



<u>Decision Ref:</u>	2020-0422
<u>Sector:</u>	Investment
<u>Product / Service:</u>	Cash Investment
<u>Conduct(s) complained of:</u>	Maladministration
<u>Outcome:</u>	Partially upheld

LEGALLY BINDING DECISION OF THE FINANCIAL SERVICES AND PENSIONS OMBUDSMAN

Background

The Complainants' complaint concerns the investment of their monies in a UCITS (Undertakings for Collective Investment in Transferable Securities) Fund.

The Complainants' Case

The Complainants complaint is that (i) the Fund was grossly mismanaged from January 2017 onwards and (ii) that the First Complainant was given incorrect information at a meeting and vital information was concealed from him at that time.

It is the Complainants' position that they have been clients of the Provider since 2010. The Complainants' investment is a UCITS Fund. The Complainants were designated as 'medium risk investors' in 2014. The First Complainant states that he told the Provider's representatives that with regard to investments, that: *"I like to sleep at night"*. The Complainants state that in late 2014 the Provider advised that they invest €0.9m in the Provider's Fund, and in early 2015 that they invest a further €0.4m in the Fund. The Complainants say that this consisted of over 25% of their net worth at the time. The Complainants state that they understood that the investment fund was a 'medium risk' fund and would consist of investments in equities, sovereign debt, commodities and cash. The Complainants state that unknown to them, in May 2016 the fund applied to the Central Bank

to include derivatives in its strategy 'for efficient portfolio management'. The Complainants say that they have records of meetings the Provider had in March and May 2016 where the Provider forwarded notes, quoting that there was no change in risk profile or financial circumstances. The Provider informed the Complainants that it was withdrawing its advisory services in 2016 and recommended that the Complainants use a named Advisor and set up a meeting with that Advisor.

The Complainants state that in January 2017 the Fund "*took a big dip*" and after that the monthly reports, which were always regular, stopped, without reason. The Complainants say that in February 2017 at a meeting, which had previously been arranged, the fund manager from the Provider advised that additional tools had been authorised for the fund. The Complainants say that the Broker from the new Advisor was also present as was a colleague of the Complainants, a fellow investor. The Complainants say that when the fund manager left the table, the First Complainant had a private conversation with the Broker about what the Complainants had heard of the fund from the fund manager, but he is alleged to have advised the First Complainant to give it more time and review in June 2017. The Complainants state that a company called S*** Trust sent a statement to them in April 2017 which showed a significant fall in value of the fund. The Complainants immediately wrote to the fund manager who responded by e-mail in April 2017. The First Complainant says that to him, the e-mail outlined reckless and speculative investments in instruments he had never heard of. The First Complainant states that he contacted the Advisor Broker and on his own initiative, closed the investment, following his alarm at the fund manager's disclosures. It is the Complainants' position that they suffered a loss of €201,756. The Complainant submits that the Fund was wound up in May 2017 and the fund manager's services with the Company were terminated. The Complainants want their losses restored to them.

The Provider's Case

The Provider states that it was an investment advisor to the Complainants from 18 November 2010 until 22 September 2017. The Provider says at inception the Complainants' investment objectives were stated on the Provider's Account Application Form as Balanced Income and Investment Growth. The Provider says that the Complainants expressed a low attitude to risk in 2010, and defined their investment experience as limited. Their overall net worth at that point was in the region of €3.5m and they indicated their annual source of Income as €100,000. The Complainants nominated the First Complainant, as the designated person to the account.

The Provider states that in that regard, the Complainants invested €1.75m of this portfolio with the Provider in November 2010.

The Provider says that the Complainants sought, and received, advice on many investment securities and products during this time, including (but not exclusively) fixed income

securities, equities, currencies, structured notes and investment funds. The Provider submits that advice was provided by it, however the ultimate decision to invest was made by the Complainants.

The Provider states that the Complainants also sought occasional informal advice on investments with other providers which included leveraged property transactions and private equity transactions. The Provider says that whilst it was not the Complainants advisors in respect of these investments, the Firm was made aware of them and their performance and risk characteristics (many of which, including those mentioned were considered high).

The Provider states that in April 2014, it introduced a more detailed risk assessment tool, to verify the Complainants' attitude to risk. In this regard, the Complainants completed the Provider's Risk Tolerance Questionnaire. The Provider says that following this assessment, it became apparent that the Complainants had in fact a greater attitude to risk, than previously indicated. The Provider states that following meetings with the Complainants, and presentations detailing the risks attached to increasing their Risk profile, the Complainants were satisfied that their Risk Mandate was to be increased to a Medium Risk Mandate. The Provider's position is that it firmly denies the Complainants' contention that this was done to enable the Complainants to invest in the Provider's Fund.

The Provider refers to the following extracts from the Risk Tolerance Questionnaire:

"Q14. Investments can go up and down in value and experts often say you should be prepared to weather a downturn. By how much could the total value of all your investments go down before you would begin to feel uncomfortable?"

- 1. Any fall in value would make me feel uncomfortable*
- 2. 10%*
- 3. 20%*
- 4. 33%*
- 5. 50%*
- 6. More than 50%"*

The Complainant selected Option 3 — minus 20%".

The Provider states that during the tenure of the relationship the Provider suggested to several of its clients that their investment portfolios would be better managed through a collective investment vehicle rather than individually managed accounts. The Provider states that it believed that such a vehicle would create better diversification for its clients and would also enable the portfolio managers respond more quickly to market events, for example, many fixed income securities trade in "blocks" of €50k and creating a diversified portfolio of such securities would not be

possible for individual accounts, but is made possible through the collective vehicle. The Provider states that in addition the nature of an individual managed account would necessitate contacting an investor in advance of an investment decision which in the Complainants' case was often made difficult by their frequent travel arrangements. The Provider says that in volatile markets this might often inhibit efficient management of a portfolio.

The Provider states that the Asset Allocation fund was launched in November 2014 to facilitate an efficient medium for suitable clients. The Complainant, it asserts, was one such client.

The Provider states that the Fund was managed from inception to termination by, a regulated MiFID Firm based in London. The Provider states that it was an advisor to the Firm.

The Provider states that the Complainant initially invested €900,000 at the launch of the Fund in late November 2014, and following 6 months of trading with positive performance, the Complainants invested a further €400,000 into the Fund at a price of €105.78 (after equalisation factor) in June 2015.

The Provider states that the Complainants first opened an account with the Provider on 18 November 2010. The Provider states that it provided investment advice to the Complainants and the Complainants made the ultimate decision to invest.

Further submission from the parties

18 June 2018 – The Provider to the FSPO – in response to queries from this Office

The Provider was asked by this office, what did the Provider ascertain about the Complainants' investment objectives, attitude to risk and investment experience, in 2010 and subsequently in late 2014 and early 2015.

