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| <u>Decision Ref:</u> | 2020-0015 |
| <u>Sector:</u> | Investment |
| <u>Product / Service:</u> | Shares/Equities Investment |
| <u>Conduct(s) complained of:</u> | Product not suitable Failure to provide warning re. Nature of investment Mis-selling (investment) |
| <u>Outcome:</u> | Rejected |

LEGALLY BINDING DECISION OF THE FINANCIAL SERVICES AND PENSIONS OMBUDSMAN

Background

This complaint concerns the alleged mis-selling of an investment product in **2015**, involving (i) alleged negligent advice provided to the Complainant regarding how best to invest his pension benefits and (ii) a subsequent failure to mitigate the Complainant's losses.

The Complainant's Case

This complaint concerns the transfer of a portion of the Complainant's accrued benefits under his defined benefit pension scheme to an investment fund, on foot of financial advice given by the Provider.

The Complainant was a member of a defined benefit scheme and when he took a transfer value of the benefit he had accrued in the scheme, he made the decision to transfer €55,000 of his pension fund into a cash fund. The Complainant submits that on foot of advice given to him by the Provider in **2015**, he also transferred €150,000 of the remaining benefit that had been accrued in the defined benefit pension scheme, into an investment fund identified and recommended by the Provider. It is the Complainant's case that the Provider gave him assurances that the risks involved with the investment were very low; the Complainant says that in a letter issued to him by the Provider dated **1 August 2018**, the Provider acknowledged the Complainant's request in 2015, for his capital amount to be guaranteed.

The Complainant submits that when he was discussing an appropriate investment fund with the Provider, he expressly explained to the Provider that he did not want to take risks and that he was seeking a capital guarantee. It is the Complainant's case that the Provider did not fully explain to him the risks associated with the investment fund.

The Complainant submits that the Provider was aware at this time that he was suffering from ill-health and was not looking for a long term investment fund. He submits that the Provider advised him that the investment fund was the best option available to him and that as it had a volatility rating of level 3 that there was no risk of a reduction in value. The Complainant submits that he was induced into selecting this product on the basis that it was capital sum guaranteed and that he would not make a loss on the fund. The Complainant states that during meetings with the Provider in 2016 and 2017, the Provider advised him that the fund was not performing as well as expected, and that the Provider advised him on these occasions to leave his investment in the fund.

The Complainant states that on 5 June 2018, he received a letter from the Provider which stated that the investment fund was underperforming and had reduced in value by approximately €17,800 during the three-year period; the Provider had advised him to transfer this fund into a higher risk investment fund with the same investment provider. The Complainant submits that some of his former colleagues had transferred their defined benefits pension into the same fund but that they had been advised by their own brokers in late 2016 or early 2017 to transfer out of the investment fund as it was not performing well. The Complainant also states that, as a result, his former colleagues did not lose as much of their investment as he did.

The Complainant submits that upon making a complaint to the Provider, the Provider advised him of a lower risk fund with a different investment with a level 2 volatility risk rating that had performed well since 1978. The Complainant submits that the Provider was aware from the outset that he wanted a low risk fund and did not advise the Complainant in 2015, of the availability of this low risk investment option. The Complainant submits that the Provider did not advise him that he was investing too much of his pension into the fund in question, and that diversification or alternative investment options were not explained to him in 2015.

The Provider's Case

The Provider refutes the allegations. The Provider states that it did not mis-sell the product to the Complainant. The Provider states that at all times, the Complainant was aware that this was a non-capital guaranteed fund. The Provider also refutes any allegation of negligent advice in relation to the fund either at the beginning of the Complainant's investment or during its lifetime.

The Provider says that the Complainant and his wife sought advice regarding the Complainant's investment options as he transferred his pension fund to a Pension Retirement Bond (PRB). The Provider says that the Complainant and his wife were seeking to invest the funds and get a return above deposit rates, and they understood that in the

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low deposit interest rate environment, they needed to consider other investment options.

The Provider says that based on its knowledge of its client, his health, financial net worth and his investment experience which included stock market shares and other insurer investment funds, the Provider identified 3 suitable investment options. 2 fixed term deposit options were identified together with a low risk investment fund with a good track record that also had the potential to out-perform deposit rates, over a 5 year period. It is these options which were presented in a straight-forward manner to the Complainant and his wife in the Statement of Suitability in 2015 and these options were discussed in detail. The Provider says that at the heart of the discussions with the Complainant and his wife was the fact that the low risk investment fund was not guaranteed. The fund in question was (and is) low risk, aiming to return 4% - 5% above deposit rates over a 3-year rolling average, in all market conditions. The option clearly stated that a 5-year minimum investment term was needed for this particular fund.

