



<u>Decision Ref:</u>	2020-0050
<u>Sector:</u>	Investment
<u>Product / Service:</u>	Shares/Equities Investment
<u>Conduct(s) complained of:</u>	Mis-selling (investment)
<u>Outcome:</u>	Rejected

LEGALLY BINDING DECISION OF THE FINANCIAL SERVICES AND PENSIONS OMBUDSMAN

Background

The Complainants incepted a Smart Funds investment policy with the Provider on **14 June 2007** by way of a single contribution of €350,000, invested in the Evergreen Fund.

The Complainants' Case

Having met with Mr R. an Insurance and Investments Manager with the Provider, on **11 June 2007**, the Complainants incepted a Smart Funds investment policy with the Provider on 14 June 2007 by way of a single contribution of €350,000, invested in the Evergreen Fund.

The Provider advised the Complainants, 5 months later, by letter dated November 2007 that the policy value as at **22nd November 2007** had decreased to €313,838.22. By letter dated 4 July 2008 the Provider confirmed that as at 3rd July, it had decreased further to €271,118.84.

The First Complainant telephoned the Provider on 18 September 2008 and requested to switch the Complainants' investment from the Evergreen Fund to the Secure Cash Fund. The Provider wrote to the Complainants on **25 September 2008** confirming that this entire fund switch from the Evergreen Fund to the Secure Cash Fund had taken place on 19th September 2008 in the amount of €257,066.38. In this regard, the Complainants submit that they "*have lost over €93,000*" of their original investment.

The Complainants later submitted an encashment request to the Provider on 21 September 2009 and the policy was encashed the next day, 22nd September, at a value of €270,569.36, which the Provider lodged directly to the Complainants' bank account on 25 September 2009.

The Complainants submit that the Provider's Agent, Mr R. ignored their instructions that they "*wished to have their capital secure*" and instead advised that they invest in the Evergreen Fund, a medium to high risk investment product that did not provide capital security. In this regard, the Complainants submit that the Provider failed to furnish them with documentation confirming the questions that Mr R. asked and recorded therein the answers that they provided during the sales meeting on 11 June 2007, that led him to determine that the Complainants wanted to incept a medium to high risk investment product.

In addition, the Complainants also note that the Provider furnished them with two different Understanding your Investment documents, one dated 11 June 2007, the other 3 February 2009.

The Complainants seek from the Provider "*the sum of €93,000 plus accrued interest which would have occurred from deposit account in Bank...from 11 June 2007 to [encashment]*".

The Complainants' complaint is that the Provider mis-sold them their investment policy in the Evergreen Fund in June 2007.

The Provider's Case

Provider records indicate that the Complainants invested the sum of €350,000 in a Smart Funds investment policy with the Provider, which commenced on 14 June 2007. This policy was later encashed on 22 September 2009 at the request of the Complainants at a value of €270,569.36, which the Provider lodged directly to their bank account on 25 September 2009. The Provider notes that the value of the Complainants' policy was impacted by the extremely volatile prevailing market conditions at that time. In this regard, unfortunately for investors such as the Complainants, an unforeseen financial crisis ensued the year after the investment was made and there was a significant downturn in investment markets, which resulted in the fall in the value of the investment before it was encashed.

The Provider notes that the Complainants met with Mr R., one of its Insurance and Investments Managers, on 11 June 2007 and that he conducted a personal financial review with them on that date regarding their general financial position. It is clear from the information recorded that the Complainants had a sum of €450,000 available, however it is usual that a recommendation be made that some of the funds available be set aside securely in the event of an emergency. The financial review documents completed on 11 June 2007 indicates that it was agreed that €350,000 only, be used for investment purposes.

Before recommending a particular investment, Mr R. discussed the Complainants' attitude to investment risk to establish if they were willing to accept some element of risk for the potential to receive better returns than deposits could offer. Whilst investors are advised to remain invested in the medium to long term to allow markets to grow, the ability to access funds if needed and the ability to suffer loss are also factors taken into account. The Provider is satisfied that the financial review documents, which were based on the Complainants' answers provided to the various questions posed, reflected their investment requirements at that time and identified them as 100% Growth Investors with the sum of €350,000 available to invest. In this regard, the Provider notes that the Recommendations and Reasons Why document dated 11 June 2007 deemed the Complainants to fall into the risk category of Growth Investors, the second lowest of four risk categories, with Capital Secure the lowest risk category and Active Growth and Geared the higher risk categories. The Provider is satisfied that it is clear from this Recommendations and Reasons Why document that the Complainants were not categorised as Capital Secure investors at the time and were willing to accept some level of investment risk.

