An tOmbudsman Seirbhísí Airgeadais agus Pinsean
Financial Services and Pensions Ombudsman

Decision Ref:	2021-0068
Sector:	Investment
Product / Service:	Investment
Conduct(s) complained of:	Misrepresentation (at point of sale or after)
Outcome:	Partially upheld

LEGALLY BINDING DECISION
OF THE FINANCIAL SERVICES AND PENSIONS OMBUDSMAN

The Provider set up a geared property fund towards the end of **2006**. The Complainants invested a substantial sum of money in the fund. It was the Complainants' understanding that the Provider, against which this complaint is made, would be the fund's investment manager and invested in the fund on that basis. The Complainants state this was not in fact the case and the fund's investment manager was a Third Party Financial Services Provider (**TPP**). The Complainants explain that they did not become aware of this until **February 2015**. It is the Complainants' position that the Provider misrepresented and/or concealed its role in the fund and/or the role of the TPP.

The Complainants' Case

In the Complainants' submissions they outline that in **2007** they purchased two self-directed pension products from the Provider and a total of €101,588.33 was invested. This consisted of €72,850.33 in respect of the First Complainant's policy and €28,738 in respect of the Second Complainant's policy. The fund was set up by the Provider to operate as a self-directed pension vehicle in conjunction with the pension policies underwritten by the Pension Provider. The Complainants state that *"[w]e understood at all times that the [Provider] Pension Property Fund was a geared property fund and that it was a high risk investment with the possibility of significant gains or losses."* The Complainants further clarify that *"[w]e are not in dispute with [the Provider] in relation to the high risk nature of [the] investment"* despite the inference contained in the Provider's final response letter dated **24 February 2015** that the Complainants did not appreciate the high risk nature of the investment.

The Complainants submit that it was their *"… distinct understanding that the [Provider] Pension Property Fund was under the direct control and management of [the Provider], with [the Provider] acting as the Investment Manager."* The Complainants state *"[t]his was the clear and unequivocal basis upon which we invested, as the [Second Complainant] was at that time a permanent employee of [the Provider] and we were drawn to the comfort of such a high risk investment being under the direct control of her employers of 13 years, whose reputation we knew well and trusted implicitly."*

It is stated by the Complainant that *"[a]ll promotional literature for the [Provider] Pension Property Fund, including the name itself, clearly indicated to us that it was under the direct control of [the Provider] and that there was no other parties involved, save for the underwriter of the policies … We invested on that basis and that basis alone."*

The Complainants advise that between **2007** and **2009** they received correspondence from the Provider to the effect that the fund was performing poorly and during this time, they also received annual fund value declarations from the Pension Provider. The Complainants explain that during this period, apart from being disappointed with the performance of the investment, *"… we had no reason to suspect that there was anything unknown in relation to the management of the investment which would have been of concern to us."*

Between **2010** and **2013**, the Complainants state that the communications from the Provider stopped completely and they heard nothing from the Provider in relation to the performance of the fund during that period. However, they continued to receive annual fund value declarations from the Pension Provider *"… but these communications, as previous ones had also done, deferred to the Investment Manager for further information, without identifying who the Investment Manager actually was. We understood that the Investment Manager was [the Provider]."*

On **31 August 2012**, the Complainants wrote to the Provider as they were concerned about the performance of the fund and the fact that they had not received an update from the Provider for 3 years. On **11 September 2012**, the Provider responded by letter advising that it was working on a detailed update for the fund which it hoped to issue *in the coming weeks*. The Complainants state that they did not receive this update and the Provider continued to act in a manner which conveyed to the Complainants that it was the investment manager, with no mention of any other party. The Complainants state that they were very concerned about the performance of the fund and the lack of communication from the Provider and on **16 December 2014**, wrote to the Provider to complain about the lack of communication from it as the investment manager and requested an urgent update. The Complainants received a response on **19 December 2014** providing the requested update. The Provider also indicated that the fund would be wound up in early **2015** as it was showing losses of approximately 90% of the amount invested. The Complainants state that the Provider *"… continued to refer to the management of the investment in a way which suggested they were the Investment Manager of the [Provider] Pension Property Fund."* The Complainants further state *"[t]hat is the clear impression they continued to create, without saying so expressly, although an enclosure with the letter disclosed the involvement of a third party which we took to be a property agent or advisor."*

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The Complainants refer to a series of letters exchanged between the parties regarding the Complainants' concerns about the Provider's performance as investment manager and the lack of updates in respect of the fund. The Complainants submit that *"[t]hroughout this correspondence, [the Provider] continued to act in a way which suggested that they were the Investment Manager for the [Provider] Pension Property Fund. … [T]hey continued to allow us believe that they were the Investment Manager."*

The Complainants state that on **13 February 2015**, the Pension Provider wrote to them advising that *"We are writing to inform you that we have been advised by your self-directed Investment Manager, [TPP], that the [Provider] Geared Property Fund in which you were invested has been sold. We have been advised that a letter was issued from [TPP] to investors in this fund giving details of the sale of the property."* The Complainants point out that they were *"… alarmed to discover for the first time that the Investment Manager for the [Provider] Pension Property Fund was in actual fact a company called [TPP], a company we have never heard of up to that point, apart from some indirect reference to some involvement enclosed with [the Provider's] letter dated 19th December 2014."* The Complainants also point out that they did not receive any correspondence from the TPP as mentioned in the letter from the Pension Provider. It is submitted by the Complainants that this reinforced their belief that the Provider *"… misleadingly downplayed, if not concealed, the role of [the TPP] as Investment Manager in favour of fostering the view that [the Provider] themselves were the Investment Manager …"*

Referring to a letter to the Provider dated **18 February 2015**, the Complainants state that they expressed their shock at discovering, for the first time, that the investment manager was the TPP, *"… a company whose involvement we had been totally unaware of."* The Complainants explain that they objected to the fact that the role of the TPP as investment manager was concealed from them and advised that they would not have made the investment in the fund had they been aware that it was not being managed by the Provider.

The Complainants state that they received a letter from the Provider dated **24 February 2015**, informing them that having investigated their complaint, it was declining to accept any responsibility or offer any resolution. The Complainants explain they found it surprising that a Final Response letter would issue within three working days of receiving their letter of **18 February 2015**. The Complainants express reservations as to whether their concerns were properly investigated by the Provider as the Provider's response does not address the involvement of the TPP.

The Complainants describe their complaint as follows:

> *"Our complaints are therefore twofold:*
>
> 1. *That the [Provider] Pension Property Fund and associated self-directed pension products which we have invested in were misrepresented to us by [the Provider] on the basis of [the Provider], and not an undisclosed third party, being the Investment Manager, a misleading impression which induced us into the investment and which impression [the Provider] wrongfully allowed to continue right up until 2015.*

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2. *That [the Provider], as our financial advisor, failed in their continuing duty of care and contractual duty towards us in relation to our investment, specifically in relation to advice, communications and service."*

In resolution of this complaint the Complainants want:

> *"… the amount of the investment of €101,588.33 to be refunded along with interest that would have accrued between 2007 and 2015 had we not invested in the [Provider's] Pension Property Fund, as we would not have done so without being misled by [the Provider]."*

The Complainants have addressed the jurisdiction of this Office to investigate their complaint. The Complainants submit, despite the fact that the investment was made in excess of 6 years prior to the complaint to this Office, this Office has jurisdiction to investigate the complaint pursuant to section 57BX(5) of the ***Central Bank and Financial Services Authority of Ireland Act 2004*** (the **2004 Act**), on the basis that the matters complained of constitute a series of acts or omissions and/or conduct of a continuing nature.