The Provider confirms that the Complainant and his wife decided to invest €56,000 in a 1-year fixed term deposit and €150,000 in the low risk investment fund which guaranteed neither the capital nor the return, in any way.

The Complaint for Adjudication

The complaint is that the Provider wrongly, improperly and based on a mistake of law or fact, mis-sold to the Complainant an unsuitable investment product and provided poor advice to the Complainant regarding how best to invest his pension benefits, and thereafter failed to mitigate the Complainant's losses.

The Complainant wants the Provider to refund him the value of the loss on his investment which he estimates to be approximately €17,800 and he also wants to be permitted to switch investment providers without incurring any fees.

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.

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A Preliminary Decision was issued to the parties on 10 December 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.

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

I have carefully reviewed in detail the documentation furnished to this office, which evidences the time leading up to the disputed investment, to the time when the product was selected by the Complainant. The Complainant engaged the Provider and sought the Provider's advice regarding his investment options as he looked to transfer his pension scheme fund to a pension retirement bond. I have reviewed the financial planning questionnaire dated **15 April 2014**.

- **Financial Planning Questionnaire**

This document records the answers given by the Complainant and his wife in relation to questions posed to them regarding their personal circumstances, their financial circumstances, their attitude to risk and what objectives they wanted to achieve. When asked

"on a scale of 1 to 10 with 1 being low risk and 10 being very aggressive where would you put yourself now?:"

The response recorded was "2/3".

When asked "why" the response recorded was

"mix of capital guaranteed plus opportunity with low/medium risk funds with potential to outperform deposits and interest rates".

- **Financial Net Worth Statement**

A further document dated **April 2014**, sets out the Complainant's financial net worth statement. Amongst other things, it was recorded that the pension fund was worth approximately €240,000.

- **BEST NON-CAPITAL GUARANTEED FUND document**

I have been furnished with a further undated document headed "BEST NON-CAPITAL GUARANTEED FUND". One copy bears no logo or markings, whilst the Complainant's copy has the Provider's Logo/markings.

Amongst other things, this document states:

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"From ongoing macro and investment research the best non-capital guaranteed fund available for investment term of five years and longer in our view is the [specified] fund with [Third Party] for the following reasons:

- *This Fund targets a return of 4% to 5% per annum above deposit rates over a 3-year rolling. In all market conditions:*
- *This fund uses over 30 different strategies to achieve this return;*
- *Absolute return funds seek to deliver positive returns over the medium to long-term whether markets are rising or falling – long only funds i.e. Managed or Equity Funds only perform in rising markets;*
- *[Third Party] have 90% of their own Staff Pension Fund investors in the [specified] fund and this is a significant endorsement – your money is invested along with [Third Party's] own money;*
- *As [Third Party] in Ireland operates as a branch of its UK parent company, investments taken out since 1 December 2001 covered by the U.K.'s financial services compensation scheme (FSCS) in the event that [Third Party] is in default. This means that a client's investment in a [Third Party] pension or investment in Ireland, the investment is covered up to 90% of the value of the investment, without any upper limit.*

The above quoted document was furnished by the Provider to the Complainant on 2 March 2015. In addition, and also on 2 March 2015, it appears that the Complainant was issued with a [Third Party] document explaining the [Third Party] [specified] fund.

- **[Third Party] [Specified] Fund**

Amongst other things, this document states:

"The value of investments within the fund can fall as well as rise and it is not guaranteed – you may get back less than you pay in. The funds may use derivatives for the purpose of efficient portfolio management and to meet its investment objective. The Euro value of overseas assets held in the fund may rise and fall as a result of exchange rate fluctuations".

The document goes on to state under the heading

"KEY RISKS" :

"Standard Risks – what you get back depends on future investment performance and is not guaranteed. Past performance is not a guide to future returns. The value of your investment, and any income from us, may go down as well as up."

In addition to the foregoing, this office has had sight of a document dated **12 May 2015** which is a statement of suitability issued by the Provider to the Complainant, and which specifies the following in the heading of the document:-

- **Statement of Suitability dated 12 May 2015**

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“Important Notice – Statement of Suitability: *This is an important document which sets out the reasons why the product or service offered or recommended is considered suitable, or the most suitable, for your particular needs, objectives and circumstances.”*

The document also set out the **“Objective as discussed”** which was to transfer the Complainant's pension scheme benefits of approximately €206,000 to his own Personal Retirement Bond *“in the most Tax and Cost efficient manner in order to:*

1. *Use Financially Sound Financial Institution;*
2. *Target Fixed Term Deposit as well as returns above deposit rates in all Market Conditions;*
3. *Retain control of Provider/Fund Choice;*
4. *Retain access at your discretion.”*

Within that document there are three options presented as A, B and C and it is clear from that document that **Option A** (a one-year fixed term deposit) was selected for an amount of €56,000. Opposite *“Capital Guaranteed”*, the entry regarding this option, was *“Yes”*.

