



<b><u>Decision Ref:</u></b>	2020-0457
<b><u>Sector:</u></b>	Investment
<b><u>Product / Service:</u></b>	Property Investment
<b><u>Conduct(s) complained of:</u></b>	Mis-selling (investment) Failure to consider suitability
<b><u>Outcome:</u></b>	Partially upheld

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

#### **Background**

This complaint relates to the Complainants' investment in a Geared Property Fund in or around December 2006. The Complainants made the complaint to then Financial Services Ombudsman's Bureau in April 2012.

The Complainants state that they were wrongly advised to invest in a product which they state was not suited to their needs.

The Complainants seek the return of their investment of €200,000.

The complaint is that the investment was mis-sold.

#### **The Complainants' Case**

The Complainants state that they are making this complaint on the grounds that the Provider, given the Complainants' ages and circumstances, requirement regarding risk and liquidity, were duty bound under the Consumer Protection Code to undertake a proper fact find as well as exercise duty of care, and that it failed to do so. The Complainants set out the following details for information and consideration.

1. In 2002 the First Complainant was made redundant at 57 years of age.

2. The Complainants inherited a family house soon after.
3. Having paid inheritance tax the Complainants were left with €480,000 which they state they needed to live off for as many years as possible.
4. The Complainants' Bank [not the Provider] contacted them with regard to an investment. The Complainants state that they received a lot of paper work, but came to the conclusion that they would need to be an experienced investor to come to a decision. The Complainants state that they were too worried to take any risks because the funds which they had were not surplus, but were needed to provide for their future. The Complainants did not proceed with the Bank's proposals.
5. The Second Complainant's friend's husband was a retired director of the Provider. The Complainants asked if he would recommend somebody to advise them. Mr.C from the Provider was recommended as the person to give advice.
6. Mr. C called to the Complainants' home and the Complainants gave him all of the information and he took the relevant details, including the proposal from their Bank which they state they had found so confusing. The Complainants subsequently transferred €480,000 from their Bank to the Provider at a rate of 3.4%.
7. Mr. C and Ms. R returned to the Complainants' home with a proposal setting out their Investment Strategy Summary dated 23/5/2006. Their recorded objectives were Capital Preservation, Income Generation, Low to Medium Risk and the time horizon of 5 to 7 years.
8. The Complainants state that they advised the Provider that they did not wish to proceed because they were afraid of the risk bearing in mind that the money had to provide for their future and instead decided to leave the money on deposit with the Provider at 3.4% rate of interest.
9. The Complainants states that sometime later they invested €100,000 of the €480,000 in a Capital Guaranteed Bond.
10. The Complainants submit that at this stage Ms. R, of the Provider, was their financial advisor as Mr. C no longer seemed to be involved.
11. The Complainants state that sometime later Ms. R came back with a suggestion that they should invest in a Geared Fund. The entry level requirement was for €250,000. The Complainants state that they explained again their anxieties about their age, needing the money to live on, also that if they invested €250,000 that they would run out of the remainder of their money too quickly.
12. The Complainants state that Ms. R said that she would discuss their anxieties with Senior Bankers.

13. The Complainants say that Ms. R came back to say that a meeting of Senior Bankers had taken place and that they would accept €200,000 to allow them to invest. The Complainants submit that they said that they would not invest on the basis of paper work because you would have to be an expert to work it all out. The Complainants state that they would only invest if Ms R as their financial advisor would recommend they proceed. The Complainants' position is that Ms R said in her view they were lucky to be allowed in at €200,000 and that she would recommend the investment to her own parents if they were the same age and had the same worries and concerns for the future. The Complainants state that the decision was then made on this basis.

14. The Complainants state that the important decision to invest in the Geared Fund was made during the course of two telephone calls with Ms R.

15. The Complainants state that a letter from the Provider dated 18/12/2006 indicates the Provider received a cheque on the 13/12/2006, but the start date for the contract was the 7/12/2006. The Complainants state that it is interesting that the contract documents were not received until the 21/1/2007 approx. 6 weeks after the start date of the contract and the money had been invested.

16. The Complainants state they started correspondence with the Provider on the 1/8/2009 and concluded with what they thought was an official complaint on the 26/4/2010.

17. The Complainants state that they have asked the Provider to produce a written record of the two vital telephone calls which took place with Ms.R, but the Provider has failed to produce this information.

18. The Complainants state that the Provider accepts that the high level meeting took place and confirm that it decided to make a special arrangement for the Complainants. The Complainants say the Provider said that the decision was made at the highest level. The Complainants submit that the decision the Provider said was a business one and according to its letter of the 26/5/2010 it was not related to the Complainants personal circumstances. It is the Complainants' position that as their advisors the Provider should have taken account of all of their personal circumstances as conveyed to Ms.R and in keeping with the Consumer Protection Code.

19. The Complainants say that the same letter of the 26/5/2010 indicates that they should have known that Geared Property Funds are subject to a high degree of volatility. It is the Complainants' position that at no stage was this ever mentioned by Ms. R during their two telephone conversations, and state that they would not have invested if those words were used. The Complainants state that the Provider's original recommended portfolio which included this fund states that the assets which the Provider recommended are predominantly low to medium risk. The Complainants say that this is incompatible with the product sold to them.

20. It is the Complainants' position that this investment was very high risk, it was illiquid, and it absorbed a significant proportion of the money which they had to provide for the

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rest of their lives. The Complainants point out that they were 61 years of age, they were not professional or experienced investors and they depended on the Provider to give them the correct advice. The Complainants state that the decision, the Senior Bankers or Wealth Manager made, to allow them to invest below the minimum of €250,000, was clearly designed to capture high net worth business, is telling.

21. The Complainants submit that the Provider failed in its duty of care as far as they are concerned. The Complainants state that they were 61 years of age of limited financial strength, without earned income and within a few years of retirement. The Complainants submit that the Provider was well aware that they were extremely anxious about taking any risks. It is the Complainants view that the product was mis-sold by the Provider. The Complainants say that they believe the facts they have outlined support this complaint which is why they are demanding that their money be returned.

The Complainants put forward the following for consideration:

1. The Investment Strategy Summary 23/5/2006 repeats that the objective is capital preservation and income generation and that, crucially, the Portfolio is to be LOW to MEDIUM risk profile.
2. The Complainants state that it then remarkably categorises GEARED Property 20% (in the U.K.) and GEARED Irish equity 16% as a fit. The Complainants state that in no way could gearing investment at this level contribute to describing a portfolio as LOW to MEDIUM risk.
3. The Complainants state that the facts are that 20% or €104,000 was exposed to full capital loss. The Complainants say that this is not disclosed and that this is the crucial point. The Complainants say that no sensible people in their position would gamble a fifth of their retirement pot in this way and that it is also in conflict with their risk profile. The Complainants state that geared Property Funds are high risk investment where 100% capital losses can happen especially if values fall below banking covenants triggering foreclosure.
4. The Complainants state that later, because of minimum entry points, to a Geared Property Fund this is then heightened to even higher risk level of 38.46% of the portfolio or €200,000.
5. The Complainant's say that the Investment Bond — Supplementary Provisions is a *dark document*. The Complainants state that in section 3 it attempts to have investors waive their rights to sue and denies any Provider responsibility for giving advice. The Complainants consider that it is a remarkable disclaimer; and question why would the Provider be so moved as to put this in. The Complainants state that the answer is obvious; the Provider knew it to be very high risk.
- 6 The Complainants state that they are unsure as to when this *remarkable* disclaimer document was issued, but if it followed the advice, the special arrangements to allow in

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€200,000 and the investment itself, that is, issuing of the contract. The Complainants state that it is not a defence. The Complainants say that it is a cynical attempt to deny access to crucial information before investment. The Complainants state that even if it occurred previous to investment, which they presume did not happen, it contradicts the nature of the advisory relationship established and contained in the document 23/5/2006.