Establishing Jurisdiction

The then Financial Services Ombudsman's Bureau (FSOB) wrote to the Complainants on **14 May 2015** citing ***section 57BX(3)(b)*** of the 2004 Act and the 6 year time period within which to make a complaint in respect of the conduct of a financial service provider. The Complainants were advised that as their complaint was received on **4 March 2015**, this Office was prohibited from examining any aspect of the Provider's conduct which occurred prior to **4 March 2009**. The Complainants responded to this letter on **26 May 2015**, stating:

> *"Our understanding is that [the Provider] was acting in its own capacity as an investment manager and had not delegated that role to a third party, [the TPP]. The latter fact only became known to us as late as January 2015. The Conduct on the part of [the Provider] which is the subject matter of our complaint in that [the Provider] concealed, misrepresented and/or failed to disclose this material information in relation to the investment. Our complaint is based on the assertion that we would not have invested in the '[Provider] Pension Property Fund' had it been disclosed to us that it was in reality the '[TPP] Fund'.*

The Complainants referred to ***section 57BX(5)*** advancing the point that this qualified ***section 57BX(3)(b)*** where the conduct complained of is of a *continuing nature*. Accordingly, they argued their complaint was made within the relevant time limit. The Complainants' submission as to jurisdiction was considered and the FSOB wrote to both parties on **10 June 2015** accepting jurisdiction in the following terms:

> *"… I am satisfied that we can accept jurisdiction on the basis that the conduct complained of (that is the alleged ongoing misrepresentation concerning [the Provider's] role in the management of the Fund) is of a continuing nature and therefore we are in a position to investigate same.*

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> *The other aspect of your complaint which refers to the Provider's alleged failure to advise and communicate with you regarding the investment and its performance since 2010 also falls within the scope of the Bureau."*

The Provider's Initial Response

The Provider furnished its initial response to the complaint on **13 July 2015**. The Provider submitted that this was a vexatious complaint, without merit or foundation. The Provider also alluded to *"… historical legacy issues in the background of the relationship …"*

The Provider explained that the Second Complainant was a long standing employee who worked in the New Business processing area at the time the fund was developed and marketed and *"… she was absolutely unequivocally aware of the involvement of [the TPP] in the product and indeed referred to it on her husband, [the First Complainant's] application form as the [Provider/TPP] bond."* The Provider submits that as the Complainants were aware of the involvement of the TPP at the time they made the investment, their argument that they would not have invested had they known of the TPP's involvement does not stand up to scrutiny.

The Provider argues that the complaint is based on the *false premise* that the TPP was responsible for the decisions surrounding the investment of the funds. The Provider states this was not the case, explaining that it made all of the decisions around the selection of investments made by the fund which the Provider states can be verified by the TPP. The Provider explains that the TPP's appointment as investment manager by the Pension Provider did not mean the TPP took over responsibility for investment decisions. The Provider states that the Complainants have accepted that they had no issue with the risk associated with the fund and were more than happy to invest in a fund where the investment decisions were made by the Provider. The Provider submits that *"… there can be no grounds for a complaint of being induced or mislead into an investment which was de facto managed by [the TPP] because the investment was de facto managed by [the Provider]."*

Dealing with the level of communication between the parties, the Provider states that the Complainants received their annual statements each year. They also received additional updates up to **2010** and *"… were left in no illusion that the investment was in trouble at that time."* The Provider states that *"[w]hilst there were no additional updates from that point on there was also no information of note to communicate – they continued to receive their annual statements."* The Provider advises that the fund was a closed fund which the Complainants were aware of from the outset. The Provider submits that:

> *"… irrespective of the information being communicated, there was no opportunity for the complainant[s] to take any action relating to their investment – in other words there was no breach of duty of care because they received an annual update on their investment …*

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and whilst there was no additional updates provided in the latter period this had absolutely zero impact on the value of their investment or on their decision making because the investment structure did not allow investors any scope to divest or make any adjustment to their plan … No financial loss whatsoever accrued as a function of the lack of additional update …"

Jurisdiction

The parties engaged in mediation in **September 2015** in an effort to resolve this complaint. At this stage of the process, the complaint was being handled the Provider's solicitors. The mediation proved unsuccessful. There was an exchange of correspondence regarding jurisdiction following the unsuccessful mediation.

The FSOB wrote to the Complainants on **21 December 2015** (copying the Provider) as follows:

"I note that the jurisdiction of this office has been explained to you and that you are on full notice of the fact that this office cannot examine the circumstances surrounding the sale of the investment to you in 2007.

Accordingly in relation to your email of the 22 October 2015 the alleged conduct on the part of the Provider which is examinable by this office includes:

- *Failing to disclose the role of [the TPP]*
- *Failing to explain the role of [the TPP]*
- *Concealing the role of [the TPP]*
- *Failing to give adequate updates on the investment*
- *Failing to respond to enquiries*
- *Failing to identify the investment manager*
- *Issuing misleading correspondence*
- *Failing to deal adequately with our complaint*
- *Describing our complaint as vexatious*

I confirm that any other ground of complaint concerning the sale of the investment to you in 2007 in not examinable by this office (in accordance to Section 57BX (3) of the 2004 Act) such conduct includes:

- *" the alleged failure of the Provider to adequately explain the product*
- *Misrepresentation of the product (on any ground other than the alleged failure to disclose the role of [the TPP])*
- *Failing to consult at all with [the First Complainant]*
- *Failing to adequately consult with [the Second Complainant]*

…"

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This Office wrote to the Provider separately on **21 December 2015** (a copy of which was provided to the Complainants) advising that:

> *"The Complainants have set out their complaint to be:*
>
> > *'Our understanding is that [the Provider] was acting in its own capacity as an investment manager and had not delegated that role to a third party, [the TPP]. The latter fact only became known to us as late as January 2015. The Conduct on the part of [the Provider] which is the subject matter of our complaint in that [the Provider] concealed, misrepresented and/or failed to disclose this material information in relation to the investment. Our complaint is based on the assertion that we would not have invested in the '[Provider] Pension Property Fund' had it been disclosed to us that it was in reality the '[TPP] Fund' … the alleged ongoing misrepresentation concerning [the Provider's] role in the process, the concealment of the role of [the TPP] in the process and the serious omissions by [the Provider] in relation to the service …'*
>
> *In accordance with Section 5 of the Act this office will examine the conduct complained of by the Complainants (as set out above). …"*

The quotations contained in this letter are taken from the Complainants' submissions dated **26 February 2015** and **26 May 2015.**

On **14 January 2016**, solicitors for the Provider indicated that it did not intend to make any further submissions in relation to jurisdiction on the basis that the complainant for investigation was that outlined in the letter of **21 December 2015**.

The Complainants addressed this issue in a letter dated **24 January 2016**, stating:

> *"It is our assertion that the FSOB has full jurisdiction under s.57BX(5) of the Central Bank Act 1942, as amended, to investigate all conduct of a continuing nature in relation to the sale, management and administration by [the Provider] … from October 2006 to January 2015 inclusive. For the avoidance of doubt, we assert that this should include all conduct of [the Provider] in relation to the sale of the insurance products forming part of the [Provider] Pension Property Fund excluding conduct bearing on the risk profile of the investment, which we accept was not conduct of a continuing nature and which is not therefore captured by s.57BX(5) …*
>
> *The remaining conduct surrounding the sale and management of the investment, and which conduct we say continued throughout the lifetime of the investment, includes, but is not limited to, the following:*
>
> - *Failing to disclose the role of [the TPP], adequately or at all*
> - *Failing to explain the role of [the TPP], adequately or at all*
> - *Concealing and/or misrepresenting the role of [the TPP]*

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- *Misrepresenting and/or engaging the role of [the Provider]*
- *Failing to identify the actual investment manager, adequately or at all*

We accept that, under s.57BX(3) of the Act, complaints not made within 6 years of the conduct complained of do not come within the remit of the FSOB. For that reason, we accept that conduct bearing on advice received from [the Provider] in 2007 in relation to the risk profile of the investment, would be excluded. Thus, we are not asking for an investigation into mis-selling relating to the sales process in 2006/2007 in that sense. We have made it clear all along that we do not complain of mis-selling in any event; … however, we do complain of other conduct forming part of the sales process which we say continued beyond the sales process itself and extended throughout the life time of the investment, right up to December 2014. To the extent that this conduct can be regarded as continuing in nature, it is our assertion that s.57BX(5) applies.

We put forward the following additional points in support of our assertion that s.57BX(5) applies in this case.
…

- *The conduct complained of, which we say originated during the sales phase of the investment and continued during the investment phase, right up to the completion of the investment itself, included, but is not limited to, concealment, misrepresentation, exaggeration and mal-administration. The conduct we do not complain of, and which we say was confined to the sales phase, includes advice given by [the Provider] in relation to the risk profile of the investment …"*

The Provider's solicitors responded to this letter on **15 February 2016**, explaining that it was satisfied to deal with the complaint as originally defined but strongly objected to any attempt to widen the scope of the complaint in order to include complaints surrounding the sale of the product to the Complainants in **2006**. The Provider's solicitors submitted that any complaint in relation to the sale of the product was *statue barred*. The Provider's solicitors have relied on the Supreme Court case of ***Gallagher v. ACC Bank plc*** [2012] IESC 35, in support of their position. While I do not intend to repeat all of the points made by the Provider's solicitors, I note the following paragraphs:

*"The Complainants assert that alleged misrepresentations made which induced the **sale**, as distinct from the ongoing **management** of the product fall under the exception. In order to do so, the Complainants are effectively asking the Ombudsman to accept that the sale of the financial product can, for the purposes of their complaint, legally be considered a continuing event.*

The Respondent respectfully submits that this cannot possibly be the case. A product is considered sold when an offer has been deemed to be accepted. It occurs at a defined point in time and cannot ever be considered to be an ongoing event.

