



<b><u>Decision Ref:</u></b>	2020-0425
<b><u>Sector:</u></b>	Investment
<b><u>Product / Service:</u></b>	Approved Minimum Retirement Fund AMRF
<b><u>Conduct(s) complained of:</u></b>	Mis-selling Fees & charges applied
<b><u>Outcome:</u></b>	Partially upheld

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

**Background**

The complaint relates to Investment Products and the Provider's advice relating to, and administration of the investment products.

The Complainants referred their complaint to this office in January 2017. Aspects of the complaint date back to more than six years before the complaint was made to this office, that is, the allegations of mis-selling of the property investments in 2006 and 2007, and allegations of misrepresentation in relation to the investment, at that time. These matters are therefore outside the jurisdictional time-frame for an examination by this office. The investigation has examined whether the Provider has breached its contractual agreement with the Complainants, in the later years of the investments. We also examined the conduct of the Provider in relation to the administration of the investments over the 6 year period prior to the complaint being made to this office.

The examinable complaint is that the Provider (i) incorrectly or unreasonably failed to invest the Complainants' monies in accordance with the Complainants risk profile and (ii) failed to administer the pension funds correctly or reasonably particularly in relation to the charging of fees.

In support of the position of the parties to alleged breach of investment agreements, the Provider and the Complainants include the background and supporting documents in relation to the Complainants entering these investments. These investments were subsequently held by the Complainants in their accounts with the Provider.

### **The Complainants' Case**

It is the Complainants' complaint that in mid 2006 their Bank introduced them to the Provider as the First Complainant was retiring from full time employment and required advice in respect of his pension. The First Complainant says that the Provider advised him to transfer all his funds which were held within a Defined Benefit Pension Scheme administered by an Insurance Company and place them in an Approved Retirement Fund (ARF) and subsequently an Approved Minimum Retirement Fund (AMRF) which the Provider would setup and manage. The First Complainant says that he was persuaded of the merits of this for estate management reasons and also that a 6% per annum compound growth was presented as reasonable to achieve. The First Complainant states that he emphasised and was assured that risk would be in the 'moderate' range with due acknowledgement of his age. In October 2006 the funds were transferred from the Insurance Company and an ARF was set up by the Provider.

The First Complainant states that he mentioned at the time that he had a share portfolio with a firm of Stockbrokers and that he was not keen to have multiple accounts with various brokers. The First Complainant states that he suggested that he transfer this account to the Provider subject to 'Execution only' status and there would be no fees charged. This he says was agreed and embedded in the arrangement going forward.

The First Complainant says that in the period since he was first introduced to the Provider several instances have arisen where he believes he has been unfairly treated, and his pension fund unnecessarily suffered a very significant decline in value. The First Complainant submits that the essence of the complaint is founded on whether he has been treated justly. The First Complainant states that the agreements are biased in the Provider's favour, but he believes are ambiguous in some areas and argues that due recognition of this is justified. The First Complainant states that embedded in these agreements and which the Provider signed was a clear recognition that his knowledge was limited and that his risk profile was moderate. The argument is that the Provider chose to ignore those vital elements.

In the complaint, the Complainants refer to three different accounts:

- Stock portfolio
- Approved Retirement Fund (ARF)
- Approved Minimum Retirement Fund (AMRF).

The specific complaints are as follows:

- Breach of agreement re Share portfolio transferred from the Stockbroker
- Asset Allocation and erosion of pension value
- Management Fees — Breach of Agreement
- Breach of agreement in respect of Advisory service.

**(A) Alleged Breach of agreement re Share portfolio transferred from the Stockbroker.**

The Complainants submit that the Provider has defaulted on an agreement in respect of fees charged on the Execution Only account. The Complainants state that this portfolio was transferred from the Stockbrokers to the Provider as part of the initial arrangement and it was agreed that no fees would be charged. The Complainants state that an Application Form for this was signed on 20<sup>th</sup> November 2006. The Complainants submit that there is another agreement on file designated an Advisory Non Managed Agreement which the Complainants state was signed by both of them on 25<sup>th</sup> September 2008. The First Complainant says that his memory of this was that he was asked to sign this as it was a Provider requirement. The First Complainant's position is that he was assured that no fees would be charged and that this was covered under Clause 3M 'unless otherwise agreed'. The Complainants state that in accordance with this agreement with the Provider representative executive Mr. C, no fees were charged since inception. The Complainants state that in mid 2016 the Complainants were notified that fees would be charged. The Complainants state that they were informed that an annual fee of approximately €7,000 per annum would be implemented despite the Provider's published rate card for 'Execution Only' accounts was €200 per annum. The Complainants immediately questioned this and say that they were subsequently advised that the annual charge would be in the region €7,000 per annum. The Complainants submit that they protested but could not get the Provider to accept that this account was execution only and attracted either zero fees or €200 per annum. The Complainants believe that the Provider is confused between Advisory Non Managed and Advisory Managed accounts. The Complainants point out that the Provider's Final Response Letter in the third paragraph refers to an Advisory account but does not specify whether they are referring to Managed or Non Managed, the fees for which are different. The Complainants' position is that because of frustration and feeling that they were not getting a fair hearing and concerned that substantial fees would accrue, they had no option but to move this account to another broker. The Complainants then transferred the account to another broker. The fees for this account are €180 per annum. The Complainants say that similar agreements for the ARF and AMRF were signed also in late 2008. The Complainants state that for almost 9 years no fees were charged by the Provider in accordance with the original 2006 'Execution Only' agreement.

The Complainants set out the following summary of points which they assert support their contention that the account was intended always to be 'Execution only' and that the Provider accepted this to be the case.

**B) Asset Allocation and erosion of Pension value**

In regard to this aspect of the complaint the Complainants state that on 31<sup>st</sup> October 2006 they were persuaded by the Provider to transfer €1,073,209 from the Insurance Company to the ARF account.

The First Complainant states that in a relatively short period he was advised to invest in several Provider promoted property investments.

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The Complainant states that the following investments were made and locked in by the Provider as follows:

- 14/12/06 – Investment A, €117,199 investment (fees €4,500)
- 21/12/06 - Investment B, €156,967 investment (fees €5,995)
- 15/3/07 – Investment C, investment (fees €5,791)

The Complainants state that all three of the above investments failed spectacularly. The First Complainant states that substantial losses were incurred on his Pension ARF due to the failure of these investments. The Complainants submit that the investments were high risk and also had an inappropriate weighting in respect of a single asset class. The First Complainant states he was persuaded against his instincts to accept these investments because he trusted the Provider and was paying substantial fees for its professional advice.

The First Complainant states that when opening the ARF with the Provider he was very clear that a moderate risk approach be taken in respect of all investments and that his investment knowledge was limited. The Complainant says that his investment objective was for assets to provide a mix of income and capital growth. The Complainant states that this after all, was his pension account and intended to provide him with adequate income to fund his retirement.

The Complainants state that within 5 months a total of €424,622 or almost 50% of the entire pension fund (less tax free lump sum) was invested in foreign currency high risk investments. The Complainants say that the Provider collected over €16,000 in up front fees, and an additional €33,000 has been charged in quarterly fees in the period from 2006 to September 2016 and it is quite possible that another €10,000 has been levied in respect of other commissions / charges.

The Complainants state that all of the above investments have now been written down to zero or almost zero value.

The Complainants state that some of the investments were transferred by the Provider before write down to the AMRF and the Complainants believe this was to satisfy funding rules. The Complainants state that although they are not clear on the legitimacy as they suspect it was known they would be written down in advance of the transfer. The Complainants submit that the result however is that the value of the AMRF is currently approximately €8,000 and the Provider continues to levy fees on this account despite the nominal value for which the Provider was responsible.

It is the Complainants' contention that these investments were not appropriate for a Pension plan. The Complainants say that the expectation was for a moderate strategy in

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keeping with initial guidelines as specified in the ARF agreement. The Complainants state that the magnitude of this erosion of value reflects not only on the poor quality of advice, but also the hasty and reckless approach with the pension fund, which was earned over a large part of the First Complainant's working life.

The Complainants state that the Provider has admitted that these were high risk speculative investments and as so the Complainants question why they were offered to them when it states quite clearly within the agreement that the First Complainant would accept moderate risk only and that his knowledge in respect of these instruments was limited. The Complainant states that also the allocation of substantial funds to one asset class, that is, property was not in keeping with prudent management, and he contends was irresponsible on the basis of the conservative approach required for an elderly person's pension. The Complainants feel there is a public interest dimension to this which should be investigated as it is unlikely he is the only pensioner affected. It is the First Complainant's position that had he been made aware that 50% of his funds were recommended to be invested in highly speculative, foreign currency denominated instruments he would definitely have declined.