The Complainants state that taken as a whole, the Provider acted not only negligently but did so knowingly, requiring the full restitution of losses.

The Complainants say that it is their opinion the Provider was so anxious to get money into this fund that it ignored all warning bells including Consumer Protection Regulation and Proper Conduct of Business Principles.

### **The Provider's Case**

The Provider states that it categorically rejects the Complainant's allegations in relation to this investment.

The Provider states that the Complainants were referred to its Wealth Management Division by a friend of the Complainants, who was a director of the Provider. The director asked that a member of the Provider's Wealth Management team to contact the Complainants. The Provider states that Mr C contacted the Complainants and arranged to meet with them in their home on 24<sup>th</sup> March 2006.

The Provider says that its records show that during the meeting on 24<sup>th</sup> March 2006 the Complainant's investment objectives were discussed. The Provider states that the Complainant's financial circumstances were discussed and its records show that the Complainants had assets of approximately €1m (excluding the family home). This included a cash amount of approximately €520k then invested with a Bank at an interest rate of 2.1% per annum. The Provider submits that the Complainants' investment objective was to produce an income of approximately €50k per annum for the initial 4 years and €30k per annum from year 5 onwards, as they would then be in receipt of a €20k per annum defined benefit payment. The Provider's position is that producing a return of €50k per annum would have required investing in high risk products.

The Provider says that the Complainants had confirmed that they were earning 2.1% per annum on their cash deposit with the Bank and the Bank had provided them with an investment proposal. The Provider says it was agreed at that meeting that the Provider would prepare an Investment Proposal based on the information provided by the Complainants.

The Provider submits that on 24<sup>th</sup> May 2006, the Complainants met with Mr. C for a second time, a colleague of Mr C (Ms R) was also in attendance. The purpose of this meeting was to present the Provider's Investment Proposal. The Provider states that its overall recommendation to the Complainants was to diversify their assets across a number of different investment types and asset classes with varying risk and liquidity profiles. The

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Provider states that the return expectations for the proposed strategy were based on the long term average returns of the relevant asset classes.

The Provider says it demonstrated in its Investment Proposal the impact of drawing the required annual income from the portfolio, that is, the real value of the portfolio would decrease over time and eventually the capital would run out.

The Provider states that the Complainants decided not to implement the proposed strategy.

The Provider states that it was agreed that instead of the proposed strategy, the Provider would present investment opportunities to the Complainants as and when they arose.

The Provider explains that it is an intermediary of an Assurance Company. The Provider states that the Complainants did not agree to implement the proposed investment strategy nor did they sign an advisory mandate.

The Provider says that its relationship with the Complainants was that of product promoter/ introducer.

The Provider states that at all times the Complainants were advised throughout the product literature and contractual documentation to seek their own independent, financial advice.

The Provider states that in April 2006, the Complainants decided to transfer €480k to the Provider to an account yielding 3.4% per annum

On 30<sup>th</sup> May 2006 the Provider sent the Complainants brochures for an open-ended Leveraged Equity Fund and a Geared Property Fund. The Provider states that these provided the Complainants with details of the type of product available. The Provider says that it invited the Complainants to contact the Provider to discuss the relevant details of the investment opportunities. The Provider states that the Complainants chose not to invest in either of these funds.

The Provider states that on 28<sup>th</sup> September 2006 it sent the Complainants a brochure for a 100% Capital Protected Bond and the Complainants subsequently decided to invest €100k in this fund.

The Provider says that on 20<sup>th</sup> October 2006 it sent the Complainants details and a Fund brochure for a Geared Property Fund which they subsequently decided to invest in. The Provider says that disclosure documentation was also enclosed with this correspondence. The Disclosure documentation stated the following:

*"Unless you are fully satisfied as to the nature of this commitment, having regard to your needs, resources and circumstances, you should not enter into this commitment. If you are unclear about any aspect of your investment outlined above, please contact your Financial Advisor or [the Provider]"*.

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The Provider submits that it invited the Complainants to review the documentation and to contact it so that it could discuss further and address any queries they may have had in relation to the Fund.

The Provider states that the Fund was presented to the Complainants as a high risk, illiquid, geared property investment.

The Provider states that at that time the Complainants still had a sum of approximately €380k on deposit which was available for investment. The Provider states that it had previously outlined to the Complainants the type of products available and agreed that the Provider would present opportunities to them on a case by case basis. The Provider submits that at the time of the investment the Complainants had a net worth of approximately €1m (excluding the family home) and an investment of €200k represented approximately 20%. The Provider's position is that at all times the investment decision remained with the Complainants.

The Provider states that the Complainants having been advised of the details of the Fund, including the associated risk and the illiquid nature of the Fund, decided to invest €200k in the Fund.

The Provider states that it is satisfied that it was suitable for the Provider to present this investment opportunity to the Complainants for their consideration.

The Provider says it did not advise the Complainants to invest in the Fund. It says it presented the Complainants with an investment opportunity as previously agreed with them and provided them with all the necessary details to make an informed investment decision.

The Provider states that the Fund Brochure did not stipulate a minimum investment premium. The Provider says that access to the Fund at €200k was granted based on the fact that the Complainants had been provided with the Fund Brochure and had been made aware of the investment features and risks associated with the Fund. The Complainants refer to a letter from the Provider dated 25/06/2010. The Provider explains that this letter was in fact dated 26.05.2010. This letter refers to the Provider's internal procedure for approving investment contributions to a Fund. The Provider states that it was not unusual for investments to be approved by a Director of the Provider and it was not a special arrangement for the Complainants.

The Provider says it does not have any record of any "personal assurances" being given by Ms R to the Complainants.

The Provider states that the Complainants stated in their letter of 26<sup>th</sup> April 2010 that they read all the correspondence on the Fund which sets out the main features and outlines the high risk nature of this investment. The Provider says it is not credible therefore for the Complainants to assert that they were not aware of the high risk nature of the investment.

The Provider's position is that the Complainants' statement that: "*[the Provider] had previously presented this to us as part of low to medium risk scenario in May 2006*" is not correct. The Provider states that investment in a geared property fund was included in the Investment Strategy in line with an asset allocation across a number of different asset classes. The Provider states that the Investment Strategy did not specifically include investment in the Fund. The Provider says that the fact remains that the Complainants did not implement the Investment Strategy as outlined.

The Provider says that investment in the Fund had not previously been turned down by the Complainants.