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> *If we accept the dicta of Justice Fennelly in the above mentioned case, which the Respondent submits the Financial Services Ombudsman is bound to do, then we have to accept that the statute of limitations, in so far as the sale of the product is concerned, begins to run from 2006, when the investment was made.*
>
> *We must therefore distinguish between acts of misrepresentation which, it is alleged induced the Complainants to enter into a sale back in 2006, and allegations of misrepresentation in so far as the management of the fund are concerned. The Respondent is firmly of the view that these allegations are without merit, but accepts that as it is alleged that these misrepresentations continued to 2015, these are within the remit of the Financial Services Ombudsman. …"*

In order to assist with the determination of the assessment of jurisdiction in this complaint, this Office requested certain categories of documentation from the Provider's solicitors on **24 May 2017**. The Provider's solicitors agreed to provide the documentation sought by letter dated **12 June 2017** but questioned why this documentation was being sought and its relevance to the assessment of jurisdiction.

2017 Legislative Changes

Two legislative changes occurred in 2017. First, was the introduction of the ***Central Bank and Financial Services Authority of Ireland (Amendment) Act 2017*** (the **Amendment Act**) and second, was the ***Financial Services and Pensions Ombudsman Act 2017*** (the **2017 Act**).

The Amendment Act broadened the jurisdiction of this Office through the introduction of the concept of *long-term financial services* which empowered this Office to investigate conduct related to such services. Consequently, this Office wrote to the parties on **10 October 2017** seeking *"… all documentation relevant to the inception of the [Pension Provider] Self Direct Portfolio – The [Provider] Geared Property Fund, including the Information Memorandum, marketing or information brochures which were available at the time of inception of the investment, and any documents referencing key product information …"*

The Complainants responded to this letter on **19 October 2017**, stating that the product which they were sold came within the definition of *long-term financial service*. The Complainants further stated that:

> *"… we still contend that the FSO has full jurisdiction to determine all aspects of our complaint under the original legislation … as the conduct complained of is one of a 'continuing nature' … i.e. conduct in this case which was aimed at concealing the fact that the investment manager of the investment was [the TPP] and not [the Provider]. It is our contention that this conduct continued from 2007 to at least 2014, placing the complaint fully within the jurisdiction of the FSO.*
>
> *…*

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We would like to clarify at this point that we do not have in our possession any marketing or information brochures in relation to the investment. [The First Complainant] was never provided with such material, a serious issue in itself. [The Second Complainant's] employment with the Provider ceased in 2007 and she did not retain any such information in a personal capacity. However, [the Second Complainant] recalls that such marketing information existed, including an information brochure, and should be available on file in the name of [the First and Second Complainants] held by the Provider."

Preliminary View

This Office wrote to the parties on **26 October 2017**, to inform them of its preliminary view that the conduct complained of came within the time limits prescribed by the 2004 Act, as amended. It was also clarified that:

"… the underlying conduct complained of relates to an alleged misrepresentation in relation to the roles of the Provider and [the TPP] in the [Provider] Pension Property Fund. Consequently, the investigation and adjudication of this complaint may involve a further assessment of whether you were aware or ought to have been aware, of this at the time the investment was made in 2007. …"

This Office wrote to the parties on **10 January 2018** following the commencement of the 2017 Act advising them of the repeal of the Amendment Act and the preliminary view as to jurisdiction expressed in the above letter was unchanged owing to the provisions of ***section 51*** of the 2017 Act. The Provider's solicitors wrote to this Office on **11 January 2018** acknowledging that a preliminary view as to jurisdiction had been made but disagreed with this view. The Provider's solicitors submit that it does not accept, for the reasons set out in this letter, that the Complainants did not became aware of or ought to have become aware of the conduct complained of until **13 February 2015**.

The Complainants prepared further submissions dated **5 February 2018**, stating:

"We wish to make the following further observations in relation to the misrepresentation and concealment which we say wrongly induced us into this investment;

1. *[The Second Complainant] had no role in the planning, setting up, initiation or sale of this investment fund. [The Second Complainant] had no knowledge of the mechanics of the investment fund and had no part to play in its implementation. She acted solely as the post-sales administrator and her job description, New Business Manager, was a misnomer, as she had no sales or advisory role. The role of [the Second Complainant] in relation to the investment fund is a matter for oral evidence.*

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2. *The understanding of [the Second Complainant] had of the investment fund is that it was managed exclusively by [the Provider] who had the relevant Revenue approval to manage a self-directed pension investment. She was not aware of the involvement of [the TPP] nor had she any reason to be so aware. Her role in the investment fund, as an employee of [the Provider], was as a post-sales administrator. The knowledge of [the Second Complainant] in relation to the management of the investment fund is a matter for oral evidence.*

3. *[The Second Complainant] invested in the fund because she understood and believed it was exclusively managed by [the Provider] under a Revenue approved self-directed pension scheme. She was led to believe this by [the Provider] and never had her attention been drawn to the fact that the fund was managed by another Revenue approved party, [the TPP]. [The Second Complainant] understood that all investment decisions would be taken exclusively by [the Provider], she had a high level of trust in her employer over many years and she trusted her employer to make those decisions wisely. She communicated this understanding to [the First Complainant] and her understanding of the management of the investment fund will be a matter for oral evidence.*

4. *The only information [the First Complainant] received in relation to management of the investment fund was from [the Second Complainant] acting as an employee of [the Provider], including acting as a conduit of documentation for signing. He was never invited to meet or otherwise discuss his investment in the fund with [a Provider] qualified financial advisor and he never received a copy of the information material. [The First Complainant] trusted in the information received from [the Second Complainant] that the fund would be managed exclusively by [the Provider] under a Revenue approved self-directed scheme and this will be a matter for oral evidence.*

5. *…*

6. *[The Provider] was not authorised to act as an exclusive Revenue approved self-directed pension investment fund manager but, by failing to give adequate notice of the role of [the TPP], it concealed that fact from us and gave the misleading impression that it was properly authorised to act, as the exclusive investment fund manager.*

7. *The Pension Property Fund application forms to [the Pension Provider], which were signed by [the First and Second Complainants], and which reference [the TPP] as a joint investment fund manager, were not filled out or completed by us, were not adequately explained to us or at all, did not disclose any reasonable grounds for believing that the investment fund was not being exclusively managed by [the Provider] acting under proper Revenue authorisation, as we believed, and gave no reasonable notice of the misrepresentation at that time.*

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8. *Correspondence from [the Provider] to us dated 19 December 2014, which in turn enclosed an e-mail from [the TPP] dated 14 December 2014, makes it clear that [the Provider] relied on [the TPP] for the effective management of the fund and that [the Provider] itself had no active decision making role in the management of the fund, including the acquisition and sale of assets, contrary to all previous indications. All its dealings with us to that point suggested otherwise and we say that this was our first reasonable opportunity to discover the true position. Up to that point, all the representations made to us were that [the Provider] was in exclusive control of all aspects of the investment, including the acquisition and disposal of fund assets.*

Thank you for noting the above points and we look forward to providing the relevant sworn evidence at an oral hearing."

The Complainants delivered a further set of submissions dated **30 April 2018**, which repeated many of the points contained in their previous submissions dated **5 February 2018**. However, I note the following passages:

"We wish to make the following further points in relation to the misrepresentation and concealment which we say wrongly induced us into this investment;

1. *… The role of [the Second Complainant] in relation to the investment fund was strictly limited to administering back-office paperwork and ensuring that all relevant paperwork was on file for each investor …*

2. *…*

3. *…*

4. *…*

   b. Failure to adequately explain the management of the investment fund by face to face meetings or discussions with [the Second Complainant], as a vulnerable employee investor, and [the First Complainant]

   …

The fact that the investments were sold to a vulnerable employee and her husband at a remove, without providing any consultations or adequate information, under a misleading title, on the basis of erroneous internal [Provider] verbal communications, had the effect of duping us into believing it was an investment under the direct control of [the Provider]. …"

This effectively concluded the parties' submissions as to jurisdiction.

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The Provider's Case

Following the extensive submissions in respect of jurisdiction, the Provider delivered its substantive response to the complaints on **28 September 2018**.

Nature of the fund

The Provider explains that the fund is comprised of direct property investments in the United Kingdom commercial property market which makes up 80% of the fund and indirect investments in the European commercial and residential market which makes up 20% of the fund. This fund was a closed investment with a seven year investment period which was sold to 54 of the Provider's clients, including the Complainants.

