An tOmbudsman Seirbhísí Airgeadais agus Pinsean
Financial Services and Pensions Ombudsman

Decision Ref:	2020-0449
Sector:	Banking
Product / Service:	Dormant Account
Conduct(s) complained of:	Maladministration Dissatisfaction with customer service Failure to provide accurate account/balance information Failure to process instructions in a timely manner
Outcome:	Rejected

LEGALLY BINDING DECISION
OF THE FINANCIAL SERVICES AND PENSIONS OMBUDSMAN

This complaint is brought by the Complainants arising out of an assertion by them that the Provider has failed to account for, and repay to the Complainants, a sum of money that they say was deposited in an account with a predecessor of the Provider in March 1979.

The Complainants, through their solicitor, state that on 23 March 1979, they deposited the sum of £5,000 (circa €6,350) in an account with the Provider. They say that they have not at any time in the meantime withdrawn funds from the account. Further, the Complainants say that they are in possession of evidence that they had not made any such withdrawals as, had they done so, they say that the document evidencing lodgement would have had to have been surrendered to the Provider. The Complainants say that in April 2017, they notified the Provider of their intention to withdraw the funds from the account in question. They state that after a reminder to the Provider in September 2017, the Provider's agent told them that the Provider has no record in respect of the account or the deposit.

In September 2017, the Complainants made a formal complaint to the Provider and required it to conduct a thorough search of its records to determine the whereabouts of the deposited funds. The Complainants say that the Provider subsequently informed them that it was unable to trace any records of the account or the deposit which they say was made with the Provider in March 1979.

The Complainants have estimated the current value of the investment, with compound interest at a rate of 11%, is in the region of €411,000. Their claim is denied in full by the Provider which states that it has no record of having any banking relationship with the Complainants.

The Complainants' Case

The Complainants state that on 23 March 1979, they deposited the sum of £5,000 with a predecessor of the Provider as evidenced by a deposit receipt of the same date. The Complainants also point to a contract letter dated 23 March 1979 and an acknowledgement letter dated 24 July 1979. The Complainants state that the conditions of the contract are set out in the contract letter, which includes an undertaking by the Provider to repay the money deposited, together with interest, at one month's notice. The Complainants state that they have never drawn down funds from the relevant account. They argue that this is evidenced by the fact that they still have the original account deposit receipt which, had they withdrawn funds, would have had to have been signed on the reverse by them and surrendered to the Provider to withdraw funds.

The Complainants state that on 3 April 2017, the Provider was notified by way of letter from the Complainants' then solicitors of their intention to withdraw funds from the account. A follow up letter was sent on 26 April 2017. In the reply of 17 May 2017, an agent of the Provider indicated that it held no record in respect of the account. By letter dated 18 September 2017, a formal complaint was made to the Provider on behalf of the Complainants, coupled with a request for a search to be carried out to determine the whereabouts of and information in respect of the account. By letter in response dated 25 September 2017, the Provider's agent advised the Complainants that following an extensive review of files, it was having difficulties locating any information relating the account. The agent further indicated that if there was no communications regarding the account within the preceding five years, it was extremely unlikely that there was any deposit relating to the Complainants within its records. A letter in comparable terms was sent in response to a data protection access request.

The Complainants argue that the Provider's refusal to honour the request to withdraw their investment is contrary to law. They have requested that this Office direct that the Provider rectify the conduct complained of; direct an amount of compensation to the Complainants; and direct the payment of interest on the amount. The Complainants have provided a calculation of the interest which they expect to have been accrued, with an estimate of the current value of the investment. This estimate calculates the total value of the Complainants' investment, to include the interest rate of 11% on a compound basis, in the sum of €410,806.08.

In a further submission to this Office, the Complainants argue that they deposited the sum of money in the account with the Provider in 1979 and that the parties both entered into a contract under which the Provider became indebted to the Complainants. They argue that the express terms of the contract are proved by the original deposit receipt and contract letter issued to the Complainants.

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The Complainants submit that they did not seek to withdraw funds or to close the account between 1979 and 2017. In relation to the Provider's operating hypothesis that the funds were withdrawn and the account closed during the period 1979 and 2002, the Complainants argue that this is not supported by any positive assertion or evidence.

The Complainants argue that the Provider has offered evidence of the period from 2002 to 2017 only. The Complainants argue that there is a conflict with this hypothesis and the Complainants' first-hand evidence that they did not withdraw funds or seek to close the account during the relevant period. The Complainants argue that the hypothesis which was arrived at is by inference from surrounding circumstances and without reference to the policies or record-keeping practices of the Provider's predecessor during the period and is therefore without merit.

The Complainants argue that they have provided documentary evidence to demonstrate a bank-customer relationship and a legal obligation to repay a debt owed by the Provider to the Complainant. They also point to the fact that the Provider has accepted that there is no reason to question the authenticity of the evidence in question. They argue that the fact that the deposit receipt was not surrendered to the Provider means that no withdrawal could have been made in compliance with the terms and conditions of the contract between the parties. The Complainant argue that a failure on the part of the Provider to locate the sum of money deposited or to retrieve details of the account does not discharge or negate the legal obligation owed by the Provider to the Complainants as depositors. The Complainants argue that regardless of whether the Provider can trace use of the original sum of money, or the account details, the Provider owes a debt to the Complainants in accordance with the terms of the contract between them and that debt is repayable upon the giving of notice. The Complainant argue that any inference that a banking customer could be disentitled to repayment of the deposit and interest due to an insufficiency of record-keeping by an entity with which it places a deposit, or due to a lack of appropriate due diligence by an entity which later acquired the deposit, is clearly without foundation. It further argues that were an absence of records to be regarded as an appropriate justification for the Provider in refusing to repay a deposit and interest in agreed terms, this could fairly be characterised as a disincentive to good information governance. The Complainants argue that the fact that the original documentation requires surrender encashment suggests that, in all probability, the Provider's debt to the Complainants has yet to be discharged.