The Provider's response was that the first account opening documents were completed by the Complainants in November 2010 and stated a low risk attitude with experience of bonds, fixed income, stocks, mezzanine finance & property with providers including Stockbroker and Banks. The Complainants described their investment experience as limited, and investment objective as balanced income and investment growth.

The Provider states that from 2012 onwards the Complainants expressed a greater appetite for risk, and demonstrated a greater knowledge and experience of investments than previously advised at the inception of the relationship. The Provider submits that the Complainants expectations of their return on investment were higher than their low risk mandated account would have generated. The Provider says that dissatisfied with the performance of this low risk mandate, the Complainants' risk

attitude increased to the point of becoming medium risk investors. The Provider states that this is documented in an email exchange between the Provider and the First Complainant on 18 March 2015 in which the First Complainant expresses disquiet over a 3.5% return and it is highlighted to him by the Provider that in low risk investments this is a strong performance over the course of one year.

The Provider states that the Complainants wished to achieve investment growth and the Complainants acknowledge in the initial complaint letter dated 4 September 2017 that they are "Medium Risk" investors.

It is the Provider's position that in April 2014 it, prudently, performed an intensive risk assessment of the Complainants' risk attitude. The Provider states that the risk assessment questionnaire employed was designed by a FCA approved firm. The Provider says that the results of that assessment confirmed both in qualitative and quantitative terms that the Complainants had a medium risk appetite.

UCITS Exposure and experience

The Provider states that during the course of the relationship and specifically in 2013 the Complainants invested in a number of UCITS Funds in order to gain market exposure to the following:

- The Nikkei Equity Index
- The MSCI World Equity Index
- The iShares European Property Index
- The iShares UK Property Index
- The iShares Global Private Equity Index

It is the Provider's position that each of the above allowed the use of derivatives to gain exposure to the underlying asset class and to assist in achieving the fund's investment objective. The average investment in the above was in the region of €50,000 per transaction.

Corporate Bonds

The Provider states that the Complainants also invested in several corporate bonds during the relationship with an average deal size of approximately €120,000. Issuers of these bonds included, banks and insurance companies.

It is the Provider's position that the Complainants displayed a clear appetite for, and understanding of these bonds.

Leveraged Property and Private Equity Investments

The Provider says that as the relationship evolved it became clear that the Complainants had significant investment experience including the aforementioned leveraged property and private equity. The Provider says that these were not advised or recommended to the Complainants by the Provider.

Further UCITS, Derivative and Currency Exposure

The Provider states that in March 2013 and April 2013 the Complainants also invested a total of €350k in an investment fund (K Fund). The Provider says that approximately half of this amount was invested in the US Dollar class of the fund as the Complainants were (correctly) advised by the Provider that the US Dollar would likely increase in value. The Provider submits that the Complainants fully understood the risks involved, accepted the risk and enjoyed the benefits of the outcome.

The Provider states that furthermore, the K Fund employed derivatives similar to the Provider's Fund for the purposes of efficient portfolio management and hedging.

The Provider says that in the prospectus of the K Fund, included in permitted investments, are Financial Derivative Instruments.

The Provider submits that the K Fund Prospectus further goes on to state on page 20:

"Financial Derivative Instruments (FDIs)

6.1. A Fund's global exposure (as prescribed in the Central Bank Notices) relating to FDI must not exceed its Net Asset Value.

6.2. Position exposure to the Underlyings of FDI, including embedded FDI in Transferable Securities or Money Market Instruments, when combined where relevant with positions resulting from direct investments, may not exceed the investment limits set out in the Central Bank Notices. (This provision does not apply in the case of index based FDI provided the underlying index is one which meets with the criteria set out in the Central Bank Notices.)

6.3. A Fund may invest in OTC derivatives provided that the counterparties to the OTC derivatives are institutions subject to prudential supervision and belonging to categories approved by the Central Bank.

6.4. Investment in FDIS are subject to the conditions and limits laid down by the Central Bank".

The Provider states that in the risk disclosure section of the K Fund Prospectus on page 32 the following is declared:

“Derivatives

Certain Alternative Investment Funds may invest in complex derivative instruments which seek to modify or replace the investment performance of particular securities, commodities, currencies, interest rates, indices or markets on a leveraged or unleveraged basis. These instruments generally have counterparty risk and may not perform in the manner expected by the counterparties, thereby resulting in greater loss or gain to the investor. These investments are all subject to additional risks that can result in a loss of all or part of an investment, in particular, interest rate and credit risk, volatility, world and local market price and demand, and general economic factors and activity. Delays in settlement may also result from disputes over the terms of the contract (whether or not bona fide) since such markets may lack the established rules and procedures for swift settlement of disputes among market participants found in "exchange-based" markets. Derivatives may have very high leverage embedded in them that can substantially magnify market movements and result in losses greater than the amount of the investment. The Alternative Investment Fund's may also buy or sell options on a variety of Underlyings. Risk of writing (selling) options is unlimited in that the writer of the option must purchase (in the case of a put) or sell (in the case of a call) the underlying security at a certain price upon exercise. There is no limit on the price an Alternative Investment Fund may have to pay to meet its obligations as an option writer. As assets that can have no value at their expiration, options can introduce a significant additional element of leverage and risk to an Alternative Investment Fund's market exposure, The use of certain options strategies can subject an Alternative Investment Fund to investment losses that are significant even in the context of positions for which the relevant Trading Advisor has correctly anticipated the direction of market prices or price relationships”.

It is the Provider’s position that the Complainants acknowledged these risks in declaring that they had read and understood the K Fund Prospectus.

The Provider states that it estimates that the Complainants made gains of almost 12% in the Euro share class and circa 40% in the US Dollar share class of the K Fund. The Provider states that it notes the above as relevant due to the fact that the disclosures in its Fund were virtually identical.

The Provider says it proposed the Provider’s Fund to the Complainants as a suitable investment opportunity because:

- (i) The Complainants had completed a risk assessment analysis which deemed them medium risk investors and the Provider’s Fund was objectively assessed as medium risk;

- (ii) The Complainants had invested in a similar fund which held the same risk categorisation; and
- (iii) The Complainants had expressed disquiet at the low level of returns which their low risk investments were accruing.
- (iv) The Complainants were in a position financially to bear any related investment risks consistent with the client's investment objectives.

The Provider submits that based on the above information, it had satisfied itself that the Complainants were fully aware of the risks involved and the techniques employed, were happy to enjoy the gains and understood that these were consistent with the Complainants' risk appetite.