The Provider states that the indirect investment component of the fund involved commercial properties with single tenants in prime city locations. The *Pension Investment Recommendation* document provided to the Complainants prior to the investment advised that professional UK commercial property investment experts would be engaged to identify the appropriate properties to acquire. The Provider advises that the indirect investments were carried out by the Provider in two particular property funds which the Provider states was set out in the *Pension Investment Recommendation*.

The fund was a highly geared property fund. The Provider states that the *Pension Investment Recommendation* expressly stated that gearing would be between 70% and 80%. It was made clear to the Complainants that this was a high risk investment and the risks were set out in the *Pension Investment Recommendation*.

Timeline of Events

The Provider has prepared a timeline of events which states that the fund was created in **2006** and the Second Complainant was the New Business Manager at the time. On **18 December 2006**, the First Complainant completed an attitude to risk form. Also in **December 2006**, the Provider prepared a *Pension Investment Recommendation* for the First Complainant, recommending the fund. On **8 January 2007**, the First Complainant signed and returned the *Pension Investment Recommendation*. On **16 January 2007**, the First Complainant's *Fund Application* was completed and sent to the Pension Provider.

The Provider states that in **January 2007** it prepared a *Pension Investment Recommendation* for the Second Complainant, also recommending the fund. On **7 February 2007**, the Second Complainant completed an attitude to risk form. The Provider states that on **7 February 2007**, the Second Complainant completed and signed the application form for investment in the fund.

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On **24 April 2007**, the Pension Provider sent retirement bond documentation to the Provider for both Complainants and on **16 May 2007**, the Provider sent original policy documentation to the Complainants. The remainder of the timeline sets out the various updates received by the Complainants from the Provider and the Pension Provider. The Provider had furnished a further timeline of events in its letter of **5 November 2018** which states that *Proposal and Policy Review* forms for each of the Complainants were completed by the Second Complainant and dated **12 June 2007**.

Relationship between the parties

The Provider states that it was the employer of the Second Complainant and the investment manager of the fund. The Provider advises that it created the fund and sought investors. The Provider also engaged the Pension Provider and the TPP in their respective roles within the fund. The Provider explains that it engaged an auctioneer to act as property advisor for the direct property investment part of the fund. The Provider submits that it carried out all due diligence in relation to the property acquisitions and vetted the properties which were purchased by the fund to include travelling to visit two of the larger properties acquired. The Provider states that it provided instructions to the auctioneers in respect of the property acquisitions and also in relation to property management post acquisition. The Provider also approved lending finance for the direct property acquisitions with the relevant lending institutions.

The Pension Provider - The Provider explains that as the fund was a pension product, it was required to be sold through an authorised insurer. The Pension Provider was chosen by the Provider to fulfil this role as the Pension Provider had been selling these types of product for some time and were experienced in the area.

The TPP - As the fund was a pension product, the Provider advises that it was required to be packaged by way of a trust structure. Therefore, access to a pension unit trust provider was required. A unit trust is a contractual fund structure created by way of trust deed between a trustee and a management company under the ***Unit Trusts Act 1990***. The Provider explains that a unit trust is not a separate legal entity and therefore, the trustee acts as legal owner of the fund assets on behalf of the investors. The TPP was chosen by the Provider to fulfil this role because it had a proven track record in this area and had experience of working with the Pension Provider.

The Second Complainant - The Second Complainant was the New Business Manager for the Provider. The Provider states that this role was not, as characterised by the Complainants, a purely administrative role. It was a managerial position within the Provider which involved handling millions of euro worth of investment funds and pension products on behalf of clients. The Second Complainant's responsibilities were varied but included the processing of investor applications for the investment.

/Cont'd…

Therefore, the Provider states that prior to the sale of this product to investors, the Second Complainant attended internal training in relation to the fund which included presentations about the fund, how it worked and its structure. The Provider submits that the training made clear who the TPP was and its role in relation to the fund.

The Provider states that while the Second Complainant did not hold a formal QFA qualification, she had worked in the industry for 30 years and in **2006** she had made an application for qualification as QFA through the *grandfathering* system. The Provider states that the Second Complainant considered and set out in her application that she was entitled to the QFA qualification due to her depth of knowledge in the industry and the fact that she had undergone at foundational level, a financial advice qualification.

Complainants' investment in the fund

The Provider states that the Second Complainant approached it after the training in respect of the fund and expressly requested that she and the First Complainant be given access to the fund. The Provider advises that the Complainants were both considered appropriate to invest in this specific product based on their attitude to risk and investment objectives. The Provider explains that the Complainants had, over the years, invested in other investment products including a directly held share portfolio.

In respect of the First Complainant, the Provider states that one of its financial advisers and directors reviewed and signed the due diligence paperwork completed by the First Complainant. The Provider submits that all information material was made available and provided to the First Complainant prior to the investment. The Provider explains that it is its understanding that the Second Complainant provided this material to the First Complainant. The Provider states that its staff was available at all times to meet with the First Complainant in person, however, he declined to meet prior to the investment, preferring to discuss the fund with the Second Complainant.

In relation to the financial adviser who reviewed the First Complainant's due diligence paperwork, the Provider explains that this individual ceased employment with the Provider in **October 2007**. The Provider states that it contacted her after this complaint was made but was advised that due to the passage of time since the investment was entered into, she has no recollection of events.

The Provider's role in the management of the fund

In addition to the submissions outlined above regarding the Provider's role, the Provider states that its role was conveyed to the Second Complainant at internal staff presentations prior to the sale of the fund. This information is further set out in the *Pension Investment Recommendation* and the fund brochure both of which were provided to the Complainants prior to investment. The Provider points out that the brochure for the fund states that it was a sub-fund of the TPP's unit trust.

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The Provider states that the TPP later became a Pension Provider approved investment manager and the Provider added the TPP as an additional investment manager to the fund in order to meet the technical requirements of the Pension Provider. The Provider states that this was made clear on the application form for entry into the fund where the investment manager is listed as the Provider/TPP. The Provider states that this form is marked as having been read and understood by the First and Second Complainants on **18 December 2006** and **7 February 2007** respectively. The Provider submits that there was never any attempt to hide this fact from either of the Complainants and it did not have any bearing on the control and management of the fund.

The role of the TPP

The Provider explains that the role of the TPP was that of pension unit trust provider and named investment manager of the fund. The Complainants were sent correspondence in relation to the performance of the fund by the Pension Provider. The Provider states that when the investment was wound up, the Pension Provider sent investor returns to the TPP who then sent this on to investors directly. The Provider advises that the Pension Provider was aware that it was also investment manager for the fund and correspondence sent to the TPP was also sent to it. The Provider submits that, as it suggests, is clear from the correspondence provided, the TPP sought instructions from and deferred to, the Provider in relation to investment decisions.

The Provider explains that valuations were usually provided to the Pension Provider by the TPP. The Provider also states that there were regular and open communications between it and the TPP during the life of the fund.

Misdescription of roles and failure to identify the TPP

The Provider submits that there was no concealment of the involvement of the TPP and it is wholly incorrect to refer to the TPP as *the Investment Manager*. The Provider states that the TPP was listed as investment manager for the fund for technical reasons. However, the Provider was at all times the investment manager and at all times had responsibility for the management, control and operation of the fund.

The Provider explains the reason there was no mention of the TPP when communicating with the Complainants is that communications between the Complainants and the Provider related to the status and performance of the fund. As investment manager, the Provider was in a position to communicate this to the Complainants without reference to the TPP as all decisions in relation to property acquisitions and management were carried out by the Provider. The Provider submits that the role of the TPP had no place in such communications. Again, the Provider points out that the application forms signed by the Complainants identifies the Provider and TPP as the investment manager.

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Complainants' discovery of the TPP's role

The Provider disagrees with the date on which the Complainants assert they became aware of the TPP's position. In this regard and as already outlined above, the Provider points to the application form and the technical requirement for the TPP's involvement.

Communication Gaps

The Provider acknowledged that there were communication gaps but states that it is important to note that the fund was a closed investment in which the investment properties were *significantly underwater* from as far back as **2009**. The Provider states that communications in **2010**, **2011** and **2012** made this clear to the Complainants. The Provider states that while an update was promised in **2012**, it is admitted by the Provider that this *fell through the cracks*; this was at a time of significant financial crisis which had placed the Provider under serious pressure as a business. The Provider also states that this update was not pursued by the Complainants for a further 2 years.

The Provider states that in any event, the Complainants had no opportunity to withdraw funds given the closed nature of the investment and as such, the update would have been purely for informational purposes. The Provider also points out that an annual statement was provided to the Complainants in **2013** and an update was later provided in **2014**. Therefore, while it is accepted that there was a gap in communication, updates were provided to the Complainants each year.