The Provider's Case

The Provider states that it has conducted extensive searches of all repositories available in relation to:

- live accounts;
- dormant accounts;
- uncashed drafts;
- legacy accounts;

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- funds transferred to the National Treasury Management agency (NTMA); and
- funds held in trust for the Provider as security for outstanding loan facilities.

The Provider states that it cannot locate any account which matches the details of the deposit slip provided by the Complainants in terms of (a) name or (b) address or (c) account number.

The Provider explains that the deposit slip provided relates to a deposit made with a particular branch of a predecessor of the Provider in March 1979. The portfolio of the original institution was purchased in 2002 and the acquisition involved the transfer of:

(i) all open accounts held at the time within the original institution; and

(ii) details of all connections which maintained a relationship with the original institution at that time

to the current Provider. The Provider states that it did not receive any details surrounding closed accounts held by clients who ended the relationship in full with the original institution prior to the Provider's purchase of that entity.

Following the acquisition of the original institution in 2002, a register of dormant accounts was created by the original institution. All customers whose accounts were considered to fall within the category of dormant accounts were written to in May 2002 in advance of being formally classified as dormant. In this correspondence, the customers were advised that that their account had been classified as a dormant account as there had been no customer transaction in relation to the account for 15 years prior to 31 March 2002. They were further advised that if no customer transaction was affected by 31 March 2003, the funds would be transferred without further notification to the NTMA on 1 April 2003. Each customer was advised that if they wanted access to the account, they should contact their local branch and bring with them the letter received, evidence of address and identity, and any documentation held in relation to the account. Once formerly classified as dormant, the accounts were frozen and withdrawals only permitted if the accounts were closed in full. On 2 April 2003, the original institution transferred the balances from the first tranche of dormant accounts (8,629 accounts in total) to the NTMA.

The original institution also withdrew from providing personal current accounts and personal deposit accounts in February 2003. The Provider explains that any customer who did not initiate the transfer of credit funds themselves and who had not previously been classified as holding a dormant account had any credit funds returned them by a bank draft.

In May 2014, any clients that retained any current accounts with credit balances (that is which had not been previously deemed to be dormant and transferred to the NTMA) were advised of the impending closure of their accounts. The Provider states that if no steps were then taken by the customers to close the accounts themselves, then credit funds were sent to the customers through the issue of bank drafts.

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The Provider explains that it has an information system or register for recording the details of all dormant accounts which had their balances transferred to the NTMA from the date of the initial transfer on 2 April 2003. The system contains the details of all accounts which were deemed to be dormant and contains all relevant information to identify the account in question including:

- client name;
- address of client;
- country of residence;
- account number;
- date client advised of the impending transfer to NTMA;
- balance on date of transfer to NTMA;
- date of transfer to the NTMA;
- date funds claim by claimants;
- claimed amount; and
- date claim repaid to client.

The Provider states that it engages with clients and representatives of deceased clients on an ongoing basis to identify those accounts where credit funds have been transferred to the NTMA or to locate historical drafts. All queries are dealt with through the use of the register described. The Provider argues that this system contains accounts which were originally held in the same branch that the Complainants' deposit slip is associated with and who would have received notification in May 2002 of the impending dormant classification. The Provider states that there is no account contained within the register which matches any of the details provided by the Complainants in terms of name, address, or account number. The Provider states that it maintains the required register of dormant accounts pursuant to section 14 of the Dormant Accounts Act 2001.

The Provider says that there is no evidence that the relevant account was ever held by the original institution after its acquisition or that it was subsequently considered as dormant. The Provider states that it has not contacted the NTMA in relation to the account as it would have to provide the date of transfer to the NTMA to identify the deposits. The Provider states that in the present case, there are no details whatever contained in the relevant register which matches the details provided by the Complainants.

The Provider states that the documentation provided by the Complainants reflects that of a former branch within the original institution and it has no reason to question the authenticity of the documentation.

The Provider states that details of any live connections would have transferred to it from the original institution in 2002. It would not have received any details surrounding accounts which had been closed during the intervening period, from the date of deposit up to the date of acquisition (that is, the 23 years between 1979 and 2002), where the relationship with the client in question had ended in full by the date of purchase.

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The Provider explains that the branch at issue was closed in December 2007 at which point the majority of clients were transferred to a larger branch nearby for ongoing management. Larger commercial connections were transferred for management by the commercial lending teams in Dublin.

The Provider states that as it has no record of the deposit account in question, it has not contacted any former employees to trace the deposit in question.

The Provider accepts that it can only explain the process required to affect withdrawals from 2002 onwards when clients with personal deposit accounts were written to, to advise either of the classification of their account as dormant, or of the impending closure of the deposit accounts due to the withdrawal of these personal products.

In the event that the Complainants wanted to withdraw funds from a dormant account, the following documents would have been required:

Pre-transfer of the account balance to the NTMA:

(A) The deposit passbook, statement of deposit account, investment record or a statement. In cases where such documents were not available, the onus was on staff members to be fully satisfied with the customer's identification and ownership of the funds and be provided with appropriate supporting documentation to the fact.