Having discussed and collated information as part of the personal financial review, Mr R. recommended to the Complainants that they accept a Smart Funds investment policy and that based on their attitude to investment risk, they invest in the Evergreen Fund. The Smart Funds and the Evergreen Fund product literature provided to the Complainants on 11 June 2007 explained the nature and management investment style of these funds. The Evergreen Fund itself was classified as a suitable fund for those falling within the Growth Investor category, that is, those who were willing to take some level of investment risk in return for better growth potential. The Provider notes that investing in a Smart Funds policy and the funds thereby available was advised as a medium to long term investment to allow time for markets to grow and it was recommended to all potential investors that they invest for at least 5 years. However, if access to funds was required in the early years, it was possible to do so as the Evergreen Fund did not restrict access.

The Smart Funds product, which provides access to the Evergreen Fund where there is no capital guarantee, was the product chosen by the Complainants and the Provider is satisfied that all of the documentation completed at the time supports this position. The Provider is satisfied from the records held that at no stage were the Complainants advised that the capital invested was guaranteed. In this regard, the Provider notes that there was a separate product available at the time, namely, the Guaranteed Evergreen Fund. The Provider submits that this product, being one of the range of products available at the time, would have been discussed with the Complainants as part of the options available, however it is satisfied that there is no evidence to support that this was the product chosen by the Complainants but rather that all of the documents completed at the time reflect that the Smart Funds policy and the Evergreen Fund were the product and fund chosen.

As part of its review of this complaint, the Provider contacted Mr R., who is no longer its employee, to discuss the matter with him. Whilst he does not recall the details of the sales meeting that took place with the Complainants on 11 June 2007, Mr R. has no doubt based on the documents completed at the time that the product and fund selected are as stated on the application form, that is, the Smart Funds product and the Evergreen Fund. Mr R. notes that it was his usual practice to discuss all investment options with a customer,

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including capital secure products available, so he is satisfied that capital secure options would have formed part of the discussion. If the capital secure option was not selected, Mr R. has confirmed that he would have made it clear that the product and fund selected were not capital secure, as would be the case for any client. Mr R. regrets that in view of the time that has elapsed he cannot recall the meeting in question but he is confident that the documents completed reflected the outcome of the discussions at that time.

In this regard, the Provider notes that Mr R. took contemporaneous notes of his meeting with the Complainants on 11 June 2007, as follows:

"1. Customer would like to invest €350,000 into a lump sum investment with [the Provider].

2. The customer understands the medium to long term nature of this investment and wishes to leave the investment for at least a 5 to 7 year term, the customer does not anticipate needing access to this investment in the next 5 years.

3. The customer confirms that they have sufficient monthly disposable income and is not reliant on this investment to meet any current financial obligations.

4. The customer has a lump sum of at least €105,000 remaining on deposit to act as an emergency fund, if required. Recommended Evergreen Fund €350k. Clients fully understands 1.50% charge pa. Fully explained evergreen fund med to long term investment".

The Provider is satisfied that all documents provided to the Complainants during the financial review sales meeting and policy application process on 11 June 2007, and later by post on 18 June 2007 following the inception of the policy, demonstrated that there were risks associated with their investment and that their policy was best suited for medium to long term investors. In addition, having considered all of the policy documentation it had sent them on 18 June 2007, the Provider notes that it was open to the Complainants to avail of the cooling-off option which allowed them to cancel the policy within 30 days if they were unhappy with the policy for any reason. The Complainants did not avail of this option.

The Provider sent a statement to the Complainants in November 2007 detailing a policy value as at 22 November 2007 of €313,838.32 and which advised ***"Warning: The value of your investment may go down as well as up"***. The First Complainant later telephoned the Provider on 14 February 2008 to request the policy value at that time and during the course of this call was reminded that their money was invested in the Evergreen Fund and that this was not a capital guaranteed investment.

The Provider sent a further statement to the Complainants on 4 July 2008 advising of a policy value as at 3 July 2008 of €271,118.84. The Provider has a record of telephone calls made on 3 July, 7 July, 15 September and 18 September 2008 from the Complainants' local bank branch and/or from Mr R., in which policy valuations and/or policy details were sought and provided.

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The First Complainant telephoned the Provider on 18 September 2008 requesting to switch the Complainants' investment from the Evergreen Fund to the Secure Cash Fund. This request was processed and the Provider wrote to the Complainants on 25 September 2008 confirming that an entire fund switch from the Evergreen Fund to the Secure Cash Fund had taken place on 19th September in the amount of €257,066.38.