Further submissions

The Provider states that in addition to the submissions previously made, the central pillar of this complaint is based around an argument that the Complainants were unaware that the TPP was the investment manager of the fund. The Provider states that, as previously mentioned, the Second Complainant attended staff training which specifically explained the TPP's role in relation to the fund both as a unit trust provider and investment manager. This title was purely to satisfy the Pension Provider's requirements. The Provider states that the *Pension Investment Recommendation* and the brochure set out the TPP's role. The Provider submits that there was never any attempt to hide the TPP's role nor was there any reason to do so.

The Provider also observes that no allegations have been made that the Complainants' monies were improperly invested or the fund was mismanaged. Instead, the Complainants allege that they would not have entered the fund had they been aware that the Provider was not the investment manager as they only trusted the Provider to manage the fund. The Provider states that it did manage the fund and took responsibility for all investment decisions, including carrying out due diligence in relation to property acquisitions, vetting properties and instructing auctioneers.

/Cont'd…

The Provider states that the picture painted by the Complainants is one of two vulnerable investors who were induced to enter the fund. The Provider argues that this could not be further from the truth. The Provider submits that the Complainants actively sought to be included in the fund and the Provider never approached either of the Complainants to enter the fund. The Provider advises that in **2006**, it had no shortage of interested parties wanting to invest in the fund and therefore, had no reason to pursue investment from the Complainants.

The Provider states that the Complainants clearly communicated an appetite to invest in a high risk investment and a desire to invest in this specific fund. It was unfortunate that he subsequent property crash led to the destruction of the fund's value, however, the Complainants were aware of the risks associated with investing in a geared property fund. The Provider submits that had the fund provided the expected returns, no complaint would ever have been made by the Complainants in relation to the role of the TPP.

The Provider also states that it has complied with the provisions of the relevant Consumer Protection Code.

The Complainants prepared an extensive response to the Provider's submissions dated **14 March 2019** and they have also made a number of observations in respect of the documentation provided. This was followed by a final exchange of submissions by the parties in **April 2019** and **May 2019**.

The Complaints for Adjudication

The complaints are that the Provider:

1. Misrepresented its role as investment manager of the fund and/or misrepresented and/or concealed the role of the TPP; and

2. Failed to advise, communicate with and/or provide an appropriate level of service to the Complainants.

Preliminary Decision

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

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

1. Letter from the Complainants to this Office dated 3 August 2020.

2. Letter from the Provider's representatives to this Office dated 11 August 2020.

3. Letter from the Complainants to this Office dated 22 August 2020.

Copies of these submissions were exchanged between the parties.

Much of the Complainants' post Preliminary Decision submissions rehash previous arguments raised during the investigation stage of the complaint. The evidence referred to in these submissions and arguments made were all available to me in arriving at my Preliminary Decision. I will none the less refer to some of the post Preliminary Decision submissions in my Decision.

The Provider responded to the Complainants' post Preliminary Decision submissions by way of its post Preliminary Decision submission dated **11 August 2020.**

The Provider submits in its post Preliminary Decision that it has:

> *"reviewed the complainants' submissions, and are of the view that the points raised by them have been dealt with in Previous correspondence and submission, and that no new information is provided in these submissions. We therefore intend only to direct the FSPO to the relevant sections of our previous correspondence and submissions by way of response"*

The Complainants responded to the Provider's post Preliminary Decision submission in their submission dated **21 August 2020.**

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

Decision

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

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

The Complainants have requested an Oral Hearing in respect of this complaint. The Complainants submit in their post Preliminary Decision submission dated 3 August 2020 that they:

> *"Consider that the failure to hold an Oral Hearing has undermined the investigation of our complaint because it has caused the FSPO to make a determination based on incomplete evidence. We say that there are many conflicts of fact which require the holding of an Oral Hearing to resolve those conflicts".*

Following the above statement, the Complainants list 4 issues, which they believe can only be resolved by way of an Oral Hearing. These are:

The Role of the Second Complainant in the setting up and administration of the fund;

The Complainant submits that:

> *"The Preliminary Decision is heavily laden with inferences that the submissions of the Provider were preferred to that of the Second Complainant in relation the latter's knowledge and her role. The FSPO did not afford the Second Complainant an opportunity to give sworn testimony as to her knowledge and it denied both the Complainants an opportunity to test the claims of the Provider by cross-examination. The investigation therefore fell seriously short of establishing the facts in relation to this key issue which goes to the very heart of the Preliminary Decision".*

Fund Documents, including the Attitude to Risk Forms, Pension Investment Recommendations, Fund Brochure and Application Forms;

The Complainants submit that:

> *"The Fund Documents referred to above give rise to many conflicts of fact in relation to the completion of the documents, the information contained in the documents and the background as to how the information contained in the documents was recorded… we say that the failure to hold an Oral hearing denied the Complainants an opportunity to test these matters and to cross-examine the Provider in relation to serious deficiencies in the way some of the documents were made available…"*

/Cont'd…

The Complainants' experience as investors;

The Complainants submit that:

> *"the Preliminary Decision makes a finding of fact that the Complainants were experienced investors based solely on a ticked box on the Attitude to Risk forms. The failure to hold an Oral Hearing has denied the Complainants an opportunity to put forward details of their lack of experience in vesting in geared funds…"*

Evidence as to when the Self-directed Investment Manager was appointed;

The Complainants submit that:

> *"This is a key issue in the case because it could help resolve a conflict of fact as to what the Second Complainant knew in relation to the identity of the Self-Directed Investment Manager and when. The documents submitted by the Provider did not reveal when this key decision was made and the FSPO ignored the Complainants' call for the matter to be investigated further".*

The Complainants further submit that:

> *"for all of the above reasons, and more, we consider that the failure to hold an Oral Hearing represents a serious error in the investigation of our complaints and has caused the FSPO to make a Preliminary Decision which is based on incomplete factual information. We say that the decision is therefore flawed in a material respect".*

I do not accept the position in relation to the necessity for an Oral Hearing put forward by the Complainants. It was open to the parties, at any time during this investigation, to put forward any evidence or submissions in relation to the matters outlined above. Having reviewed and considered the comprehensive and extensive submissions made by the parties to this complaint, I am satisfied that the submissions and evidence furnished do 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 extensive submissions and evidence furnished are sufficient to enable me to arrive at my Decision in this complaint without the necessity for holding an Oral Hearing.

This complaint has been dealt with in accordance with the well established procedures of this Office that are designed to ensure fair procedures are applied in the investigation and adjudication of complaints. I do not believe the Complainants have been disadvantaged, in any way by the absence of an Oral Hearing.

The Decision to hold an Oral Hearing is a discretionary power granted to me under the ***Financial Services and Pensions Ombudsman Act 2017***, where I can hold a Hearing if I am of the view that such a Hearing would be of benefit to the adjudication of the complaint. Having considered all of the evidence and submissions and the particular circumstances of this complaint I am firmly of the view that such a hearing would not be of benefit to the adjudication of this complaint.

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In the High Court case of *Kanagaratnam Baskaran –v- Financial Services and Pensions Ombudsman* [20016/149MCA] Binchy J in his decision refers to various cases which involved the non-holding of an Oral Hearing by the FSPO and its predecessor, the Financial Services Ombudsman.

Binchy J at section 68 of his judgement states that *"it is well established by the authorities to which I have referred above, that the respondent* [the Financial Services and Pensions Ombudsman] *is under no obligation to conduct an oral hearing unless there is a conflict as to matters of fact that can only be resolved by such a hearing".*

In this complaint I do not believe an Oral Hearing would have assisted to resolve the issues raised by the Complainants. Therefore, I do not propose to hold an Oral Hearing and will now proceed to outline my Decision.

The Financial Services and Pensions Ombudsman Act 2017

This complaint was made prior to the introduction of the 2017 Act which commenced on **1 January 2018**.

Pursuant to ***section 48(c)***, this Office has jurisdiction to conduct an investigation in respect of a complaint made prior to the commencement of the 2017 Act where the conduct complained of *"… was being investigated by the Financial Services Ombudsman or the Pensions Ombudsman, as the case may be."* Furthermore, the investigation of such a complaint shall be conducted in accordance with the provisions of the 2017 Act as mandated by ***section 57(b)***. I am satisfied that this complaint was being investigated by the Financial Services Ombudsman at the time the 2017 Act was commenced. Therefore, this Office has jurisdiction to investigate this complaint and the provisions of the 2017 Act apply in respect of the investigation of this complaint.

There have been extensive submissions surrounding the question as to whether the conduct complained of comes within the time limits for the making of a complaint. The time limits in operation at the time the complaint was made were contained in the 2004 Act. These time limits were subsequently amended by the Amendment Act. This was followed by further legislative change with the introduction of the 2017 Act.