The Provider was asked by this office how did the Investment product and any top ups on the investment, match the Complainants' investment objectives, attitude to risk and investment experience.

The Provider's response is that the Complainants' Investment objective was balanced income and investment growth at inception. The Provider says that the Risk mandate was increased from low risk to medium risk in April 2014. The Provider states that in May 2015, the Complainants altered the Investment objective to investment growth, as the Complainants no longer had a requirement for income. The Provider states that the Complainants continued to be satisfied with the medium risk mandate.

The Provider states that in March 2013 and April 2013 the Complainants invested a total of €350,000 in an investment Fund (K Fund).

The Provider says that the time the Complainants invested in the Provider Fund they had clearly demonstrated a medium risk attitude and were experienced in investing in similar investment funds with similar risk profiles and underlying investment instruments.

The Provider submits that the Provider Fund is a UCITS. The Provider states that UCITS are highly regulated by the Central Bank of Ireland. The Provider says that one of the regulatory obligations is that each UCITS Fund closely monitors the risk of the fund using a quantitative technique known as the Synthetic Risk and Reward Indicator (SRRI). The Provider states that SRRI calculation is designed and imposed by the European and Securities Markets Association (ESMA). The Provider explains that ESMA is an independent EU authority whose purpose is to improve investor protections and promote stable, orderly financial markets.

The Provider submits that the range of outcomes for the SRRI calculation ranges between 1 and 7, with 1 being the lowest risk rating and 7 the highest risk rating. The Provider states that upon inception the Provider Fund was deemed to be a risk category 5 based on "pro-

forma" data (as per the guidelines). The Provider submits that the fund risk rating was then reduced to a 4 in January 2016. The Provider says that thereafter at no point whatsoever did the risk rating of the fund, as per the ESMA and Central Bank of Ireland guidelines change from 4. The Provider states that 4 is deemed to be a "medium" risk rating. The Provider says therefore it is clear that the fund risk characteristics, actually reduced during the period of the Complainants investment.

The Provider submitted a copy of the risk presentation provided to the Complainants on 5 August 2016. The Provider states that it is noted on page 3 that the Complainants were deemed to be a 4 on the ESMA volatility band, given their medium risk mandate. The Provider says that given the Provider Fund was also a risk level 4, on this approved risk analysis the Provider Fund had the correct risk for the Complainants.

The Complainants state that derivatives were applied to the Fund in May 2016. The Provider was asked if this is correct, how did this alter the Provider's risk profile of the Fund and does the Provider accept that by adding the derivatives to the Fund that the Fund no longer met the Complainants' objectives, attitude to risk, and investment experience.

The Provider's response was that firstly, the use of derivatives in UCITS funds is not uncommon and should not be confused with either a change in investment strategy or an increase in risk profile. The Provider says in the case of the Provider Fund this was no different. The Provider states that derivatives are mostly used in UCITS to gain an exposure to an underlying asset class, for efficient portfolio management, hedging, cost efficiency and ease of transaction.

The Provider submits that the use of derivatives in UCITS is also heavily regulated by the Central Bank of Ireland and all UCITS employing derivatives must submit a Risk Management Process (RMP) to the Central Bank. The Provider states that the Fund RMP was submitted and approved by the Central Bank.

The Provider states that secondly, the application of derivatives (as permitted by, and disclosed in, the prospectus) as per the ESMA guidelines did not alter the risk profile of the Fund. The Provider says that at no point beyond that date did the risk profile increase beyond an ESMA 4 — Medium Risk.

The Provider's position is that Derivatives were used for efficient portfolio management purposes and hedging purposes only and to achieve the investment objective. The Provider says that the asset class mix did not stray beyond those stipulated in the prospectus (e.g. equities, bonds, fixed income, currency), and no other asset classes (for example commodities) were added to the underlying portfolio. The Provider states that the decision was made in May 2016 to engage the use of derivatives on the same asset classes to facilitate efficient portfolio management. The Provider says that it wishes to highlight at this juncture that the ICAV Board which is independent and separate to the

Provider (and to whom the Provider is a delegate) deemed that there was no change in the strategy of the Provider Fund.

The Provider's position is that the Complainants had previous experience of the underlying asset classes and the use of derivatives for efficient portfolio management and hedging techniques. The Provider submits that at all stages of the investment the Complainants' risk profile matched the funds risk profile.

The Provider was asked by this office whether the Provider accept the Complainant's contention that high risk investment strategies were implemented by the Provider in relation to the Fund in the early months of 2017, and does the Provider accept that its strategies brought the fund outside a "Medium Risk Fund".

The Provider states it disagrees, and says that the Provider Fund's risk profile remained at an ESMA risk rating of 4 until the Fund was terminated in May 2017, and that it never deviated from this position.

The Complainants refer to the Provider's advisory service ceasing and that he was introduced to a new advisor as a replacement. The Provider was asked by this office to outline the circumstances of the ending of the advisory service and the introduction of the new Advisor to the Complainants.

The Provider's response is that in 2016 the Board of the Provider made a strategic decision to cease offering private client investment advisory services. The Provider says that consequently, in August 2016, the Provider advised the Complainants that they would most likely require an alternative provider for advisory services. The Provider says that a number of potential advisors were discussed with the Complainants and it also discussed the Complainants relationship with a Stockbroker who also could have provided services.

The Provider states that a letter was sent to the Complainants, dated 2nd August 2016, outlining the options available to the Complainants.

The Provider says that the Complainants were also provided an opportunity to choose an alternative provider of their choice. An extract from the above letter states:

"If you do not wish to open an account with [named advisor] but rather move to a different investment firm, please tick option 2 in the Appendix to this letter".

The Complainants chose to appoint an Advisor Firm as their investment advisor.

The Provider states that it was explained to the Complainants in August 2016 that although they may decide to remain invested in the Provider Fund it would be the Advisor Firm and not the Provider who would make that recommendation as suitable and appropriate for them thereafter. The Provider says that the above letter provided to the Complainants dated **2nd August 2016**, clearly states:

"While you remain an investor in the [Provider's] Asset Allocation Fund, you will no longer be an advisory Client of [the Provider]".

The Provider states that the Complainants completed the Advisor Firm's Account opening documentation, and opened an account with the Advisor Firm in September 2016. The Provider states that the assets held under the Provider mandate, were transferred to named advisor on 22 September 2016.

The Provider states that a meeting took place on 21st October 2016, which was attended by a fund manager from the Provider, the Advisor Broker and the First Complainant to discuss the Complainants individual holdings of their portfolio in detail. The Provider says that specifically, the Provider is advised that the composition of the Provider Fund was discussed in detail including the fact that derivatives were being used within the Provider Fund, and that it was likely that the Provider Fund would use investment contracts (put options), to protect the fund in the event of the current US President being elected President.