The Provider says that a file note of the meeting on 24<sup>th</sup> March 2006 indicates that the Complainants had the following assets at the time.

Holiday Home	€500k
House	€800k
Cash	<u>€520K</u>
	€1.8M

The Provider states that a cooling-off notice was issued to the Complainants together with the contractual documentation on 17<sup>th</sup> January 2007. The Provider says that the Complainants were urged to read all documentation to ensure that it met with their requirements and explained that they had 30 days from the date of that notice to withdraw from the investment. The Provider submits that the Complainants had until mid-February 2007 to cancel their investment, and chose not to invoke the cooling-off option.

It is the Provider's position that the Complainants received all the necessary information to ensure they were in a position to make an informed decision. The Provider says that they chose not to exercise their cooling off rights to exit from the investment.

The Provider says that at the point of sale, the Fund was presented as a high risk, geared, illiquid, property investment and the Fund Brochure warned investors that they may not get back the amount invested.

The Provider states that the supplementary provisions forming part of the contractual documentation that the Complainants signed up to, contained a number of important provisions whereby they:

- accepted that the value of contributions could fall as well as rise;
- represented that they had taken independent advice as to the suitability of investment in the Fund;
- represented that they had personally familiarised themselves with and were satisfied with the linked assets which would form part of the Fund;
- acknowledged that the Provider had no responsibility to advise them as to the suitability of an investment in the Fund;
- acknowledged that the Provider had no responsibility, other than as specifically set out in the Supplementary Provisions to review or advise them of the performance of the linked assets,



- acknowledged that the Provider had no responsibility arising out of such review or otherwise, to alter the composition of any linked assets,
- acknowledged that they would not commence or bring and irrevocably waived any entitlement to commence or bring any legal or other proceedings against the Provider arising out of or connected with the non-performance of the linked assets or their failure to perform; and
- specifically agreed that the Supplementary Provisions were fair and reasonable in the particular circumstances of an investment into the Fund.

The Provider says it has at all times acted appropriately and correctly in the presentation of this investment opportunity and cannot be held liable for the subsequent decline in value.

The Provider states that prior to making their investment decision the Complainants were furnished with a Fund Brochure and Disclosure documentation on 20<sup>th</sup> October 2006.

The Provider submits that the Fund Brochure provided the Complainants with full details about the investment as outlined in the relevant sections as follows:

- Executive Summary
- Investment Rationale
- The Properties
- Fund Structure
- Property Management
- Fees, Exit Strategy
- Risk Factors
- Taxation Issues
- Investment Steps
- Valuations
- Important Notice and
- Appendix — Expected Costs of Purchase

In the Executive Summary on page 2 of the Fund Brochure, it outlines the high risk nature of the investment and urged prospective investors to consult with their legal, tax and financial advisors.

*"This investment is high risk — please refer to the section entitled 'Risk Factors'". Prospective investors should review this brochure carefully and in its entirety and consult with their legal, tax and financial advisors in relation to the legal, tax, financial and other consequences of investing in the unit-linked policies outlined in this brochure".*

The Provider states that the high risk nature of the investment is reiterated in the section entitled Risk Factors on page 30 of the Fund Brochure where it states in the heading;

*"A geared property investment is considered to be high risk".*

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And in the opening paragraph:

*"A geared property investment is considered to be high risk and the following considers the types of risk associated with an investment of this kind. This brochure does not constitute investment advice, and prospective investors should consult their own legal, financial and tax advisers in relation to their participation in this investment".*

The Gearing Risk on page 30 states in paragraph one:

*"Policyholders and investors should note that, as a result of gearing alone, the encashment value of their bond, policy or investment may be significantly less than the contributions paid into the Fund and in certain circumstances investors may lose all of their investment".*

The Important Notice on page 36 of the Fund Brochure outlined the availability of additional documentation in relation to the Fund should clients wish to review the Fund in more detail:

*"Copies of the documentation setting out the details of the investment structures, the financing in place and the property management may be inspected at the offices of [the Provider], by prior appointment during business hours".*

The Provider submits that on 14<sup>th</sup> November 2006, Ms R phoned the Complainants to discuss the Fund details.

The Provider states that on 3<sup>rd</sup> December 2006, the Complainants completed the application form to set up their new Investment Bond Policy with the Provider and to invest in the Fund. The Complainants had about 6 weeks from receipt of the Fund Brochure to review and consider the information provided before making a decision to invest and complete the application form.

The Provider states that on 5<sup>th</sup> December 2006, following the Complainants' decision to invest, the Provider issued a 'Reasons Why Letter' outlining the main details of the Fund. It states that the target investment term and illiquid nature of the Fund were also outlined in this letter.

*"The target investment term of the [Fund] is five to seven years. However, it may be held for a longer time period"*

*"This is an illiquid investment and direct access to the funds is not possible".*

The Provider submits that in relation to the risk profile of the Fund the 'Reasons Why letter' stated:

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*"The capital in such funds is not guaranteed and may be subject to a high degree of volatility. Your specific investment requirements as stated above indicate that your investment choice would be high risk".*

The Provider states that having received the completed application form, the policy was effected with a start date of 7<sup>th</sup> December 2006. The Provider states that the additional policy information was issued to the Complainants on 17<sup>th</sup> January 2007 as follows.

#### Contract Schedule

Showing details of the Complainants contribution, their investment choice and the associated charges.

#### Policy Documents

The Provider states that the policy documents included general provisions and Fund specific supplementary provisions as well as the 'Cooling Off' Notice. The 'Cooling Off' Notice dated 17<sup>th</sup> January 2007 provided the Complainants with the opportunity to cancel this investment within 30 days from the date of the notice. The 'Cooling Off' Notice prompts investors to review their investment. It asks investors to read all of the investment documentation carefully, specifically the Disclosure Documentation section of the policy documentation.

It is the Provider's position that following receipt of these documents, the Complainants did not contact the Provider to advise that they would like to cancel this investment. Nor did they contact the Provider to query any of the details of the investment.

The Fund specific supplementary provisions (Section 3.1 to 3.1 .6) highlight the features of the underlying Fund investment including its high risk nature, the fact that values can fall as well as rise and the illiquid nature of the Fund. Sections 3.3.1 and 3.3.2 confirm that by signing the application and requesting contributions to be paid to the Fund that the investor is representing that they have taken independent advice as to the suitability of investment and that they have familiarised themselves with and are satisfied with the composition of the assets.

#### Disclosure Documentation

The Provider states that the disclosure document contained important information relevant to the investment in the Fund. The Disclosure Document recommended that the Complainants ensure that the investment met their requirements. It advised them to read all the relevant documents pertaining to their investment in the Fund and stated that *"unless you are fully satisfied as to the nature of this commitment, having regard to your needs, resources and circumstances, you should not enter into this commitment. If you are unclear about any aspect of your investment outlined above, please contact your Financial Advisor or [the Provider]"*.

The Disclosure Document also states that:

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*"Actual investment growth will depend on the underlying investments and therefore cannot be guaranteed".*

#### Fund Brochure

The Provider states that a second copy of the Fund Brochure outlining the nature of the investment and the associated risks was issued to the Complainants along with the policy information.