In determining the time limits that apply to this complaint it is necessary to have regard to ***section 51(6)(a)*** of the 2017 Act. ***Section 51(6)(a)*** states as follows:

> *"(6) The time limits specified in this section shall, on and after the establishment day, apply to the following:*
>
> > *(a) any complaint received by the Financial Services Ombudsman or the Pensions Ombudsman which had not been assessed as to its suitability for consideration by the Financial Services Ombudsman or the Pensions Ombudsman, as the case may be;"*

/Cont'd…

In deciding which enactment contains the appropriate time limits, I must determine whether this complaint was *"… assessed as to its suitability for consideration by the Financial Services Ombudsman or the Pensions Ombudsman …"* I am satisfied that an assessment as to suitability for consideration by the relevant Ombudsman could only arise after the investigation of a complaint was complete. This is so notwithstanding the expression of the preliminary views outlined above.

I consider such preliminary views, while not determinative of any complaint or constituting an assessment as to suitability, are necessary in order to clarity and/or establish the precise complaint being made and to avoid the introduction of additional complaints or aspects to a complaint which were not made at the time of the original complaint. This is imperative for the proper investigation of a complaint by this Office. This also ensures that a respondent to a complaint is aware of the complaint being made and affords them an opportunity to address and respond to the complaint.

Therefore, I am satisfied that the investigation of this complaint was ongoing at the time of the commencement of the 2017 Act. Accordingly, I find that the time limits as set out in ***section 51*** of the 2017 Act apply to this complaint.

This Office wrote to the parties on **10 January 2018** to advise them of the commencement of the 2017 Act and that ***section 51*** of the 2017 Act allowed for the same extension of time limits as previously contained in the Amendment Act. As such, the preliminary view expressed on **26 October 2017** remained unchanged.

Creation of the fund

The Provider wrote to the TPP by email dated **31 August 2006** stating:

> *"… I can now advise that [the Provider] are interested in developing a bespoke pension product for our clients and would like to partner with [the TPP] and utilise your Unit Trust Services. …"*

In the correspondence that followed, the Provider and the TPP then set about establishing the fund in conjunction with the Pension Provider.

Attitude to Risk Forms

The First Complainant completed and signed an *Attitude to Risk* form dated **18 December 2006**. On the form, the First Complainant described himself as having previous investment experience and that his current investment objective was to *"diversify current fund for retirement."* The Second Complainant completed and signed an *Attitude to Risk* form dated **7 February 2007** and described herself as having previous investment experience in the areas of equities and property.

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Pension Investment Recommendations

A *Pension Investment Recommendation* dated **December 2006** was prepared by the Provider for the First Complainant in respect of the fund.

Section A of the Recommendation states as follows:

> ***"A) Recommendation***
>
> *…*
>
> *In brief it is proposed that your pension contribution be made to the [Provider] Pension Property Fund.*
>
Provider	***Risk Profile***	***Recommended Fund***	***Contribution***
[Provider]	*High Risk*	*[Provider] Pension Property Fund*	**Circa €70,000*

> *…"*

Section K of the Recommendation identified the entities involved in the fund and their respective roles:

> *"…*
>
Company	*[The Provider]*
Insured Product Provider	*[The Pension Provider]*
Unit Trust Provider	*[The TPP]*
…	

> *…"*

The Recommendation contains the following declaration which was signed by the First Complainant on **8 January 2007**:

> *"I have read and I understand the above literature, recommendation and attached product brochure.*
>
> *I confirm receipt of the information memorandum specific to this investment."*

An almost identical *Pension Investment Recommendation* dated **January 2007** was prepared for the Second Complainant which she signed on **7 February 2007**.

/Cont'd…

Fund Brochure

The Provider has furnished a copy of the fund brochure. I note that page 2 of the brochure states:

> *"**Investment structure***
>
> *The [Provider] Pension Property Fund will be set up as a sub-fund of the [TPP], a Revenue approved Exempt Unit Trust. …"*

A description of the parties involved in the fund is given on page 9 as follows:

> *"**Who are the various parties involved in this product?***
>
> ***Promoters***
>
> *[The Provider] are the promoters and are responsible for bringing this product to market. …*
>
> ***Unit Trust Providers***
>
> *[The TPP subsidiary] are the unit trust providers. They are a subsidiary of [the TPP] a specialist product provider regulated by the Financial Regulator. …"*

Application Forms

The First and Second Complainants signed separate application forms in respect of the fund on **18 December 2006** and **7 February 2007** respectively. I note that on the first page of these forms, the investment manager is identified as the Provider and the TPP. The application forms were sent by the Provider to the Pension Provider on **16 January 2007** and **8 February 2007**.

Internal Documents

The Provider has furnished two *Signing Off Policy Documents* forms in respect of the First Complainant dated **13 March 2007** and **12 June 2007**, and further form dated **12 June 2007** in respect of the Second Complainant. These forms acknowledge that an original/copy policy document was sent to the Complainants. I note that these forms appear to have been signed off by the Second Complainant.

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Three *Proposal & Policy Review Forms* dated **12 June 2007** were also completed by the Provider in respect of the Complainants: two in respect of the First Complainant and one in respect of the Second Complainant. I note that these forms were signed off by the Second Complainant.

The first form relates to a review/recommendation in respect of the fund in **December 2006** in respect of the First Complainant, and the second and third forms relate to a review/recommendation in respect of the fund in **January 2007** in relation to both Complainants. The second page of each of these forms contains a checklist to confirm whether certain listed items were reviewed. Amongst the documents, acknowledged to having been reviewed, were the signed application forms, the Recommendations and the policy.

Correspondence

The Provider wrote to the Complainants by letters dated **16 May 2007** enclosing their original policy documents and advising them to read the enclosed documentation carefully together with any attaching literature. The Provider wrote to the Complainants on **10 October 2007** to provide an update in respect of the fund. Further updates were also sent by the Provider on **27 November 2008**, **22 April 2009**, **6 October 2009** and **18 January 2010**.

No further updates were received from the Provider and on **31 August 2012**, the Complainants wrote to the Provider seeking an update in respect of their investments. The Provider responded to the Complainants separately on **11 September 2012** advising that *"[w]e are working on a detailed update for the [Provider] Property Fund which we hope to issue in the coming weeks."* The Provider gave a very brief update on the fund and also enclosed a valuation.

The Complainants wrote to the Provider on **16 December 2014**, referring to the correspondence from **August** and **September 2012**, expressing their disappointment that the Provider had not furnished the promised update. The Provider responded to the Complainants on **19 December 2014** explaining:

> *"… Firstly let me apologise - I should have issued an update to you as promised in 2012. Just to confirm, you haven't been excluded from updates, I hadn't issued one to the investor group at all. I was waiting for some key developments to complete and that process took longer than anticipated. I only received the final completion correspondence this Wednesday (17th December) copy attached. …"*

The document referred to in the Provider's letter is an email from the TPP to the Provider dated **17 December 2017**. In this email, the TPP is updating the Provider as to the sale of the property development the subject of the fund and once certain administrative matters were attended to, the remaining sales proceeds would be transferred to the various investors' pension policies which the TPP expected to happen in early **January 2015**.

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The Provider wrote to the Complainants on **28 January 2015** to inform them that the fund had been wound down and to advise them of the amounts that would be returned to the Pension Provider in respect of their retirement policies.

The Pension Provider wrote to each of the Complainants on **13 February 2015** to advise them of the sale of the fund:

> *"We are writing to inform you that we have been advised by your self-directed Investment Manager, [TPP] that the [Provider] Geared Property fund in which you invested has been sold. We have been advised that a letter was issued from [the TPP] to investors in this fund giving details of the sale of the property."*

In response to the Provider's letter of **19 December 2014**, the Complainants wrote to the Provider on **22 December 2014** to complain about the manner in which their investment was handled. I note that no reference was made to the TPP in this letter. It was not until **18 February 2015** that the Complainants wrote to the Provider to express their shock at the discovery of the TPP's role as investment manager.

Analysis

Time limit for complaints

There is a dispute between the parties as to whether the first aspect of this complaint comes within the time limits prescribed by the 2017 Act for the making of a complaint. ***Section 51*** of the 2017 Act sets out the time limits for the making of a complaint as follows:

> *"(1) A complaint in relation to conduct referred to in section 44 (1)(a) that does not relate to a long-term financial service shall be made to the Ombudsman not later than 6 years from the date of the conduct giving rise to the complaint.*
>
> *(2) A complaint in relation to—*
>
> > *(a) conduct referred to in section 44(1)(a) that, subject to the requirements specified in subsection (3), relates to a long-term financial service, or*
> >
> > *(b) conduct referred to in section 44(1)(b), that is subject to the requirements specified in subsection (4),*
>
> *shall be made to the Ombudsman within whichever of the following periods is the last to expire:*
>
> > *(i) 6 years from the date of the conduct giving rise to the complaint;*
> >
> > *(ii) 3 years from the earlier of the date on which the person making the complaint became aware, or ought reasonably to have become aware, of the conduct giving rise to the complaint;*

/Cont'd…

(iii) such longer period as the Ombudsman may allow where it appears to him or her that there are reasonable grounds for requiring a longer period and that it would be just and equitable, in all the circumstances, to so extend the period.