The Complainant states that in this context he thinks the word 'advisory' as used in the agreement places the onus on the Provider for delivering appropriate advice according to individual circumstances. The Complainant says that if this is not the case then why bother to determine an individual's attitude to risk and investment knowledge as requested on page 10 of the agreement.

The First Complainant says he would be interested to learn if in-house asset allocation guidelines exist within the Provider and if so why they were not applied in his case.

### **(c) Management Fees — Alleged Breach of Agreement**

The Complainants submit that the fees for the ARF account have escalated hugely with no adequate explanation as to how they are calculated. The First Complainant gives the example that for the last two quarters for which he was charged fees (at the time of communication) are quarter ending June and September 2016. Management fees invoiced were €1,250 and €1,294 respectively, which the Complainants state are an approximate 192% increase on the average quarterly charge between 2011 and 2015 inclusive. The Complainants state that there has been no plausible explanation, despite repeated requests.

The Complainants submit that the Provider has suggested that it inadvertently undercharged fees from 2009. The Complainant considers that this is unlikely and that the agreement when the account was set up was that fees would be calculated excluding cash deposits and investment funds. The logic of this being that no management is required for these assets. The Complainants says that there are no management skills required for cash and the fees for investment funds are ongoing within the specific fund and also substantial entry fees have already been paid in advance. The First Complainant says that the

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Provider agreed with this reasoning when he was being encouraged to transfer the funds from the insurance company.

The First Complainant says that his suspicion is that the Provider has reviewed this agreement such that fees are now charged on the total value of the portfolio.

#### **(D) Alleged Breach of Agreement in respect Of Advisory Service**

The Complainants say that according to the ARF Agreement Section 1A, the Provider in return for fees is to provide investment advice. The Complainants' position is that the Provider has had no contact with him in respect of offering advice for several months. The First Complainant submits that he should not be paying fees for a service not provided. The First Complainant says that since June 2016 when this dispute arose with the Provider he has paid €2,544 and received no unsolicited advice. The First Complainant states that his pension fund is being left to stagnate whilst the Provider extracts monies with regularity.

The Complainants want the Provider to put things right, as follows:

##### **Share portfolio transferred from original stockbroker**

In this regard the Complainants state that it is not feasible to reverse what has happened but because of the unnecessary stress and anxiety to which they have been subjected, caused by the Provider and also now having to deal with multiple brokers which they wanted to avoid from the start, the Complainants require an admission of fault and an apology with suitable compensation.

##### **Asset Allocation and erosion of pension value**

The Complainants say that they think that this should be brought to the attention of the Board of the Provider as it is likely that the practice of ignoring an individual's risk profile is probably pervasive and may indicate a systemic problem in its approach toward pensioners such as the First Complainant. The Complainants submits that the public interest should be protected. The Complainants say that in their situation they could well have a case in law but obviously reluctant to pursue because of age and limited means. The Complainants consider that all fees should be refunded and the Provider should review the circumstances and make a suitable offer of compensation for the flawed and inappropriate advice which led to the catastrophic losses of the pension fund.

##### **Management Fees**

The Complainants seek the restoration of original fee agreement. They argue that this was honoured by the Provider from inception to March 2016. The Complainants consider that calculation details of fees should be included on the invoice in future.



Agreement in respect of Advisory service

In this regard the Complainants are seeking an apology and clear guidelines for how the advice which they pay for is to be delivered. The Complainants state that they are paying considerable fees for the facility and have had no contact in respect of advisory services on the pension for some time.

**The Provider's Case**

The Provider states that it notes from the Summary of Complaint, that the allegations of mis-selling of the investments or allegations of misrepresentation in relation to the investments, some of which date back to 2006, are outside the timeframes for an examination.

In support of its response relating to an alleged breach of agreement, the Provider includes the background and supporting documents in relation to the Complainants entering these investments. The Provider explains that these investments were subsequently held by the Complainants in their accounts with the Provider.

The Provider was asked by this office to fully explain how it complied with the requirements of giving advice over the years to the Complainants in relation to the investments and in doing so, show it had regard to the Complainants' stated knowledge and experience of investing and risk tolerance.

Details of the various accounts held by the Complainants

Number	Type	Set up date	Risk / Knowledge
*340A3	Advisory Account (Pre-retirement)	22/08/2006	-
***345	Execution Only non-pension	20/11/2006	N/A
***345	Advisory Non-Managed	05/09/2008	Moderate/Good
***0A1	Advisory Approved Retirement Fund ("ARF") / Approved Minimum Retirement	19/11/2008	Moderate/Limited

	Fund ("AMRF")		
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The Provider states that the Risk/Knowledge column in the above table indicates the selections made by the Complainants in the client agreement documents under the headings of Risk Profile and Investment Knowledge and Experience. The Provider says that as can be seen from the Table, Investment Knowledge and Experience was indicated as Good in September 2008 and Limited in November 2008.

The Provider submits that it is noteworthy that in the Complaint Form, the First Complainant has referred on 3 occasions to his limited investment knowledge yet makes no reference to his stipulated good investment knowledge. The Provider states that it is satisfied that the First Complainant's investment knowledge was good and it furnishes examples to illustrate such knowledge.

The Provider says that it is important to state that it did not make any decisions regarding the investment of the Complainants' assets. The Provider states that all investment decisions were made by the Complainants and it received specific instructions to enact such decisions. The Provider states that the Complainants accounts were operated strictly in accordance with the agreed advisory nature of such accounts and no discretion, whatsoever, was exercised on the Provider's part. The Provider refers to Clause 1A of the advisory agreements entered into by the Complainants which stated:

*"We will provide you with investment advice for use by you in the management of your account".*

The Provider states that typically it provided investment information to the First Complainant and he then reviewed such information, carried out his own investment analysis made investment decisions and instructed, the Provider to carry out his decisions.

The Provider submitted copies of communications which it states shows the Complainant's good investment knowledge.

The Provider states that the First Complainant has complained specifically about the property related investments that he purchased in late 2006 and early 2007. The Provider says that these were high risk property related investments. The Provider refers to Clause 1A of the client agreement which states:

*"We may also provide other services if agreed with you".*

The Provider says that this enables it to provide services outside of the account mandate if agreed with the client. The Provider submits that it received clear written instructions from the First Complainant to enter into the property related transactions, and as was the case with other investment instruments, it provided

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information for the Complainant's consideration and the Complainant made decisions of his own volition.

#### Syndicated property related investment in the UK

The Provider states that in November 2006 an opportunity arose to invest in a syndicated property related investment in the UK and the documentation on this project was sent to the First Complainant. The Provider states that the Complainants received an Application Form, Private Placement Agreement and a detailed Information Memorandum, which outlined all aspects of the investment, including the risk profile and the risk factors associated with it. On 27 November 2006 the First Complainant signed all of the relevant documentation and the Provider says that in doing so, acknowledged that he was aware of the high-risk nature of the investment, the potential loss of some or all of his capital and that he was prepared to accept the risks involved. The Provider submits that the Complainant was free to reject the investment at any time prior to signing such documentation. The Provider states that the First Complainant instructed the Provider in writing to make an investment of STG€75,000 in the project.

The Provider states that the Private Placement Agreement contained the following explicit risk warnings which featured in the first paragraph of the document: .

*"- THIS IS A HIGH-RISK INVESTMENT (displayed in block capitals)*

- *Prospective investors should be able to withstand a total loss of their investment*
- *Investment in...an unlisted property investment company is speculative".*

The Provider states that the Information Memorandum outlined the various risk factors in more detail. It stated at Part 8 Risk Factors that "Investment in the commercial property market in the UK is speculative and involves a high degree of financial, commercial and other risk". Further detail was provided on market risk, planning risk, financial risk, liquidity risk etc.

#### Syndicated property related investment in Northern Ireland

The Provider states that in December 2006 an opportunity arose to invest in a syndicated property related investment in Northern Ireland and the documentation on this project was sent to the First Complainant. The Complainant is said by the Provider to have received an Application Form, Private Placement Agreement and-a detailed Information Memorandum which outlined all aspects of the investment, including the risk profile and the risk factors associated with it.

The Provider says that on 18 December 2006 the First Complainant signed all of the relevant documentation and in so doing acknowledged that he was

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aware of the high-risk nature of the investment, the potential loss of some or all of his capital and that he was prepared to accept the risks involved. The Provider states that the Complainant was free to reject the investment at any time prior to signing such documentation. The Provider submits that the First Complainant instructed it in writing to make an investment of STG€100,320 in the project.