The Provider's position is that it ceased to have a direct advisory relationship with the Complainants following the opening of their named advisor Account in September 2016.

The Provider was asked by this office whether the Complainants had a choice in Advisor after the Provider stopped its advisory service (in this regard the Provider states in its letter of 13th November 2017 that there was a discussion with the First Complainants about a number of potential providers). The Provider's response is that the Complainants were free to choose any advisor they wished. The Provider says that at a meeting on the 5th August 2016 both the named advisor and X were discussed as potential providers. The Provider states that the Complainants also had a relationship with named Stockbrokers who also could have provided services. It is the Provider's position that it did not give advice on the choice of providers.

The Provider was asked by this office whether the named advisor was an independent intermediary, separate from the Provider. The Provider's response is that the named advisor is a separate independent advisor from the Provider. The Provider states that it did not provide intermediary services to the Advisor. The Provider states that rather the Provider ceased to provide services, and wished to assist clients migrate their account.

The Provider states that no fees or commissions were received from, or paid to the Advisor in this regard by the Provider.

The First Complainant refers to the stopping of monthly updates in January 2017 and that he had suspicions of a drastic change in strategy for the worse and that a high risk approach was being applied to the Fund. The Provider was asked by this office to comment on the circumstances of the stopping of the updates and on whether there was such a change in approach by the Provider.

The Provider's response is that no high-risk strategy was employed. The Provider submitted confirmations extracted from the Provider Funds' Financial Statements at termination of the Fund for the five month period ended 31 May 2017 confirming the Provider Funds compliance with UCITS Regulations. The Provider states that relevant confirmations are extracted from the Custodians Report contained within the Financial Statements are noted below:

"In our opinion, the Board of Directors have managed the ICAV, in all material respects, during the period from 1st January 2017 to 31st May 2017 in accordance with the limitations imposed on the investment and borrowing powers of the ICAV by the Instrument of Incorporation and the UCITS Regulations, and otherwise in accordance with the provisions of the Instrument of Incorporation and the UCITS Regulations.

.. Trustees (Ireland) Limited"

The Provider refers to a letter from the Board of Directors of the collective investment vehicle, which confirms that the Board considered the amendments to the Supplement of the Provider Fund dated 20 May 2016. The Provider states that the Board of the Fund, did not consider the amendments to be material as they did not significantly alter the asset type, credit quality, borrowing limits or risk profile of the Fund pursuant to Regulation 50 of the Central Bank UCITS Regulations 2015 (S.I. 420 of 2015) (as amended).

The Provider states that with regard to updates, the Provider was no longer responsible for providing e-mail updates to private clients as the Provider no longer had a direct relationship with them.

The Provider says that the Complainants were advised that they would require a new provider who would assess the appropriateness and suitability of the Provider Fund. The Provider says that any new provider would have been responsible for price updates on all investments held, including the Provider fund.

The Provider states that it notes however, that the Complainants discussed the fund with the Advisor on 21st October 2016, 8th December 2016, and 30th January 2017 and that the First Complainant also had meeting with the Provider and the Advisor on 14 February 2017.

The Provider says that it also understands that the Complainants received regular valuation updates from their independent advisor.

The Provider states that it should be noted that the Provider Fund was also priced publicly on Bloomberg, and was available through a Google search.

The Provider concludes from the above that the Complainants were fully and regularly informed of the Provider Fund's performance and that in any event, from August 2016 onwards the Provider was not responsible for providing updates.

The Provider was asked by this office whether the Provider accepts the Complainants' position that by not having or being provided with the February and March 2017 Monthly Reports, they were denied the opportunity to exit the Fund earlier.

The Provider's response was "No" and that the price of the Provider Fund was publicly available on Bloomberg and was available through a Google search. The Provider states that if the Complainants had any concern regarding the value of the Fund, this information was easily available through Google. The Provider also suggests that a telephone call to either the fund manager or Advisor Broker or e-mail request would have provided this information.

The Provider states that the Complainants discussed the fund with the Advisor on 21 October 2016, 08 December 2016, 30 January 2017 and the Complainants had a meeting with the Provider and the Advisor on 14 February 2017. The Provider says it understands a detailed discussion took place surrounding the elements of the Fund during this meeting, whereby the Complainants decided not to redeem their investment, but to hold the Fund until June 2017.

The Provider says it also understands that the Complainants received regular valuation updates from their independent advisor. The Provider states it concludes from the above that the Complainants were fully and regularly informed of the Fund's performance.

The Provider's position is that although performance of the Provider Fund suffered in the early parts of 2017, it notes the valuation of the Fund did not surpass the Complainants quoted risk appetite.

The Provider says that regardless of the above, at the time of the meeting on the 14th February 2017 the First Complainant was aware that the price of the Fund was at 92.08. The Provider says that by the end of February the Provider Fund price had declined marginally to 90.05. The March report valued the Fund at 88.38. The Provider states that this would have been prepared for issue by mid-April, in which time; the Complainants had already decided to redeem their investment.

This office asked the Provider whether the Provider notifies or seeks agreement from an investor before taking greater risk with the Fund or when the risk factors change from Medium to High.

The Provider's response is that the investment strategy of the Provider Fund did not change. The Provider says that in the event that it would have, investor approval would have been required. The Provider states that this was not the case in this instance and that the risk profile did not change either.

The Provider states that UCITS regulation stipulates that when the ESMA rating of a UCITS fund changes (either up or down) then a new Key Investor Information Document (KIID) must be published. The Provider's position is that no such publication was necessary.

The Provider was asked to outline S... Trust's role with the investment.

The Provider's response is that S... Trust were the custodian/depositary to the Provider Fund and as such responsible for ensuring that the fund adheres to the regulatory and Fund Prospectus guidelines at all times. The Provider submits that if a fund were to breach its guidelines the depositary would notify both the board of directors of the fund and the Central Bank of Ireland. The Provider states that no such breach took place and no notification was necessary to any party.

The Provider says that S.. Trust were also the administrator of the Provider's Fund, responsible for shareholder services and for producing and verifying the Fund's Net Asset Value.

The Provider refers to notes of meeting as evidencing that the Complainants were aware of the use of derivatives in their Fund. The Provider was asked whether the Provider sends its Clients a written communication of what was discussed and agreed at its meeting, or whether the meetings notes were merely an internal record.

The Provider's response is that the firm does not send Clients, communication of meetings and that these are for internal records only.

The Provider was asked whether there are any direct written communications from the Provider to the Complainant, when a change of investment strategy occurs.

