



<b><u>Decision Ref:</u></b>	2021-0064
<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 provide product/service information Dissatisfaction with final fund value
<b><u>Outcome:</u></b>	Rejected

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

The Complainants invested in a property bond with the Provider through one of its Tied Agents in **2006**. During the economic recession, the value of this investment fell and the Complainants surrendered the bond in **September 2011** at a substantial loss.

**The Complainants' Case**

The Complainants explain that in **2006** they invested approximately €70,000 with the Provider from an inheritance received the previous year. The Complainants advise that this money was for their retirement as the Second Complainant had suffered from an illness in **2005** and was required to retire.

The Complainants say that the First Complainant was also diagnosed with illness and underwent two major surgeries “... *which made this investment our only chance of stability in our old age.*”

When taking out the investment, the Complainants explain they were not informed about the investment risks involved and they did not receive any *service/advice* from the Tied Agent during the term of the investment. The Complainants say they do not understand the *investment language* used by the Provider/Tied Agent. The Complainants also say they do not agree with the comments contained in the Fact Find and never signed a Fact Find.

The Complainants also explain they were told that “... we could have a quarterly return on the interest or put it all into the principal sum.” The Complainants state that as the recession went on, they continued to receive the same quarterly amount. Referring to the Tied Agent, the Complainants state: “Rang him about this and was told it was coming out of the principal I was never informed about this he was told to stop it we then did not get any more money quarterly.”

The Complainants explain they telephoned the Tied Agent several times and “... all he could say was everyone was losing money including himself.” The Complainants state they were told at one point that “... a sum of 7.000 euro taken from the account that would go back in. It was said to help members in bad times it was never returned when i look back at things I never got any financial advice from him.”

The Complainants conclude their submission explaining that the Tied Agent was told from the beginning of the investment that the money was for their retirement and how important it was for them.

### **The Provider’s Case**

The Provider explains that the Complainants’ chosen investment product was a medium to long term investment, and it is a characteristic of this product to rise and fall in value in line with the assets (property) in which it is invested. The Provider states the full risk and potential return of the investment was explained to the Complainants by the Tied Agent, and this was also explained in the investment documentation in **2006**. The Provider advises that the investment was a lump sum investment and was not subject to plan reviews.

The Provider explains the Complainants made their investment through the Tied Agent and he was their point of contact for any queries in relation to the investment in addition to being their point of contact for any advice-related queries in his role as their financial adviser. The Provider advises that the Complainants also had the option of contacting its Customer Service Team for any product queries they may have had.

The Provider advises that before investing in the product the subject of this complaint, the Complainants were already invested in a very similar product through the Provider. The Provider also refers to three meetings held with the Complainants during **2006**.

The Provider submits that it is the responsibility of the Complainants to monitor the performance of their investment plan, to seek financial advice if and when needed, and it is their decision as to what course of action to take when their investment goes through a turbulent period of performance.

The Tied Agent, the Provider advises, held an annual service phone call with the Complainants from the first anniversary of their plan where the plan’s performance was discussed.

When the commercial property market crashed in **2008**, the Provider states that the Tied Agent agreed to hold these calls on a six monthly basis given the rapidly changing environment in the property market. The Provider advises that typically, the Complainants would telephone the Tied Agent to discuss their investment between the scheduled six monthly calls.

The Provider states that at all times, the Tied Agent provided the Complainants with their options which were to:

- Stay invested;
- Switch to another investment fund, with lowest risk fund options being discussed; or
- Cash in the investment.

The Provider explains that a financial adviser, when markets are performing poorly, can only give a concerned investor their options, as mentioned above. The Provider submits that the ultimate decision was always with the Complainants whose decision was to cancel their investment in **2011**. The Provider states that the full and final value of the plan was paid to the Complainants six months after they notified the Provider of their intention to cancel as there was a six month moratorium in place at the time. The Provider advises that the amount of €22,908.90 was paid to the Complainants on **22 March 2012**.

The Provider submits that if the Complainants required any information or advice outside of their annual/six monthly calls with the Tied Agent it was their responsibility to contact him, which they did.

The Provider advises that when the Complainants made their investment in **2006**, the investment was initially performing very well. However, the commercial property market crashed in **2008** and all property investments suffered.

The Provider advises that the Complainants were provided with annual benefit statements which kept them up to date on the performance of their investment.