The Provider says that the Private Placement Agreement contained the following explicit risk warnings which featured in the first paragraph of the document:

- “- THIS IS A HIGH-RISK INVESTMENT (displayed in block capitals)*
- *An investment in a Private Placement is a highly volatile investment, which may be subject to sudden and large falls in value.*
  - *An investment in Private Placements is only suitable for those persons who are able to bear the financial risk of holding the investment for an indefinite period of time and able to withstand a total loss of their investment”.*

The Provider states that the Information Memorandum outlined the various risk factors in more detail. It stated at Part 8 Risk Factors that:

*“An investment in the Units involves a high degree of risk... the following risk factors should be considered carefully before participating in the investment”.*

The Provider states that further detail was provided on planning risk, development risk, liquidity risk, bank funding, no early exit mechanism etc.

Second syndicated property related investment in Northern Ireland:

The Provider states that in March 2007 a further opportunity arose to invest in a syndicated property related investment in Northern Ireland and the documentation on this project was sent to the First Complainant. He is said by the Provider to have received an Application Form, Private Placement Agreement and a detailed Information Memorandum which outlined all aspects of the investment, including the risk profile and the risk factors associated with it. The Provider states that on 3 March 2007 the First Complainant signed all of the relevant documentation and in so doing acknowledged that he was aware of the high-risk nature of the investment, the potential loss of some or all of his capital and that he was prepared to accept the risks involved. The Provider states that the Complainant was free to reject the investment at any time prior to signing such documentation. The Provider states that the First Complainant instructed the Provider in writing to make an investment of STG€100,00 in the project.

The Provider states that the Private Placement Agreement contained the following risk warnings which featured in the first paragraph of the document:

*“- THIS IS A HIGH-RISK INVESTMENT (displayed in block capitals)*

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- *An investment in a Private Placement is a highly volatile investment, which may be subject to sudden and large falls in value.*
- *An investment in Private Placements is only suitable for those persons who are able to bear the financial risk of holding the investment for an indefinite period of time and able to withstand a total loss of their investment”.*

The Provider states that the Information Memorandum outlined the various risk factors in more detail. It stated at Part 8 Risk Factors that:

*“An investment in the Units involves a high degree of risk...the following risk factors should be considered carefully before participating in the investment”*

The Provider states that further detail was provided on planning risk, liquidity risk, no early exit mechanism, investment risk etc.

In the document entitled Details of Complaint attached to the Complaint Form, the First Complainant states:

*“Had I been made aware that 50% of my funds were recommended to be invested in highly speculative, foreign currency denominated instruments I would definitely have declined”.*

With regard to this statement the Provider states that it gives the impression that investments were made without the Complainant's knowledge. The Provider submits that the Provider had no discretion to enter into investments without specific instructions from the Complainants. The Provider says that the First Complainant provided it with written instructions for each property related transaction and the amount to be invested.

The Provider states that it is also worthy of note that subsequent to the above 3 property transactions which are the subject of the Complainants' complaint, the Provider received a further instruction from the First Complainant to make an investment of €150,000 in another Property Fund. The Provider refers to an email from the First Complainant of 26 April 2007 as demonstrating the Complainant's desire to invest in this high-risk property related investment, that is:

*“If possible I would like to participate in the ... investment”.*

The Provider states that in June 2007 the First Complainant signed all of the relevant documentation for this project and in so doing acknowledged that he was aware of the high-risk nature of the investment, the potential loss of some or all of his capital and that he was prepared to accept the risks involved. The Provider submits that at this time the First Complainant would have been fully aware that he had already made 3 significant high-risk property investments in his pension account.

The Provider was asked by this office about the Provider not charging a fee for some time on the Advisory Account, and whether the Provider accepts that the Complainants may have had an expectation that this position would have continued, when not charged for an extended period, or not told anything to the contrary about the payment of fees for some time.

The Provider's response is that it does not accept that it was reasonable for the Complainants to expect to pay no fees on their advisory account for an indefinite period. The Provider says that on the contrary it is the Provider's view that it would have been more likely to anticipate that fees would have to be paid at some stage. The Provider states that no business can be expected to provide a service to a client on an indefinite nil fee basis. The Provider notes that the service provided to the Complainants included hosting their account on the Provider system, providing investment advice, processing dividends, implementing corporate actions, making/receiving payments, providing statements of holdings etc.

The Provider was asked by this office whether the Provider communicates any information to the Complainants about why it would not be charging / was not charging a fee on this account, from the outset or over the years.

The Provider's response was that when the Complainants opened their Execution Only account in 2006, it was not uncommon at that time for investment firms to only charge dealing commission on Execution Only accounts. The Provider says that the position changed in subsequent years as the cost burden on firms increased. The Provider states that when the Complainants changed their account from Execution Only to Advisory in 2008 the nil fee arrangement was continued as a gesture of goodwill.

This office asked the Provider whether the Provider ever communicate to the Complainants that its stance in not charging a fee could change.

The Provider's response was that the Complainants entered into an Advisory Non-Managed Account Agreement with the Provider in 2008. The Provider refers to Clause 3M of the agreement signed by the Complainants which states:

*"Charges will change from time to time and we will notify you in advance of any such change".*

The Provider states that it is important to note that this clause stated that charges will change rather than could change. The Provider says that the Complainants were informed that the charge on their account would change in the future.

As regards the Provider's reference to Clause 3.M which states that charges would change from time to time the Provider was asked by this office whether the Provider accepts that as there was no charging of a fee at all by the Provider for some time, that the reference in

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this clause to a charge..., change does not apply in this instance, in that there had to be a charge in place before it could be changed.

The Provider's response was that it does not see any basis for this line of argument, in that the fee was 'nil' at the outset and Clause 3.M provided that it would change in the future. The Provider says that furthermore, the charges on an account comprise a number of elements, that is, fees, commissions, custody charges etc. The Provider's position is that such elements are collectively referred to as "charges" in Clause 3.M and as stated in the clause such charges will change from time to time.

The Provider was asked by this office what information was communicated to the Complainant about the application of fees, from the outset and throughout the duration of the investments.

The Provider's response was that the position in respect of fees agreed with the Complainants for their various accounts is as follows:

"At the outset fees were set out in the various client agreements signed by the Complainants.

- ....345 — nil fees.
- ....0A3 — 1% fee as per client agreement; reduced fee of 0.875% charged.
- ....1A2 - 0.5% fee up to Q1 2016 and 1.25% from Q2 2016.
- ...0A1 - no fees 2013 - 2015, fees commenced in Q2 2016 at 1.25%"

The Provider states that the Complainants appear to be of the view that ARF fees are paid solely to cover investment advice. The Provider says that this is not the case. The Provider submits that in order to offer ARF services an investment firm must become a Qualifying Fund Manager. The Provider says that there are both costs and responsibilities associated with this status. The Provider's position is that it provides ARF clients with a range of services including making returns to the Revenue Commissioners, operating ARF cash drawdowns, payment of clients PAYE, managing dividends and corporate action etc.

The Provider states that its systems do not currently provide the facility whereby the fee invoice includes the portfolio valuation used to calculate the management fee. The Provider says the Provider's systems do not allow for such a facility and that the Provider bases its fees on a specific portfolio valuation. In this regard the Provider was asked by this office what would prevent such a figure being communicated on the fee invoice and whether the Provider accepts that having all this information included in the one document, as opposed to having to obtain the information elsewhere (as suggested by the Provider) would be the preferable position.

The Provider's response to the above is its fee invoices are generated by a servicing third party as part of the full range of back office services that they provide to the Provider. The Provider states that the third party servicing company are part of a global financial services

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group, that provides a range of services to investment firms. The Provider accepts that it may be preferable for management fee invoices, generated by the third party to include the relevant portfolio valuation figure. The Provider submits that at all times it can provide any further details to its clients in relation to the fee invoice.

The Complainant's portfolio was transferred on an Execution Only basis, but was later designated as "Advisory Non-Managed" account. In this regard this office asked the Provider what led to this change and whether the Complainants were alerted, at any time over the years as to the purpose of the change and consequences of this change.

The Provider's response was that in late 2006 the First Complainant transferred his pre-retirement pension to the Provider. The Provider states that at that time the First Complainant mentioned that he had a personal, non-pension, account with another stockbroking firm. The Provider states that the Complainant wished to also transfer this account to the Provider and he applied to open an Execution Only account with the Provider in November 2006. The Provider states that while this account was opened in late 2006 it lay dormant for approximately 2 years with no assets transferred into the account and no trading activity taking place.