In this regard, the Provider notes that had the Complainants remained invested in the Evergreen Fund in the medium to longer term, as was recommended in the product literature, their investment would have recovered over time, though it understands why an investor may wish to encash at a point in time to prevent potential further losses. A further statement sent to the Complainants in November 2008 detailed a policy value as at 14 November 2008 of €259,104.56.

The Second Complainant telephoned the Provider on 2 September and 18 September 2009 and was advised that as the Secure Cash Fund in which the Complainants' funds had been moved into the previous September was only available for one year, that the value was now due to be automatically switched to the standard secure Deposit Fund. The Provider later received a telephone call from the Complainants' bank branch on 18 September 2009 requesting that an encashment form be faxed to the branch as the Complainants had indicated that they would be surrendering the policy. The Agent advised that the Evergreen Fund had begun to recover from the market volatility and had increased in value and recommended that the Complainants speak with a financial advisor first, as to encash the policy at that time would be to realise their earlier losses. The Complainants did not meet with a financial advisor and they submitted an encashment form to the Provider on 21 September 2009. As a result, the Complainants' policy was encashed on 22 September 2009 at a value of €270,569.36, which the Provider lodged directly to the Complainants' bank account on 25 September 2009.

The Provider notes that it furnished the Complainants with two different 'Understanding your Investment' documents, one dated 11 June 2007, the other 3 February 2009. In this regard, the 'Understanding your Investment' document provided at the time of the sales meeting on 11 June 2007 contains the date at the bottom right-hand corner on page 2, "11/06/2007".

The 'Understanding your Investment' document dated 3 February 2009, which contains the date "03/02/2009" at the bottom right-hand corner on page 2, was furnished to the Complainants during the internal complaints process and was printed from an upgraded system rather than extracted from customer records and thus was not an exact copy. The Provider apologises for this and trusts that the information contained in the documents do not differ substantially. In any event, it is the 'Understanding your Investment' document dated 11 June 2007 that the Complainants were provided with on that date, that is the correct and relevant document.

In conclusion, the Provider is satisfied that the Complainants' investment policy was recommended and sold to them in good faith and based upon matters discussed throughout their financial review with Mr R., one of its Insurance and Investments Managers, on 11 June 2007. The Provider is also satisfied that the documents completed and provided before and

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after the investment was made clearly reflected that the investment was not guaranteed and that there were risks involved. In this regard, the product and fund documents were provided to the Complainants before the policy application was made and they declared that they understood the nature of the investment when they completed and signed the policy application.

Furthermore, the Provider correspondence to the Complainants dated 18 June 2007, which enclosed the policy documents, clearly stated that the capital and return were not guaranteed and invited the Complainants to read the enclosed documents carefully, which outlined the 30 day cooling-off period that the Complainants could have availed of if they had then, at that time, considered the policy unsuitable. As a result, the Provider is satisfied that the sale of the policy to the Complainants in June 2007 complied with the relevant provisions of the Consumer Protection Code 2006, this being the applicable code at that time.

The Provider shares in the Complainants' disappointment at the fall in value of their policy due to exceptionally volatile market conditions at the time, but having carefully investigated the matters set out as part of their complaint, the Provider is satisfied that care was taken at the time to advise the Complainants as to the nature of the policy that they were applying for and then accepted, and the product and fund recommended was based on matter discussed and agreed. Accordingly, the Provider is satisfied that it did not mis-sell the Complainants their investment policy.

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 13 January 2020, 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

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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.

The complaint at hand is that the Provider mis-sold the Complainants their investment policy in June 2007. This complaint was made to the Financial Services Ombudsman in June 2013, and accordingly, met the FSO's time limit requirement, at the time when it was originally received.

Having met with Mr R., an Insurance and Investments Manager with the Provider, on 11 June 2007, the Complainants incepted a Smart Funds investment policy with the Provider on 14 June 2007 by way of a single contribution of €350,000, invested in the Evergreen Fund. The Provider then advised the Complainants 5 months later, by letter dated November 2007 that the policy value as at 22nd November had decreased to €313,838.22 and by letter dated 4 July 2008 that as at 3rd July it had decreased further to €271,118.84.