(B) The letter of notification of the dormant account.

(C) Satisfactory evidence of identity.

Post-transfer of the account balance to the NTMA:

(A) Completed dormant account claim form.

(B) Certified copy of a valid driving licence or passport of the completed M10 form.

(C) A deposit book/statement/record/receipt of any document held in relation to the account (if any).

(D) Proof of address.

The Provider states that there is no record of any account which reflects the details provided by the Complainants in terms of name, address, or account number. It states that details of all dormant accounts within the organisation are retained on a dedicated information system and that there is no record of any account which reflects the details provided by the Complainants.

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The Provider further states that it has searched all possible repositories concerning legacy accounts and cannot locate any account which reflects the details provided by the Complainants. The Provider is therefore of the opinion that the account must have been closed at some point during the 23 year period between 1979 and 2002. That is before the portfolio of the original institution was acquired by the Provider.

The Provider rejects the €411,000 claimed by the Complainants on the basis that as it has no record of the accounts, and in the absence of any other information, it asserts that the account was closed prior to 2002. The Provider closed all accounts in 2003 which fell under this remit. The Provider states that it is satisfied that it has met its obligations under the Consumer Protection Code in relation to consumer records. It argues that its records allow it to identify and manage the ongoing requirements of its residual portfolio and in relation to clients' accounts closed within the past six years. It further argues that it has retained all relevant information within its information system to facilitate the identification of dormant accounts. It has no record which matches any of the information provided by the Complainants in terms of names, addresses, or account number.

The Provider explains the delay between the date a letter of demand was received from the Complainants' then solicitor dated 3 April 2017 and its response on 17 May 2017 on the basis that care was taken to ensure that a full search of all relevant repositories was made by the Provider and its agents before formally responding.

The Provider states that there is no evidence that it has ever had a contract with the Complainants and it has not therefore refused to honour the request to withdraw the investment. Rather it has no record that any relationship existed or exists. It states that it has a duty to ensure that any request relating to deposits transferred to the NTMA are correctly identified but it cannot find any such deposit based on the information provided by the Complainants. The Provider requested that the Complainants provide a copy of any documentation received from the original institution including statements or interest certificates, but none have been provided. The Provider states its belief is that the account was cleared at some point between 1979 and 2002.

In response to the Complainants' argument that the retention of the initial deposit slip is evidence that the account was not closed, the Provider argues that clients did not always have to provide such original documentation. The onus instead was to establish the legal ownership and confirm the identity of the person claiming the funds.

In a further submission to this Office, the Provider explains that at the point of purchase of the portfolio, it obtained information from the original institution only in relation to clients who had live accounts at the point of purchase, or who would have closed their accounts within the six years prior to completion of the purchase of the portfolio. The Provider asserts that it has no record of having any relationship with the Complainants through any of the former entities owned by it.

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The Complaint for Adjudication

The complaint is that the Provider has failed to account for the sum of £5,000 (circa €6,350) deposited in an account held with a predecessor of the Provider in March 1979 and that the Provider has failed to repay on demand this amount with interest added to the Complainants.

Preliminary Decision

A Preliminary Decision was issued to the parties on 14 January 2020, outlining my preliminary determination in relation to the complaint. The parties were advised on that date, that certain limited submissions could then be made within a period of 15 working days, and in the absence of such submissions from either or both of the parties, within that period, a Legally Binding Decision would be issued to the parties, on the same terms as the Preliminary Decision, in order to conclude the matter.

Following the issue of my Preliminary Decision, the parties made the following submissions:

1. Letter from the Complainants' representative to this Office dated 4 February 2020.

2. Letter from the Provider to this Office dated 18 February 2020.

3. Letter from the Complainants' representative to this Office dated 3 March 2020.

4. E-mail from the Provider to this Office dated 18 March 2020.

5. Letter from the Complainants' representative to this Office dated 2 April 2020.

6. Letter from the Complainants' representative to this Office dated 23 June 2020 (in response to the letter from this Office to it dated 11 May 2020).

Copies of the above submissions were exchanged between the parties.

Having considered these additional submissions and all of the submissions and evidence furnished by both parties to this Office, I set out below my final decision.

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.

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In arriving at my Legally Binding Decision, I have carefully considered all the evidence and submissions, including the post Preliminary Decision submissions put forward by the parties to the complaint.

Having reviewed and considered the submissions made by the parties to this complaint, together with the evidence, 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.

In a post Preliminary Decision submission from the Complainants' representative dated **4 February 2020**, in response to my view, as expressed in my Preliminary Decision, that I did not deem it necessary to hold an Oral Hearing, the Complainants' Representative stated that:

> *"It was never [the Oireachtas] intention that a complaint should be disadvantaged by making a complaint to the Ombudsman rather than proceeding in the ordinary courts where an Oral Hearing would be afforded as a matter of course".*

The Complainants' representative argued that:

> *"For clarity, the Complainants' position (as detailed in our submissions of 4 February 2020) is that on the evidence before the Ombudsman it was open to him to decide in favour of the Complainants without an oral hearing. It was not, we say, open to the Ombudsman to favour instead the frankly speculative assertions submitted by the Provider but, if the Ombudsman was considering doing so, there would exist on that basis a clear dispute between the Complainants' well-founded evidence and the Provider's hypothesis which could only conceivably be resolved in favour of the Provider if an oral hearing was held to test the Provider's hypothesis. Essentially, the Complainants' case is that there is enough evidence to find in favour of the Complainants with or without an oral hearing and that there are fundamental deficiencies in the Provider's evidence that only an oral hearing could even hope to address. The Complainants' case, of course, is also that an oral hearing would fail ultimately to bolster the Provider's evidence in that it would allow the weakness in such evidence to be further exposed through questioning".*