The Provider states that in late 2008 the First Complainant transferred a portfolio of assets into this account from another investment firm. The Provider's position is that having applied for an Execution Only account and having taken the decision to transfer his portfolio into this account, the First Complainant was clearly of the view that he had sufficient investment knowledge and experience to manage this portfolio himself without any advice or assistance from the Provider. The Provider states that the assets transferred by the First Complainant represented a substantial portfolio valued at approximately €330,000 and comprised of in excess of 20 individual holdings of Irish and international shares and investment funds. The Provider states that at that time it formed the view that despite the Complainant's good investment knowledge, it would be prudent for him to accept some advice from the Provider in his management of the portfolio. The Provider submits that accordingly it suggested to the Complainant that he consider making an application to change the status of his account from Execution Only to Advisory Non-Managed. The Provider states that in September 2008, the Complainants applied for and entered into an Advisory Non-Managed agreement with the Provider. The Provider's position is that in completing this application the Complainants stipulated their investment knowledge as Good.

The Complainant states that the Provider has accepted that the investments were high risk speculative investments. In this regard the Provider was asked by this office if the Provider was satisfied that it invested the Complainant's monies in accordance with the risk approach communicated by the Complainant (moderate strategy), or assessed by the Provider from the outset. The Provider was also asked to show how it invested, and if it altered the risk approach communicated by the Complainant when investing, to show why it invested in that way.

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In its response the Provider refers to its previous observations and states that it is important to note that it did not make any decisions regarding the investment of the Complainants' assets. The Provider's position is that all investment decisions were made by the Complainants and the Provider received specific instructions to enact such decisions. The Provider states that the Complainants' accounts were operated strictly in accordance with the agreed advisory nature of such accounts and no discretion was exercised on the Provider's part.

The Provider was asked by this office where there was any variation or change in risk allocation of assets being invested in by the Provider, was the Complainant advised/notified of such changes and the reason for the charges. The Provider was asked by this office whether it was clearly explained by the Provider over the years the nature of the risk attaching to the investments. The Provider was asked by this office to refer to instances and where such (written) explanations were given. And where there was no explanation given the Provider was to set out why there was no such advice/explanation given.

The Provider's response was that the risks associated with the various investments were set out in writing to the Complainants and that details in this respect were contained within its previous responses.

The Complainant stated that some of the investments were transferred by the Provider before write down to the AMRF and that the First Complainant believes this was to satisfy funding rules. In this regard the Provider was asked whether this was the situation and to give a reason for this.

The Provider's response is that in early 2009 the First Complainant retired and converted his pre-retirement account into a post retirement account, ARF/AMRF. The Provider states that at that time there were a number of regulatory requirements for individuals wishing to set up an ARF/AMRF. One such requirement was that the First Complainant was required to retain assets valued at €63,487 or more in his AMRF. The Provider states that the First Complainant transferred two of his property holdings from his pre-retirement account into his AMRF in order to satisfy this requirement. The Provider says that this was a prudent decision as assets in an AMRF are required to be held for the long term. The Provider states that property assets transferred by the First Complainant were long term investments which were suitable for holding in an AMRF. The Complainant retained his liquid assets in his ARF and they could be traded and encashed as required.

The Provider was asked from what time the pension began to show a loss from what was originally invested.

The Provider's response is that the First Complainant transferred funds into his pre-retirement account, ...0A3, in November 2006. The Provider submits that unfortunately,

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with the benefit of hindsight, the Complainant's timing in opening this account was not opportune as the global financial crisis got underway in late 2007. The Provider says that this crisis proved to be a major shock to all asset classes and was not anticipated by most of the world's leading investment firms.

The Provider states that in the months following its opening, the Complainant's account experienced normal volatility due to movements in stockmarkets and currencies. The Provider however, says that by the end of 2007, as the global credit crisis started to impact equity and property assets, the Complainant's account was clearly loss making.

The Provider was asked by this office to what extent was the Provider willing to provide the remedies sought by the Complainant.

The Provider response is that in relation to the Share portfolio transferred from the existing stockbroker — the Provider sees no basis for awarding any compensation under this heading. The Provider states that the Complainants enjoyed the benefits of a nil fee charging structure for many years. The Provider says that when it proposed to increase the fee the Complainants decided to move their account to another investment firm as was their prerogative.

As regards the Asset Allocation and erosion of pension value — the Provider states that the property and equity assets in the Complainant's pension account were severely impacted by the global financial crisis. The Provider states that in respect of the property investments, the First Complainant received Application Forms, Private Placement Agreements and detailed Information Memorandums which outlined all aspects of the investments, including the risk profile and the associated risk factors. The Provider submits that the First Complainant signed all of the relevant documentation and in so doing instructed the Provider to purchase the investments, acknowledged that he was aware of the high risk nature of the investments, the potential loss of some or all of his capital and that he was prepared to accept the risks involved. The Provider says that the Complainants were free to reject the investments at any time prior to signing such documentation and against that background the Provider sees no basis for any award of compensation.

As regards the Management Fees — the Provider states that the First Complainant's pension accounts benefitted from management fees that were actually lower than those set out in writing in the client agreements. The Provider says that this situation continued for a number of years. The Provider says that Fees were increased in 2016, as provided for in the client agreements, after a lengthy period of notice and discussion. The Provider accordingly, states that it sees no basis for a reduction in the level of its fees.

As regards its Advisory service — the Provider states that it provides ARF clients with a range of services in addition to investment advice, including making returns to the Revenue Commissioners, operating ARF cash drawdowns, payment of clients PAYE,

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managing dividends and corporate action etc. The Provider states that First Complainant can contact the Provider at any time to obtain advice in assisting him in the management of his ARF portfolio..

#### Further submissions from the parties

5 November 2018 - The Complainants' further submission

#### Argument regarding level of investment knowledge

The First Complainant states that the Provider refers to several examples of his investment knowledge as being 'Good' and not 'Limited' and his approach towards risk. The First Complainant submits that he always intended that investment of his pension fund would be of 'Moderate' risk. The Complainant states as a retiree he deemed this to be a prudent approach and the Provider was told this at the outset of the relationship.

The First Complainant states that where he has indicated his investment knowledge to be 'Good', this was based on, dealing with stockbrokers over several years and what he gleaned from newspapers and magazines. The First Complainant states that it did not extend to being able to understand the complexities of the investments presented. The First Complainant says that he was relying on the Provider to bring the assessment and scrutiny of suitable pension investments to a higher level which was outside of his sphere of knowledge.

The First Complainant's position is that 'Good' is a subjective term and his level of knowledge whether good, limited or moderate was not adequate to make decisions on the complex investments presented to him by the Provider.

The First Complainant submits that the Provider cites several examples of emails illustrating his 'Good' investment knowledge. The Complainant says that what is important in this is the context that most if not all these emails were in response to information supplied by the Provider following client presentations or his meetings with the portfolio managers. The Complainant states that the Provider suggest that his use of jargon is indicative of his knowledge of complex financial instruments. The Complainant submits that it was merely a repetition of descriptions / knowledge/ information used by the Provider at these meetings / presentations. The First Complainant states that much emphasis is placed on whether his knowledge and experience was good. The Complainants state that as 'Good' is a subjective term and should properly have been defined if it was to be relied on contractually.

The First Complainant position is that his stated desire of 'Moderate' risk was far more important and he was not in a position to assess any individual investment as representing a moderate risk or otherwise. The Complainant states that he was totally reliant on the Provider for the Provider's professional guidance on this aspect.

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The Complainant submits that in relation to the specific investments referenced by the Provider, the prospectus for each consisted of several pages of highly detailed technical, financial and other complex information, which was clearly outside the scope of a layman's knowledge or expertise. The First Complainant states that he trusted his advisors that these were appropriate and fitted his profile of 'Moderate Risk'.

The First Complainant mentions that his recollection is that none of the documentation would qualify as 'Plain English', be it an industry or statutory requirement.

The First Complainant states that in all of his conversations with the Provider regarding these instruments prior to investment he was never told that they were high risk, but he would have assumed that the Provider acted in accordance with the mandate. The Complainant submits that the Provider now acknowledge that they were high risk and rely on clause 1(A) of the agreement to elude to their responsibilities. The Complainant questions whether the provision of this clause override the mandate and his expressed wish for a moderate risk approach.

The Complainant state that the Provider was always positive in relation to the suitability of the investments, notwithstanding the fact that the Provider now acknowledge them to be high risk.

The Complainants states that the objectives outlined in the Investment Proposal dated 20<sup>th</sup> August 2006 (Page 6), clearly indicates that a medium risk tolerance level was discussed and agreed. The Complainant states that he trusted the Provider to implement that agreed strategy. The Complainant state that it is usual for there to be trust between a professional advisor and client, generally because of complexities in various contracts. The professional advisor is paid fees in return for advice and guidance and the client trusts the advisor to provide that leadership. The Complainant states that the layman does not have the expertise or the time to gain that expertise this is why fees are paid. The Complainant states that the Provider earned substantial fees by introducing and influencing him to purchase the investments recommended.