The Provider's response is that a change of investment strategy would necessitate communication, via durable medium. The Provider says however, there was no change in investment strategy in the Provider Fund in May 2016. The Provider's position is that the use of derivatives on the underlying strategy for efficient portfolio management and hedging purposes are not deemed to be a change in investment strategy by the Central Bank of Ireland. The Provider states that neither the risk profile of the Provider Fund nor the underlying assets changed.

It is the Provider's position that the Complainants signed a prospectus which outlined that derivatives may be used. The Provider says that the Complainants signed and acknowledged the prospectus, and that the Complainants refer to the prospectus risk disclosures in their letter of complaint.

The First Complainant refers to the Advisory Account Opening Document of 26th August 2016 and says he crossed out the section where it stated "You would consider using Derivatives", and also states that he answered "No" to the use of derivatives. In this regard the Provider was asked by this office to advise why such a strong position from the Complainants, was ignored by the Provider.

The Provider's response is that the account opening document referred to is not that of the Provider. The Provider's position is that it is the Advisor's document and the Provider would not have been furnished with a copy of this document.

The Provider states that the document was completed in August 2016 following the Complainants investment in both the Provider Fund and the Provider's K Fund both of which outlined the use of derivatives in their investment prospectuses.

The Provider states that it notes that when completing the application form for the Provider in 2010 the Complainants was asked did they have any investment restrictions, to which they replied "None".

The Complainants refers to a significant drop in the value of the investment reported in the April 2017 independent statement. The Provider was asked by this office whether this was the first time that there was a drop in the value of the investment.

The Provider's response is that the Provider Fund incurred losses on a number of occasions prior to April 2017. The Provider states that the Fund suffered losses during the period April 2015 to September 2015, when the Fund value dropped from a high of 106.07 to 96.28 on the 30 September 2015, a loss of 9.2%.

The Provider says that subsequently the Provider Fund recovered before falling again during the period November 2015 to February 2016 when the Fund moved from 102.31 to 93.37, a loss of 8.7%. Combined during the period April 2015 to February 2016, the fund reduced in value by 11.97%. During the month of August 2015 the Fund value dropped 5.63%.

The First Complainant refers to his closure of the investment at a loss of €201,756 and that the fund was wound up in May 2017. The Provider was asked by this office what would the investment value have been, had the Complainants remained in the Fund until it was wound up. The Provider's response was that there would have been a + Movement during the period of €22,298.61

The Provider was asked to outline the amount of fees and commission charged, and pointing to where the rate had previously been agreed between the Complainants and the Provider. The Provider's response is that it did not charge the Complainant fees or commissions for their investment in the Provider Fund. The Provider states that it was remunerated by the Fund Manager for the provision of Investment Advisory Services.

The Provider says that at inception of the account, the Complainants were charged Commission fees of 50 basis points. Commission reduced to 25 basis points on bonds in 2012. Prior to March 2013, the Complainants were charged 15 basis points (.15%) safekeeping fee plus VAT.

The Provider states that In March 2013, it agreed a new rate management fee of 1% plus VAT on assets under management, contained within the Complainants' advisory share dealing account. The Provider says that it no longer applied commission and safekeeping fees to this account. The Provider states that this fee was agreed by email with the Complainants on 11 March 2013.

The Provider states that it regrets that the Complainants have chosen to make a complaint against the Provider. The Provider states that it is firmly of the view that the Complainants had been fully appraised of the risks of the Provider's Fund which reduced by 12% during the course of the investment.

The Provider sets out a synopsis of its key points:

- The Complainants agree that they were medium risk investors at the time of investment in the Provider Fund. The Provider Fund at all times was categorised by external categorisation mechanisms, the ESMA, as a medium risk fund, level 4.
- The Provider Fund Prospectus which the Complainants acknowledged they had read states: *"The Company on behalf of a Fund may employ techniques and instruments relating to transferable securities and/or other financial instruments in which it invests for efficient portfolio management purposes. Many of the risks attendant in utilising derivatives will be equally relevant when employing such efficient portfolio management techniques"*.
- The underlying asset classes of the Provider Fund did not alter.

The Provider states that whilst it ceased advisory service in August 2016, it understands that updates on the Fund would have been available from the Advisor, or a Google search.

The Provider states that it is its view that the Complainant was fully appraised of the Fund, its investment Strategy, and the Financial Tools utilised by the Fund Manager in protecting that Strategy. The Provider submits that it is unfortunate that the Market View of the Investment Manager was simply overly pessimistic, in a rising market which resulted in the Fund's performance being so poor.

The Provider asserts that the Provider Fund traded within the parameters of the risk management plan as authorised by the Central Bank of Ireland.

The Complainant's submission of 2 July 2018

The Complainants point out the following:

"Total Reliance on Adviser

- *The tone of [the Provider's] letter suggests in a number of places that I was an experienced investor. On my initial Application form I selected that I had limited experience in investments and a low attitude to risks.*
- *In every instance I fully acted on [the Provider's] recommendations and I never initiated any investments myself.*

/Cont'd...

- *I completed a second questionnaire where I was reclassified as a Medium Risk Investor, which allowed me to participate in the [Provider's] fund. I acknowledge that I was prepared to take on more risk for that purpose.*

Over Exposed in [the Provider] fund.

- *I was initially advised to invest €400,000 of my €2.8m total assets into the [Provider] fund by BS, which seemed appropriate.*
 - *On dealing with PP, I was recommended to invest €950,000 as shown on the KIID Client Application Form. This was cut back to €900,000 and subsequently, it was recommended by PP that a further €400,000 be invested in the [Provider] fund. Both sums were obtained by cashing in existing investments.*
 - *On reflection, this appears an enormous risk and an over exposure in the fund.*

No disclosure of derivatives and change in investment behaviour.

- *[The Provider] claims that I knew about derivatives in the fund after receiving the very large prospectus. Until recently, I did not know what a derivative was, and it certainly was never disclosed to me until the receipt of the e-mail dated 6th April 2017 from [fund manager], on receipt of which I immediately closed my account. It was certainly never highlighted to me that I was investing in complex volatile derivatives.*
- *These only seem to be used from Jan 2017 when the fund's performance appeared to be lagging after a positive return as per the Nov 2016 advice note.*
- *The e-mail of 6th April 2017 quotes the use of Put Options and VIX Options which generated significant losses over a short period. Also, the use of currency options on the USD/Yen generated losses. There was never any reference to these any stage in previous discussions.*
- *When losses occurred throughout 2015 and 2016 I stuck with the fund as it appeared that it was managed in the same way that my previous assets were managed. I became very concerned during the Lunch of the 14th Feb 2017, and even greater concerned on receipt of the e-mail of the 6th April 2017. I was concerned that [the Provider] had adopted an aggressive trading position with the [Provider] Fund which went far beyond how a Medium Fund should be managed. It appeared to me that they were engaged in reckless trading and the overall management appeared to be absent. It is greatly significant that the fund was wound up in May 2017.*

As a side issue, there are multiple inaccuracies in the [the Provider] reply:

- *I did not receive monthly factsheets from Jan 2017, and had received no advice on the behaviour and approach to the fund save at the lunch of 14th Feb 2017, when I raised the issue as to the fund's performance. The next time I became aware of trouble in the fund was on receipt of the S...Trust Statement of April 5th 2017, on foot of which I immediately wrote to [fund manager]. His e-mail of the 6th April 2017 was the response received on foot of which I en-cashed our investment in the [Provider] fund.*

/Cont'd...