The Provider states that the Cooling Off period was effective from the date of issue of the contractual documentation thereby giving the Complainants until mid-February 2007 to change their mind and withdraw from the investment.

The Provider states that since investing in the Fund the Complainants have received the Supplementary Fund Brochure issued in June 2008 as well as annual Fund Updates as follows:

- June 2007, March 2008, May 2008, March 2009, June 2009, December 2009, June 2010, December 2010, June 2011, December 2011 and June 2012

The Provider states that it is satisfied that the Complainants were furnished with full details at the point of sale and thereafter in relation to the investment.

The Provider states that the Fund was launched in October 2006 and the acquisition of the assets was completed by June 2008 when the Provider issued the Supplementary Fund Brochure. The Provider says that accordingly, the first formal valuation including the capital values of the underlying assets did not take place until February 2009.

The Provider states that the Fund invested in a portfolio of office, retail and mixed use properties (the "Properties") in Ireland, the United Kingdom ("UK") and Continental Europe.

The Provider says that the portfolio of investments contained completed buildings, properties with development opportunities and some exposure to other investment opportunities/operating businesses. The Fund had a target investment period of 5 to 10 years with the exit strategy for each property/investment to be assessed on a case by case basis.

Investors were advised in the Valuations Section of the Fund Brochure on page 35:

*"Investors should note that due to the effects of upfront costs, certain provisions and leverage the valuation of investors' contributions will be adversely affected in the early years of the investment. In the case of this Fund, costs of acquisition amount to 23% of investor contributions and a 1.5% provision for costs of sale amount to 6% of investor equity. Therefore, investors should expect the value of their investment at the end of year 1 to show a c. 29% decrease assuming no surplus rental income and no change in the capital value of the Properties".*

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The Provider states that the initial drop in value was compounded by the impact of the unprecedented global recession on the value of commercial property.

In relation to gearing, the Provider says that the impact of gearing on the investment was clearly outlined to the Complainants in the Fund Brochure.

The reference to Gearing is set out in the Risk Factors section on page 30 where it is stated:

*“Gearing Risk*

*This is a geared investment in that the Fund is borrowing monies to fund the purchase of the Properties. Gearing by its nature may increase the potential returns from investments such as these. Conversely, if capital values fall, the return on the investment will be disproportionately negatively affected. Policyholders and investors should note that, as a result of gearing alone, the encashment value of their bond, policy or investment may be significantly less than the contributions paid into the Fund and in certain circumstances investors may lose all of their investment.*

*Investors should note that a fall in the capital value of the investment of c. 20% would reduce the value of investor equity to zero assuming no surplus rental income and no reduction in bank borrowings”.*

In the Important Notice section on page 36 the following was stated:

*“This is a geared investment in that [the Provider] is borrowing monies to part fund the acquisition of property interests. Gearing by its nature may increase the potential returns from an investment such as this but gearing also increases the risk associated with the investment”.*

The Provider states that the value of the Fund at any point in time is determined by the unit price. The unit price is calculated assuming the current equity value of the assets and dividing it by the total original investor equity. The unit price reflects the net equity in the Fund. The Provider says that the decline in the unit price, does not necessarily equate to a decline of the same magnitude in the value of the underlying Properties. The Provider says that the movement in the unit price is affected by the structure of the Fund, the economic environment and the property market. The Provider states that as well as the underlying Property valuations, the unit price calculation takes into consideration accrued interest, accrued charges, prepaid rent and a 1.5% cost of sale provision.

The Provider states that the movement in unit price between the launch of the Fund and January 2007 reflects the drop in value of approximately 26% as a result of the costs of acquisition and provisions for the cost of sale. The Provider states that the price from January 2007 up to 31<sup>st</sup> March 2009 reflects the operational movements within the Fund

which included, but were not limited to foreign exchange rate movement, accrued interest, charges and rental income etc.

The Provider states that the properties within the Fund were valued by independent valuers.

The Provider submits that as stated in the Fund Updates, property valuations are sourced from independent property valuers. The Provider states that the two principal factors utilised in valuing the Properties within the Fund, and for that matter most commercial assets, are the income generated from the Property and the yield applied to this income.

The Provider says that the income is a matter of record and is simply derived from the passing net income of the asset. The Fund Updates include details on the rental income for each Property. The Provider submits that the yield (which represents the return an investor would require) is more subjective and is impacted by numerous factors, including but not limited to:

1. market evidence; this includes investment transactions & market rents,
2. the condition of the property,
3. environmental matters,
4. title,
5. finance,
6. tenure,
7. planning,
8. lettings, and
9. demand.

The Provider says that the Property values reported in its Fund Updates reflect the market at the time.

The Provider states that the March 2009 Fund Update to investors outlined the then latest valuations on the underlying Properties within the Fund and provided further information as outlined above. The Provider states that at that time, the valuers had written down the values of each of the Properties in the Fund to varying degrees since they were purchased. The Provider says that the dramatic reduction in values reflected the then current economic environment and the knock-on impact for the property market in general, which had been negatively impacted across Ireland, the UK and Europe where the Fund is invested.

The Provider submits that during this time a number of factors were at play across global economies with one of the worst recessions in history being experienced. It states that events over the following 4 years have been well documented. It summarises that the effective meltdown of the US financial system as a result of its over-exposure to the sub-prime sector led to the credit crunch which developed into a freezing of global credit. The Provider says that these factors led to the stagnation of economic growth globally and had a subsequent catastrophic impact on the property market. It gives the example that the retail sector saw a large number of insolvencies, administrations, vacancies, falling rents and tenants exercising break options to leverage the poor market and achieve significant rent concessions. Demand for office space had slowed dramatically and concerns about



domestic and international economies made tenants extremely cautious about making long term business decisions, such as committing to new leases.

The Provider states that the change in capital values has been dramatic and this together with the gearing had significantly reduced the investor equity.

The Provider states that the key objective for the Fund in the then current markets was to maintain cash flow and to maximise income on investments and ensure investment commitments are met on an on-going basis. This it says, was important to ensure that the Fund could continue to participate in the assets and take advantage of any future potential recovery in the respective markets.

The Provider states that further analysis of the plans for each of the individual Properties is given in the Investment / Property section of each Property throughout the December 2011 Fund Update and June 2012 update.

The Provider states that it had outlined to the Complainants through various client contact, Fund Updates and correspondence, the significant impact on retail property and rental levels as a result of the unprecedented recession. The Provider explains that the Fund is an illiquid, long term, high risk investment, the value of which will only be realised at maturity or as and when any of the underlying Properties in the Fund are sold.

In response to the Complainants letter dated 20<sup>th</sup> March 2012 which was sent following receipt of the Provider's Final Response letter, the Provider states that the Complainants were introduced to the Provider through a family friend and former director of the Provider. The Provider states that it acted as a product promoter / introducer of its own products and at no time declared that it was acting in an advisory capacity. The Provider says that the provision of information in relation to the available interest rates is a matter of fact. The Provider submits that at that time, it was a deposit taking bank and offered competitive rates to retail and corporate customers. The rate available at the time was 3.4% per annum versus the rate of 2.1% per annum then applicable to the Complainants' deposit in their previous Bank. The Provider says it was the Complainants' decision to transfer their deposit for a significantly higher interest rate. The Provider says that the Complainants were not disadvantaged by transferring their deposit.

