



<u>Decision Ref:</u>	2021-0091
<u>Sector:</u>	Investment
<u>Product / Service:</u>	Property Investment
<u>Conduct(s) complained of:</u>	Misrepresentation (at point of sale or after) Delayed or inadequate communication Maladministration
<u>Outcome:</u>	Partially upheld

LEGALLY BINDING DECISION
OF THE FINANCIAL SERVICES AND PENSIONS OMBUDSMAN

The jurisdiction of this Office to deal with this complaint was impacted by the time the conduct complained of occurred and a number of legislative changes that impacted on this Office and the Provider. This included the dissolution of the Office of the Financial Services Ombudsman (FSO) to which the complaint was initially made, and the establishment of the Office of the Financial Services and Pensions Ombudsman (FSPO) through the enactment of the Financial Services and Pensions Ombudsman Act 2017.

The Complainants entered into a number of investments with the Provider. In **June 2013**, the Complainants wrote a letter of complaint to the Provider in respect of several of these investments.

The Complainants submitted a Complaint Form to the FSO dated **1 July 2013**. The Complaint Form was received by the FSO on **10 July 2013**. In the Complaint Form, the Complainants refer to a letter of complaint addressed to the Provider dated **30 June 2013** containing a number of complaints in respect of the Provider's conduct. The Complainants wished to rely on this letter as the basis for their complaint to the FSO and the FSPO.

Three aspects of the complaint were considered to be within the time limits prescribed for the making of complaints under the legislation governing the FSO. The first complaint relates to the Provider's management of Fund A, the second relates to the mis-selling of Fund B and the final aspect of the complaint concerns the purchase of shares in the Provider.

Owing to the time at which the conduct complained of occurred, this Office issued a *Preliminary Opinion* as to jurisdiction dated **14 November 2018**. This letter indicated that certain of the complaints made by the Complainants fell outside the time limits prescribed by the *Financial Services and Pensions Ombudsman Act 2017*. The Complainants and the Provider responded to this letter on **19 November 2018** and **21 December 2018** respectively. In particular, the Provider submitted that the remaining complaints, for the reasons set out in its correspondence, did not come the jurisdiction of this Office. Further correspondence was received by the parties on **9 January 2019** and **30 January 2019**. This Office issued a *Final Opinion* on jurisdiction dated **12 April 2019** which determined that the complaints to be investigated by this Office related to the management of Fund A, the selling of Fund B to the Complainants, and the selling of shares in the Provider to the Complainants.

The Complainants' Case

In light of the scope of the investigation, this section will be confined to those aspects of the Complainants' submissions which relate to the complaints being investigated.

Management of Fund A

The Complainants state in their letter of complaint to the Provider dated **30 June 2013** that in the years since they invested in the fund, they believe that it was mismanaged by the Provider and that it was subsequently sold in a very weak German property market.

As investors in the fund, the Complainants submit that they were not kept up to date in that the Provider's strategy and full disclosure of its strategy for the fund was not made. The Complainants also state that client equity was not taken into consideration by the Provider. Examples of the Provider's mismanagement of the fund are described as:

"Firstly, SWAPS on the senior debt have recently matured, with the entire senior debt interest charge falling to 3 month EURIBOR. This signifies a drop in cost of funds from a weighted average of 3.88% to a current 3 month rate of 0.20%. When applied to the €228m of senior debt in this fund, it equates to c. €8.4m saving p.a. If given more time and left to amortise, this would result in substantial amortisation of the debt increasing to c. €10m p.a. and would have a significant positive impact on investor equity.

Secondly, the blended term to maturity of the leases is getting shorter and as [the Fund] themselves pointed out, the shorter the terms gets, the less marketable the fund becomes. However, it must be pointed out that the majority of the properties in this portfolio are new/modern builds and at strategic locations for tenants so it is unlikely in the majority of cases that they would vacate. Hence, when an individual lease is renewed for a further twenty years for example, the value would substantially increase."

/Cont'd...

In this section of their letter, the Complainants remarked that the sale of the fund should be put on hold to allow for “... *substantial amortisation, market recovery in Germany and opportunity for further asset management initiatives driven by [the Fund].*”

The Complainants observe that the “... *fire sale scenario that has resulted from the nationalisation and subsequent liquidation of [the Provider] has affected the management of the loans and associated investments.*” It is submitted that the immediate strategy of the Provider was to ensure the full repayment of senior debt. However, this accelerated wind down prevented possible courses of action that would otherwise have existed for the fund and which would have resulted in a more positive outcome for investors and “[i]nvestors’ interests have not been taken into account in any of the decision making around the senior debt for this fund.”

The Complainants point out that the most recent fund update refers to a NAV of 0.27. However, the update advises that no valuation would be undertaken in **October 2012**. If no valuation was undertaken, the Complainants explain that they fail to understand how NAV reduced from 0.60 in **December 2011**. The Complainants also state that they did not receive a fund update for 2013 “... *which may be intentionally delayed so that clients have less time to complain prior to the statute of limitations timeframe for this fund passing.*”

Mis-selling of Fund B

The Complainants explain that the Provider launched Fund B in **September 2007** and in **October 2007**, the First Complainant met with the Provider’s Relationship Manager to discuss investing in this fund. The First Complainant states that “*I was told that it was never going to generate very high returns and that it was a longer investment period than other funds. Given that it was referred to as expecting a steady return over a longer period it was sold to me as being an ideal pension product.*”

The First Complainant outlines that he was required to make a pension contribution of €85,000 at the end of **October 2007** and that he had a personal pension plan with a financial services provider of €192,000. The First Complainant advises that he asked the Relationship Manager if it would be possible to transfer the money in his pension plan to Fund B and use the current year’s pension contribution to invest €300,000 in Fund B. The First Complainant stated that the Relationship Manager advised that this would be a good idea.

The First Complainant states the yield on the properties in the fund were quite low (not being much higher than deposit rates). Therefore, “... *it was hard to justify the fact that the private bank was advising me to take on the risk of placing my pension into a highly geared property fund rather than placing funds on deposit, particularly given my already significant exposure to geared property funds.*” The Complainants advise that their daughter [a former employee of the Provider] subsequently learned that investment managers found it very hard to raise equity for this reason as well as the fact that many clients were over exposed in Ireland through their wider investment portfolios which “... *I don’t think was taken into account by the bank when bringing this deal to private clients.*”

/Cont’d...

The First Complainant continues as follows:

"I have been informed that there was immense pressure placed on Investment Managers to get clients to enter this deal – it seemed like an act of desperation to raise as much equity as possible no matter what, as the private bank had committed to raising the equity for these properties. Many of the deals (as far as I'm aware) were owned by large lending clients of the bank. As the market was turning at this time it seems to be a widely accepted view that the bank was helping the lending clients complete the deals by raising the equity/cash portion these clients needed through the banks wealth management investor base. If this was the case it would not have been an objective decision to bring these deals to private clients, rather it would have been biased in favour of the development clients."