- *They mention that I did not select any investment restrictions on my initial application form. I have no recollection of this and there is no evidence of it on the said application form.*
- *they say that the fund price was publicly available on Bloomberg and/or from a Google search. I do not know what Bloomberg is but if it was available on the internet surely they would have provided a web site.*
- *I strongly dispute that I was informed that I would be investing in derivatives. As can be seen from my application to [Advisor], I struck out the reference to including derivatives in my dealings.*
- *[The Provider] never stated they ceased to issue the Monthly Factsheets. It is some coincidence that this occurred when they adopted a very aggressive trading position which led to the closure of the fund”.*

The Provider’s submission of 11 July 2018

The Provider acknowledges (and references in its letter of 19 June 2018) that the Complainants initially had a low attitude to risk. The Provider states however, this changed over the course of the relationship to a medium risk. It states that this was acknowledged by the Complainants in their initial letter of complaint and the Provider’s previously submitted documents.

As regards the service that was provided, the Provider refers to Section 5.1 2nd Paragraph of the Terms of Business for share dealing accounts, as follows:

“An Advisory Service means that we will provide you with advice on investments services and products but the decision to invest or not will ultimately be made by you.”

The Provider says that in advance of any recommendation, the Provider conducted a full and frank discussion regarding the merits and general risks of each investment. The Provider states that the ultimate decision on whether to invest or not rested with the investor.

The Provider states that it is clear that the Complainants attitude to risk evolved over the course of the relationship. As regards the Complainants statement that they were prepared to take on more risk for the purpose of investing in the Provider Fund, the Provider states that the reality is that the Provider fund was deemed suitable to the Complainants demonstrably changed risk appetite.

The Provider states that it disputes the claim that this was an "enormous risk". The Provider states that the Fund was made up of multiple securities and asset classes. The Provider says that it estimates that at any time during the Complainants investment there would have been approximately 800 individual securities in the portfolio, giving a broad and diversified exposure to global investment markets. The Provider submits that many of the Complainants previous investments would have been included in the Provider’s Fund portfolio but with reduced specific securities risk.

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Disclosure of derivatives and change in investment behaviour

The Provider states that the Complainants signed and acknowledged the receipt of the prospectus for the Fund and that they understood its contents. The Provider says that the risk disclosures and in particular the risk associated with derivatives were also contained in the prospectus, as detailed in previous submissions. The Provider states that furthermore, the Complainant also acknowledged the receipt and understanding of almost identical disclosures in the K Fund. The Provider submits that the derivatives employed in the strategy were no more volatile than the underlying securities.

The Provider states that Derivatives were employed in the Fund from May 2016. The Provider says the positive return in the month of November 2016 was as a direct result from the hedging strategy employed by using derivatives in a falling equity market.

The Provider maintains its position that all the necessary and required information was provided to the Complainants regarding the risk profile of the Provider fund.

The Complainant's submission of 16 July 2018

The Complainants say that it was the single strategy and lack of management which caused the fund to fail, regardless of the underlying securities. The Complainants state that if this was an 'absolute return fund' why were they advised to invest 50% of their wealth to one asset in one asset class.

The Complainants state that the Provider relies on the service of the Prospectus as indicating an understanding of its contents. The Complainants say that there was no delay in the presentation of the prospectus, and certainly no time to even read it, before the decision was made to invest in the Provider Fund. The Complainants state that this was a similar approach as applied to the K Fund. The Complainants submit that the investment was made on the basis of recommendations from PP and on the basis of their existing investment strategy. The Complainants say that all other documents were laid to one side.

The Complainants state that they do not know on what basis the Provider claims that there were several meetings and communications with the Advisor on the Provider Fund. The Complainants state that there was a meeting on the 30/1/2017 and their note states '[Provider] –hold til March'. The First Complainant says there was the meeting of 14/2/2017, when in response to a question as to when the Fund would make money; the fund manager gave a detailed response, which concerned him greatly. The First Complainant states that he was requested by the fund manager to remain with the Fund, and in his absence was advised by the Advisor to hold the investment until June 2017. The First Complainant states that no other meetings/correspondence took place with the Advisor until he instructed the Advisor to close the account on the 10th April 2017.

The Complainants state that they note that there was no comment on the public availability of the fund prices, so that the only information on the Fund arose out of a question posed at the meeting of 14/2/2017.

/Cont'd...

The Complainants state that they are disappointed that there was no reason offered as to the Fund's windup.

The Provider's submission of July 2018

The Complainants state that they "*agreed to increase their risk profile as that was a requirement for participating in the [Provider] Fund. This was done on the recommendation of [the Provider]*". The Provider's response is that this is misleading. The Provider states that it, in line with good and evolving industry practice, enhanced its method of assessing client risk attitude with the adoption of the Finametrics risk assessment model and questionnaire. The Provider states that the Complainants completed this form independently of the Provider and presumably answered each question honestly and fairly. The Provider submits that by this independent assessment the Complainants were deemed medium risk, a categorisation to which the Complainants agreed.

The Provider disputes that the Fund was a single strategy and single asset class. That there were many assets classes contained within the Fund including;

- Equities
- Cash
- Foreign Exchange
- Bonds
- Fixed Income
- Third party Funds

The Provider says that at any given time, it estimates that there were between eight hundred and a thousand individual securities contained within the Fund. The Provider states that the spread of investments was well documented in both the Prospectus and the marketing materials. The Provider states that the reduction in the value of certain securities within the Fund led to the fall in value of the Fund. The Provider submits that the diversified strategy employed by the Fund was well documented in both the Prospectus and the Key Investor Information Document (KIID).

The Provider states that with regard to the Prospectus, it unreservedly relies on its contents, and by the Complainants signed declaration to be bound by its terms. The Provider states that this is the constitutional document of the investment which provides the governance to the investment strategy and is relied upon by not only Investors but by the Auditors, Board of the Fund, the Depository and the Administrator to the Fund.