In respect of the telephone conversations with the Tied Agent, the Provider advises that records of telephone conversations with the Complainants subsequent to **July 2006** were not retained following the migration of the Complainants' plan from a previous financial services provider to the Provider. The Provider advises that as the investment was surrendered in **2012**, it was archived when it moved to the Provider's current system in **2014**. Therefore, the Provider says it has limited information on contact received between **2006** and **2012**. The Provider also remarks that the relationship in respect of this investment ended over eight years ago in **March 2012**. The Provider also refers to the statement of the Tied Agent in respect of the telephone conversations with the Complainants.

The performance of the property fund over the period of the Complainants' investment, the Provider explains, was extremely challenging for all property fund investors, and there was nothing either the Provider or the Tied Agent could do about the performance of the market.

The Provider submits that the Tied Agent is a very experienced financial adviser and when discussing the performance of the Complainants' investment, he learned from his experience with property markets to explain to the Complainants why the value of their investment had fallen, that the property market historically follows a cyclical pattern, and history would show that it should recover. The Provider says the Tied Agent also explained that one of his personal property investments had similarly fallen significantly in value in an attempt to demonstrate how the factors which were affecting the market were affecting all investors.

### **The Complaint for Adjudication**

This Office wrote to Complainants on **24 October 2018** setting out a preliminary opinion in respect of the jurisdiction of this Office to investigate the conduct being complained of owing to the time at which the conduct occurred and date on which a complaint was made to this Office. For the reasons set out in that correspondence, the Complainants were informed that only the conduct relating to the *Ongoing Advice Complaint* would be investigated.

Following further submissions from the Complainants, by letter dated **10 October 2019**, this Office issued a final determination as to jurisdiction confirming that only the conduct relating to the *Ongoing Advice Complaint* would be investigated. This decision was confirmed again on **2 March 2020**.

Accordingly, the complaint is that the Provider wrongfully and/or unreasonably failed to provide an adequate or an appropriate level of advice to the Complainants during the lifetime of their investment regarding the reduction or mitigation of risk or loss.

### **Decision**

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

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

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

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A Preliminary Decision was issued to the parties on 16 February 2021 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.

In the absence of additional submissions from the parties, within the period permitted, I set out below my final determination.

### **Background**

The Complainants invested approximately €70,000 in a property bond in or around **July/August 2006** through the Tied Agent of a financial services provider. This financial services provider was subsequently acquired by the Provider.

Annual benefit statements have been furnished by the Provider beginning on **14 February 2009**. These statements contain information about the number of units invested by the Complainants in the chosen fund and the value of their investment. The statements also advise the Complainant to contact either the Provider or the Tied Agent should they have any queries in relation to their investment.

The Complainants wrote to the Provider on **6 September 2011** stating that they wished to surrender their policy with immediate effect. This had a six month deferral period for withdrawals and the surrender value was paid to the Complainants on **22 March 2011** in the amount of €22,980.90.

### **Formal Complaint**

The Complainants made a formal complaint by letter to the Provider dated **12 May 2015**. I note the following passages from this letter:

*"... During the recession I phoned [the Tied Agent] several times about the investment all he could say everyone was losing money including him I felt like I was losing everything. I did not know what to do as I was locked in for five years. ..."*

*When I look back on things I feel let down never got any advice from [the Tied Agent], never rang us or called out to the house to talk things over as to how the investment was progressing during the recession he knew I was sick at the time. ..."*

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The Provider issued a formal response to this complaint on **29 May 2015**. Following this, the Complainants wrote to the Provider again on **16 June 2015** as follows:

*“... Below are the reasons why we have raised this complaint:*

*1) ...*

*2) The second reason why we have raised this complaint is that we got absolutely no service from your advisor as when the fund started to lose money we were told by him that “he had also lost a lot of money”, we were never made aware that you could move or switch funds into something with a lower risk option, simply we were told we had to stay where we were. ...”*

### **Post Complaint Correspondence**

In a letter to this Office dated **5 May 2017**, the Complainants explain that:

#### ***“Regular Reviews***

*When we took out the plan we were promised that regular review would be completed around every 6 months. This did not happen at all in fact it was us who contacted [the Tied Agent] throughout the term to try get an update or advice on what to do. During one conversation [the Tied Agent] simply said, “It’s losing money, we have all lost money & that there was nothing we or he could do about it. He knew our concerns and made no attempt to advise us at all, again it was only later on after we exited the investment did we realise that we could have reduced the risk and move to a cash fund rather than watch our money keep going down. I must be honest he never phoned us or made any contact during the fall in the market it was all us contacting him and him avoiding us or brushing us off. ...”*

In a letter dated **12 November 2018**, the Complainants say the Tied Agent *“... never gave us any advice following the setting up of the plan, anytime we would contact him and there was many attempts, he would simply say ‘everyone is losing money’.*” Similar sentiments were also conveyed in a letter dated **24 April 2019**.