#### Additional submissions from the parties

##### The Complainants submission of – 9 October 2012

The Complainants state that a director of the Provider told the Second Complainant that Mr C would provide advice. Mr C was contacted and agreed to meet the Complainants at their home.

The Complainants' position is that Ms R was their Financial Advisor and state that it is disappointing that there is no response from Ms. R to the schedule of evidence required by this office.

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The Investment Bond contains the signature of Ms R as the Financial Advisor. The Complainants state that they trusted Ms R to provide the correct advice. The Complainants state that when they questioned their suitability to invest in the Fund, Ms R's advice was very positive and that she would recommend the investment to her own parents if they were of the same age and had the same reservations etc. etc.

The Complainants state that Ms R signed the paperwork as their Advisor and the Provider accepted her as being the Complainants' Advisor.

The Complainants refer to a correspondence (30/11/2006) from Ms R where she stated that the Complainants were on her "B" list.

The Complainants state that those on the A list were more suitable and that they were on the B list as they were not interested in high risk investments.

As regards Ms.R statement that the Complainants requested to go into the Fund with €200,000, the Complainants say it is important to note that Ms R contacted them regarding the investment. The Complainants state that the €200,000 was stated to be a special concession so that they did not run out of the remainder of their money inside approximately 6 years.

The Complainants do not recall getting the brochure until after the investment was made. The Complainants refer to a note from Ms R in support of this. The First Complainant states that he was not aware (when speaking with Ms R on the telephone) of the high risk nature of the fund before investing.

As regards the Provider's statement that it has no record of personal assurance being given by Ms. R, the Complainants state that the personal assurance given by Ms.R has to do with advising after consultation with her senior bankers despite their worries and concerns about suitability regarding age etc., and running out of funds.

The Provider states that: *"the Complainants confirmed in their letter of 26/4/2012 that they read all correspondence on the fund which sets out the main features and outlines the high risk nature of this investment. It is not credible therefore for the complainants to assert that they were not aware of the high risk nature of the investment"*. In response the Complainants state that they only say they read the Provider's correspondence, not the brochure. That the brochure was the only correspondence that set out the high risk.

The Provider refers to the Complainants having had a net worth of about €1 million (excluding Family home) and an investment of €200,000 represents about 20%. The Complainants response is that if the "fact find" was referred to it would be seen that half of their new worth was tied up in a holiday home to provide for their dependent son. The Complainants state that the €200,000 therefore represented 40% as far as they were concerned and not 20%. It is the Complainants' position that from the very first fact find meeting Mr.C knew the Complainants could not afford to put their money at risk. The Complainants say that the Bank proposal (which Mr.C took away to study) contains the sentence ***"You Do Not Want to Take Any Major Risk with the Initial Capital"***.

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The Complainants question why then introduce a High Risk investment to them. The Complainants state that the only time Mr.C/Ms.R ever sat down with them face to face after the fact find meeting, they referred to Geared Property Funds as medium risk. The Complainants' position is that the Provider did not on that occasion take the opportunity to explain the very serious ramifications of being involved in this type of investment. The Complainants question why it was not explained.

The Complainants submit that when the Provider wrote to them on 30/5/2006 regarding the Bank's proposal they indicated that it was heavily weighted to equities even though their profile is not High Risk.

### **Recordings/Transcripts.**

The Complainants state that they note that Mr.C and Ms.R's telephone lines were not recordable. The Complainants state that it was their understanding that all telephone calls to the Provider were recorded. The Complainants say that in the reply to the Financial Ombudsman's letter of 20/8/2012 the Provider states that: *"On the 14/11/2006 Ms.R phoned the Complainants to discuss the Fund details"*. The Complainants state that if there is no telephone recordings this means the Provider must have a written record of the telephone conversations going back to 2006 and that this is not included in the file presented. The Complainants position is that the Provider also excluded this information when they requested their file information under the Data Protection Acts.

The Complainants submit that it is very hard to believe that the Provider cannot produce notes which Ms R would have written relating to their investment. The Complainants consider that Ms. R could not have organised a meeting with her superiors without having a written record of their concerns to present to them. The Complainants state that these notes should be on file. The Complainants say that there should also be a minute of the meeting which Mr D referred to in his letter of 26/5/2010.

Letter from Provider dated 5 December 2006

The Complainants state that the Provider's letter of 5 December 2006 indicates that: *"you may have to repay borrowings from your own resources"*. The Complainants say they have no record on file or of having seen or signed this letter. The Complainants state that it is a cause of great worry and anxiety to them and they question if this can be true. The Complainants say that it has been pointed out to them that borrowings are nonrecourse. The Complainants state that they are not familiar with the term but are told that it is the opposite to what is contained in this letter. The Complainants submit that in all the correspondence the Provider has never referred to this letter. The Complainants question how the Provider could possibly have asked them to take on such a responsibility when the Provider knew the Complainants were going to run out of money.

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Letter from Provider dated 20 October 2006

The Complainants submit that the Provider has, at different times, denied that the Fund was suitable for pension and that a minimum investment applied. The Complainants say that this letter mentions that it is suitable for a pension and that a minimum investment of €500,000 applies. The Complainants say that this was reduced to €250,000 by Ms.R and later to €200,000 to make sure that they would not run out of the remainder of their money.

The Complainants state that when reading through the information sent to them by the Provider under a Data Access Request, they note that on a number of occasions correspondence was sent to the incorrect address. The Complainants state that the Data Access information itself was sent to a Solicitor's office at some unknown address and was only recovered after they contacted the solicitors. The Complainants say that it was over a 100 days before the Complainants received the information.

The Complainants refer to a letter from Mr. D dated 26/5/2010 which to their mind expresses the real truth of the situation as far as the Provider was concerned. The Complainants state that the Provider had its meeting, recognised the Complainants' worries and concerns, the Provider knew they had ongoing cash flow problems and would run out of funds in approximately 6 years but the Provider still allowed the Complainants to invest because the Provider felt it had no responsibility to take the Complainants' personal circumstances into account.