The Provider submits that the Prospectus was reviewed and approved by the Central Bank of Ireland. The Provider says that the Prospectus provides both obligations and protections for all parties to the Fund, including investors and service providers.

With regard to the Complainants claim that they did not have time to read the Fund documents, the Provider makes the following observations with respect to the Complainants signed declarations and Funds investment dates.

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Timeframes

Provider Fund

Initial Investment

Declarations signed on	15 July 2014
Investment made	24 November 2014

Supplementary Investment

Declarations signed on	19 May 2015
Investment Made	3 June 2015

K Fund

Initial Investment

Declarations signed on	8 March 2013
Investment made	22 March 2013

The Provider states that despite the fact that the Complainants claims that they did not have time to read the Fund documents, a claim which the Provider asserts is unsupported by the timelines outlined above, the Provider re-iterates its position that the Complainants agreed in writing to be bound by the terms of these documents, and on the dates referenced.

The Provider also references that the Complainants have previously quoted extracts from the Prospectus in submitting their complaint.

The Provider states that, as the Complainants unwound prior to the voluntary wind up of the Fund, no correspondence relating to the wind up of the Provider Fund was issued to them. The Provider says the below paragraph is extracted from the letter provided to shareholders of the Provider Fund, as notification of Termination.

The Provider states that the decision to terminate the Fund was made independently by the Board of Directors of the Fund. The Provider submits the following extract from a letter it says was provided to shareholders of the Fund, as notification of termination:

"The Board of Directors, after assessing on an aggregate basis the past performance of the Fund, the net outflows from the Fund, the slowing demand for the Fund, and having regard to the prevailing economic and market conditions and the best interests of the Shareholders, resolved that it is impractical or inadvisable to continue to operate the Fund".

The Complainants' submission of 30 July 2018—

As regards the time frame for investing, the Complainants say that the delay in making the investment was wholly due to Provider. The Complainants state that it had been agreed as to what existing shares were to be redeemed, which together with cash balances made up the total investment figure in both cases. The Complainants submit that it was the Provider which dictated when these events would happen.

The Complainants says that it was also the Provider who dictated the size of each investment.

Provider's submission 1 August 2018

The Provider states that it notes that the Complainant alleges that it was the Provider which dictated the timing of the investment in the Provider Fund post return of the signed declaration stating that it had read the prospectus. The Provider says whilst it disagrees with this allegation, it wishes to highlight that the Complainants have acknowledged: that they received the relevant prospectuses and have quoted from them in their complaint; they signed a declaration stating that they had read the prospectus. In response to an allegation that the Complainants had insufficient time to read the prospectus, the Provider outlined that it was some 4 months between the signed declaration being returned and the investment being made affording ample time for further consideration.

Investment Documentation

Declarations on Pages 6 & 7 from the Provider Fund Application Form:

"2. I/We hereby acknowledge that I/we have been offered the Prospectus and Memorandum and Articles of Association of the Company as may be amended from time to time and where applicable the most recent annual report or half-yearly report of the Company. Furthermore I/we hereby acknowledge that this application is made on the terms thereof and subject to the provision of the Prospectus and Memorandum and Articles of Association of the Company and I/we am/are bound by the terms of the Prospectus and Memorandum and Articles of Association of the Company.

3. I/We confirm that I/we have received and read the information contained in this form and confirm that a copy of the key investor information document ("KIID") has been supplied to me/us. I/We confirm that I/we have read the KIID and that any future investments can also be transacted based on this confirmation.

5. I/We have such knowledge and experience in business and financial matters that I/we am/are capable of evaluating the merits and risks of

/Cont'd...

an investment by me/us in the Shares and have considered the risk factors as set out in the Prospectus.

14. I/We agree to indemnify and hold harmless the Company, the Investment Manager, the Administrator, and their respective affiliates, directors, members, partners, shareholders, officers, employees and agents from and against any and all losses, liabilities, damages, penalties, costs, fees and expenses (including without limitation legal fees and disbursements) which may result, directly or indirectly, from any inaccuracy in or breach of any representation, warranty, covenant or agreement set forth in this section or in any document delivered by me/us to the Company and Administrator or any of them and shall notify the Company and Administrator immediately if any of the representations herein made are no longer accurate and complete in all respects."

Declarations from the K Fund Application Form:

"2. I/We hereby acknowledge that I/we have been offered the Prospectus and Memorandum and Articles of Association of the Company as may be amended from time to time and where applicable the most recent annual report or half-yearly report of the Company. Furthermore I/We hereby acknowledge that this application is made on the terms thereof and subject to the provision of the Prospectus and Memorandum and Articles of Association of the Company and I/we am/are bound by the terms of the Prospectus and Memorandum and Articles of Association of the Company.

3. I/We confirm that I/we have received and read the information contained in this form and confirm that a copy of the key investor information document ('KIID') has been supplied to me/us. I/We confirm that I/we have read the KIID and that any future investments can also be transacted based on this confirmation.

5. I/We have such knowledge and experience in business and financial matters that I/we am/are capable of evaluating the merits and risks of an investment by me/us in the Shares and have considered the risk factors as set out in the Prospectus.

14. I/We agree to indemnify and hold harmless the Company, the Investment Manager, the Administrator, and their respective affiliates, directors, members, partners, shareholders, officers, employees and agents from and against any and all losses, liabilities, damages, penalties, costs, fees and expenses (including without limitation legal fees and disbursements) which may result, directly or indirectly, from any inaccuracy in or breach of any representation, warranty, covenant or agreement set forth in this section or in any document delivered by me/us

/Cont'd...

to the Company or any of them and shall notify the Company immediately if any of the representations herein made are no longer accurate and complete in all respects."

The Complaints for Adjudication

The complaints for adjudication are that (i) the Fund was grossly mismanaged from January 2017 onwards and (ii) that the First Complainant was given incorrect information at the lunch meeting and vital information was concealed from him at that time.

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 **30 October 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 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 Provider proposed the Fund to the Complainants as a suitable investment opportunity on the basis that:

- The Complainants had completed a risk assessment analysis which deemed them medium risk investors and the Fund was objectively assessed as medium risk;
- The Complainants had invested in a similar fund which held the same risk categorisation;
- The Complainants had expressed disquiet at the low level of returns which their low risk investments were accruing.
- The Complainants were in a position financially to bear any related investment risks consistent with their investment objectives.

I accept that at the time the Complainants invested in the Fund they had clearly demonstrated a medium risk attitude and were experienced in investing in similar investment funds with similar risk profiles and underlying investment instruments.

At inception, the Complainants' Investment objectives were balanced income and investment growth. The Risk mandate was increased from low risk to medium risk in April 2014. In May 2015, the Complainants altered the Investment objective to investment growth, as the Complainants no longer had a requirement for income. The evidence shows that the Complainants continued to be satisfied with the medium risk mandate.