In a further letter dated **26 July 2019**, the Complainants explain that:

*“... We got no level of service when things started to perform badly, we were told by [the Tied Agent] to basically get over it and everyone had lost money. We panicked and took out all the funds we had left as we honestly thought at that point we were going to lose everything we had put in. Looking back this is also something we got no advice from [the Tied Agent] on.”*

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In a letter dated **4 December 2020**, the Complainants state:

*"... We received no annual update from [the Tied Agent] regarding the performance of the fund. Any conversations with him were as a result of us phoning him asking him for information as the fund kept falling, we are happy to supply phone records of this ..."*

### **Statement of Tied Agent**

The Tied Agent has prepared a statement in respect of his engagement with the Complainants. In so far as concerns this complaint, I note the following passages from this statement:

*"The investment performed well certainly for the first 18 months or so.*

*As you know the world and in particular our Irish commercial property fund suffered at the hands of a severe global financial crisis and in particular the Irish economy was hit by its own domestic/fiscal crisis.*

*During this time I received phone calls from [the First Complainant] and occasionally from her husband [the Second Complainant]. On each occasion I provided them with their options as follows:*

- 1. Give 6 months notice to effect a fund switch to a low risk cash/bond fund*
- 2. Give 6 months notice to effect a full surrender of the proceeds*
- 3. Stay with the investment to see if it recovers as the investment was as originally indicated for a period of between 8 & 15 years.*

*During these phone calls [the First Complainant] kept me informed as to her now developing medical status. On each occasion I enquired on her progress and always extended my best wishes to her for a speedy recovery.*

*I feel that I could not have been more helpful or obliging to [the Complainants] as I always made myself available to them at all times and always presented the full options available to them. Any decision to be made in relation to the investment always rested with them."*

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### **Analysis**

The Provider's evidence is that annual telephone conversations took place between the Tied Agent and the Complainants following their investment in the bond, and conversations were held on a six monthly basis from around **2008**. The Complainants' evidence is that the Tied Agent never telephoned them, and it was the Complainants who contacted the Tied Agent.

Having considered the evidence, it appears that a number of telephone conversations took place between the Complainants and the Tied Agent, regardless of who initiated contact. However, neither party has been able to show when the various telephone conversations took place or the precise discussions which were had during these conversations.

The Provider/Tied Agent's evidence is that the Complainants' options were discussed during the conversations. This is disputed by the Complainants who state that no advice was given, they were unaware of their options, and the Tied Agent simply told them that all investments were losing money. While several conversations appear to have taken place, the Complainants have not provided any details of what was discussed during these conversations except for the statement they say was repeatedly made by the Tied Agent.

It is clear from the evidence that the Complainants showed great concern for their investment which prompted their calls to the Tied Agent. It is also clear that the Complainants were dissatisfied with the outcome of these conversations. If it was indeed the case that, as the Complainants say, no *advice/service* was given by the Tied Agent, it is difficult to understand why the Complainant's continued to contact the Tied Agent if, each time they did, he gave the same answer and was unable to provide any assistance. Furthermore, if this was the case, it would seem reasonable to expect the Complainants to contact the Provider directly, contact a different financial adviser or make a formal complaint. However, none of this appears to have occurred.

While I am satisfied that the performance of investments generally and the performance of the Tied Agent's investments were discussed in the course of the conversations between the parties, I am also satisfied that it is likely some level of advice was given in respect of the Complainants' investment and that options were discussed.

Therefore, having considered the submission, I have not been provided with evidence that the Tied Agent failed to properly advise the Complainants during the lifetime of their investment.

### **Goodwill Gesture**

By letter dated **6 June 2018**, the Provider offered a goodwill gesture in the amount of €1,000 to the Complainants in respect of conduct that is not the subject of this complaint. In its Formal Response to this complaint, the Provider advised that this goodwill gesture remains open to the Complainants and "*... the context for same as set out in our submission of 6 June 2018 remains open.*"

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Having considered this letter and the context in which the goodwill gesture was made, it does not appear that this goodwill gesture was made in respect of the complaint for adjudication in this Decision. Therefore, it is a matter for the Complainants if they wish to accept this offer.

While I understand the Complainants' upset and disappointment at the losses they incurred, I cannot hold the Provider or its Tied Agent responsible.

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.

**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 March 2021**

**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,**

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**(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.**