The Complainant says that the Provider states that it did not make any decisions regarding the investment of his pension assets, but the Provider did play a substantial role in the persuasion / influencing of those decisions which he made following consultation. It is the Complainant's position that these decisions were not taken in isolation and would not have been entertained without the advice of the Provider. The Complainant states that these investment opportunities were introduced to him by the Provider and were specific, that is, not as part of a selection from which he would choose. The Complainant states that this influence was enhanced by the trust that he placed in the Provider based on the Provider's status and reputation.

The Complainant submits that the Provider never alluded in prior conversations that the investments were high risk. The Complainant says that this only became a factor when the paperwork was presented for signature.

/Cont'd...

The Complainant states that the Investments were brought to him and presented as suitable. The Complainant says that he presumes that there were other opportunities available for investment, but that these were not presented for reasons associated with risk, that is, not compatible with his profile.

As regards what the Provider stated that it did not have any discretion, the Complainant says that this is not true as they did have discretion in the type of investment that was brought to his attention. The Complainant says that he presumes that those investments that were not brought to him did not meet his moderate risk requirement.

As regards fees, the Complainant states that his understanding was that the Provider was keen for him to transfer the portfolio from his stockbroker and that the fees would be covered in the ARF charges. The Complainant says that the Provider's income would be enhanced through commissions etc on share sales /purchase. The Complainant submits that the Provider established the course of trading in the relationship and to impute an expectation that fees may be introduced is misleading.

As regards communication on the fees, and reason / duration for non payment, the Complainant states that the Provider has not responded to the specific information required. The Complainant states that adequate notice should have been given and a phasing in of fees agreed which did not take place.

As regards a communication from the Provider as to likelihood of fees being charged, it is the Complainant's position that this agreement was presented to him as a new administration requirement and his attention was not drawn to the fine print. The Complainant submits that it is noteworthy that when the various agreements were signed there was no reference to which account the Provider referred. The Complainant says that a reference number was added in by hand by the Provider at a later stage. The Complainant says that in one instance handwritten details are redacted which illustrates the lack of formality and attention to detail by the Provider.

The Complainant refers to the Provider's comment that it can furnish the information if requested, and he asks why then does the Provider not do this as a matter of course. The Complainant's view is that the fact the Provider does not provide the information seems a restrictive practice. The Complainant states that the calculation should be clear on the demand invoice and this practice lacks the transparency that should exist in the client/advisor relationship.

As regards the re-classification of the account from "Execution Only" basis to "Advisory Non Managed" the First Complainant states that the Provider informed him (he is not sure that the co signatory was informed) that there was a need to sign the new form for administrative reasons. The First Complainant states that the Provider pushed this as useful to have a consolidated strategy on the total account. The Complainant states that the Provider implies that the co signatory and himself had sufficient knowledge. The Complainant says that he would like to know how the Provider reached this conclusion.

/Cont'd...



The First Complainant also states that the Provider never met the co-signatory, so that view could not have been established in her case.

As regards the risk approach the Complainant states that at all times the Provider led him to believe that it was an advisor to be trusted and that the Provider would safeguard his pension through implementation of the agreed approach based on the moderate risk strategy. The Complainant states that he acted and made decisions based on the advice received. The Complainant states that if the Provider had not promoted the products he would not have invested. The Complainant states that the complexities of the instruments were such that only a very experienced professional could understand them and assess the risk. The Complainant states that the purpose in dealing with the Provider was to have expertise and guidance in executing in accordance with the agreed mandate.

As regards any communication from the Provider of a change in risk classification, the Complainant states that in the first instance the information on the investments was generally initiated in the form of a phone call stating that this was a good or suitable investment. The Complainant states that when his interest based on the Provider's demonstrated influence and expertise, had been established, the written detail followed in the form of the prospectus. The Complainant submits that this was complex, legalistic and not for the lay person and he would invariably rely on verbal assurances in follow up discussions prior to signing the document.

As regards the Complainant's understanding of the reason for transferring the fund to the AMRF, the Complainant says that the purpose of the AMRF is a statutory safety net to ensure an income in later years. The Complainant says that it seems to him that the Provider's industry knowledge would have indicated that these investments were likely to fail. The Complainant says that if the time elapsed between transfer of the assets and the write down of the investment was examined it would be seen to be of relatively short duration. The Complainant states that if it was anticipated that the two investments referred to (both property based investments) were to be written down to zero then the action of transferring them to the AMRF clearly is at variance to the principles of the AMRF and is of dubious practice.

As regards when the investments started to show a loss, the Complainant states that the Provider was aware that the investments were speculative / high risk and thus unable to withstand any future financial shock. The Complainant submits that the financial crisis which the Provider blame for the obliteration of the investments is indicative that the products were unsuited to a retirement account and also that the asset allocation was deeply flawed.

#### The Provider's submission of 7 November 2018

The Provider states that it remains satisfied that the First Complainant has "Good" investment knowledge. The Provider states that comments from the Complainant such as "...P/E's relative to the sectors as they seem very undemanding" tend to be made by sophisticated investors. The Provider says that good investment knowledge is necessary in order to understand investment research material such as that requested by the First

/Cont'd...



Complainant regarding Glaxo Smithkline. The Provider refers to the First Complainant's statement that he wished to "increase holding in Alternatives" as also indicating a level of investment sophistication (emails of 25/07/2013, 03/06/2015 and 28/08/2015).

The Provider states that it was abundantly clear from the property investment documents provided to the First Complainant that the investments were high risk. The Provider says that the First Complainant made the decisions himself to invest in such projects.

The Provider says that it should be noted that moderate risk portfolios can combine low risk, medium risk and high risk assets. The Provider states that the First Complainant was responsible for devising a strategy for his overall portfolio and he was entitled to choose high risk investments for inclusion within his portfolio.

The Provider states that the First Complainant has not provided specific details in respect of his reference to "handwritten amendments/additions on it which are illegible".

As regards the Complainant's statement that: "*I trusted [the Provider] to implement that agreed strategy*", the Provider says that it is important to restate that the First Complainant's initial interaction with the Provider took the form of a request to open an Execution Only account where he had sole control and responsibility for all investment decisions without any advice from the Provider. The Provider states that it now seems that the First Complainant is seeking to be provided with some of the features of a Discretionary Account whereby the Provider would be responsible for implementing an investment strategy agreed with a client. The Provider states however that in the case of Execution Only and Advisory accounts it has no such authority or responsibility

The Provider states that the First Complainant mentions that there was time pressure surrounding the various property investments that he made. The Provider submits that at the time of these investments there was significant demand from investors for syndicated property investments and such transactions tended to become oversubscribed in a very short time period and waiting lists were in operation. The Provider says that the time pressure experienced by potential investors arose due to market forces pertaining at that time.

The Provider states that the First Complainant has suggested that "adequate notice" was not provided in respect of increasing fees. The Provider states that in its response to the complaint it set out in chronological order the various communications with the First Complainant regarding fees.

The Provider states that the composition of the First Complainant's AMRF was both prudent and legitimate while also providing the First Complainant with flexibility in dealing with his pension assets. The Provider says that the First Complainant has restated his misunderstanding that asset allocation was its responsibility. The Provider states that due to the advisory and non-discretionary nature of the First Complainant's account, he was fully responsible for all asset allocation and individual investment decisions in respect of his pension portfolio.

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## Evidence

Correspondence which the Provider states indicates the Complainant's investment knowledge:

26/04/2007 – the Complainant to the Provider

*"We spoke briefly about commodity funds on Tuesday night. I have read that the following give exposure to a broad range of commodities but may have a high exposure to energy. Perhaps you know some of these or have info on file?"*

02/05/2007 – Complainant to the Provider

*"I like the Lyxor ETF Commodities CRB non-energy. The CRB index has a good history of returns although the risk is in the currency. The funds value is calculated in € but the index replicated by the fund is in USD. I think this might be a good punt with 50k and add to it in say 6 months".*

05/11/2012 – Complainant to the Provider

*"Following the recent excellent presentation I have been looking at investing some of the cash deposits on my account.*

*..*

*€10k Irish Commercial property IPUT€20k BH Macro (Euro) ex Euro deposit a/c (does this pay a dividend?)*

*Also thinking of liquidating Axa or Aviva"*

25/07/2013 – Complainant to the Provider

*"I like the FIAT and Wolseley ideas. How are the P/Es relative to the sectors as they seem very undemanding?"*

30/03/2014 – the Complainant to the Provider setting out a number of purchases

*"€30k - ... purchase with portfolio cash*

*€30k - .. purchase with portfolio cash*

*€30k Sell ...300APD shares to fund*

*€25k - ... Sell UK stocks from ... to fund*

*"Reject - Asia only"*

*"Consider – High initial investment €50k*

/Cont'd...

