdraw if they felt that the investment was not suitable for their needs.
- The Personal Illustration Quotations the Complainants received from the Underwriter of the investment as part of their policy documentation stated that the projected benefits outlined therein were for illustration purposes only and were not guaranteed. They also outlined details of the Complainants' cancellation rights if not satisfied with the investment.
- The Complainants did not query the nature of their investment when they received their policy documentation nor did they contact the Provider or the Underwriter directly during the available 30 day cancellation period.

- The Complainants received annual statements from the Underwriter of the investment on the anniversary dates of their investment. These annual statements, as well as confirming the current values of the investment, advised them of its non-guaranteed nature and the fact the value could fall as well as rise.
- The Complainants were provided with the relevant product brochure for the investment and this outlined the features and any risks associated with the Investment Fund. This brochure contained the relevant warnings about the non-guaranteed nature of the fund option selected and the fact that past performance was not a reliable guide as to future performance.
- It appears that the Complainants did not raise any objections at the time as to the Provider meeting at their home or in discussing matters over the telephone.

While noting the above, I have the following concerns with how this Investment Policy was sold.

- There were two investors, but the Provider only met the First Complainant.
- There appears to have been a short window of time for the applicants to avail of the investment. The monies were handed over and transferred to the Underwriter on 4 May 2007 prior to the Suitability Statement being signed by the applicants on 7 May 2007.
- It is reasonable to expect that before any investment can be recommended or explained to a potential investor, their attitude to risk must first be established by the financial adviser. This can be done by having a discussion on 'Risk versus Return'. The categories of No Risk, Low Risk, Medium Risk, and High Risk, should have been discussed and examples given of the types of investments that fall under each category. There is little evidence on file or in the Provider's statement of recall, to indicate that such a discussion took place with both Complainants.
- I accept that the Provider should have endeavoured to meet both Complainants before completing the sale of the investment.
- I am not satisfied that the Complainants were made aware of the possibility that they would have to wait many more years (12+ at this point) for the investment to liquidate, rather than the 6 years they thought was the term of the investment.
- The Provider submitted a one page, unsigned and undated Fact Find. It is the Complainants' position that they never saw this document before or after they had invested. Under the Consumer Protection Codes before providing a product or service to a consumer, a regulated entity must gather and record sufficient information from the consumer to enable it to provide a recommendation or a product or service appropriate to that consumer. A regulated entity must also endeavor to have the consumer certify the accuracy of the information they have

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provided to the regulated entity. I accept that the Fact Find process was not as robust here as it should have been. The Fact Find submitted by the Provider, was: (i) not specific to both applicants, (ii) did not include all the information that should be recorded on a Fact Find, and (iii) is undated and unsigned.

- I accept that there was a detailed Suitability Statement issued to both Complainants, which referred to the risks associated with the property investment. However, this Suitability Statement was sent to the Complainants by post and it does not appear that it was gone through personally by the Provider with the Complainants. The signing of the Suitability Statement was done separately by the parties, with the Provider signing the Statement on 4 May 2007 before posting it to the Complainants and the Complainants signing it on 8 May 2007 and returning it by post to the Provider.
- The Provider makes reference to having provided documentation to the Complainants and that the documentation set out the risks and explained what gearing meant. However, I note that the Provider makes no reference to having gone through that documentation personally with the applicants or having explained the important sections to them, which should have included an explanation from him of what a geared property investment entailed.

To conclude, I accept that the investment process is a two way process where the Provider must do its part by establishing facts about the applicant and advising appropriately. It is also the position that Policyholders must play their part in the contractual arrangement that they have embarked upon, by taking time to read the policy and supporting documentation, mindful of their needs, objectives and responsibilities. There is an onus on the investor to acquaint themselves with the contractual terms to ascertain whether the investment is sufficient for their needs.

From an examination of the submissions it is clear that the investment product was not a guaranteed product and its value was therefore subject to the rises and falls in the property market. I find that the information supplied and received by the Complainants made this clear to them. I consider that the Complainants would or ought reasonably to, also have been aware (from a reading of the documentation) of the 6 month delay period for the cancelling of units in a property based fund. The investment documentation also made it clear that for single premium life assurance policyholders early withdrawal was at the sole discretion of the Underwriter.

I accept that the Complainants had enough information before them to make informed decisions on this investment, that is, whether the product was suitable to their needs.

I cannot undo a contract that the parties sought out and freely entered into. The risks associated with the investment were set out for the Complainants and the possibility of a loss on the investment was highlighted. I am also mindful that the Fund has not been fully liquidated, and therefore any losses on the investment have not been fully ascertained. However, on the basis that there were shortfalls in the sales process, in particular in relation to the completion of the Fact Find, and the Provider not making sure to meet and

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explain the investment directly to the Second Complainant, it is my Legally Binding Decision that the complaint is partially upheld and that a compensatory payment is merited in respect of these gaps in the sale's process. In this regard I direct that the Provider pay the Complainants the compensatory payment of €2,000 (two thousand euro).

### **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 €2,000, 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**.

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.

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**GER DEERING**  
**FINANCIAL SERVICES AND PENSIONS OMBUDSMAN**

19 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

ensures compliance with the Data Protection Regulation and the Data Protection Act 2018.