The First Complainant telephoned the Provider on 18 September 2008 and requested to switch the Complainants' investment from the Evergreen Fund to the Secure Cash Fund. The Provider wrote to the Complainants on 25 September 2008 confirming that an entire fund switch from the Evergreen Fund to the Secure Cash Fund had taken place on 19th September in the amount of €257,066.38. In this regard, the Complainants submit that they "*have lost over €93,000*". The Complainants later submitted an encashment request to the Provider on 21 September 2009 and the policy was encashed the next day, 22nd September, at a value of €270,569.36, which the Provider lodged directly to the Complainants' bank account on 25 September 2009.

The Complainants submit that the Provider's Agent, Mr R. ignored their instructions that they "*wished to have their capital secure*" and instead advised that they invest in the Evergreen Fund, a medium to high risk investment product that did not provide capital security. The Provider, on the other hand, is satisfied that the Smart Funds product and Evergreen Fund reflected the Complainants' investment needs as identified during the financial review conducted at the sales meeting on 11 June 2007 and that the nature of and risks associated with their investment policy were clearly set out in all the documentation that was provided to the Complainants before and after they incepted the policy.

Whilst there are conflicting accounts from the parties as to what was discussed during the meeting on 11 June 2007, the documentary evidence before me assists the investigation.

In this regard, the Policy Application Form provides, *inter alia*, at pg. 5, as follows:

"UNDERSTANDING YOUR INVESTMENT

I/We confirm that the information shown in the Understanding Your Investment Section has been explained to we/us and I/we understand it ...

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ATTITUDE TO INVESTMENT RISK

I confirm that I have carefully considered and discussed my investment requirements and the various investment options available to me with my Insurance and Investment Manager, ranging from a capital secure investment to a geared investment. I confirm that my chosen attitude to investment risk is 100% Growth Investor as stated in my financial review."

I note that the Complainants signed directly below this declaration on 11 June 2007.

This Office has previously expressed concern in relation to the choice of terminology used by the Provider when classifying investment risk tolerance. In this regard, phrases like "Growth Investor" offer connotations only of the good and contain no inherent warning as to the level of risk involved in a risk classification of that type. Nevertheless, I am satisfied that the policy documentation did set out a number of warnings to the effect that returns were not guaranteed and that the value of the Complainants' investment may go down as well as up.

For example, I note that the 'Recommendations and Reasons Why' Report dated 11 June 2007 (as identifiable from the Sales Process ID xxxxxxxxxx0611/16:17 on pg. 1) provides, *inter alia*, at pg. 5, as follows:

"Attitude to Risk – Savings and Investments:

Having discussed our investment requirements and the investment options available, we have indicated that we would like our investment made in the following way:

*Single Premium Investment: Capital Secure [0%] **Growth [100%]** Active Growth [0%] Geared [0%] ...*

As a Growth Investor: ...

- You are looking for opportunities for your investment to outperform inflation and you are therefore prepared to invest in equities, fixed interest assets and property.*
- You expect that these assets will outperform deposits in the medium to long term but you understand that they are also subject to investment risk and possibly currency risk.*
- You understand that the value of your investment may fluctuate and at times may be worth less than your original investment. If your investment does not perform as intended, **you may not receive back all of your original capital**".*

[Emphasis added]

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Similarly, I note that the Policy Application Form provides, *inter alia*, at pg. 2, as follows:

“UNDERSTANDING YOUR INVESTMENT

The key features of your investment are as follows: ...

2. *Your money is invested in the following unit linked fun(s):*

Evergreen 100% ...

6. ***Your original investment is not guaranteed and you may get back less than you invested ...***

7. *We strongly recommend that you invest for a period of five years or more”.*

[Emphasis added]

In addition, I note that this Policy Application Form also provides, *inter alia*, at pg. 4, as follows:

“The insurance intermediary has provided me with:

1. *Part 1 of the quotation, incorporating client specific details and the number of this quotation is 2285 and*

2. *Part 2 of the quotation, which provides further relevant information.”*

I note that the Complainants signed below this declaration on 11 June 2007, indicating that they had been provided with Part 1 and Part 2 of the Quotation.

In this regard, the ‘Your Quotation – Part 1’ document advises, *inter alia*, at pg. 1, as follows:

“MAKE SURE THE POLICY MEETS YOUR NEEDS! ...

Taking out the policy is a long-term commitment (we recommend a minimum of 5 years). You should ensure that the contract meets your needs, bearing in mind your resources and personal circumstances. If it does not meet your needs, you should not enter into it.”

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In addition, the 'Smart Funds: Your Quotation – Part 2' Booklet [300126 V7/04/07] provides, *inter alia*, at pg. 2:

“Are returns guaranteed?”