40k - .. Purchase with new cash”

20/10/2014 – The Complainant to the Provider

*“Thank you for sending me the .. Q4 Investment Outlook Brochure. I note that there are two Fixed Income Funds recommended. ... Appreciate if you could send factsheets.”*

27/01/2015 – Provider’s Mandatory meeting note

*“In depth discussion and did let [the Complainant] know that the fees would be increasing from April. [The Complainant] was not happy and expressed his displeasure reviewing the historic problems and huge losses and in his view mis-selling .. [The Complainant] would consider this if the fees were to increase”*

09/02/2015 – The Complainant to the Provider

*“Many thanks for the phone call this afternoon. I understand completely about your point about CRH, but I will hold fast for the moment. I really need to develop a strategy for the whole portfolio asap”.*

03/06/2015 – The Complainant to the Provider

*“I was thinking of purchasing some Glaxo stock, seems beaten down at the moment but good div yield. Div cover not great but generates good cash, also has strategy to cut debt and restructure balance sheet. Also my portfolio is a bit light on Pharma. Do [the Provider] analysts have any research material?”*

05/06/2015 – The Complainant to the Provider

*“Just looking at my ... portfolio. I am considering selling the Edinburgh Dragon Trust and the JP Morgan Chinese which are both low yielders. This should generate approx. €30k stg as well as some profit. Then use the proceeds to purchase ...”*

28/08/2015” – the Complainant to the Provider

*“I would like to arrange a short meeting to review portfolio, with a view to generating some profit in advance of the budget in October. Also I would like to increase holding in Alternatives”.*

#### Correspondence relating to Fees increase proposal

11/11/2015 – Mandatory Meeting Note

The First Complainant expressed concerns about significant fund losses experienced with his ARF as a result of what he considered poor investment advice. The First Complainant’s

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position was that an agreement was made on the transfer of his assets from initial stockbroker regarding fees.

30/11//2015 – The Provider advise of a change to its charges from 1 January 2016.

05/12/2015 – The Provider responds to the Complainant's communication of same date advising that the letter he received was a generic communication sent to all clients and that a specific fee proposal would sent to him.

11/12/2015 – the Provider to the Complainant – Fee proposal

*"Our proposal is to reduce the fee under three different categories firstly the poor investment advice historically, secondly the length of time as a client of [the Provider] and lastly a further reduction to the fee if additional funds are added to the portfolios.*

*Poor performance 0.45%*

*Longevity 0.20%*

*Conditional on additional funds 0.10%"*

30/05/2015 – The Provider to the Complainant

*"[W]e waived the increase for you Q1 2016 fee as you were moving your account to another provider. As this has not happened we will institute the new pricing on your AMRF & ARF from Q2 on".*

The Provider's Approved Retirement Fund And Approved Minimum Retirement Fund – Advisory Portfolio document dated 27/11/2008 – (as submitted by the Complainant and the Provider).

*"1.B*

*Limits and Restrictions*

*It should be clearly understood that under the terms of this agreement we do not have the authority to enter into transactions on your behalf without first taking instructions from you. Whilst we may contact you from time to time in relation to the holdings on your account, it is your responsibility to monitor the price movements of the securities which you hold. We make no commitment to advise you of price movements, views or research items which impact the securities held in your account.*

*In instances where you instruct us to transact for you on an execution only basis wherein you elect not to follow our advice or we do not provide you with advice on the merits of the transaction, we shall not take any responsibility for such investment decisions. You should note that this execution only service is different from the advisory service that we provide in a number of fundamental ways. If you elect to transact on an execution only basis, you will be treated as an execution only client for this purpose, which will mean that you, and not [the Provider] will be responsible for ensuring that all such investment decisions undertaken by you meet*

/Cont'd...

*you investment objective, financial position and attitude to risk. [The Provider] will act solely in accordance with the instruction provided by you and will take no responsibility for assessing, on your behalf, the merits of such an investment. It will remain your responsibility to monitor the price movements of such securities. We make no commitment to advise you of price movements, news or research items which impact such securities. Holding unsuitable investment instruments may expose you to greater risk and/or losses than are acceptable to you. In providing this service we are not required to assess whether the investment decisions that you have chosen to undertake are suitable for you.*

*In respect of the above execution only service clause, all other clauses save clause 1.A apply”*

#### *1 F Statement Service*

*On an annual basis we will provide you with a statement detailing the assets held in your account. This statement will be sent to you by post”.*

#### *“Section 3*

*In this section we set out specific provisions which apply to an AMRF and an ARF:*

#### *3 A Opening an AMRF or ARF*

*To set up and AMRF or ARF you must sign this agreement which includes the attached Declaration and you must provide a Certificate from the existing Qualifying Fund Manager Pension Scheme Trustees or the Life Office from whom you are transferring monies. The Certificate is included for completion at the back of the agreement.*

#### *Our Charges*

*Unless otherwise agreed: Our charges will be in accordance with our published rate card in effect at the time the charges are incurred. A copy of our current rate card accompanies this agreement. You will also have to pay any applicable value added tax, stamp duty or similar third party charges. Charges will change from time to time and we will notify you in advance of any such charges. We will send you a list of current charges on request. Details of any commission sharing arrangements which relate to trades conducted on your account will be available on the contract note. We may share management fees with third parties or associated companies. The fee sharing arrangement is normally calculated as a percentage of the fee charged to your account and further details are available on request”.*

Application for Approved Retirement Fund And Approved Minimum Retirement Fund Advisory Portfolio (dated 27/11/2008 contains the following “Financial Questionnaire”)

“Investment Objectives

..

14 Risk Profile

/Cont’d...

*"How would you describe your risk profile?"*

**"Moderate"** was selected by the Complainant

*"Moderate You have a moderate risk appetite"*

*"Speculative You have a high risk appetite"*

15 Investment Objective

**"Balance of Income and Capital Growth"** was recorded by the Complainant.

Knowledge And Experience

*"17 Please answer the following questions in relation to your knowledge and experience of different financial instruments".*

*"Have you dealt in these instruments before? Shares / Bonds / Investment Funds"*

**"Yes"** was selected by the Complainant and for *"Type"* **"Shares"** was selected by the Complainant

As regards *"In what capacity"* **"Execution-only"** **"Advisory"** and **"Discretionary"** are all selected by the Complainant

As regards *"Derivatives"* **"No"** was selected by the Complainant

As regards *"How would you describe your investment knowledge and experience of these financial instruments?"* The answer selected by the Complainant was **"Limited"**

As regards *"How often do you deal in these financial instruments?"* The Complainant answered: **"Under 10 times per annum"**

As regards *"What is the average size of these transactions"* **"25 K Euro"** is the answer recorded by the Complainant.

As regards *"How long have you been dealing in these financial instruments?"* the answer recorded by the Complainant was **"30 years"**

*"18. Do you have any qualifications or previous experience that are relevant to making investment decisions? If yes please provide details".* The answer given by the Complainant was **"N/A"**

/Cont'd...



Advisory Non-Managed Account Agreement (signed by both Complainants and dated 5 September 2008)

*“Section 1*

*This section sets out the services that we will provide to you.*

*1A Advisory Non-Managed Account Service*

*We will provide you with investment advice for use by you in the management of your account. We will on your instructions, enter into any kind of transaction or arrangement for your account, in or relating to investments of the following types.*

- (a) Shares in Irish or foreign companies*
- (b) Debenture stock, loan stock, bonds, notes, certificate of deposit*
- (c) Depository receipts.*
- (d) Unit trusts, mutual funds and other similar collective investment schemes in the Republic of Ireland or elsewhere.*
- (e) Securities-related cash arrangements.*
- (f) Derivatives including options, warrants and contract for differences.*
- (g) Off exchange transactions i.e. deals not regulated by the rules of any readily realisable investments.*
- (h) Transactions which may commit you to underwriting or similar obligations in connection with as new issue, rights issue, take over or similar transactions.*
- (i) Tracker products”.*

On Page 5 of this document “Risk Disclosure Document” – the following is stated:

*“The value of financial instruments may fall as well as rise. When investing in financial instruments there is a risk that you may lose some or all of your original investment. You should consider whether investing in financial instruments is suitable for you in light of your individual circumstances and taking account of your investment objectives, financial position, attitude to risk and your investment knowledge and experience. In deciding whether certain financial instruments are suitable investments the following information describing the nature and risks of such instruments should be carefully considered”.*

The following instruments are then explained – Shares / Equities, Bonds, Exchange Traded Funds, Exchange Traded Commodities, Monetary Market Instruments, Unit Trusts etc.