The First Complainant submits that *"[the Relationship Manager] never pointed out that [Fund B] was a high risk – "modest returns" does not equate to your investment being wiped out in the space of a year."*

Purchase of Shares in the Provider

In **September 2007**, an Associate Director of the Provider told the Complainants' daughter that the Provider's shares were trading at around €12 and *"... they were a 'great buy' and advised her to tell her father to buy, as they were likely to rebound quickly."* The Associate Director indicated to the Complainants' daughter that numerous high-profile clients of the Provider were purchasing shares. However, the Associate Director did not mention that high-profile clients were being asked to support the Provider by purchasing shares. The First Complainant purchased 8,000 shares in the Provider at €12.48 each on **20 September 2007** totalling €100,000 *"... thinking they were a solid investment based on [the Associate Director's] recommendations."* The First Complainant states that he *"... held no other shares and never had an appetite for shares. ... I felt that while executives of the bank failed me, [the Associate Director] misled [the Complainants' daughter] in his advice and motives for my purchase of the shares."*

The Provider's Case

Following the determination on jurisdiction, the Provider furnished a substantive response to the complaints on **20 December 2019**. The Provider states due to the passage of time since the events the subject of this complaint took place and the fact the Provider is in special liquidation; it has limited documentation.

Preliminary Observations

A number of preliminary observations were made by the Provider:

- Given the passage of time, the loss of all staff referred to in the complaint, and the complete wind down of its Wealth Management Division, it is entirely prejudicial to investigate the complaint some 11 years since the alleged wrong.
- The First Complainant is an experienced and successful businessman. Around the time of executing the investments the subject of this complaint, he was the managing director of a [details redacted] and is currently a director of another [details redacted]. The First Complainant's success as a businessman is evidenced by the fact that the Provider considered him to be a high net worth individual with an estimated net worth of more than €20m based on information provided by the First Complainant to the Provider.
- The First Complainant's achievements in business paints a picture of an intelligent and sophisticated individual which was borne out through his investment activities with the Provider. In particular, the First Complainant had a keen interest in investing in property markets which is evidenced from his investment history.
- The First Complainant invested in a number of funds operated by the Provider totalling approximately €2.4m, in addition to other investments totalling €1.7m. As the Provider was not authorised as the Complainant's financial adviser, it did not have any visibility on any further investments which the Complainants might have invested in, other than those disclosed in their personal financial reviews. The Provider states that *"... at its very height the Bank was providing guidance to the Complainants as part of the investment process for a specific product and not as a general wealth manager/advisor."* Moreover, the Provider did not seek to hold itself out as providing portfolio investment services to the Complainants.
- The Provider submits that the level of investments undertaken by the First Complainant in a relatively short period of time are indicative of an individual with an appetite for sizeable investments who was willing to invest and also encash monies received from other investments to fund further investments, notwithstanding the risks involved which were disclosed, to include the fact Fund A and Fund B were leveraged, the risk of loss of the Complainants' equity investment and the illiquid nature of the fund.
- The Complainants' daughter was an employee of the Provider at the time the investments complained of were made. The Complainants' daughter often acted as an intermediary between the Provider and the Complainants on the Complainants' written instruction. As an employee of the Provider, the Complainants' daughter was also well placed to understand the types of investments her parents were entering into.

/Cont'd...

While the Provider is sympathetic towards the Complainants, who were amongst a larger number of individuals who fell victim to the unprecedented economic downturn from late **2007**, it cannot be held accountable for such losses in circumstances where the Complainants invested with full knowledge of the risks involved. The economic downturn and its impact on the Complainants' investments was discussed with them and/or their daughter and it is clear from the file notes that the Complainants were aware of the difficult economic environment and acknowledged they *could not have foreseen what would happen*.

Fund A

The Provider states that the Fund Brochure for Fund A provided that valuations would be provided to investors on an annual basis. The Complainants were provided with the following updates:

- March 2008
- June 2008
- March 2009
- December 2009
- December 2010
- December 2011; and
- December 2012.

It is submitted that a summary of the portfolio valuations is included in each Fund Update as well as key facts and details concerning the strategy for Fund A.

The **December 2012** Fund Update describes the manner in which it was decided to pursue a phased disposal of assets during **2013** with the broker appointed for the disinvestment of the portfolio. The Provider explains that no Fund Update was provided for **2013** and it is denied that the failure to provide such an update forms a basis for this aspect of the complaint.

The **December 2012** Fund Update notes that the Provider:

"... identified a potential breach of the LTV covenant in the senior debt facility based on the expected valuation of the Portfolio. Given the impending expiry of the facility ... and the LTV issue, the fund explored a number of options available to maximise return for investors. Refinance, partial sales, fund amalgamations and other avenues have been explored. However, given the fund value of the Portfolio, the lack of sufficient credit available and the risk of an enforced liquidation of the Portfolio, it has been decided that a phased disposal of the assets will be undertaken in 2013."

The Provider explains that payments out for **2013** in return for, as set out in the **December 2012** update, an agreement with the lenders that the LTV covenant would not be tested for the duration of the facility up to **22 February 2013** in exchange for suspension of distributions to equity investors and a cash sweep of all surplus income. The lenders therefore, agreed to co-operate with the proposed disinvestment process. The Provider states that the loan was in fact extended to **February 2014**.

Based on the information and records available to the Provider, the Complainants did not raise any queries in relation to the disinvestment strategy. Ultimately, by letter dated **21 August 2014**, the Complainants were advised that the sale of the portfolio of properties in Fund A had completed and the Provider enclosed (i) a Disinvestment Update outlining details of the background to the fund, the decision to sell the portfolio and the outcome of the process, and (ii) a policy claim instruction form. The letter further sets out details of the total return to policyholders.

Referring to a letter dated **4 December 2014**, the Provider explains that the Complainants were advised that further proceeds had been received from the sale of the assets in the fund and details of distributions payable to policyholders were provided. On **6 August 2015**, the Complainants were provided with details of the final distribution payable to them, with the total return on equity being 58.25%.

The Provider submits that based on the foregoing, there is no basis for the complaint that the Complainants were not kept sufficiently informed of the fund strategy whether in **2013** or at all.