The Complainants' representative submits that my statement in my Preliminary Decision that I do not consider an Oral Hearing would be required in this complaint:

> *"amounts essentially to the expression of a mere conclusion and that the Ombudsman has not given sufficiently detailed reasons to support that conclusion or his exercise of the discretionary power to call an oral hearing".*

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The Complainants' representative argues that I have not adhered to '*well established*' and '*implied constitutional limitations*' which require a decision maker to use common sense:

> *"There is of course a well-established, necessarily implied constitutional limitation of jurisdiction in all decision-making which affects rights or duties which requires that the decision-maker must not flagrantly reject or disregard fundamental reason or common sense in reaching his decision. In circumstances where the Ombudsman seems to have taken the view that there is some relevant evidence which supports the facts alleged by the Provider (the Complainants maintain that there is effectively no evidence to support the Provider's hypothesis and so that the Preliminary Decision proceeded on an entirely wrong basis), the conclusion that there is no conflict of fact such as would require an oral hearing to resolve must be incorrect and unsustainable. In circumstances where the Ombudsman's preliminary decision proposes to credit the Provider's very thin evidence, deciding not to have an oral hearing clearly fails to have due regard to the conflict of fact which is apparent and to which we have specifically referred between the Complainants' first-hand account of not having withdrawn their deposit and the Provider's alternative hypothesis".*

The facility to hold an Oral Hearing is a discretionary power granted to me under the ***Financial Services and Pensions Ombudsman Act 2017*.** I hold such Hearings where I am of the view that such a Hearing would be of benefit to my adjudication of the complaint.

I set out clearly in my Preliminary Decision, issued on 14 January 2020 in relation to this complaint, that having reviewed and considered the submissions made by the parties, I was 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.

The discretion of the Financial Services Ombudsman and the Financial Services and Pensions Ombudsman with regard to whether or not an Oral Hearing is necessary has been dealt with by the Superior Courts. In the High Court case **of *Kanagaratnam Baskaran –v- Financial Services and Pensions Ombudsman* [20016/149MCA]** Binchy J in his decision refers to various cases which involved the non-holding of an Oral Hearing by the Financial Services and Pensions Ombudsman and its predecessor.

Binchy J at section 68 of his judgement states that:

> *"It is well established by the authorities to which I have referred above, that the respondent* [the Financial Services and Pensions Ombudsman] *is under no obligation to conduct an oral hearing unless there is a conflict as to matters of fact that can only be resolved by such a hearing".*

Nothing in the Complainants' submissions persuade me that an Oral Hearing would be of benefit in the investigation and adjudication of this complaint, in circumstances where the matters at the heart of this complaint span a forty-year period and all the available evidence, including details of the searches undertaken by the Provider, have been submitted. Furthermore the parties have had ample opportunity to submit evidence and make submissions.

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In post Preliminary Decision submissions made on behalf of the Complainants dated **4 February 2020**, **3 March 2020** and **2 April 2020** a number of observations were made in relation to manner in which the complaint has been dealt with by this Office and the manner in which I had arrived at my decision.

These included, among other things, that:

> *"It was not the intention of the Oireachtas that in adopting informal procedures the Ombudsman's process would deprive complainants of a fair hearing and a fair result".*

The remit of this Office is set out in the ***Financial Services and Pensions Ombudsman Act 2017 (the Act).***

Section ***12(3)(a) of the Act*** states that:

> *"(3) The Ombudsman shall endeavour to –*
>
> > *(a) be accessible to the public and ensure that complaints about the conduct of financial service providers or pension providers are dealt with in an informal manner efficiently, effectively and fairly".*

Further to the above, ***Section 12(11)*** of the ***Financial Services and Pensions Ombudsman Act 2017*** states that:

> *"(11) Subject to this Act, the Ombudsman, when dealing with a particular complaint, shall act in an informal manner and according to equity, good conscience and the substantial merits of the complaint without undue regard to technicality or legal form".*

The Complainants have not been deprived of a fair hearing due to *'informal* procedures'. The complaint has been investigated and adjudicated in a fair and proportionate manner and in accordance with the well-established procedures of this Office. I have fully adhered to the obligations imposed on me by the Act in dealing with this complaint.

In a number of post Preliminary Decision submissions, the Complainants' representative stated:

> *"A complainant should not be disadvantaged by making a complaint to the Ombudsman rather than proceeding in the ordinary courts".*

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A similar comment to the above was made on behalf of the Complainants in a submission dated **2 April 2020** as follows:

> *"While the Ombudsman may be entitled to exercise an informal jurisdiction, that informal jurisdiction cannot be exercised in such a way as would imperil a fair hearing or fair result or such that a complainant should be disadvantaged by electing to make a complaint to the Ombudsman rather than proceeding by the ordinary courts".*

The Complainants, in their post Preliminary Decision submissions, put forward examples of case law which, in their view, strengthens the Complainants' position and would, in their opinion, be favoured in a traditional court setting. The Complainants also argued that they were put at a disadvantage by progressing their complaint though this Office, instead of pursuing matters through the Courts.

It was very clear to me from the Complainants' submissions that they were seeking to have their complaint dealt with in accordance with the procedures followed by the Courts. However, this Office is an alternative to the Courts. While this Office operates fully within the requirement of fair procedures, at all times, we do not, and are not required to operate, as a Court.