The “General Risks In Relation to Financial Instruments” are then set out.

The Financial Questionnaire was completed as follows:

/Cont’d...

#### 14 Risk Profile

*"How would you describe your risk profile?"*

**"Moderate"** was selected by the Complainant

*"Moderate You have a moderate risk appetite"*

*"Speculative You have a high risk appetite"*

#### 15 Investment Objective

**"Balance of Income and Capital Growth"** was recorded by the Complainant.

Execution Only Account Application Form (signed by the First Complainant and dated 20/11/2006)

*"As an Execution Only Client you are responsible for ensuring that all investment decisions undertaken are suited to meet your investment objectives, financial position and attitude to risk".*

#### *"Terms And Conditions*

- 1. Most forms of investment involve some risk as to security of capital, certainty of income or marketability. The value of your investment may go down as well as up due to the volatile nature of stock market investment and you may not recover the total amount originally invested.*

*The value of your investment may be subject to exchange rate fluctuations which may have a positive or adverse effect on the price or income of the securities. Past performance should not be taken as an indication or guarantee of future performance and neither should simulated performance.*

- 2. The service which we offer under these Terms and Conditions is an Execution Only share dealing service.*

*As an Execution Only Client you are responsible for ensuring that all investment decisions undertaken are suited to meet your investment objectives, financial position and attitude to risk. Only advice specifically requested may be provided by us and will be given in good faith and without any responsibility on our part.*

- 3. Instructions may be given to us by telephone, orally or in writing, facsimile and email instructions relating to transactions on accounts will not be acted upon unless they are in confirmation of verbal instructions. We may in good*

/Cont'd...

*faith rely upon and you will be bound by any instructions which purport to be or originate from a person authorised on behalf of you to give such instructions.*

4. *Our charges will be in accordance with our published rate in effect at the time the charges are incurred. A copy of our current rate card accompanies this account application form. You will also have to pay any applicable value added tax, stamp duty or similar third party charges. Charges will change from time to time and we will notify you in advance of any such charges. We will send you a list of current charges on request. We may share dealing charges and or management fees with third parties or associated companies, or receive remuneration from them in respect of your account. Details of any such sharing arrangement or of any remuneration received or receivable will be made available to you on request."*

### **The Complaints for Adjudication**

Aspects of the complaint date back to more than six years before the complaint was made to this office, that is, the allegations of mis-selling of the property investments in 2006 and 2007, and allegations of misrepresentation in relation to the investment, at that time. These matters are therefore outside the jurisdictional time-frame for an investigation by this office.

The complaint that can be investigated by this Office is that the Provider (i) incorrectly or unreasonably failed to invest their monies in accordance with the Complainants risk profile and (ii) failed to administer the pension funds correctly or reasonably particularly in relation to the charging of fees.

The specific complaints are as follows:

- Breach of agreement re Share portfolio transferred from the Stockbroker.
- Asset Allocation and erosion of pension value.
- Management Fees — Breach of Agreement

Breach of agreement in respect of Advisory service.\*\*\*

### **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.

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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 **29 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.

Submissions dated **05 November 2020** from the Complainants and **13 November 2020** from the Provider, were received by this Office after the issue of the Preliminary Decision to the parties. These submissions were exchanged between the parties and an opportunity was made available to both parties for any additional observations arising from the additional submissions. I have considered the contents of these additional submissions, together with all of the evidence and submissions for the purpose of setting out my final determination below.

### Analysis

In the Complainants' post Preliminary Decision submission of **05 November 2020** they state:

*"It is deeply disappointing that our complaint in respect of 'Asset Allocation and erosion of pension value' is not considered. This is for the stated reason that the investments fall outside the timeframe for investigation.*

*To help our understanding of this portion of the preliminary decision, further explanation is required as to the reasons for the decision.*

*1. The Financial Services and Pensions Ombudsman Act 2017 provides for an extension of the time limit if the FSPO considers it just and equitable. Please advise the reasons for not extending the time limit.*

*2. The definition of a 'long term financial service' was amended in October 2018 to allow for reasonable expectation of a longer or indefinite duration (Ref FSPO website)".*

It is the Complainants' position that the advice received from the Provider in 2006 / 2007 should be examined.

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The Complainants' complaint was received by this office in January 2017. Any complaint of mis-selling was noted in the Summary of Complaint dated **11 September 2017** to be out of time.

The Financial Services and Pensions Ombudsman Office would be entitled to deal with a complaint of mis-selling dating from 2006/2007 if it were to be established that the complaint fell within whichever of the following periods set down in **Section 51** of the **Financial Services and Pensions Ombudsman Act 2017**, is the last to expire:-

- (i) 6 years from the date of the conduct giving rise to the complaint;
- (ii) 3 years from the earlier of the date on which the person making the complaint became aware, or ought reasonably to have become aware, of the conduct giving rise to the complaint;
- (iii) such longer period as the Ombudsman may allow where it appears to him or her that there are reasonable grounds for requiring a longer period and that it would be just and equitable, in all the circumstances, to so extend the period.

The Complainants' complaint of mis-selling / misrepresentation by the Provider from 2006/2007 was examined by this office in the context of the above legislation which came into effect in 2018. In respect of the property investments, the evidence on file shows that the Complainants received Application Forms, Investment Agreements and detailed information which outlined all aspects of the investments, including the risk profile and the associated risk factors. The evidence also shows that the Complainants signed all of the relevant documentation and in so doing instructed the Provider to purchase the investments, acknowledged that they were aware of the high risk nature of the investments, the potential for loss of some or all of their capital and that they were prepared to accept the risks involved.

By the end of 2007, as the global credit crisis started to impact equity and property assets, the investments were clearly loss making. From the valuation statements the Complainants received, it is evident that they were aware of the losses accruing on these investments soon after.

In those circumstances, it is clear, as was already notified to the parties, that for the purpose of sub-section (ii) above, the Complainants ought reasonably to have become aware of the conduct concerning any suggested mis-selling of the policy in 2006/2007, at the end of 2007 / early 2008. On that basis, a complaint of mis-selling to this office, on the basis of the date of knowledge, would need to have been made to this office in the subsequent 3 years, but in fact this office did not receive the Complainants' complaint until January 2017.

Therefore any complaint of mis-selling which occurred in 2006/2007, remains outside the jurisdiction of this Office. Furthermore, I have not been provided with evidence that there

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are reasonable grounds for requiring a longer period and that it would be just and equitable to extend the period, in accordance with the discretionary powers available to me.

Accordingly, the complaint of mis-selling of investments in 2006/2007 is outside my jurisdiction, has not formed part of this investigation and does not form part of this decision.

The Complainants also refer to the Preliminary Decision and to the instance cited by the Provider where on the 26th April 2007 the Complainant demonstrated a desire to invest in a high risk investment. The Complainant state that in relation to this specific investment it was entirely a different proposition which fell outside the scope of the complaint. It was the Provider who referred to this investment to show the Complainants' acceptance of high risk investments and it was not further explored in the decision.

I will now deal with the aspects of the complaint that I do have jurisdiction to investigate.

#### **Asset Allocation and erosion of pension value.**

In regard to this aspect of the complaint the Complainants state that on 31<sup>st</sup> October 2006 they were persuaded by the Provider to transfer €1,073,209 from the Insurance Company to the ARF account.

The First Complainant states that in a relatively short period he was advised to invest in several Provider promoted property investments.

The Complainant states that the following investments were made and locked in by the Provider as follows:

- 14/12/06 – Investment A, €117,199 investment (fees €4,500)
- 21/12/06 - Investment B, €156,967 investment (fees €5,995)
- 15/3/07 – Investment C, investment (fees €5,791)

The Complainants state that all three of the above investments failed spectacularly. The First Complainant states that substantial losses were incurred on his Pension ARF due to the failure of these investments. The Complainants submit that the investments were high risk and also an inappropriate weighting in respect of a single asset class. The First Complainant states he was persuaded against his instincts to accept these investments because he trusted the Provider and was paying substantial fees for its professional advice.

The First Complainant states that when opening the ARF with the Provider he was very clear that a moderate risk approach be taken in respect of all investments and that his investment knowledge was limited. The Complainant says that his investment objective was for assets to provide a mix of income and capital growth. The Complainant states

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that this was his pension account and intended to provide him with adequate income to fund his retirement.