The Provider denies that it owed a duty of care to the Complainants as investors in the fund. It is also denied that there was a conflict of interest as regards the repayment of the senior debt. The borrowing provided from the Provider to the Fund Manager for the purpose of providing gearing to the fund were provided on an arm's length basis. The Provider followed normal procedure in terms of credit committee approval and the Fund Manager was obliged to satisfy the Provider that it would meet all payments due, as any lender would require in normal course. The Provider submits that it acted as any lender would and took appropriate and prudent action to protect their position.

It is also submitted that all material facts relating to any potential conflict were clearly disclosed to the Complainants in advance of them making their decision to invest in the fund. The Provider refers to a number of sections of the Fund Brochure to demonstrate the existence of the senior debt facility advanced by the Provider, the exit strategy of the fund which included prioritising payment of senior debt, and the risks of investing in a geared investment or leveraged investment. The Provider submits that the Complainants were on notice of the source of the loan facility for the fund and any such conflict (which is denied) was disclosed to the Complainants.

Fund B

The Provider submits that the responsibility for deciding which investments were suitable for the Complainants rested at all times with the Complainants. The Provider states that it was not the Complainants' financial adviser and it was their decision to invest in the fund and presentation of the fund to the Complainants was not a breach of any duty on the part of the Provider.

The Provider also denies that it failed to evaluate the fund critically or objectively as being suitable and appropriate for the Complainants. It is further denied that the fund was inappropriate or unsuitable for the Complainants having regard to their investment objectives, risk appetite and circumstances as disclosed to the Provider.

The Provider outlines the following steps taken:

- The Complainants were presented with a Fund Brochure detailing the high-risk nature of the fund;
- Personal financial reviews were completed by the Complainants on **13 July 2004** and during **2007**. The high-risk nature of the fund was consistent with the Complainants' attitude to risk as set out in the financial reviews. Specifically, in the 2007 Financial Review, the Complainants indicated that they were prepared to take significant risk, having previously indicated in the 2004 Financial Review that they were willing to allocate 50% to high risk investments;
- Personal Pension and Personal Retirement Bond applications were completed by the Complainants. These documents advised investors to read all accompanying documentation carefully and recommended receiving independent financial advice;
- A Reasons Why letter dated **9 January 2008** was sent to the Complainants which referred to the high-risk nature of the investment;
- Contractual documents were sent to the Complainants on **25 March 2008**. The documents included were the Supplementary Provisions whereby the Complainants indicated, amongst other matters, that they understood that:
 - 1) the Provider had no responsibility to advise the Complainants as to the suitability of an investment in the fund;
 - 2) they were representing to the Provider that they had taken independent advice as to the suitability of investment in the fund; and
 - 3) the policy provisions included a waiver of the Complainants' right to bring or commence legal proceedings.

/Cont'd...

- Disclosure documentation was provided to the Complainants which recommended that the Complainants ensure that the investment met their requirements and that they read all relevant disclosure information, including a statement that the *actual investment growth will depend on the underlying investments and therefore cannot be guaranteed*;
- A further copy of the Fund Brochure was sent to the Complainants along with the policy information; and
- A Cooling-Off Notice dated **25 March 2008** was furnished to the Complainants providing them with the opportunity to cancel their investment in the fund within 30 days and prompting them to review their investment.

Ability to bear risk

The Provider denies that it was obliged to evaluate whether the Complainants could financially bear the investment risks. The Provider was not the Complainants' financial adviser and at its height, was providing guidance as part of the investment process for a specific product. The Provider explains that the Complainants were advised in the Fund Brochure and Supplementary Provisions to seek independent financial advice. As such, the Provider had no visibility on the full suite of investments made by the Complainants other than those disclosed in the financial reviews and would therefore, not be in a position to form a view on whether the Complainants could financially bear the investment risks.

Furthermore, the Provider states that it is not obliged to evaluate the Complainants' financial suitability. The significant assets disclosed by the Complainants in the personal financial reviews clearly evidenced that the Complainants had significant assets and the Provider estimated their net worth to be more than €20m on the information provided by the First Complainant. Based on the information disclosed, an assessment could reasonably have been made that the Complainants could financially bear the loss of €299,328 invested in the fund. The Provider then details the information contained in each of the personal financial reviews.

Appetite for risk

The Provider denies that it was under any obligation to satisfy itself of the Complainants' appetite for risk. The Provider states that it is entitled to take at face value, the information provided by the Complainants as regards their appetite for risk having regard to the financial information provided. The Provider also submits that the Complainants clearly advised it at the personal financial reviews that they had adopted a high-risk approach to investments. In the 2004 Personal Financial Review, the Complainants were asked to indicate *the portion of savings/investments they would be prepared to allocate to savings, investment and pension products*.

The Complainants attributed their risk as follows:

- Low Risk – 20%
- Medium Risk – 30%
- High Risk – 50%

The Provider states that at Section 1 of both financial reviews, the Complainants were asked to indicate their attitude to risk. In the 2004 review, the Complainants selected option (b): *I am prepared to take some risk with capital*. And in 2007, they selected option (c): *I am prepared to take significant risk with capital*. The Provider observes that in the 2004 Personal Financial Review, the financial planning adviser notes: *“Comfortable with risks associated & looking for capital uplift rather than income. Client understands that this fund is a high risk fund as highly geared and no guarantee on capital.”* The Provider states that the investment history of this review also shows that the Complainants followed their risk profile through investing in a number of high-risk investments and as such, there was nothing unusual about the Complainants’ decision to invest in a further high-risk product.

Understanding the risk

It is submitted that the Provider is not obliged to ensure all relevant factors that affected the risk to which the Complainants would be exposed in connection with the fund was brought to their attention or understood by them. The Provider takes the position that it cannot be held accountable for the Complainants’ apparent failure to have any or any adequate regard to the risk factors affecting their investment and, in particular, the risks associated with gearing and a fall in property values. The Complainants were experienced investors and ought to have evaluated the risks affecting the investment and ought to have been in a position to make informed decisions as to those risks. The Provider asserts that the Complainants knew they were undertaking a high-risk investment and they were informed this exposed them to a risk of loss. The other documentation also made clear that independent financial advice should be sought. The Provider submits that all material risks relating to the fund were disclosed to the Complainants prior to the making of their investments. In this regard, the Provider refers to a number of sections of the Fund Brochure and also the Reasons Why letter issued to the Complainants in respect of this fund.

The Provider explains that in order to invest in this fund, the Complainants had to complete a Personal Pension and Person Retirement Bond application form. These forms advised investors to read all documentation carefully and recommended receiving independent financial advice before any decision to invest is made. The Complainants represented that they received independent financial advice in relation to their investment in this fund when they signed the Supplemental Provisions document. The Provider points to the Disclosure Information to further demonstrate that the Complainants were aware of the risks associated with the fund. The Provider also refers to the information contained on the Cooling-Off Notice.

/Cont’d...