This Office is an independent, informal and impartial alternative to the Courts for consumers to bring a complaint against regulated financial service providers or pension providers.

This view has been supported by the Superior Courts. In the High Court case, Hayes v. Financial Services Ombudsman and Others (Unreported, 3 November, 2008,) Mac Menamin J. at 33 and 34 of his decision stated:

> *"What has been established, therefore, is an informal, expeditious and independent mechanism for the resolution of complaints. The respondent* [Financial Services Ombudsman] *seeks to resolve issues affecting consumers. He is not engaged in resolving a contract law dispute in the manner in which a court would engage with the issue.*
>
> *The function performed by the respondent is, therefore, different to that performed by the courts. He is enjoined not to have regard to technicality or legal form. He resolves disputes using criteria which would not usually be used by the courts, such as whether the conduct complained of was unreasonable simpliciter, or whether an explanation for the conduct was not given when it should have been; or whether, although the conduct was in accordance with a law, it is unreasonable, or is otherwise improper…"*

It was always open to the Complainants to bring their complaint either to the Courts or to this Office, but it is not possible to have a complaint litigated before the Courts and also dealt with by this Office. Equally, where a complaint is made to this Office, it is dealt with in accordance with the procedures of this Office, not Court procedures.

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The Complainants had expressed a clear preference to have their complaint dealt with in accordance with Court procedures. For this reason, in circumstances where my Decision will be legally binding on both parties, I deemed it appropriate, on foot of the Complainants' post Preliminary Decision submissions, to offer the Complainants the option to withdraw their complaint from this Office.

In response to this offer, the Complainants' representative suggested the offer to withdraw the complaint was inappropriate and questioned my reasoning for doing this.

The Complainants' representative submits that my offer to withdraw the complaint:

> *"is quite a curious proposal. Additionally, the mischaracterising of our "preference" for Court procedure in order to effectively argue that the Complainants not only may but should withdraw their complaint is, frankly, inappropriate. Unfortunately, the manner in which the Complainants are effectively urged to withdraw their complaint leaves the Ombudsman's intentions in this regard open to interpretation"*

The Complainants' representative also submits that:

> *"they trust that the Ombudsman is merely seeking to be helpful in making this offer as the alternative interpretation would be rather unfortunate For the avoidance of doubt, we note that any attempt by the Ombudsman to pre-empt further discussion or review of the Ombudsman's conduct of this complaint by inducing the Complainants to withdraw their complaint would amount to the exercise of the Office of the Ombudsman for an entirely improper purpose".*

This response to my correspondence is clearly either a misunderstanding or a misrepresentation of that correspondence. I did not urge or induce the Complainants to withdraw their complaint. Furthermore, it is not clear to me what interpretation my correspondence was "*open to*" other than pointing out that, at that stage, it remained open to the Complainants to bring their complaint either to the Courts or to this Office.

In that regard my letter of **11 May 2020** to the Complainants' representative states:

> *"I would point out that it was always open to the Complainants to bring their complaint either to the Courts or to this Office, but it is not possible to have a complaint litigated before the Courts and also dealt with by this Office. In the particular circumstance of this complaint, where it appears your preference is for Court procedures and where I have not yet issued my Legally Binding Decision, I am now offering the Complainants the option to withdraw their complaint from my Office.*
>
> *If the complaint is withdrawn, it would then be for the Complainants to decide if they wish to progress matters through the Courts.*

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> *If the complaint is not withdrawn I will continue to deal with it in a fair, impartial and independent manner. This is how I have dealt with, and how I will continue to deal with the complaint, if the Complainants wish me to progress their complaint by way of adjudication".*

In response to this correspondence, the Complainants' representative also submitted:

> *"The Complainants' expectation has been that the Ombudsman can offer an adjudication which is independent fair and impartial. For that mission statement to be vindicated in this case however will require that the errors in the Preliminary Decision identified by the Complainants be rectified. It is curious indeed that having identified such errors the Complainants have been invited to withdraw from the process.*
>
> *The Complainants decline the offer to withdraw their complaint and request that the Ombudsman proceed to consider their submissions before issuing a Legally Binding Decision. Rather than issue new proceedings in the ordinary courts, our instructions are to pursue a statutory appeal in the event that a Legally Binding Decision finds against the Complainants based on incorrect applications of the law and/or unsustainable factual conclusions (and, to be clear, our position is that any finding against the Complainants would be necessarily incorrect and/or unsustainable)".*

The Complainants' representative further submits that this was an incorrect understanding by me and submits that:

> *"The Complainants' submission has been, simply, that the Ombudsman must exercise its jurisdiction in a way that ensures that the Complainants are not deprived of fair procedures or disadvantaged by having opted to submit their complaint to the Ombudsman instead of proceeding by the ordinary courts".*

The Complainants' representative submits that the Complainants are entitled to expect their complaint to be considered and adjudicated fairly in line with the:

> *"principles of constitutional justice and case law on the exercise of judicial/quasi-judicial functions conferred by statute including in particular the jurisdiction of the Office of the Ombudsman and its predecessors. Again, the Ombudsman's jurisdiction is not some sort of an exclusionary zone. The Ombudsman does not have an absolute discretion to resolve disputes according to a subjective view of the facts; rather, the Ombudsman should adopt a "proper evidence based approach coupled with logic".*

The Complainants' representative submits that:

> *"Nowhere have the Complainants submitted that this must be achieved by the Ombudsman seeking to replicate Court procedures*".