In addition, **Option C** was also selected for €150,000. Option C was the [specified] fund and opposite *“Capital Guaranteed”*, the entry regarding this option, was *“No”*. In relation to Option C, the interest rate was described as follows:-

“No Guaranteed Return (+6.1% per annum over the last five years)”.

In relation to its suitability, it was stated that this option was suitable for *“low/risk investments which aims to return 4% to 5% above deposit rates over a 3-year rolling average in all Market Conditions.”*

Option B, a *“Capital Guaranteed”* 2-year fixed term deposit was not selected by the Complainant.

The Provider submits that these options were presented in a straightforward manner to the Complainant and his wife in the statement of suitability and that they were discussed in detail. The Provider submits that the Complainant chose to invest €150,000 in the [specified] fund in the clear knowledge and understanding that this was not a guaranteed fund and that neither the capital nor the return was in anyway guaranteed. The Provider submitted that it was at the heart of the discussions with the Complainant and his wife that the particular fund was not guaranteed. The Provider explains and submits that this fund was, and remains, low risk, aiming to return 4% to 5% above deposit rates over a three-year rolling average, in all market conditions.

The Complainant however says that he consistently stated that he wanted *“no risk”* to his capital. He said that he was advised that putting the monies into the fund was the way to go. He stated that he was reassured by the Provider that this was no risk and that the volatility rating was low. The Complainant refutes that it was at the heart of discussions with

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the Provider that the fund was not guaranteed. The Complainant submits that outperforming deposit rates was not the most important consideration; capital security was.

I note that the Complainant signed a Declaration on **12 May 2015**, to the effect that:

“ I/~~We~~ confirm I/~~We~~ have received the Statement of Suitability dated 12/5/15 and I/~~We~~ understand that the recommendations are based on the information disclosed and that the actions agreed are to my/our satisfaction”

I am satisfied therefore that the Complainant made his decision at that time, to proceed as indicated on the Statement of Suitability dated **12 May 2015**. Whilst the Complainant has, since the preliminary Decision was issued to the parties, submitted further copy emails between the parties dating from July 2015 and also from July 2016, having carefully considered the submissions of both parties and having reviewed the documents in detail, I am not in a position to find any wrongdoing or breach of duty on the part of the Provider in selling or advising the Complainant to invest in this product in 2015.

Central to this issue is whether or not the Provider advised the Complainant that this was a “no risk” or “guaranteed” fund. As I have outlined above, from the documentation furnished to the Complainant, leading up to the selection of this fund, it was clear and stated in a number of places that this was a non-guaranteed fund. In other words, it was stated that there was a risk that the value of the investment could go down as well as up and unfortunately, this is what happened in the three years following the 2015 investment. The Provider has furnished a statement from the seller of the product explaining its performance during this period but it is not necessary or material to examine those reasons in detail.

The issue in question here is to whether the product was accurately described to the Complainant and whether it was adequately assessed as being suitable for the Complainant given his circumstances and objectives. It is difficult to understand why the Complainant believes that he was advised by the Provider that there was “no risk... of the fund going down in value...” On the basis of the evidence available, I am satisfied that this information was made clear in the documents given to the Complainant.

The Consumer Protection Code 2012, provides, *inter alia*, as follows:

Assessing suitability

5.16 *When assessing the suitability of a product or service for a **consumer**, the **regulated entity** must, at a minimum, consider and document whether, on the basis of the information gathered under Provision 5.1 and 5.3:*

- a) *the product or service meets that **consumer's** needs and objectives;*
- b) ***the consumer**:*
 - i) *is likely to be able to meet the financial commitment associated with the product on an ongoing basis;*
 - ii) *is financially able to bear any risks attaching to the product or service;*
- c) *in the case of credit products, a **personal consumer** has the ability to repay the*

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*debt in the manner required under the credit agreement, on the basis of the outcome of the assessment of affordability; and the product or service is consistent with the **consumers** attitude to risk.*

- 5.17 A **regulated entity** must ensure that any product or service offered to a **consumer** is suitable to that **consumer**, having regard to the facts disclosed by the **consumer** and other relevant facts about that **consumer** of which the **regulated entity** is aware.

The following additional requirements apply:

- a) *where a **regulated entity** offers a selection of product options to the **consumer**, the product options contained in the selection must represent the most suitable from the range available from the **regulated entity**; and*
- b) *where a **regulated entity** recommends a product to a **consumer**, the recommended product must be the most suitable product for that **consumer***

- 5.18.1 A **regulated entity** must not advise a **consumer** to carry out an **investment product** transaction, or a series of **investment product** transactions, with a frequency or in amounts that, when taken together, are deemed to be excessive and/or detrimental to the **consumers** best interests.