In light of the preceding submission, the Provider states it is satisfied that it took all reasonable steps to ensure the Complainants understood the risks involved and were in a position to make an informed decision when investing in the fund.

Objectives of the fund

The Provider refers to the foregoing discussion in addressing the objectives of the fund and submits that it was not under an obligation to ensure the Complainants were aware of the objectives of the fund. The Provider points to various parts of the Fund Brochure, a meeting with the Second Complainant, and the 2004 Personal Financial Review. It states that the fund objectives were also clear from the updates issued to the Complainants between **March 2009** and **December 2014**. The Provider submits that the Complainants were provided not only with general commentary on the strategy of the fund but also specific strategy in relation to the six properties within the fund.

Share Purchase

The Provider states that the legislation provided for the appointment of an Assessor to determine the fair and reasonable aggregate value of the transferred shares and the extinguished rights consequent to the nationalising of the Provider. Pursuant to the legislation the Complainants are entitled to make a submission to the Assessor in respect of the aggregate value of their transferred shares and extinguished rights.

The Provider states that an Assessor was appointed under the legislation in **November 2018** and the regulations which relate to the Assessor's role were enacted in **February 2019**.

The Provider submits that in circumstances where an Assessor has now been appointed and has invited submissions from shareholders to ascertain whether, on the date of nationalisation, the relevant shareholder should receive any compensation, it is submitted that the Assessor is the more appropriate and suitable forum for assessing the Complainants' claim, if any, in relation to their investment in the Provider's shares.

The Provider states that except for the very broad assertion that the Provider *induced* the Complainants' daughter by making representations that the shares were a *great buy* and *to tell her father to buy, as they were likely to rebound quickly*, the Complainants have failed to provide any evidence to show (i) that financial advice was provided by the Relationship Manager and/or (ii) that the Provider *was aware that these representations were misleading*. As such, there is no basis for the Complainants to make a complaint in connection with the purchase of the shares.

The Provider explains that due to the passage of time, it does not have the benefit of records relating to this transaction or the personnel who allegedly had the conversation in relation to the shares.

/Cont'd...

The Provider denies, in light of the Complainants' experience and sophistication that any such passing remark, which appears to be the height of the complaint, can be viewed as an inducement whether in a legal or factual sense.

The Provider also notes it is stated that the First Complainant *held no other share and never had an appetite for shares*. The Provider states that this statement appears to be at odds with the information contained in both of the personal financial reviews which indicated that money had been invested in direct investment (stocks and shares) and the First Complainants has indicated his willingness to invest in stocks/shares.

It is also stated that the Complainants invested in the Provider's shares at a time when the market was extremely volatile on **20 September 2007**. In the short period prior to this, the share price fluctuated between €17.34 per share in **May 2007** and €11.57 in **September 2007**. The share price continued to fluctuate until **2008**, when values dropped due to difficulties in the financial markets. Until this point, there was no reason to believe that the share price would not recover. The Provider submits that the Complainants were clearly hopeful that it would recover as they did not choose to sell their shares as the share price dropped. Instead, they made the informed decision to risk the recovery of the share price and as such, the Provider cannot be held accountable for their losses.

In a letter to this Office dated **19 December 2018**, the Provider advances an alternative argument in that this aspect of the complaint is for the recovery of a reflective loss and is not actionable. The Provider has referred to the High Court decision in ***Alico Life International v. Thema International Fund plc*** [2016] IEHC 363, in support of its position.

The Provider again refers to the passage of time, loss of staff and the complete wind down of its Wealth Management Division stating it has no means to put its position any further. The Provider submits that it is unfairly prejudicial and oppressive to require it to deal with such complaints some 11 years after the investment was made.

The Complaints for Adjudication

Following the consideration of the jurisdiction of this Office to deal with the conduct complained of, the complaints that have been investigated and adjudicated are that the Provider:

1. Mismanaged Fund A;
2. Mis-sold Fund B to the Complainants; and
3. Mis-sold shares in the Provider to the Complainants.

/Cont'd...

Decision

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

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

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

A Preliminary Decision was issued to the parties on 7 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.

Following the issue of my Preliminary Decision, the following submissions were received from the parties:

1. Letter from the Provider to this Office dated 28 July 2020.
2. E-mail from the Complainants to this Office dated 31 July 2020.
3. Letter from the Provider to this Office dated 11 August 2020.
4. E-mail from the Complainants to this Office dated 18 August 2020.

Copies of these submissions were exchanged between the parties.

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

/Cont'd...

Fund A

Fund Brochure

The Provider has furnished a Fund Brochure for Fund A. The *Executive Summary* describes the fund as a retail geared property fund and states:

“ ...

- *The purchase of the [portfolio] will be financed by investor equity of €101m of which [the Fund Manager’s] investors will contribute €40m. [The Provider] is also providing non-recourse bank borrowings of €240m. ...*
- *It is anticipated that surplus cash in the Luxemburg entities will be distributed to investors on an annual basis in the form of a coupon. The annual coupon will depend on the cash generated. In year one it is expected that the coupon will be c. 5%. This rate may change and there is no guarantee that any coupon will be paid. Surplus cash will be distributed in accordance with the ... Fund Distribution as outlined in Section 5 – Fund Structure.*
- *Part of the investment rationale is to generate capital appreciation from the aggregation of the retail units making the [portfolio] attractive to institutional buyers. ...”*

Section 5, *Fund Structure*, sets out the structure of the fund and how debt financing is introduced to the fund. Fund distributions to shareholders are also set out in this section. Section 6, *Financing*, advises:

“The [Fund] is being capitalised by investor equity contributions and through a number of investing vehicles. The bank borrowings of 78% loan to value (LTV) are being provided by [the Provider] to the individual [Limited Partnerships] ... The borrowings are recourse only to the properties and the lease rentals and therefore non-recourse to the investors.

...

In order to lower the risk of higher interest rates affecting the performance of the [Fund], a number of interest rate hedging and capping facilities have been entered into with [the Provider] ...”

The exit strategy for the fund is set out in section 10, *Exit Strategy*:

“The Fund has a target investment period of 5-7 years. Investors should be aware that this will not be a liquid investment and should be prepared to invest for a minimum period of 5-7 years.

/Cont’d...

In general, therefore, it will not be possible for an investor to exit the Fund before either the properties are sold and [the Fund] liquidated or [the Fund Managers] sell its interest in the [Fund]. Investors should also be aware that while 5-7 years is the target investment period, shares in the [Fund] may be held for a longer or shorter period at the sole discretion of [the Fund Manager] and/or the Fund.

The Fund may receive distributions on a regular basis during the life of this investment. Any cash received by [the Fund Managers] will be credited to the Fund and will be used to meet any loan repayments on borrowings, if any, and pay expenses arising. The balance (if any) will be distributed ... to investors, if appropriate.