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The Complainants' representative also submits:

> *"The Complainants have identified issues which suggest that the Ombudsman's exercise of his informal jurisdiction has been hindered by the lack of a robust framework for considering and assessing evidence and that this has led to an erroneous preliminary decision in this complaint*".

The Complainants' representative also maintains that while I am not expected to replicate the procedures of a court:

> *"The Ombudsman should be mindful of the frailties of his informal manner of information-gathering and carefully assess the information gathered according to an appropriate standard of or framework for assessment".*

The Complainants' representative asserts that:

> *"To effectively and fairly assess that information, we respectfully contend that the Ombudsman must have regard for appropriate methodologies for establishing facts and drawing inferences and conclusions (a proper evidence-based approach coupled with logic). We say that certain principles of case law cited in our submissions are binding on the Ombudsman but, more generally, we say the case law cited is instructive of how a decision-maker might act judicially in considering assertions and evidence (and "no evidence" as the case may be) in order to reach conclusions that are reasonable, sustainable, and not vitiated by serious and significant error. We do not, at this stage, wish to be overly prescriptive in our submissions regarding what the standard/framework that should apply would be. Suffice to say that our view on that should not arise as, in our submission, the result in this complaint should favour the Complainants under any coherent standard. For example, it might simply be that evidence should be approached rationally and logically, and that regard should be had for the lessons on evidential reasoning which can be gleaned from case law"*

The Complainants' representative states:

> *"The Complainants ask that the Ombudsman address the serious and significant errors in the Preliminary Decision which have been identified and, considering the evidence rationally and logically, to reach the only correct and sustainable conclusions open to him on that evidence i.e. that the Complainants' deposit was made, that the deposit has yet to be returned to the Complainants and that the Provider thus owes a debt to the Complainants".*

The Complainants' representative states that my letter of **11 May 2020** seemed to imply the Complainants felt they had been deprived a fair hearing during the investigation and adjudication of the complaint.

/Cont'd…

The representative argues that this is not accurate. The representative suggests that the Complainants' submissions were to avoid them being deprived of a fair hearing/result as the legally binding decision was not yet issued and could be corrected:

> *"Our submissions did not allege that the Complainants had been deprived of a fair hearing or fair result precisely because the very purpose of our submissions was to address errors so that such an outcome would not arise.*

The Complainants' representative submits that they accept that the Ombudsman's jurisdiction and ancillary powers are found in "the Act" but argue that "*the Ombudsman's jurisdiction, though it be statutory, is governed by overarching constitutionally protected principles".*

In investigating and adjudicating on this complaint, this Office has adhered to our well established processes, in accordance with fair procedures. Therefore, I welcome the Complainants' clarification of their acceptance that they were not deprived a fair hearing during the investigation and adjudication of the complaint.

However, the Complainants' representative, in response to my letter of **11 May 2020**, also seems to imply, in a somewhat contradictory fashion, that my letter to the Complainants demonstrated that I had come to a decision and risked unfairly denying the Complainants fair process and a correct outcome:

> *"To be clear, our expectation has always been that prior to the issuance of a Legally Binding Decision the Ombudsman should not yet have reached any final decision. The Ombudsman should be fully open to submissions to the effect that the Ombudsman, by its Preliminary Decision or otherwise, has fallen into serious and significant error(s) on any point(s) of law or in the determination of any fact and further such submissions should be considered dispassionately on their merits.*
>
> *Prior to the Ombudsman's letter of 11 May 2020, our hope was that the Complainants had not yet been deprived of fair procedures and that our submissions would assist the Ombudsman in reaching a correct, reasonable, sustainable, final decision free from serious and significant error. The letter of 11 May 2020 gives us to understand, however, that while the Ombudsman's Legally Binding Decision has not issued, his final decision on this complaint was a foregone conclusion by 11 May 2020 at the very latest and that, measured against our submissions at least, our clients had in fact already been deprived of fair procedures".*

It is difficult to reconcile these conflicting statements on behalf of the Complainants. In any event, it should be clear to the Complainants that I had not arrived at a final decision and that any further submissions relating to an additional point of fact, an error of fact or an error of law would be taken into account by me before arriving at my final Decision.

/Cont'd…

My letter to the parties that accompanied my Preliminary Decision dated 14 January 2020, stated, among other things:

> *"The adjudication of the above complaint has now concluded and the Preliminary Decision of the Financial Services and Pensions Ombudsman is enclosed for your attention.*
>
> *If no submissions, as outlined below, are received by the Financial Services and Pensions Ombudsman, from either party, within a period of 15 working days from today, a Legally Binding Decision will be issued to the parties on the same terms as the enclosed Preliminary Decision, in order to conclude the matter.*
>
> *Alternatively, it is open to either party to make a further submission, but only if the said submission falls within one or more of the following categories:-*
>
> **1.** An Additional Point of Fact
>
> …
>
> 2. An Error of Fact
>
> …
>
> 3. An Error of Law
>
> …
>
> …
>
> *In the event that additional submissions are made by either or both of the parties, (limited to the 3 categories outlined above) this office will ensure that all such additional submissions are made available to all parties for review, and to provide an opportunity for any further written observations which may arise. Following this process of further exchange and observation, the Financial Services and Pensions Ombudsman will consider the entirety of the matter, and will then conclude the adjudication, by issuing a Legally Binding Decision to the parties."*

Much has been made by the Complainants of my letter of **11 May 2020** offering them the opportunity to withdraw their complaint if their preference was to have their complaint adjudicated on by the Courts. In my view, this was a very fair and reasonable approach in circumstances where any decision I would issue would be legally binding on both parties. The Complainants at all times, throughout the progression of a complaint through this Office, had the right to withdraw their complaint. The Complainants' rights have not been infringed, in any way, by having this brought to their attention. To suggest otherwise is simply not sustainable.