(3) The requirements referred to in subsection (2)(a) are that—

(a) the long-term financial service concerned has not expired or otherwise been terminated more than 6 years before the date of the complaint, and the conduct complained of occurred during or after 2002, or

(b) the Ombudsman has allowed a longer period under subsection (2)(iii).

(4) …

(5) For the purposes of subsections (1) and (2)—

(a) conduct that is of a continuing nature is taken to have occurred at the time when it stopped and conduct that consists of a series of acts or omissions is taken to have occurred when the last of those acts or omissions occurred, and

(b) conduct that consists of a single act or omission is taken to have occurred on the date of that act or omission."

Long-term financial service is defined in ***section 2*** as follows:

"(a) subject to paragraph (b), a financial service the duration of which is a fixed term of 5 years and one month, or more, but, notwithstanding that the aggregate term of them may be 5 years and one month (or more), there does not fall within this paragraph a series of consecutive terms in respect of a financial service's duration (provided no individual one of them is 5 years and one month, or more, in length),

(b) a financial service that is life assurance to which, by virtue of Regulation 4 of those Regulations, the European Communities (Life Assurance) Framework Regulations 1994 (S.I. No. 360 of 1994) apply (not being life assurance falling within Class VII defined in the first Annex thereto) and regardless of whether the term of which life assurance is fixed at a specified calendar period or not;"

I am satisfied having regard to the definition contained in ***section 2(a)*** that the fund the subject of this complaint is a long-term financial service for the purpose of the 2017 Act.

/Cont'd…

Section 51(2)(a)(i) and ***section 51(2)(a)(ii)*** contain two definite periods within which a complaint must be made. However, the provisions must be read in the context of ***section 51(5)*** which provides that when conduct is of a continuing nature (as distinct from a single act or omission), it is taken to have occurred at the time when it stopped and conduct that consists of a series of acts or omissions is taken to have occurred when the last of those acts or omissions occurred. Furthermore, this Office is conferred with the power to extend the time limit for making a complaint pursuant to ***section 51(2)(a)(iii)***, where there are reasonable grounds for requiring a longer period and that it would be just and equitable, in all the circumstances, to so extend the period.

For the purpose of the time limits contained in ***section 51***, it is important to focus on the *conduct giving rise to the complaint*. In this instance, the conduct giving rise to the complaint/the conduct complained of, is the misrepresentation/concealment of the identity of the investment manager which began around the time the Complainants invested in the fund and continued, as asserted by the Complainants, until **February 2015**.

In light of the manner in which the first complaint is framed, and having considered the submissions of the parties and the evidence, I am satisfied that the conduct giving rise to the complaint is conduct of a continuing nature and/or consists of a series of acts or omissions. Accordingly, this aspect of the complaint is not time barred and comes within the jurisdiction of this Office.

The First Complaint

In the Complainants' submissions dated **26 February 2016** which accompanied their Complaint Form, the Complainants submit that it was their understanding that the fund would be under the direct control and management of the Provider and that the Provider would act as investment manager. The Complainants state that this was the "*clear and unequivocal basis"* upon which the Complainants invested in the fund.

In my Preliminary Decision, I stated:

> *"On the Complainants' Attitude to Risk forms, they both ticked the box indicating they had previous investment experience. In such circumstances, it is reasonable to expect an individual with previous experience to make certain enquiries about a potential investment, to familiarise themselves with all relevant documentation and to seek all relevant documentation before entering an investment."*

In their post Preliminary Decision submission dated **3 August 2020 t**he Complainants submit:

> *"This is factually incorrect and a ticked box on the Attitude to Risk form confirming that the Complainants had investment experience, even if it was ticked by the Complainants (which is disputed), is insufficient evidence from which such a manifestly unreasonable inference should be drawn.*

/Cont'd…

> *This is especially so because it is a pivotal finding of fact which is used to place more responsibility on the Complainants to ask questions rather than on the Provider to give crucial information and has a direct bearing on the determination reached in the Preliminary Decision"*

In my Preliminary Decision, I noted that the box indicating that the Complainants had previous investment experience was ticked. I remain of the view, particularly given the second Complainant's occupation, that it would have been prudent for the Complainants to make certain enquiries about a potential investment, to familiarise themselves with all relevant documentation and to seek and read all relevant documentation before entering an investment.

At section K of the First Complainant's *Pension Investment Recommendation* and at section J of the Second Complainant's *Pension Investment Recommendation*, the roles of the various parties involved in the fund are set out. The Provider is identified as the *Company* and the TPP is identified as the *Unit Trust Provider*. There is no mention of an *Investment Manager* and one does not appear to have been identified. The declarations contained on each of the Recommendations are also quite important as they confirm that the Complainants have read and understood *"… the above literature, recommendation and attached product brochure …"*

The fund brochure, amongst other things, provides information as to the structure of the fund and describes the various parties involved in the fund. The *Investment structure* at page 2 clearly states that the fund was being set up as a sub-fund of the TPP. The brochure describes the Provider as the *Promoter* of the fund and the TPP as the *Unit Trust Providers*.

The Complainants make the point in their submissions dated **26 February 2016** that:

> *"All promotional literature for the [Provider] Pension Property Fund, including the name itself, clearly indicated to us that it was under the direct control of [the Provider] and that there was no other parties involved, save for the underwriter of the policies … We invested on that basis and that basis alone."*

This appears to be somewhat contrary, not only to the foregoing discussion but also the following statement contained in a submission dated **19 October 2017**, where the Complainants state:

> *"We would like to clarify at this point that we do not have in our possession any marketing or information brochures in relation to the investment. [The First Complainant] was never provided with such material, a serious issue in itself. … However, [the Second Complainant] recalls that such marketing information existed, including an information brochure …"*

/Cont'd…

In their post Preliminary Decision submissions, the Complainants submit:

> *"It is manifestly an error of fact to say there is no evidence of such a misrepresentation by the Provider in the fund brochure. Such evidence was found in the correspondence furnished by the Provider and highlighted by the Complainants in their letter dated 14 March 2019 (at pages 2,3,4,5,6 and 7) which included email correspondence detailing action taken in relation to the Fund Brochure by way of concealing information and giving misleading information to potential investors….This finding of fact ignores the evidence presented to the FSPO and has a direct bearing on the determination reached in the Preliminary Decision. It therefore constitutes a serious error to say that there is no evidence to support a contention that the Provider sought to misrepresent its role in the fund brochure".*

The letter referenced by the Complainants in their post Preliminary Decision submission, as well as the arguments made by the Complainants, were previously considered by me in arriving at my Preliminary Decision. I remain of the view that the fund brochure provides information as to the structure of the fund and describes the various parties involved in the fund.

Moving on to the signed applications forms, as noted above, these forms identify, on the first page, the investment manager as the Provider and the TPP. The Complainants explain at paragraph 7 of their **5 February 2018** submission that these forms were not filled out or completed by them. Two important alternative observations can be made in respect of this statement. First, the Complainants signed application forms which did not contain the identity of the investment manager. Second, they signed application forms which identified the investment manager. In terms of the first observation, there is no evidence to suggest that any enquiries were made to ascertain the identity of the investment manager if that section was in fact blank at the time of signing. Both of these instances create the impression that the Complainants were not overly concerned with the identity of the investment manager at the time of investing.

The Complainants, in their post Preliminary Decision submission have stated I have placed:

> *"… an unfair emphasis on the completed documents without factoring in how they came to be completed. It ignores the fact that the Complainants had already been advised that the investment manager was the Provider, not the TPP…it is erroneous to assume that because the Complainants were misled about the identity of the Investment manager that they were not overly concerned about it. Why would the Complainant's (sic) be concerned about something they did not believe they had reason to be concerned about? This assumption of fact is highly detrimental to the Complainants case and is one which a reasonable decision maker would not have made…"*

I do not accept that the Complainants *had already been advised that the investment manager was the Provider*, and therefore I do not accept the Complainants' assertion in their post Preliminary Decision submission.

/Cont'd…

Despite the Complainants' submissions, I find it curious, given the importance that the Complainants are now imputing to the role of investment manager and their asserted understanding of who they state they believed the investment manager would be, that they did not consider or explore this matter further before investing.