[The] surplus cash flow will be used in the following priority:

- 1. To repay any outstanding loan interest due in connection with the assets of the Fund and repay all outstanding Fund borrowings.*
- 2. To pay any outstanding expenses.*
- 3. The balance will be payable to investors."*

Section 14 deals with valuations:

"Valuations will be sent to investors on an annual basis. Generally, these valuations will be based on desktop property valuations. Full valuations of the properties will be carried out by [the Fund] from time to time. There is no guarantee that the investment will be realisable at that or any other value."

The Fund Contract

The Fund Contract states at clause 3.5:

"3.5 The assets comprising the [Fund] will be valued once annually on a desktop basis. ... We will use reasonable endeavours to ensure that a summary of such valuation, together with a statement showing the benefits to which your contributions under the Bond into the [Fund] would have entitled you on the Valuation Date, and such other information as you may be entitled to, is provided to you as soon as is reasonably possible."

Clause 6 provides as follows:

"6 Liquidity of the Fund

6.1 We can decide to realise the Linked Assets forming part of the [Fund] at any time on such terms and subject to such conditions as we in our absolute discretion determine.

/Cont'd...

Some examples of situations in which we may decide to realise assets are as follows:-

6.1.1 ...

6.1.2 where changes in the investment performance of the assets forming part of the [Fund] make such realisation necessary or desirable;

6.1.3 in any other circumstances where we, having taken appropriate professional advice, consider realisation to be in your best interests. We will be entitled to rely on professional advice taken without further inquiry.

...

6.3 We do not require your approval in any circumstances prior to realising Linked Assets.

6.4 Should we pursuant to clause 6.1 or 6.2 decide to realise Linked Assets, we will manage such realisation with a view to securing realisation on the most advantageous terms possible. ...

6.5 On the maturity of a property investment, the proceeds will be used in the following priority:

1. To repay any outstanding loan interest due in connection with maturing investments and repay all outstanding borrowings.

2. To pay any outstanding Fund expenses.

3. The balance will be transferred to a cash fund and made available to investors.”

Fund Updates

The Complainants were provided with two separate Fund Updates in both **2008** and **2009**. Thereafter, updates were provided annually in **December 2010, 2011** and **2012**. In **2008** and **2009**, updates contained the following headings: *Fund Facts, Fund Update, Coupon Distribution, Fund Valuation, Market Updates* and *Fund Outlook*. From **2010**, updates contained the following headings: *Property Facts, Key Facts, Fund Valuation, Fund Update, Market Updates, Unit Price Reconciliation* and *Fund Strategy*.

/Cont'd...

As the Provider's conduct regarding valuations forms part of the Complainants' contention that the Fund was mismanaged, I note the following section of the **December 2012** update:

"...

Key Facts

- ...
- *The NAV (net of distributions to date of c. 24% of original equity) is 0.27.*
- *As it is expected that the Portfolio will be disposed of in 2013 it is not possible to outline the Portfolio value given commercial sensitivities.*
- ...

Fund Update

As it is envisaged that the Portfolio will be divested during 2013, it was agreed with [the Provider's] lenders that no valuation would be undertaken in Oct 2012. [The Fund] advise that the net rent as at 31 Dec 2012 was €21.18m. ..."

Disinvestment Update

An update was issued dated **August 2014** outlining the approach taken to the dissolution of the Fund.

"...

Decision to market the Portfolio for sale

Following the granting of a one year loan extension in February 2013 [the Holding Company] investigated a number of options to refinance, part-sell or re-capitalise the Portfolio to extend the life of the investment.

Given the level of debt secured against the Portfolio, and the level of additional equity which would be required, refinancing was not achievable.

As outlined in the December 2012 Fund Update, with the risk of foreclosure in February 2014 could lead to the total loss of equity value. [The Holding Company] started a process to select an agent to market some or all of the assets during 2013. After an open market selection process, [the Holding Company] appointed [selling agent] as the agent for the divestment of the Portfolio.

Sale overview

The divestment process commenced in quarter 2 2013 and concluded in 2014.

/Cont'd...

[The selling agent] undertook a number of strategies in an effort to maximize the sale process for the Portfolio. They advised that a number of sub portfolios be offered for sale to test the market as, at the time, it was felt there was insufficient appetite for an investment of the value of the full Portfolio. Two sales were concluded a single asset and a six asset sub portfolio, which realised gross proceeds of c €45m. The proceeds were paid against senior secured debt in accordance with the terms of [the Holding Company's] facility with [the Provider].

A second sub portfolio of eight assets was offered to the market in June 2013. Offers received on these assets were below expectations and a sale of this tranche did not proceed.

In addition, the remaining assets were then offered to a number of significant institutional investors. The offer prices were not in the range expected by [the selling agent] and were not pursued.

In June 2013 [the Fund] advised that they wished to retain their holding in the investment and wished to introduce additional equity to facilitate a refinance. [The Provider] considered this option and determined that it was not in policyholders interests to do the same taking into consideration the level of additional equity which would have been required from policyholders, the risks associated with refinancing the investment and the level of projected return.

In June 2013 an offer was received from ... on behalf of ... for 56 assets in the Portfolio (this was later extended to all 58 remaining assets). Over the course of a number of months, agreement was reached to dispose of the shares and loan notes ...

Conclusion

Based on our analysis of the alternatives available to the Fund and the advice provided by [the selling agent], we are satisfied that the sale outcome achieved was in the best interest of policyholders. ..."

Fund B

Personal Financial Reviews

The Complainants completed and signed a *Personal Financial Review* in **June 2004**. On this review, the Complainants declare that they had €100,000 invested in direct investments (stocks/shares). In the *Attitude to Risk* section, the following box is selected: *"I am prepared to take some risk with capital*. Beneath this, the Complainants are asked how they would allocate their money across low, medium and high risk investments. *High Risk* is described as stocks, shares, special investments and geared equity/property. The proportions chosen are 20%, 30% and 50% respectively.

/Cont'd...

The second *Personal Financial Review* is signed by the Complainants but undated. It is suggested that it was completed during **2007**. This is not disputed by the Complainants. The Provider estimates this review was completed anywhere between **February 2007** and **August 2007**. On this review, the Complainants declare that they had €20,000 invested in direct investments. At the *Attitude to Risk* section, the following option is chosen: *I am prepared to take significant risk with capital*. The section dealing with the proportions of capital the Complainants would be willing to invest in low, medium and high risk investments has not been completed.

A declaration addressed to the Provider's Relationship Manager dated **2 July 2007** and signed by the Complainants states:

"We can confirm that our financial circumstances have not materially changed since we last completed the Personal Financial Review."