The Complainants state that within 5 months a total of €424,622 or almost 50% of the entire pension fund (less tax free lump sum) was invested in foreign currency high risk investments.

The investments mentioned here were made in 2006 and 2007 and the Complainants became aware of the losses on these investments soon after. Therefore, any allegation that these particular investments were mis-sold or mis-advised falls outside the timeframe for an investigation by this office.

### **Share portfolio transferred from the Stockbroker.**

The Complainants submit that the Provider has defaulted on an agreement in respect of fees charged on the Execution Only account. The Complainants state that this portfolio was transferred from the Stockbrokers to the Provider as part of the initial arrangement and it was agreed that no fees would be charged.

This office asked the Provider whether the Provider ever communicate to the Complainants that its stance in not charging a fee could change.

The Provider's response was that the Complainants entered into an Advisory Non-Managed Account Agreement with the Provider in 2008. The Provider refers to Clause 3 of the agreement signed by the Complainants which states: *"Charges will change from time to time and we will notify you in advance of any such change"*.

The Provider states that it is important to note that this clause stated that charges will change rather than could change. The Provider says that the Complainants were informed that the charge on their account would change in the future.

It is clear that the Provider did not alert the Complainant at the relevant time, that was when it first advised that it would not be charging a fee, that this position could change in the future. The Provider refers to the contract provisions allowing for charges to be applied in the future, that is: *"Charges will change from time to time and we will notify you in advance of any such change"*. The Provider neglects to refer to the first portion of this clause which states *"Unless otherwise agreed"*.

I consider that this contract provision refers to existing charges that were being charged by the Provider, and paid by the investor. Here there were no such fees being applied by the Provider and the Provider clearly gave the Complainants the impression that they would not be charged at all.

I consider that given the duration of the Provider not charging fees (9 years), and on the basis that it was agreed by the Provider from the outset that the charges would be waived,

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that the Complainant had an expectation that this would continue for the duration of his dealings with the Provider.

While Complainant moved his account to a different Provider, I accept that he was put to inconvenience by the Provider's action in demanding a fee for its services, when initially agreeing to no fees, and maintaining that position for nine years, I propose to direct a compensatory payment, in respect of this aspect of the complaint.

### **Management Fees**

The Complainants submit that the fees for the ARF account have escalated hugely with no adequate explanation as to how they are calculated. The First Complainant gives the example of the last two quarters for which he paid fees (at the time of communication) quarter ending June and September 2016. Management fees invoiced were €1,250 and €1,294 respectively, which the Complainants state are an approximate 192% increase on the average quarterly charge between 2011 and 2015 inclusive. The Complainants state that there has been no plausible explanation, despite repeated requests.

The Complainants submit that the Provider has suggested that it inadvertently undercharged fees from 2009. The Complainant considers that this is unlikely and that the agreement when the account was set up was that fees would be calculated excluding cash deposits and investment funds. The logic of this being that no management is required for these assets. The Complainants says that there are no management skills required for cash and the fees for investment funds are ongoing within the specific fund and also substantial entry fees have already been paid in advance. The First Complainant says that the Provider agreed with this reasoning when he was being encouraged to transfer the funds from the insurance company.

The First Complainant says that his suspicion is that the Provider has reviewed this agreement such that fees are now charged on the total value of the portfolio.

As regards the Management Fees — I accept that the First Complainant's pension accounts benefitted from management fees that were lower than those set out in writing in the client agreements, for a time. However, the Fees were increased in 2016, as provided for in the client agreements. The fees were increased following a period of notice and discussion. Unlike the Share Portfolio fees, the Complainants do not argue that these fees were waived by the Provider from the outset, and they had been paying fees on this account over the years. I accept that the Provider made the increases in accordance with the contractual agreement.

### **Agreement in respect of Advisory service.**

As regards its Advisory service — the Provider states that it provides ARF clients with a range of services in addition to investment advice, including making returns to the

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Revenue Commissioners, operating ARF cash drawdowns, payment of clients PAYE, managing dividends and corporate action etc. The Provider states that First Complainant can contact the Provider at any time to obtain advice in assisting him in the management of his ARF portfolio..

I accept that investing is a two way process and advice would be given when sought. However, I consider it reasonable of the Complainants to expect some contact from the Provider regarding advice, particularly where Provider had made such unsolicited contacts previously. The contact itself, may not be in relation to any particular investment, but could be merely be a communication that the Provider had nothing to recommend at that time, or that the Complainants should not make any change to their investments.

### **General investment advice**

The Provider was asked by this office where there was any variation or change in risk allocation of assets being invested in by the Provider, if the Complainants were advised/notified of such changes and the reason for same. The Provider was asked by this office whether it was clearly explained by the Provider over the years the nature of the risk attaching to the investments. The Provider was asked by this office to refer to instances and where such (written) explanations were given. And where there was no explanation given the Provider was to set out why there was no such advice/explanation given.

The Provider's response was that the risks associated with the various investments were set out in writing to the Complainants in the documentation.

It is noted that the Provider could not be more specific on this point relies, only, on the risk information set out in the documentation as informing the Complainant. There is no evidence of the Provider specifically pointing out those risks or specifically highlight the relevant sections of the documentation to the Complainants for their consideration before taking the decision to invest in the investments brought to their attention by the Provider.

I find it is difficult to understand why a Provider would introduce / send investment documentation to clients for high risk investments, knowing that such investments did not match their stated risk profile.

While the Provider has referred to the risk warning that were in the documentation that was sent to the Complainants over the years, there was no evidence that the Provider ever advised or alerted the Complainants to the position that the investment fell outside their stated risk profile.

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Likewise, when the Complainants did opt for the riskier investments, there was no alert or warning from the Provider that those investments went beyond the risk categorisation that the Complainants had communicated to the Provider.

The Complainants are correct to question why the Provider would from the outset want the Complainants to set out their risk appetite, only to later ignore this information when sending the Complainants information on investments.

It is clear that the Complainants had from the outset intended that investment of their monies would be of 'Moderate' risk. I accept that as a retirees, the Complainants deemed this to be a prudent approach and is clear that the Provider was told this at the outset of the relationship.

The First Complainant states that where he has indicated his investment knowledge to be 'Good', this was based on, dealing with stockbrokers over several years and what he gleaned from newspapers and magazines. The First Complainant states that it did not extend to being able to understand the complexities of the investments presented. The First Complainant says that he was relying on the Provider to bring the assessment and scrutiny of suitable pension investments to a higher level which was outside of his sphere of knowledge.

It is clear that without the further probing by the Provider as to what the Complainant meant by having "Good" investment knowledge, there was going to be a mis-match in what investments to recommend. Equally without a definition of what the Provider considered to be "Good" investment knowledge, the Provider was not going to be able to measure the extent to which it could advise on type of investment for consideration. I accept that greater enquiry as to the meaning of the risk category chosen by the Complainants was required here.

I accept that 'Good' is a subjective term, requiring greater explanation from the Provider as to what it took the word to mean in the context of investing.

That said, I accept that the evidence does show that the First Complainant's communications with the Provider indicates an extensive investment knowledge of investing, and what the various investments entailed.

However, I that in a communication from the Provider to the Complainants dated 11/12/2015, it does accept poor investment advice historically. In this communication the Provider states: ***"Our proposal is to reduce the fee under three different categories firstly the poor investment advice historically, ..."***. There was no timeline stated by the Provider for this accepted poor investment advice.

Having regard to all of the above, I partially uphold this complaint and direct a compensatory payment in relation to the Provider's conduct in relation to charging of fees on the share dealing account/s, and in relation to the Provider's acceptance of poor advice

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as it relates to the later years of the investments. I direct that the Provider pay the compensatory payment of €15,000 (fifteen thousand euro) to the Complainants.

### **Conclusion**

- My Decision pursuant to **Section 60(1)** of the **Financial Services and Pensions Ombudsman Act 2017**, is that this complaint is partially upheld on the grounds prescribed in **Section 60(2)(g)**.
- Pursuant to **Section 60(4) and Section 60 (6)** of the **Financial Services and Pensions Ombudsman Act 2017**, I direct the Respondent Provider make a compensatory payment to the Complainants in the sum of €15,000, to an account of the Complainants' choosing, within a period of 35 days of the nomination of account details by the Complainants to the Provider. I also direct that interest is to be paid by the Provider on the said compensatory payment, at the rate referred to in **Section 22** of the **Courts Act 1981**, if the amount is not paid to the said account, within that period.
- The Provider is also required to comply with **Section 60(8)(b)** of the **Financial Services and Pensions Ombudsman Act 2017**.

The above Decision is legally binding on the parties, subject only to an appeal to the High Court not later than 35 days after the date of notification of this Decision.



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

24 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

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