A risk presentation was provided to the Complainants on 5 August 2016. It is noted on page 3 of that presentation, that the Complainants were deemed to be a 4 on the ESMA volatility band, given their medium risk mandate. The Fund was also a risk level 4, and on this approved risk analysis the Fund had the correct risk for the Complainants.

Derivatives are mostly used in UCITS to gain an exposure to an underlying asset class, for efficient portfolio management, hedging, cost efficiency and ease of transaction.

The evidence shows that the Complainants had previous experience of the underlying asset classes and the use of derivatives for efficient portfolio management and hedging techniques.

As regards the appointment of the Advisor when the Provider ceased providing advisory services in August 2016, it is clear that the Complainants were given an opportunity to choose a provider of their choice. An extract from the Provider's communication at this time states:

"If you do not wish to open an account with [named advisor] but rather move to a different investment firm, please tick option 2 in the Appendix to this letter".

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As regards the Provider's use of derivatives a letter from the Board of Directors of the collective investment vehicle confirms that the Board considered the amendments to the Supplement of the Provider Fund dated 20 May 2016. The Board of the Fund, did not consider the amendments to be material as they did not significantly alter the asset type, credit quality, borrowing limits or risk profile of the Fund pursuant to Regulation 50 of the Central Bank UCITS Regulations 2015 (S.I. 420 of 2015) (as amended).

With regard to updates, the Provider's position is that it was no longer responsible for providing email updates to private clients as the Provider no longer had a direct relationship with them. The Provider says that any new provider would have been responsible for price updates on all investments held, including the Provider fund.

It is noted that at the time of the meeting on the 14 February 2017 the First Complainant was aware that the price of the Fund was at 92.08. By the end of February the Provider Fund price had declined to 90.05. The March report valued the Fund at 88.38. The Provider states that this would have been prepared for issue by mid-April, in which time; the Complainants had already decided to redeem their investment.

As regards whether the investment strategy of the Provider Fund changed, I accept that it did not change, and in the event that it would have, investor approval would have been required. I accept that this did not happen in this instance and I also accept that, the risk profile did not change.

I accept that the use of derivatives on the underlying strategy for efficient portfolio management and hedging purposes are not deemed to be a change in investment strategy by the Central Bank of Ireland.

The evidence shows that the Complainants signed a prospectus which outlined that derivatives may be used. The use of, and risk associated with derivatives, is set out in the Prospectus and the Complainant signed and acknowledged them. The Complainants refer to these risk disclosures in their letter of complaint.

The First Complainant refers to the Advisory Account Opening Document of 26 August 2016 and says he crossed out the section where it stated "*You would consider using Derivatives*", and also states that he answered "No" to the use of derivatives.

However, it is noted that the account opening document referred to is not that of the Provider. The Provider's position is that it is the Advisor's document and the Provider would not have been supplied with a copy of this document.

It is noted that the document was completed in August 2016 following the Complainants investment in both the Provider Fund and the Provider's K Fund both of which outlined the use of derivatives in their investment prospectuses.

I accept that when completing the application form for the Provider in 2010 the Complainants was asked did they have any investment restrictions, to which they replied "None".

The Complainants refer to a significant drop in the value of the investment reported in the April 2017 independent statement. The Provider was asked by this office whether this was the first time that there was a drop in the value of the investment.

The Provider's response was that the Provider Fund incurred losses on a number of occasions prior to April 2017. The Provider states that the Fund suffered losses during the period April 2015 to September 2015, when the Fund value dropped from a high of 106.07 to 96.28 on the 30 September 2015, a loss of 9.2%.

The Provider says that subsequently the Provider Fund recovered before falling again during the period November 2015 to February 2016 when the Fund moved from 102.31 to 93.37, a loss of 8.7%. Combined during the period April 2015 to February 2016, the fund reduced in value by 11.97%. During the month of August 2015 the Fund value dropped 5.63%.

In coming to my conclusion on this complaint I note the following:

- The Complainants agreed that they were medium risk investors at the time of investment in the Fund. The Fund at all times was categorised by external categorisation mechanisms, the ESMA, as a medium risk fund, level 4.
- The Fund Prospectus which the Complainants acknowledged they had read states:

"The Company on behalf of a Fund may employ techniques and instruments relating to transferable securities and/or other financial instruments in which it invests for efficient portfolio management purposes. Many of the risks attendant in utilising derivatives will be equally relevant when employing such efficient portfolio management techniques".

- The underlying asset classes of the Fund did not alter.
- The First Complainant alleges that post the 14 February 2017 meeting with the Provider and the Advisor he was concerned about the performance of the Fund. However, there is no evidence of the Complainants seeking updates from the Advisor, or the Provider, nor does he appear to have carried out any research to establish the performance of the Fund. I accept that any of these steps would have provided the NAV value of the Fund.
- I accept that the evidence shows that the Complainant was apprised of the Fund, its investment Strategy, and the Financial Tools that could be used by the Fund Manager in protecting that Strategy.
- I have not been provided with any evidence that the Fund traded outside the parameters provided for in relation to risk management as authorised by the Central Bank of Ireland.

- The evidence shows that the Complainants would have been familiar with the workings of the Fund and the use of derivatives by the Provider when investing, as they had invested in a similar Fund previously.

It must be noted that the Fund was not a guaranteed fund where returns would be guaranteed. Therefore, the Fund was not a “risk free” Fund and I accept that this was made clear in the documentation. Security of capital was not a feature of this Fund. I accept that the risks that could lead to possible losses on the investment were clearly spelt out in the documentation.

That said, it is noted that the Provider states that with regard to updates, the Provider was no longer responsible for providing e-mail updates to private clients as the Provider no longer had a direct relationship with them. The Provider says that any new provider would have been responsible for price updates on all investments held, including the Provider fund.

While this may be the position, I find no evidence of this being specifically communicated to the Complainant by the Provider.

Additionally, while I accept that the Provider had the latitude to introduce / invest in derivatives, I consider that it would have been helpful for the Complainant’s understanding on what was happening with his investments that this would have been communicated at the time of their introduction, or soon after such measures were taken by the Provider.

Having regard to all of the above, I partially uphold this complaint and direct the Provider to pay the compensatory payment of €8,000 (eight thousand euro) to the Complainants for the Provider’s failings identified above.

Conclusion

- My Decision pursuant to **Section 60(1)** of the **Financial Services and Pensions Ombudsman Act 2017**, is that this complaint is partially, 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 €8,000, 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.

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- 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.



GER DEERING
FINANCIAL SERVICES AND PENSIONS OMBUDSMAN

23 November 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

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