/Cont'd…

The only evidence that a financial service was supplied by the Provider's predecessor to the Complainants is a series of documents from 1979. There do not appear to be any more recent documents available that would indicate that there was any relationship between the parties. For its part, the Provider states that no such relationship exists between the parties. The Complainants, on the other hand, are adamant that as the funds were never withdrawn after being deposited in 1979, the deposited sum plus substantial accrued interest is owed to them.

Turing to the available documentation, in a letter from the Provider's predecessor dated 24 July 1979 and addressed to the Complainants, the following is stated:

> "*I have pleasure in enclosing our official Deposit Receipt [***405], together with Contract Letter in respect of your recent deposit of £5000 with the [Provider].*
>
> *I wish to thank you for availing of our investment facilities.*
>
> *If you have any queries or require further information at any time, please do not hesitate to contact me.*
>
> *Kindest regards,*
>
> *Yours sincerely,*
>
> *[Area Manager]*"

A copy of the deposit receipt has also been provided to me. This deposit receipt confirms a deposit made by the Complainants in the sum of IR£5,000 with the predecessor of the Provider on 23 March 1979. At the top of this receipt, the following appears:

> "*This Acknowledgement must be signed on the reverse by the depositor(s) on encashment*".

There is space on the reverse of the receipt for the signatures of the depositors and a further warning in relation to the surrender of the receipt, as follows: "*NB This acknowledgement must be surrendered on encashment*". The receipt further notes that the sum was deposited "*on the conditions contained in our letter of 23/03/79*".

The relevant terms of the letter of 23 March 1979 are as follows:

> "*Deposit Account Number – [***405]*
> *Date of Deposit – 23 March 79*
> *Rate of Interest – 11.0%*
> *Amount – £5,000.00*
> *First Interest Date – 21 September 1979*
> *Withdrawal Notice Required – 1 Month*
> *Maturity Date – [blank]*

/Cont'd…

Dear [Complainants]

Thank you for your investment which has been placed on deposit under the terms set out above. The deposit account, which is attached, and this letter should be retained carefully by you.

Interest will be calculated from the date of deposit to the first interest payable date, and will be credited to your account. Thereafter, interest will be credited half yearly."

The Complainants have argued that the documents prove that the relevant sum was deposited in March 1979, prove the terms of the contract between the parties, and prove that the sums were not withdrawn as the conditions of the contract contemplated the surrender of the deposit slip on encashment. I agree that the documents prove that the relevant sum was deposited and that any express terms of the contract are set out in the contract letter of 23 March 1979. I do not accept, however, that it has been proven that the sum was not withdrawn at any time between 1979 to the present.

While I accept that the agreement contemplated the surrender of the deposit slip on encashment, I do not accept that this fact alone proves that the sums were not withdrawn. The fact that the deposit slip remains in the possession of the Complainants is certainly probative of the question of whether or not the deposit remains a liability of the Provider but I do not believe it is the only matter to be taken into account.

Also relevant to whether or not the deposit plus accrued interest remains repayable by the Provider is: (a) the complete lack of any documentary evidence in the forty plus years between 1979 and the present day which in any way evidences the deposit which the Complainants claim is still owed to them; and (b) the exhaustive searches that have been undertaken by the Provider in relation to the Complainants and their account. The fact that no record whatsoever exists of this deposit is, in my opinion, also probative of whether or not the debt remains due and owing by the Provider in light of the information available as to the Provider's acquisition of the records of the original entity in 2002.

In a submission to this Office, the Complainants have relied on case law demonstrating that with the deposit of the sum of money, a bank becomes indebted to the Complainants. There is no question that this is true as a legal principle. The problem in adjudicating the present case is the dearth of evidence available to prove that that debt is still owed after the elapse of some 40 years, with no documentation in the intervening period that would tend to prove this is a matter of fact. Though the Complainants have also relied on case law in respect of tracing sums of money into and out of bank accounts, in my view this case law deals with a very different type of tracing.

The complaint for me boils down to the simple question of whether or not the Complainants have proven on the balance of probabilities that a contractual debt is due and owing to them in light of the fact that the Provider has no record in relation to the sum in question.

/Cont'd…

The Complainants' representative asserts that I misinterpreted the case law relating to FSPO complaints to the detriment of the Complainants:

> "*While, again, we do not propose that the Ombudsman should adopt the civil procedures of the ordinary courts, we must point out a possible misinterpretation of the part of MacMenamin J's decision cited in the Ombudsman's letter. The point that MacMenamin J was making was essentially that the Ombudsman's jurisdiction goes further in the protection of consumers than do ordinary courts in that complaints against providers may be upheld on the grounds of unreasonableness alone. At low water, the case is authority for the Ombudsman having to [sic] the power to uphold complaints on unreasonableness even where there is no contractual basis. On a more expansive interpretation, it is authority for the proposition that the Ombudsman's function and duty is to afford a greater level of protection to consumers over and above that afforded by their contractual terms.*
>
> *If the Ombudsman is suggesting by his letter that he has jurisdiction to find against the Complainants in this case on some unreasonableness basis (e.g. that the sum claimed is in the Ombudsman's view unreasonably large or claimed unreasonably late), then we regret to say that that view is misguided. The Ombudsman may, under Section 60(2)(b) of the Act, uphold a complaint where "the conduct complained of was unreasonable, … in its application to the complainant". Thus unreasonableness is a ground of complaint which may be raised only by a complainant against a provider under the Act – it is not a standard against which the complainant is themselves to be judged and in any event we reject any suggestion that the Complainants' behaviour has been in any way unreasonable".*

The Complainants are correct in their assertion that it is the conduct of the Provider that is investigated by this Office. I made no statement or suggestion that the Complainants were unreasonable. This again is either a misunderstanding or misinterpretation of my Preliminary Decision. However, I would point out that it is incumbent on me to ensure that the outcome of my decision is fair and reasonable to both parties. This is how I have dealt with this complaint.