Personal Pension Plan

The First Complainant completed and signed a *Pre-Retirement Personal Pension Plan* dated **30 October 2007** in respect of his investment in the Fund. This form states:

"If you propose to take out this policy in complete or partial replacement of an existing policy, please take special care to satisfy yourself that this policy meets your needs. In particular please make sure that you are aware of the financial consequences of replacing your existing policy. If you are in doubt about this, please contact your insurer or your insurance intermediary."

The *Declaration of Insurer or Intermediary* section and Section F, *Financial Adviser*, has been signed by the Provider's Relationship Manager.

Section G, *Signatures and Declarations*, is signed by the First Complainant:

"NOTE: Please read carefully. Your Financial Adviser will have access to information on your investment, and will be able to effect changes."

I understand that this completed application forms the basis of my contract with [the Provider].

I hereby authorise my Financial Adviser, as stated in Section F, acting on my clear written instructions, to effect changes to this investment on my behalf, including the switching of investment funds. ..."

Personal Retirement Bond

The First Complainant completed and signed a *Personal Retirement Bond* in respect of the Fund dated **27 November 2007**. The format of this form is quite similar to the *Pre-Retirement Personal Pension Plan*. This form contains two sections which have been signed by the First Complainant's financial adviser. The signature of this individual has been redacted.

The Provider has outlined in its submissions dated **20 December 2019** that redactions have been applied in certain instances where a document contains privileged legal advice or commercially sensitive information which is not relevant to this complaint. In a submission dated **21 December 2017**, the Provider also advised that staff members' names have been redacted and efforts were made to include non-redacted copies.

In my Preliminary Decision I stated:

"In light of the position taken by the Complainants regarding the assertion that the Provider acted as their financial adviser in the context of the investments the subject of this complaint, I am not satisfied that the Provider was entitled to apply redactions in this instance and there appears to be no discernible justification for so doing. Furthermore, the Provider had not sought to identify the individual in question. Equally, it is not clear whether this was simply an instance where an unredacted copy was unavailable. In any event, in light of the fact that the Provider's Relationship Manager signed the Pre-Retirement Personal Pension Plan and the First Complainant's evidence regarding the personnel involved in the sale of the Fund, I am satisfied it is likely that the Relationship Manager signed the various financial adviser sections of this form."

In response to the above, the Provider submits in its post Preliminary Decision submission:

"In relation to the concerns raised by the FSPO in connection with redactions applied to certain documents (noted on page 19 of the Preliminary Decision), the Bank wishes to clarify that it did not make a positive decision to redact such information, and notes that it has provided the FSPO with the best documentation available to it having regard to the passage of time since the conduct concerning the complaint. The Bank's understanding is that the issues raised in connection with such redactions were not determinative in respect of the FSPO's finding of inappropriate conduct in relation to Fund B, and further notes that it is relying on this understanding".

Reasons Why Letter

Two letters recommending investment in Fund B dated **9 January 2008** and addressed to the First Complainant have been furnished by the Provider. I note that while both letters are not identical, they are substantively the same in respect of the information they convey.

/Cont'd...

Both letters request that the First Complainant return a signed copy to the Provider, however, signed copies have not been presented. The Provider has not furnished an explanation in respect of these letters.

The Provider's Relationship Manager wrote the first letter. However, the identity of the author of the second letter has been redacted.

The first letter states:

"We have recently discussed your investment objectives, appetite for risk and options available to you from [the Provider].

This letter is designed to confirm your request and state the rationale behind your decision.

Personal Objectives

We have explored the various investment objectives that are important to you and have identified these as follows:

- *The provision of benefits for retirement through a pension fund.*

Your current situation is as follows:

...

You describe your attitude to risk as follows: High Risk.

When deciding how to invest your money with a view to potentially higher returns, you are prepared to take the necessary risks for this investment. These are outlined in detail in the marketing brochure.

Investment Structure Recommendation

We acknowledge your request to transfer cash you have accumulated within your Personal Pension Plan ... into [Fund B].

Based on the information discussed, we have recommended a personal pension plan as being suitable to your circumstances.

Personal Pension Plan

...

Investment Fund Recommendations

/Cont'd...

[Fund B]

The Fund is a unit-linked life assurance fund which invests in a number of properties and investments throughout Ireland and the UK. The Fund provides investors with the opportunity to participate in a portfolio of office, retail and mixed use properties containing both completed buildings and properties with development opportunities as well as some exposure to associated operating businesses. The investment offers investors access to unique opportunities through a diversified portfolio and seeks to achieve returns through various asset management initiatives as well as through the development potential associated with some of the properties.

Risk

This Fund is deemed to be a high-risk investment and the encashment value may be significantly less than the contributions paid into the Fund. Investors may lose the full value of their investment.

Term

The target investment term is 5-10 years. ...

Access

As this investment [is] held within pension there is no access permitted until retirement.

Charges

...”

Fund Brochure

At page 5 of the *Executive Summary*, the Brochure advises:

“ ...

The Fund will be financed by investor contributions of c. €255m ... and non-recourse bank borrowings of c. €339m. Bank borrowings count for c. 63% of the value of the Properties held in the Fund.

...

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

/Cont’d...

...

WARNING

The value of your investment may go down as well as up. Past performance in not a reliable guide to future performance. The income that you get from this investment may go down as well as up. This product may be affected by changes in currency exchange rate.

In the *Investment Rationale* section on page 7, the Brochure sets out a number of reasons why a prospective investor should invest in the Fund. However, at the end of this section, the reader is advised to refer to the *Risk Factors* section.

The Fund's exit strategy is set out on page 26. The Fund is described as "... not a liquid investment ...". The reader is advised that if properties are sold, proceeds may be available to investors however, proceeds may be re-invested. The Fund also reserved the right to re-gear.

This section also outlined the order of priority of sale proceeds on maturity. First in line was loan interest and borrowings, second was Fund expenses and third was investors. Prospective investors are advised in the *Risk Factors* section at page 28 that:

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

This is then followed by a description of the various risks that would accompany an investment of this nature under a number of separate headings.

The final section of the Brochure is the *Important Notice* and states:

"...

Please refer to the section entitled "Risk Factors", which highlights some of the risks associated with an investment of this nature.

... The value of the assets in the Fund is a matter for an independent expert's opinion and the assets may be difficult to sell at that or any value.

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

WARNING

The value of your investment may go down as well as up. Past performance is not a reliable guide to future performance.

The income that you get from this investment may go down as well as up. This product may be affected by changes in currency exchange rate.”

Fund Documents

There is conflicting information as to when the correspondence enclosing the First Complainant's Fund documentation was issued. Two identical letters have been furnished.