Submission by the Provider 23 October 2012

*"As stated in our letter of 30<sup>th</sup> August 2012, at the request of [Mr K, Mr C from the Provider] arranged to meet with the Complainants in their home. The Complainant's letter of 9<sup>th</sup> October 2012 confirms this statement. Having declined to implement the Investment Proposal presented, [the Provider's role] became that of product introducer / promoter.*

*As previously advised, [Ms R] no longer works for [the Provider]. As stated in our letter of 30<sup>th</sup> August 2012, [the Provider] acted as an intermediary for [Underwriter]. The Complainants declined to implement the Investment Proposal presented to them in May 2006 and instead it was agreed that [the Provider] would present product opportunities as and when they became available. [The Provider] did not act as the Complainants' financial advisors and at all times, throughout all documentation provided, they were recommended to seek independent financial, legal and tax advice.*

*We have on a number of occasions confirmed that there was no minimum investment amount applicable to the investment in the Fund, Furthermore, it was not unusual for a director of [the Provider] to approve client investments and we reject the Complainant's on-going allegations that this was a "special concession". The investment decision and amount to be invested remained with the Complainants at all times. In managing a Fund launch it is standard practice to*

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*maintain lists of investors. It is irrelevant to the complaint which list the Complainants were on as the fact remains that they were provided with all the necessary information to make an informed decision about investing in what was clearly identified as a high risk fund. An investment which they confirm they read all the necessary documentation and chose not to cool-off from.*

*We do not accept the statement made by the Complainants at point 3 of their letter. As previously stated we issued the Fund Brochure to the Complainants on 20<sup>th</sup> October 2006.*

*This is clearly stated in the aforementioned letter. We also enclosed Disclosure Documentation for the Fund with this correspondence.*

*It is not acceptable for the Complainant's, three years into their on-going correspondence to suggest a set of circumstances which do not conform with the facts. Furthermore, the Complainants have previously stated in their letter of 26<sup>th</sup> April 2010 that they read all the correspondence on the Fund.*

*In addition to the Complainants being issued with a Fund Brochure some 6 weeks prior to making their investment decision, they subsequently received a further copy of the Fund Brochure with their contractual documentation, issued on 17<sup>th</sup> January 2007 and which provided them with a further 30 days to cool-off from the investment. It would also appear from the undated compliment slip attached to their letter of 9<sup>th</sup> October 2012 that they also received a third copy.*

*It is not credible for the Complainants to assert that they were unaware of the high risk nature of the Fund.*

*Our records provide no evidence of any assurances being given. We have no further comment to make in this regard.*

*We have already addressed the issue of the Fund Brochure and the Complainants being made aware of the high risk nature of the investment. In addition to the Fund Brochure, the Reasons Why letter issued on 5<sup>th</sup> December 2006 clearly outlined the high risk nature of the investment and the contractual documentation issued in January 2007, including the cooling off notice and disclosure documentation asked that the investors read all documentation carefully to ensure that it meets their needs.*

*The Complainants did not proceed with the Investment Proposal provided to them. It was agreed that [the Provider] would present investment opportunities as they arose. The investment decision remained with the Complainants.*

*We have already confirmed that [Ms R's and Mr C's] telephone lines were not recordable. We provided all the available documentation to this complaint in the Schedule of Evidence and reject any suggestion otherwise.*

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*The Complainants have taken the reference to "you may have to repay borrowings from your own resources" out of context. The full paragraph refers to the fact that risk is increased when you borrow capital to invest in a geared property fund. The Complainants did not borrow to enter into this investment.*

*[The Provider] has never denied that the Fund was suitable for a pension. The Complainants make reference to our letter of 20<sup>th</sup> November 2009, in which we stated that the Complainants invested through a Personal Investment Bond and not in a pre-retirement pension policy. In this context we did not advise the Complainants that this was a suitable pension investment.*

*A copy of the Complainants personal data was sent to an external solicitors firm in error by [the Provider] on 25th May 2012. [The Provider] contacted the firm by telephone in August when [the Provider was] notified that the Complainants had not received the documentation. The external solicitors confirmed to the bank that they had read the bank's cover letter addressed to them but not the enclosed documentation as it did not relate to one of their clients. The firm further stated that no copies were made of the documentation and that it was not shared with any other party. The firm promptly returned the documentation to [the Provider], following our telephone conversation, and it was forwarded to the Complainants on 23rd August 2012".*

Complainants' submission 12 November 2012

As regards the Provider's statement that having declined to implement the Investment Proposal the Provider role became that of product introducer / promoter, the Complainants state that this statement is wrong and misleading. The Complainant states that the first proposal was to give them some idea of what would be required to achieve the income they were hoping for. The Complainants say that after discussing the proposal with the Provider they decided against it because of the risk involved. The Complainants say there was no agreement or discussion about a change of role for the Provider after that. The Complainants' submit that the Provider continued to be their advisors until all their money was invested with the Provider.

The Complainants state that if they accept for a moment that the Provider became product providers, they question it would not have had a greater responsibility in the circumstances. The Complainants say as advisors in the first instance the Provider would have had the following information:

- The Complainants were 61 years of age
- The First Complainant had been made redundant.
- No earnings.
- Depending on inherited money to live on.
- Would run out of money in the medium term.

/Cont'd...



- Had a son with a disability to provide for in the future.
- Needed to be extra careful about investing.

The Complainants state that with all that personal information the Provider then decided, without the acceptance by their clients, to become product provider in order to sell them an extremely high risk product without having any responsibility to take these personal circumstances into account.

The Provider had stated that throughout all documentation provided, the Complainants were recommended to seek independent financial advice.

With regard to this statement the Complainants state that for the Provider to continue to apply this statement to them is misleading. The Complainants state that when they received a proposal from their Bank in the first instance, they went looking for advisors and ended up with Mr.C/Ms.R. The Complainants state that this standard statement throughout the Provider's documentation only applied to people who had no advisors. The Complainants state they were not in that category as agreed with Ms R. The Complainants submit that they had great confidence in these people who were so highly recommended. The Complainants say that they never for one moment thought that they would have to get advisors to check on their advisors.

The Provider states it has on a number of occasions confirmed that there was no minimum investment amount applicable to the investment in the Fund. In this regard the Complainants say the Provider continues to contradict its own correspondence in making this statement. The Complainants refer to the Provider's letter of 20/10/2006 where it says that a minimum investment of €500,000 applies.

The Complainants refer to Mr D's letter of 26/5/2010 where he acknowledges that:

- Meeting took place.
- Decision to invest lower amount of €200,000 arose from the Complainants concerns regarding on going cash flow.
- Decision by Provider to accept smaller amount was a business decision not related to the Complainants' personal circumstances,
- Director of Provider made the decision.

As regards the Provider's statement that the Investment decision and amount to be invested remained with the Complainants, the Complainants state that this statement is true, but in isolation is totally misleading. In this regard the Complainants refer to their letter of 26/4/2010 showing the calculation they had to make to ensure that they would not run out of money in about 6 years. The Complainants state that these figures were discussed with Ms.R and state that in fairness to her she was as concerned as they were that they would make the right calculation. The Complainants say that this concern was one of the main reasons why Ms R called for the meeting referred to in Mr.D's letter of 26/5/2010. The Complainants state that it was after that meeting that she confidently advised them to invest.

The Provider stated it is not acceptable for the Complainants, *years* into their on-going correspondence to suggest a set of circumstances which do not conform with the facts.

In response to the above the Complainants state that from their point of view it is vital that they should give their view as to how they ended up in the situation they are in.

The Complainants state that they did not receive a Brochure with the letter of 20/10/2006. The Complainants say that Ms.R sent them what she referred to as a hard copy after the decision to invest was made. The Complainants question why Ms R needed to send them a hard copy if they already had one. The Complainants state that unfortunately for some reason they did not realise that the warnings were all contained in the Brochure. The Complainants say that the decision was already made and they had every confidence in the advice given. The Complainants state that the Provider also refers once again to the 'Reasons Why' letter of the 5/12/2006 but do not include a copy of this letter with their signatures on it. The Complainants state that they find it very strange and telling that never once during their discussions leading up to the investment did Ms.R ever ask them if they realised the High Risk nature of the Investment. The Complainants submit that even when they made it clear their situation about running out of money Ms. R still did not say the Fund was a high risk investment and the Complainants question why this was not advised.