In my Preliminary Decision, I stated that I was conscious of the fact that the Complainants do not merely seek the return of the IR£5,000 that they deposited in March 1979 but they are also seeking the repayment of contractual interest over a 40 year period at a rate of 11%. They calculate that the Provider is therefore indebted to them in the sum of approximately €411,000. I also stated that this is a very large sum of money in light of the sum equivalent to €6,350 which was deposited by them in 1979. In response to this, the Complainants' representative, in a post Preliminary Decision submission, stated that:

> *"The Complainants should not be penalized because the amount the Provider agreed to is a large sum".*

/Cont'd…

The Complainants' Representative further states that were I:

> "*to be guided by this improper consideration is a serious error which would vitiate against the validity of the ultimate Decision".*

This statement by me in the Preliminary Decision was a simple statement of fact. By any reasonable person's standard €411,000 is a very large sum of money. During my adjudication of this complaint I have considered not only all submissions furnished by the parties but also the circumstances of the complaint. I have not been guided by the amount of money sought or any improper consideration, as the Complainants' representative has suggested. The decision I have reached would be the same even had the sum been significantly less or solely the return of the original deposited amount. This Office does not penalise any party as this is not the role of the Office as an impartial adjudicator of complaints. The Complainants have not been penalised for seeking €411,000.

The Complainants argue that the hypothesis arrived at by the Provider that their account must have been cleared before 2002 is by inference from surrounding circumstances and without reference to the policies or record-keeping practices of the Provider's predecessor during the period. They have further argued that it is inappropriate and legally incorrect to place an obligation on a depositor to prove that sums were not withdrawn. While there is merit in these arguments, I do not have sufficient evidence before me that would enable me to arrive at the conclusion that the debt remains due and owing.

Although the time limit for a complaint to this Office has been met by the Complainants in that the conduct complained of relates to the Provider's refusal to pay out the deposited sum on demand in April/May 2017, in reality the issues in this case cover a 40 year period. Particularly relevant is the period between 1979 and 2002 after which the Provider states that records from its predecessor were transferred over to it and which did not include any record of the Complainants' alleged deposit account.

While I accept that there was a limited delay in the Provider responding to the demand letter of 3 April 2017, I accept that this was due to the Provider attempting to retrieve the relevant record before responding. In light of the timescale involved (that is, a deposit from 1979), it is reasonable in my view that some time was required by the Provider and/or its agent and I do not feel that a response on 17 May 2017 was unreasonable in this regard. Further, I see no evidence of any deficiency in the current record-keeping practices of the Provider as if the record of the Complainants' deposit has been lost, this is likely to have occurred prior to 2002. In my view, the dispute relates solely to the question of whether or not the Complainants can prove that the deposit remains due and owing to them in spite of the lack of record of their deposit from 1979, and if so, what level of interest has accrued on the deposit.

The Complainants have not adduced any evidence of the continued existence of such an account.

/Cont'd…

I accept the documents prove that the relevant sum was deposited in 1979. However, I also accept that having the deposit receipt is not conclusive evidence that there is still money in an account or that the account remains in existence. As it was possible for transactions to have occurred on the account without the deposit record, it does not necessarily reflect all events on an account.

Rather, it simply shows a snapshot in time. It is entirely possible that the balance listed was withdrawn without the deposit slip, or transferred into another account. It is simply not possible for me to say, in the absence of any further evidence as to what occurred, given that the deposit dates from over 40 years ago.

The Provider has not produced any evidence of a withdrawal of the Complainants' monies but I accept that the Provider, or its predecessor, has no obligation to retain documentary records relating to particular transactions after six years from the date on which a particular transaction occurred or six years after the date on which it ceased to provide a product to a customer.

Although I can understand the disappointment of the Complainants, having considered the matter fully and on the basis of the foregoing considerations, I do not uphold this complaint.

The Complainants' representative has made several references, in submissions, of the Complainants' intention to pursue a statutory appeal in the event that my Decision does not find in their favour. All parties have a right to appeal my Decision to the High Court not later than 35 days after the date of notification of the Decision. As will be seen below, this right is notified to the parties in this Decision, as is the case with all my Decisions. Notwithstanding the parties' right to appeal to the High Court, I can only arrive at my Decision in accordance with the procedures of this Office and in a manner that is fair and reasonable to both parties, based on the evidence and submissions before me.

For the reasons outlined in this Decision, I do not uphold this complaint.

Conclusion

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

/Cont'd…

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

9 December 2020

Pursuant to *Section 62* of the *Financial Services and Pensions Ombudsman Act 2017*, the Financial Services and Pensions Ombudsman will publish legally binding decisions in relation to complaints concerning financial service providers in such a manner that—

(a) ensures that—

(i) a complainant shall not be identified by name, address or otherwise,

(ii) a provider shall not be identified by name or address, and

(b) ensures compliance with the Data Protection Regulation and the Data Protection Act 2018.