The first is dated **26 February 2008** and the second is dated **25 March 2008**. However, throughout its submissions, the Provider refers to the relevant letter as having been sent on **25 March 2008**.

In both letters, the Provider wrote to the First Complainant enclosing a number of documents in respect of the investment in Fund B. These were listed in the letter as the Contract Schedule, Policy Documents and Disclosure Information.

Contract Schedule

The Contract Schedule in respect of the Personal Pension Plan indicates that three contributions were made to Fund B. These were received by the Provider on **30 October 2007**, **3 December 2007** and **7 February 2008**. A receipt in respect of each of these contributions was issued by the Provider on **25 March 2008**. I note that the Provider's Relationship Manager is recorded as the First Complainant's financial adviser on this receipt.

Policy Documents

While the letter enclosing the Fund Documents refers to Policy Documents for Fund B, none appear to have been furnished by either party.

Disclosure Information

The Disclosure Information states:

“Make sure the policy meets your needs

...

The proceeds from this product will depend on future investment returns on the underlying assets of your investment. It is a long-term commitment and you must be sure it meets your requirements. ...

/Cont'd...

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

WARNING

If you propose to take out this policy in complete or partial replacement of an existing policy, please take special care to satisfy yourself that this policy meets your needs. In particular, please make sure that you are aware of the financial consequences of replacing your existing policy. If you are in doubt about this, please contact [the Provider] or your insurance intermediary. ...”

The remainder of the Notice outlines information regarding the operation of the plan including, projected benefits, early values, benefits on retirement and also provides certain illustrations.

Page 5 of the Notice contains the following:

“Information about the Insurer / Insurance Intermediary / Sales Employee

[The Provider] is an insurance company regulated by the Financial Regulator. Our details are listed below:

...

No delegated or binding authority is granted by [the Provider] to your insurance intermediary in relation to underwriting, claims handling or settlement.

*Intermediary name: [Redacted]
Intermediary company name: [The Provider] – Private Bankers
...”*

The First Complainant was issued with a Cooling-Off Notice dated **25 March 2008**.

File Notes

The Provider has furnished a number of file notes relevant to this complaint. On **7 July 2008**, one of the Provider’s agents wrote to the Complainants’ daughter by email (to an email address of a separate financial services provider) to give her an update in respect of certain matters relating to Fund A.

/Cont’d...

On **21 November 2008**, the Provider's Relationship Manager entered the following file note (which has been partly redacted):

"I met with [the Complainants' daughter] (agreed in writing, contact for her parent's investments) ..."

A further file note was drafted by the Relationship Manager on **9 December 2008**:

"I met with [the Complainants] following my meeting with ... their daughter (the agreed intermediary). They are both aware of the difficult environment and that values are likely to drop further."

A file note dated **5 May 2009** and prepared by the Relationship Manager records the following interaction with the Complainants' daughter:

"Met with [the Complainants' daughter] who has agreement with us and her parents to act as the intermediary. ..."

[The Complainants' daughter] has spoken to her father re his [Fund B] investment (pension) and he is disappointed but resigned to the valuation."

On **14 August 2009**, the Relationship Manager made the following file note:

"I met with [the Complainants' daughter] who is the authorised contact for her parent's investments. We spoke about [Fund B] and I gave her any update we had. In hindsight [the Complainants' daughter] would be happier if they had left his pension with [financial services provider] but understands that she or he could not have foreseen what would happen."

On **1 September 2009**, the Relationship Manager wrote:

"[The Second Complainant] called ... She was wondering when if ever any of the investments would ever come back ... She said she was sorry she went into any of the investments but that her daughter ... and husband wanted her to and also the same re [the First Complainant's] pension investment."

The First Complaint

The Complainants have advanced a number of reasons in support of their position that the Provider mismanaged Fund A.

/Cont'd...

It is important to note that this Office can investigate the procedures and conduct of the Provider. The role of this Office is an impartial adjudicator of complaints. However, it will not interfere with the commercial discretion of a financial service provider unless the conduct complained of is unreasonable, unjust, oppressive or improperly discriminatory in its application to the Complainants.

Fund Updates

It is not suggested that the Provider failed to furnish the Complainants with Fund Updates other than in **2013**.

While the Fund's documentation appears to be silent on when exactly fund updates (as opposed to valuations) would be provided, I accept that it is reasonable to expect the Provider to furnish Fund Updates, as it has done in previous years, at least annually.

The Complainants submitted a complaint in respect of the Provider's failure to issue a Fund Update for **2013** mid-way through the year **2013**. As such, when the complaint was made, the time for issuing updates had yet to expire and there was still time within which the Provider could issue an update. Though it appears that a Fund Update did not issue during **2013**, I do not accept, at the time the complaint was made to the FSO, the Provider had failed to fulfil any of its obligations regarding the provision of a Fund Update.

NAV

In respect of the NAV, the question is posed as to how the Provider was able to provide information on the NAV in the **2012** update if no valuation was undertaken.

An explanation does not appear to have been given by the Provider. However, having reviewed the update in question, I note that the *Key Facts* section states: "... *it is not possible to outline the Portfolio value given commercial sensitivities...*" This does not necessarily mean that a valuation was not undertaken. As such, it was possible to calculate an NAV but not disclose the underlying valuation. Furthermore, rationale for not outlining the Fund's value appears to be attributable to the impending disposal of the Fund. I accept that publication of this information at such a time could have had an adverse impact on the sale price.

It is also stated in the *Fund Update* section that it was agreed with the Fund's lenders that a valuation would not be undertaken. I accept this agreement was most likely in the context of the obligations contained in the covenants associated with such lending and separate from the requirements contained in the Fund Brochure or Fund Contract, outlined above.

In any event, it is difficult to discern how the Provider's conduct in respect of the NAV would be considered to constitute mismanagement of the Fund.

/Cont'd...

Fund Strategy

Simply because the Complainants would have pursued an alternative strategy than the one implemented by the Provider, does not mean the strategy chosen by the Provider was wrong. As outlined above, each Fund Update set out, amongst other things, the fund strategy. Furthermore, while the Complainants claim that the Provider failed to disclose details of the fund strategy, there is no evidence that (i) the Complainants requested such information; or (ii) sought to engage with the Provider in respect of fund strategy prior to **June 2013**.

Viewed in this context, prevailing global economic conditions and the unique position in which the Provider found itself through its nationalising. The Complainants' submissions or the evidence furnished by the parties, do not demonstrate that the Provider's conduct in respect of the fund's strategy, including the disinvestment strategy, was unreasonable, unjust, oppressive or improperly discriminatory in its application to the Complainants. Accordingly, I have no evidence that the Provider mismanaged Fund A.