*The returns under the policy depend on the future investment performance of the fund(s) in which you are invested. **Returns are not guaranteed.** Note that any illustration provided to you in relation to this policy is not a guarantee or promise of the future returns under the policy; the illustration is only intended to give you an indication of the benefits that would be provided if certain investment returns and other assumptions are achieved. These assumptions are based on the advice of the Appointed Actuary who is responsible for protecting policyholders' interests. However **they are not guaranteed.** If these assumptions are not met the policy may not provide you with the benefits illustrated”.*

[Emphasis added]

I also note that the section 'The risks and the rewards' of the Smart Funds Product Brochure [500138 V4/02/07] that provides, *inter alia*, at pg. 3, as follows:

“With investment funds there is a level of risk as not only can the value of a fund increase, it can also fall, sometimes quite dramatically. History has shown however, that despite occasional falls, this type of investment has over time generally recovered any losses and delivered better returns than ordinary deposit investments ...

With a pooled fund you can always access you money when you need it. But as its value can fluctuate, and this is particularly true over the short term, an investment fund is not the ideal choice if you need to encash your investment within five years. However, if you have a longer investment time frame in mind, then you should seriously consider investment funds. In the long run, the growth potential of these funds outweighs their term volatility”.

[Emphasis added]

In addition, pg. 12 of this Brochure advised, *inter alia*, as follows:

“Warning: The value of your investment may go down as well as up”.

Following the inception of the policy in question, I am satisfied from the documentary evidence before me that the Provider posted the Complainants their policy documents on 18 June 2007. The cover letter enclosed with this documentation advised:

“Thank you for your investment of €350,000.00 on 14 June 2017 in the [Provider] Smart Funds...We believe that these funds offer you the opportunity for long-term investment growth.

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We are pleased to enclose your Policy Schedule and your Policy Documents which include your legal contract. We recommend that you read these documents carefully, as they contain important contractual clauses ...

Unit or Investment values can fall as well as rise. Your capital and return are not guaranteed".

[Emphasis added]

In this regard, the enclosed 'Smart Funds: Important Information' Booklet [500125 V5/04/07] advised, *inter alia*, at pg. 2, as follows:

"Make sure this Policy meets your needs ...

Please read your Policy Documents (which consist of your Policy Conditions and your Policy Schedule) thoroughly, so that you know how your Plan works and to satisfy that the Plan meets your needs".

In addition, pg. 6 of this Booklet advised, *inter alia*, as follows:

"30 Days Cooling-off Option

If you are not satisfied with your policy, whatever the reason, you have 30 days from the date of the covering letter sent with this notice during which you may cancel your investment and receive a return of the investment made by you, less an adjustment for any downward movement in the unit price of the funds in which you are invested, occurring between the date of policy commencement and the effective date of cancellation. To exercise this option please return the enclosed policy documents to [the Provider] together with the Cooling Off Form (to be found at the end of this notice), duly completed by you, stating that you wish to withdraw from the investment".

I am therefore satisfied that taken collectively, the application form which the Complainants signed on 11 June 2007 and the financial review and policy documentation that they were provided with, by Mr R. during the sales meeting on 11 June 2007 and subsequently by the Provider by post on 18 June 2007, sufficiently and appropriately put the Complainants on notice as to the non-guaranteed nature of their investment policy and the risks associated therewith.

It would have been prudent of the Complainants to have read this policy documentation in full, as the Provider advised them to do in its correspondence dated 18 June 2007. If having done so, they were not satisfied with the nature of their policy, the Complainants could have chosen at that stage to cancel it, and they had 30 days to do so from 18 June 2007, that is, the date of the cover letter enclosing the policy documentation advising them of this cancellation option.

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The Complainants did not do so however, and indeed, although they were notified in November 2007, of a fall in value of some €36,000, there is no evidence that they raised any query at that time as to how this could have occurred, as one might expect if they had in fact believed that the investment carried capital protection.

The audio evidence shows that the First Complainant raised a specific question with the Provider in February 2008, regarding a capital guarantee and he received specific confirmation at that time that the investment product was not capital guaranteed. I note that a further 6 months plus then elapsed before the Complainants made the decision to switch the investment to a secure cash fund.

Having considered the matter at length, I take the view that the evidence before me does not bear out the Complainants' suggestion that the Provider mis-sold them an investment policy in the Evergreen Fund in June 2007. The evidence shows that all of the documentation made available to the Complainants at that time, confirmed that the investment did not carry any capital guarantee and that they might not receive back all of the original capital invested.

Accordingly, it is my Decision therefore, on the evidence before me that this complaint cannot be 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

4 February 2020

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.