The Complainants have not clearly demonstrated where their understanding of the identity of the investment manager came from and how this constituted a misrepresentation or concealment on the part of the Provider.

This now brings me to consider the role of the Second Complainant. While contrary views have been expressed by the parties as to the nature of the Second Complainant's employment with the Provider, I note that the Second Complainant describes her role as *"a post-sales administrator."* As noted above, the Second Complainant appears to have completed the *Signing Off Policy Documents* and the *Proposal & Policy Review Forms* in respect of the Complainants' investments in the fund. These forms acknowledge that certain documentation regarding the fund was sent to the Complainants, including the completed application forms.

I also note a submission made by the Provider on **24 February 2015**, which I believe is consistent with the Second Complainant's description of her role:

> *"Given that you, [the Second Complainant] were a permanent employee of [the Provider] at the time and were fully involved in the administration of these policies at the time we find it difficult to accept your argument that you had no idea of the parties involved. In fact, [the Second Complainant], you would have as the person who administered New Business, here at [the Provider], signed off on all the check lists and proposal forms for all these products, including the two policies you referred to. …"*

The Complainants in their post Preliminary Decision submission have stated:

> *" There is no evidence to say that the Second Complainant had any authority to act in such a capacity and the Second Complainant, if afforded an opptunity (sic) to do so, will testify that she only acted as a conduit because of the marital relationship between the First and Second Complainants. The Second Complainant will also say that she only made an initial general enquiry to her superior about suitability to participate in the fund. Thereafter, another employee of the Provider, who was at that time charged with giving financial advice in relation to the fund, took over responsibility for completion of all documentation, up to and including the point when the Complainants were legally committed to investing…."*

The Complainants in their post Preliminary Decision also state:

> *"We submit that the relationship between the Second Complainant and the Provider is of no relevance to the determination of the FSPO".*

/Cont'd…

I believe it is entirely appropriate, in the adjudication of this complaint, that I address the relationship between the First Complainant, Second Complainant and the Provider and consider the role played by the Second Complainant.

I note that the Provider wrote to the Complainants by letter dated **16 May 2007** enclosing their original policy documents and advising them to read the enclosed documentation carefully together with any attaching literature.

What appears to have occurred in this case is a misunderstanding. This misunderstanding originated from the Second Complainant and was communicated by her to the First Complainant. In the Complainants' submissions dated **5 February 2018**, it is stated that the Second Complainant had no role in *"planning, setting up, initiation or sale"* and *"no knowledge of the mechanics of the investment fund and had no part to play in its implementation."* It is further stated that the Second Complainant's understanding of the fund was *"… that it was managed exclusively by [the Provider] who had the relevant Revenue approval to manage a self-directed pension investment. She was not aware of the involvement of [the TPP] nor had she any reason to be so aware."* In terms of the First Complainant, the Second Complainant *"… communicated this understanding to [the First Complainant] … [The First Complainant] trusted in the information received from [the Second Complainant] that the fund would be managed exclusively by [the Provider] …"*

This suggests that both Complainants entered into an investment without first ascertaining information considered by them to be fundamental to their decision to invest. Furthermore, the Second Complainant advised the First Complainant about the fund despite claiming to have very little knowledge about it and the First Complainant nonetheless followed this advice. Again, the Complainants have not clearly demonstrated precisely where their understanding of the management of the fund came from, particularly as the Second Complainant states she had no knowledge of the mechanics of the investment or the parties involved. Furthermore, there is no evidence to suggest that either Complainant sought this information prior to making their investment. I also find it difficult to understand why, if the Second Complainant was, as described in the submission dated **30 April 2018**, a *"vulnerable employee investor"* that she would take it upon herself to advise the First Complainant about the investment. This is also inconsistent with the fact that the Second Complainant signed off on the internal documents I have referred to above.

If the Provider's submission in relation to the Second Complainant's employment/professional experience, and knowledge and awareness of the fund is accepted, then it appears to be the case that the Second Complainant either ignored this information or failed to appreciate or understand it and in turn, miscommunicated the information to the First Complainant.

If the Second Complainant was acting as an employee of the Provider in terms of her dealings with the First Complainant, I would have expected that she would fully inform herself about the fund.

/Cont'd…

I am satisfied that if she did so, both she and the First Complainant would have been aware, or ought to have been aware of who the investment manager would be. At the very least, this would have allowed them to enquire about the identity of the investment manager.

A large amount of correspondence has been furnished in relation to the establishment of the fund.

I have reviewed this correspondence and I am satisfied that there is no evidence to support a contention that the Provider sought to misrepresent its role or the role of the TPP in relation to the fund, whether as investment manager or otherwise. The documentation outlined above demonstrates that the TPP had a role in the fund both as unit trust provider and investment manager. This ought to have been clear to the Complainants prior to and at the time of investing in the fund. Furthermore, given the importance of the function and identity of the investment manager to the Complainants, there is no evidence of any inquiries or efforts made by the Complainants to ascertain the identity of the investment manager prior to investing in the fund nor is there any evidence to suggest this was communicated by the Complainants to the Provider. Finally, I think it is important to note in the context of the assertions underpinning this complaint, that the Provider did not invite the Complainants to invest in this fund. The Second Complainant approached the Provider about investing in the fund. Not only does this suggest that the Provider did not intentionally target the Complainants, it also suggests that the Second Complainant had access to information about, and a certain level of knowledge of, the investment.

The Complainants, in their post Preliminary Decision submission, state:

> *"The Fund documents, and the fact that the Provider pre-completed the documents in the case of both investments, clearly do not comply with the Consumer Protection Code, yet the Preliminary Decision seems to make such a finding of compliance in the absence of any reference to the code at all. In the Complainants letter dated 14 March 2019 (at pages 7 & 8), clear evidence of breaches of the Code were highlighted but were not part of the determination made. The fact that such breaches were not taken into account and addressed at all in the Preliminary Decision represents a serious error in the way the FSPO analysed, interpreted and applied the law to the matters at issue".*

While the Complainants have asserted breaches of the Consumer Protection Code, I have not been provided with any evidence that the Provider breached the Code.

For the reasons set out in the analysis above, I do not uphold this aspect of the complaint.

<u>The Second Complaint</u>

The second complaint relates to the absence of communication from the Provider regarding the Complainants' investment. After the Complainants made their investment in the fund they received a number of updates from the Provider as well as from the Pension Provider.

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It is not disputed that the Provider's communications ceased following the **January 2010** update. The Complainants wrote to the Provider in **August 2012** requesting an update in respect of the fund. The Provider responded in **September 2012** advising that it was working on a detailed update which would be issued in the coming weeks. This update never materialised. Over two years later, the Complainants wrote to the Provider in **December 2014** expressing their dissatisfaction at not receiving the promised update. The Provider responded to the Complainants within a number of days apologising for not issuing the update and proceeded to update the Complainants about the fund. I note that the Provider has apologised for this conduct in its response to this complaint.

The Provider undertook to provide the Complainants with updates regarding the fund, however, these updates stopped in **2010** without any warning or explanation. The Provider then failed to issue the update promised in **2012**. Simply because the fund was a closed fund or the Provider believed there was little to report, did not entitle the Provider to cease providing updates without first notifying and/or explaining to the Complainants the rationale for doing so. Furthermore, it is not clear, nor has it been explained by the Provider, how the promised update *"fell through the cracks."*

While the Complainants did not actively pursue or follow up with the Provider regarding fund updates and were in receipt of annual statements from the Pension Provider, I do not accept that this excuses the Provider's conduct.

In the context of this complaint, I am satisfied that the Provider's conduct was unreasonable and unacceptable. Therefore, I uphold this aspect of the complaint and direct the Provider to pay a sum of €1,500 in compensation to the Complainants.

For the reasons set out in this Decision I partially 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 partially upheld, on the grounds prescribed in ***Section 60(2)(b), 60(2)(d), 60(2(f)*** and ***60(2)(g)***.

Pursuant to ***Section 60(4) and Section 60 (6)*** of the ***Financial Services and Pensions Ombudsman Act 2017,*** I direct the Respondent Provider to make a compensatory payment to the Complainants in the sum of €1,500, to an account of the Complainants' choosing, within a period of 35 days of the nomination of account details by the Complainants to the Provider.

I also direct that interest is to be paid by the Provider on the said compensatory payment, at the rate referred to in ***Section 22*** of the ***Courts Act 1981***, if the amount is not paid to the said account, within that period.

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The Provider is also required to comply with ***Section 60(8)(b)*** of the ***Financial Services and Pensions Ombudsman Act 2017.***

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

GER DEERING
FINANCIAL SERVICES AND PENSIONS OMBUDSMAN

15 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,

(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.