#### Provider's submission 26 November 2012

The Provider states that it rejects outright the Complainants allegation that its responses in its letter dated 3 October 2012 were '*wrong*' and/or "*misleading*'. The Provider reiterates that it was not acting as the Complainants' financial advisors. The Provider says that it introduced the product and the investment decision always rested with the Complainants.

The Provider states that the investment decision and amount to be invested remained with the Complainants at all times. The Provider says that it is disingenuous for the Complainants to continue to allege that this statement is "*misleading*". The Provider submits that the Complainants have confirmed in their latest submission that the statement is true. The Provider says furthermore, the Complainants have previously confirmed that they read all the documentation they received. The Provider's position is that the Complainants were provided with all the necessary information to make an informed decision to invest in a high risk fund, which they chose not to cool-off from. The Provider states that whether or not a minimum contribution was applicable is simply not relevant and the fact remains that there was no minimum investment amount outlined in the Fund Brochure.

The Provider states that a Fund Brochure was issued with its letter of 20th October 2006 and the Complainants received a further copy of the Fund Brochure with their contractual documentation which was issued on 17<sup>th</sup> January 2007, giving them 30 days to cool-off. The Provider states that a copy of the Reasons Why Letter issued to the Complainants on 5th December 2006. The Provider submits that the Complainants were made fully aware of the high risk nature of this investment both in the Fund Brochure and in the Reasons Why

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letter.

Complainants' submission 10 December 2012

*"The following are our comments on the [the Provider] submission: There are two points that we would like to put forward for your consideration:-*

*1. It is our view that even if we were fully aware of the risk involved in this investment (and we were not) that [the Provider], knowing our age and circumstances, should never have advised us to make the investment.*

*2. When making the investment we were not aware of the risk involved. In this regard [the Provider] has referred you to section 2 of their schedule of evidence which contains the Reasons Why Letter of the 5/12/2006. We have examined this letter and find that it is only a computer printout and is unsigned. We also checked the paper work we received in response to our data access request and find the Reasons Why Letter is also unsigned.*

*We have reread this Reasons Why Letter of the 5/12/2006 and find that two further points come to our attention. [Ms R] says:*

*"During our meeting we explored the various investment objectives that are important to you Based on the information discussed at our meeting I recommend the following product as suitable to your circumstances".*

*The reason why these two points stand out is because no meeting ever took place regarding the [Fund]. We only ever had two meetings with [the Provider] — one when Mr. C came to our home for the fact find and the second when Mr.C and Ms. R came to our home to discuss the investment Strategy Summary dated 23 May, 2006. We did not proceed with that because of the risk involved (low to medium).*

*The investment in the [Fund] was as a result of an initial telephone call from [Ms R] followed by a letter of the 20/10/2006 followed by the two very important telephone calls when the advice was given and the decision was made.*

*How could [Ms R] have recommended the [Fund] as suitable for our circumstances, based on the information discussed at our meeting when no meeting to discuss the [Fund] ever took place.*

*I would also like to put forward for your consideration that the Reasons Why Letter was typed on the 5th December 2006 and if it was posted on the same day it would arrive [at Complainant's address] on the 7 December 2006. [Ms R] in the reasons why letter states "please sign one copy and return to me at your convenience" this means that if somebody sent the letter back it would probably arrive with [the Provider] about the 15 December 2006 but the contract start date was 7 December 2006.*

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*We need to see a signed copy of the letter because we have no memory of ever having seen it and also need to know what date they received it as we have no recollection of ever having sent it.*

*Was it acceptable to [the Provider] that such a letter outlining all the risks be sent by post. Surely it should have been presented at a meeting and explained in detail before signing giving [the Provider] the opportunity to see that both investors fully understood the risks involved”.*

#### Second Complainant’s submission 11 December 2012

In relation to the whether the role of the Provider included the role of financial adviser the Second Complainant states as follows:

*1. I contacted Mr.C by telephone. I explained my concerns and asked him if he would be prepared to help and advise us. He agreed to come to my home in that capacity.*

*2. I stood in the hallway of my home and heard the telephone conversation between my husband and Ms.R. I heard him refer to our age and concerns for the future. I heard him discuss figures with Ms.R along the lines that we would not run out of the remainder of our money if we made the investment. I heard him express anxiety about making investments and not wishing to lose our money.*

*After the first telephone call my husband told me that Ms R had taken on board our concerns but was going to have to meet with more senior colleagues.*

*I stood in my hallway and listened to the second telephone call and heard my husband confirm that the entry level could be reduced by €50,000 and that the senior people believed it to be a suitable investment for us. I heard my husband say that we would not be willing to make the investment without her advice. I heard the reference to her own parents if they were the same age with the same concerns. I myself would never have agreed to that investment without Ms R’s advice and recommendation”.*

#### Second Complainant’s submission 20 December 2012

The Second Complainant states that as no one in the Provider discussed this investment with her, she relied solely on the advice given to the First Complainant over the telephone. The Second Complainant states that for this reason she would like the contents of her letter of the 11 December, 2012 to be taken into account as part of the investigation.

#### The Provider’s submission 3 January 2013

The Provider states that it did not advise the Complainants to invest in this product. The Provider says that the ‘Reasons Why’ Letter was issued to the Complainants on 5th

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December 2006, a copy of which has been provided both to the Complainants under a Data Access Request and in the Schedule of Evidence issued to this office.

The Provider submits that the Complainants were issued with a Fund Brochure and Disclosure Documentation on 20th October 2006 which fully outlined the high risk nature of the investment.

It is the Provider's position that it was on receipt of this documentation that the Complainants made their decision to invest in the Fund. The Provider says that the Complainants confirmed in their letter of 26th April 2010 that they read all the correspondence on the Fund which sets out the main features and outlines the high risk nature of this investment. The Provider says that it is not credible therefore for the Complainants to assert that they were not aware of the high risk nature of the investment. The Provider states that in addition to the Fund Brochure issued on 20th October 2006, the contractual documentation, including a further copy of the Fund Brochure was issued to the Complainants on 17 January 2007, giving them a 30 day period from that date to review all documentation and cool-off from the investment. The Provider says that the Complainants chose not to avail of the cooling off option.

### **The Complaint for Adjudication**

The complaint is that the Provider mis-sold the investment.

### **Decision**

During the investigation of this complaint by this Office, the Provider was requested to supply its written response to the complaint and to supply all relevant documents and information. The Provider responded in writing to the complaint and supplied a number of items in evidence. The Complainant were given the opportunity to see the Provider's response and the evidence supplied by the Provider. A full exchange of documentation and evidence took place between the parties.

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

Having reviewed and considered the submissions made by the parties to this complaint, I am satisfied that the submissions and evidence furnished did not disclose a conflict of fact such as would require the holding of an Oral Hearing to resolve any such conflict. I am also satisfied that the submissions and evidence furnished were sufficient to enable a Legally Binding Decision to be made in this complaint without the necessity for holding an Oral Hearing.