*Where a **consumer** instructs a **regulated entity** to carry out an **investment product** transaction, or series of **investment product** transactions, with a frequency or in amounts that, when taken together, are deemed to be excessive and/or detrimental to the **consumer's** best interests, the **regulated entity** must make a contemporaneous **record** that it has advised the **consumer** that in its opinion the transaction(s) is/are excessive and/or detrimental to the **consumer's** best interests, if the **consumer** wishes to proceed with the transaction(s).*

Statement of suitability

- 5.19 Prior to providing or arranging a product or service, a **regulated entity** must prepare a written statement setting out:

- a) *the reasons why a product or service offered to a **consumer** is considered to be suitable to that **consumer**; or*
- b) *the reasons why the product options contained in a selection of product options offered to a **consumer** are considered to be the most suitable to that **consumer**;*
or
- c) *the reasons why a recommended product is considered to be the most suitable product for that **consumer**.*

*The reasons set out in the statement must reflect the information gathered under Provision 5.1 to assist the **consumer** in understanding how the product(s) or service(s) offered or recommended meets, where relevant, the **consumer's**:*

- i) *needs and objectives;*
- ii) *personal circumstances; and*

- iii) *financial situation.*

The written statement must also include an outline of the following, where relevant:

- iv) *how the risk profile of the product is aligned with the **consumer's** attitude to risk; and*
- v) *how the nature, extent and limitations of any guarantee attached to the product is aligned with the **consumers** attitude to risk.*

*The **regulated entity** must sign the statement and provide a copy of this statement on paper or on another **durable medium**, dated on the day on which it is completed, to the **consumer** prior to providing or arranging a product or service, and retain a copy.*

5.19 *A **regulated entity** must include the following notice at the beginning of the statement of suitability:*

Important Notice - Statement of Suitability This is an important document which sets out the reasons why the product(s) or service(s) offered or recommended is/are considered suitable, or the most suitable, for your particular needs, objectives and circumstances.

In light of the documentation furnished to this office and the salient documentation outlined and/or quoted above, I am satisfied, on balance, that the Provider complied with its obligations under the Consumer Protection Code 2012.

I note indeed that the Complainant has referred to other persons who similarly had pension benefits to invest, in similar circumstances to those of the Complainant. He refers in that regard to having made contact with ex-colleagues and having discovered that

“of those who had invested in this [specified] fund when our company pension was wound up in 2015, they had all been contacted and advised in late 2016 or early 2017 to get out of the fund which they did, and suffered a lot less of a loss than I have”.

It is noted in that regard, that for individuals investing in circumstances such as the Complainant's, a number of such ex-colleagues were similarly recommended the [specified] fund as being suitable. Whilst the Complainant's ex-colleagues it seems fared better, as a result of switching away from the fund at an earlier stage, it was always possible that they would have fared worse, in making that decision, given that the investment was one which was designed for a medium to long investment term.

In light of the foregoing facts and findings, I am not persuaded that there has been any shortcoming or breach of duty on the part of the Provider in relation to advice given following or during the performance of the investment. While it is accepted that the investment fund lost money over a period of three years, it was always possible that the

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nature of the markets could result in the fund ultimately recouping losses and making a profit.

What the Complainant asserts however, is that there was another fund with a lower risk available and that this should have been offered at the time and, at the very least, his investment should have been switched to this fund when it was first discovered that the [specified] fund was not performing as well as anticipated.

This office is satisfied that the Provider adequately assessed the suitability of the [specified] fund for the Complainant and that he elected for the product, whilst being on notice that the product was non capital guaranteed. The product was designed to yield potential benefits over “5-years (minimum)” per the Statement of Suitability, and I therefore believe that it would be unreasonable to impugn the conduct of the Provider, for not advising the Complainant to switch product within a short period of a year or two, in light of the stated objectives of the Complainant in the 2014 Financial Planning Questionnaire.

In those circumstances, whilst it is disappointing that the Complainant’s selection of a non-guaranteed Personal Retirement Bond led to losses to the tune of almost €18,000 over the period 2015 – 2018, nevertheless the investment option selected was speculative. Although the specified fund in question had yielded consistent results over a number of years, it was always possible that within the spectrum of market movements, the Complainant might not achieve the same results over the period of his own investment.

Accordingly, I take the view on the evidence before me that it would not be appropriate to uphold the complaint against the Respondent Provider that it mis-sold an unsuitable investment product to the Complainant and provided poor advice to the Complainant thereafter. The evidence before me does not bear out the Complainant’s contentions in that regard and accordingly, this complaint is not upheld.

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.

MARYROSE MCGOVERN
DIRECTOR OF INVESTIGATION, ADJUDICATION AND LEGAL SERVICES

15 January 2020

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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.