A Preliminary Decision was issued to the parties on **03 November 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

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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.

A post Preliminary Decision submission dated **24 November 2020**, was received from the Provider. This submission was exchanged with the Complainants.

In its post Preliminary Decision submission, the Provider re-iterates that the Complainants signed up to all of the documentation in question having received the brochure some 6 weeks before they signed the application form and also had a further period of cooling off where they could have made a decision to exit from the investment.

The Provider states that the Complainants indicated in their correspondence that they had read all of the documentation.

The Provider submits that the Preliminary Decision is written on the basis the Provider acted as an advisor, when there was a clear conflict of fact set out in the submissions in relation to this matter. It also submits that the Preliminary Decision does not set out any evidence suggesting how the Provider was retained as an advisor, the terms of such retention including the financial terms of same.

The Provider states that the Complainants never suggested that they entered into an agreement whereby the Provider was their advisor.

The Provider argues that there is no evidence that when the Complainants entered into the agreement, in December 2006, to invest in the fund, they were unaware of the risks involved or what they were signing up to. The Provider states that there is no correspondence or indication that the Complainants were in contact with anyone in the Provider to suggest that the brochure did not meet with their requirements at that time. The Provider submits that there was a letter sent on 5 December 2006 setting out the risk involved and at no point thereafter up until the complaint in 2009 did the Complainants ever suggest to the Provider that the investment had been mis-sold to them.

The Provider states that the Complainants made their initial complaint in 2009, on the basis of the performance of the fund at that point in time. The Provider says it believes that the complaint was made with the benefit of hindsight when, because of circumstances clearly outside the control of the Provider, and the depressed property market that occurred at that time, the value of the investment decreased. The Provider submits that it was only then that the Complainants made any complaint. The Provider states that if the fund had in fact increased and made money it does not believe that there would have been any complaint made by the Complainants that somehow they were mis-sold this investment in 2006.

I have considered this post Preliminary Decision submission and all of the submissions and evidence in arriving at my final determination set out below.

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## Analysis

The complaint is that the Provider's employee acting as an advisor, mis-sold the investment to the Complainants. The Provider asserts that, when the Complainants declined to implement the initial Investment Proposal presented to them, the Provider's role in relation to the Complainants became that of product introducer / promoter. The Provider states it was agreed that the Provider would present product opportunities as and when they became available.

In this regard, I consider that if the relationship / role had changed from that of advisor to introducer, I would reasonably have expected to see some evidence of this being brought to the Complainants' attention and recorded. I have been furnished with no evidence of this important information being communicated to the Complainants. Nor have I been presented with evidence of an agreement that the Provider would be merely be an introducer / promoter.

It is the Provider's position that it was not the Complainants' advisor and points to information in the fund brochure which informed investors of the need to seek financial advice.

The wording in the brochure was as follows:

*"This brochure does not constitute investment advice, and prospective investors should consult their own legal, financial and tax advisers in relation to their participation in this investment".*

I consider that it would have been helpful and more open of the Provider if it had stated the above in its cover letter accompanying the brochure, or highlighted in its correspondence that the brochure contained such a warning, or provided evidence that it was verbally communicated to the Complainants when the investment was being sold over the telephone. I find no evidence of such additional advices been given to the Complainants.

The Provider submits that on **14<sup>th</sup> November 2006**, Ms R phoned the Complainants to discuss the Geared Property Fund details. However, it is most disappointing that the Provider does not have any written or audio evidence to support what was actually discussed with the Complainants in relation to the investment.

As regards the Provider's communication of the Geared Investment, I find it difficult to understand why the Provider sent the Complainants the Geared Property brochure when it knew the Complainants were averse to taking on an investment which had a high risk. The Complainants had rejected a previous introduction by the Provider to products with such risks attached. The Investment Proposal of 2006 from the Provider, which was rejected by the Complainants contained a Geared Property Investment.

It is unclear as to what the Provider had established in relation to the Complainants' change in circumstance, if any, that made this investment product one that the Complainants would want to invest in.

The Provider makes great play as to the investment documentation fully outlining the high risk nature of the investment, but do not submit any argument or evidence that such important information was specifically pointed out to the Complainants, over the telephone or in a face to face meeting.

There is certainly no such evidence of the Provider communicating this information directly to the Second Complainant (the First Complainant being the only one to have had conversed with Ms. R in the telephone call).

The Provider refers to a 'Reasons Why Letter'. The letter submitted required that it be signed by the Provider and the Complainants. The Complainants dispute seeing this letter or signing it. The Provider has submitted into evidence a copy of a 'Reason Why' letter, dated **05 December 2006** that is not signed by either party.

The facts show that the Provider introduced investments to the Complainants in May 2006 which involved a level of risk they were not prepared to take. That proposal contained a geared property investment. The Provider subsequently introduced a 100% protected investment in September 2006, which the Complainants invested in.

Geared Property Fund introduced by the Provider October 2006

I consider that with no telephone recording, contemporaneous notes of what was advised, or the written recall of the person who sold the product over the telephone, it is unclear what was advised to the Complainants, particularly in relation to the nature and risk associated with the investment. It is also not evident whether the cooling off period was verbally advised on the telephone, or that it was advised that it was important that the applicants read the documentation when they received it. It is also not clear if the Provider's representative made clear what her role was in relation to the investment, that is advisor, or, as the Provider submits, merely the introducer of the product.

As regards the nature of Ms R's role, it is noted that the receipt sent by the Provider to the Complainants, dated **18 January 2007**, does refer to Ms. R as Adviser, that letter stated: "**Financial Adviser ... Ms R... [The Provider's name]**". If it is the position that Ms R was not the Complainants' advisor this should have been made clear to the Complainants. I find no evidence of this having been done.

To conclude, I would have expected that the offering / advice on this geared investment warranted greater communication directly with both of the Complainants relative to its nature and risks, and as to the Complainants' 'cooling off' rights, as opposed to it being sold from a distance by way of the two telephone calls, neither of which were recorded. I consider that the absence of recordings of those telephone calls, or contemporaneous notes of what was advised in those calls, does not assist the Provider's position.

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That said, the evidence shows that the Complainants engaged in this advice / introduction process with the Provider. The Complainants approached the Provider for advice, accepted the mode of delivery of that advice, that is, the initial visits to their home to discuss their options, their later acceptance of the guaranteed product that was introduced to them by the Provider, and their engagement with the Provider on the telephone in relation to the disputed geared investment product. Thereafter, the Complainants both signed the paperwork required for them to invest in the geared investment, and received the investment documentation which outlined the nature and risks associated with the geared investment.

Having regard to all of the above, and in order to do justice between the parties, I partially uphold this complaint, and direct that the Provider pay the Complainants the compensatory payment of 50% of any losses on this investment.

### **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 to make a compensatory payment to the Complainants in the amount of 50% of any losses on this investment, 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.



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

14 December 2020

/Cont'd...

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

(a) ensures that—

- (i) a complainant shall not be identified by name, address or otherwise,
  - (ii) a provider shall not be identified by name or address,
- and

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