Therefore, I do not uphold this aspect of the complaint.

The Second Complaint

The First Complainant transferred his existing pension investment to the Provider in or around **October 2007** with a view to consolidating his pension in one investment plan through an investment in Fund B. In the documentation supplied by the Provider on **21 December 2017**, it is stated that the First Complainant's retirement bond, Fund B, was inceptioned on **27 November 2007**. However, the First Complainant made his first contribution to Fund B on **30 October 2007**.

Fund Information

The First Complainant completed the Person Pension Plan and Personal Retirement Bond on **30 October 2007** and on **27 November 2007** respectively. A Reasons Why letter was issued to the First Complainant on **9 January 2008**. I accept that a Fund Brochure was furnished to the First Complainant around this time but no later than **March 2008**. Fund documents were sent to the First Complainant under cover of letter dated **25 March 2008**. This comprised the Contract Schedule, Policy Documents and Disclosure Information. While the Provider has referred to and cited from, the Policy Documents/Supplemental Provisions for Fund B, none appear to have been included in any of the documentation furnished to this Office. A Cooling-Off Notice was also issued to the First Complainant on **25 March 2008**.

On **14 January 2008**, one of the Provider's agents emailed the Relationship Manager in respect of Fund B:

"... But can you please confirm the amounts paid for the Personal Pension Plan and the Personal Retirement Bond for [Fund B]. As the funds and docs came in at all different times ..."

The foregoing clearly illustrates an absence of evidence demonstrating that the Provider furnished the First Complainant with the written or documentary information regarding the Fund in advance of the date of the first contribution. While I accept there were discussions involving the First Complainant, his daughter and the Provider's Relationship Manager before the investment was made, no evidence or supporting documentation in terms of the nature or extent of these discussions has been produced.

Risk Profile

Fund B was a high-risk investment. The First Complainant submits that the Relationship Manager did not disclose the fact that Fund B was a high-risk investment. However, the evidence before me shows that the Complainants had a high attitude to risk.

In a submission received from the Complainants' on **23 August 2017**, the First Complainant states that:

"... [The Relationship Manager] met with me in Oct 2007 and spoke with me about [Fund B] – she told me that ... it was never going to generate very high returns and it was a longer investment period ..."

In an email to this Office dated **25 April 2018**, the First Complainant states:

"... we received substantial verbal advice from the Bank at the time of making our investment and lending decisions which was in contrast to the documented disclosures on file and which heavily influenced our decisions. ..."

Based on the evidence, it does not appear to be the case that the First Complainant was unaware of the level of risk associated with investing in Fund B, particularly in the absence of evidence of any queries or discussions surrounding the risks associated with the investment at the time the first contribution was made and also following the provision of the Reasons Why letter in **January 2008** and Fund Documents in **March 2008**.

While the First Complainant has not given any precise detail as to his interactions with the Relationship Manager or any of the Provider's agents in advance of investing in Fund B (including his daughter), he was aware that Fund B was the fund in which the money for his pension was going to be invested.

/Cont'd...

In such circumstances, it is reasonable to expect the First Complainant to make or have made, certain enquiries regarding the investment, such as its risk profile and/or seek written information about the Fund.

Furthermore, if the documents furnished to the First Complainant were inconsistent with the information imparted by the Provider orally/verbally, there is no evidence to suggest this was raised by the First Complainant. I accept that the First Complainant would have been in a position to fully appreciate any such inconsistencies no later than **March 2008**, yet he remained invested in the Fund.

Role of the Provider's Relationship Manager

The First Complainant maintains that the Relationship Manager was akin to a financial adviser. The Provider submits that, at its height, the Relationship Manager provided no more than guidance.

While no statement or account of events has been submitted from the Complainants' daughter, in an email from Complainants' daughter to the Provider dated **8 February 2011**, she refers to a number of her parent's investments, in particular the investment in Fund B and the purchase of the Provider's shares, stating that "*All the above was done on the advice of [the Relationship Manager] ...*"

It is apparent that the First Complainant dealt almost exclusively with the Provider's Relationship Manager when it came to investing in Fund B. For instance, it was confirmed to the Relationship Manager in **July 2007** that the Complainants' financial circumstances had not materially changed since the previous financial review. The Relationship Manager signed the *Financial Adviser* section of the Personal Pension Plan and as previously stated, I accept that it is likely she signed the corresponding section of the Personal Retirement Bond too. The Reasons Why letter was also issued by the Relationship Manager. The Relationship Manager is recorded as the First Complainant's financial adviser on the payments receipt section of the Contract Schedule. On the *Information about the Insurer / Insurance Intermediary / Sales Employee* section of the Disclosure Notice, while the *Intermediary Name* has been redacted, the *Intermediary Company* is listed as the Provider, Private Bankers. The division of the Provider within which the Relationship Manager apparently worked.

While I accept that the Complainants' daughter assisted around the time this investment was made, there is no evidence to suggest that she was her parents' authorised contact or intermediary prior to **July 2008**. In addition to the file notes set out above, an email drafted by one of the Provider's agents and dated **3 July 2008** states that:

"... I recently had [the Complainants] sign a letter so that [their daughter] is the point of contact going forward and clients themselves NOT to be contacted."

/Cont'd...

Mis-selling of Fund B

In my view, an investment in Fund B would not necessarily have been contrary to the First Complainant's risk profile nor the objectives of a personal pension fund. I have not been provided with evidence to support the assertion that Fund B was misrepresented or mis-sold to the Complainants.

Conduct of the Provider

I do not accept that the Provider acted appropriately regarding the First Complainant's investment in Fund B.

In support of this view, I stated in my Preliminary Decision:

"...in terms of the provision of documentation surrounding the investment, it is quite obvious that the Provider did not furnish the First Complainant with important documentation regarding Fund B prior to his first contribution to the fund.

This information should have been provided to the First Complainant in advance of this and not a number of months later."

The Provider, in its Post Preliminary Decision submission, submits:

"while the FSPO does not specify what "important information" was not provided to the first Complainant prior to his investment in Fund B".

The Provider goes on to state that:

"the [Provider] would like to clarify that it is our understanding that it was the [Provider's] standard practice to provide the Fund Brochure, the contents of which we are satisfied includes all "important information".

I do not accept the Provider's assertion that I did not identify the deficiency in information furnished. I made several references to where no evidence was furnished to this Office to show that the appropriate information was given to the Complainants. These included the following references in my Preliminary Decision also included above:

"While the Provider has referred to and cited from, the Policy Documents/Supplemental Provisions for Fund B, none appear to have been included in any of the documentation furnished to this Office."

"By the same token, it has not been possible to ascertain the precise extent of the information conveyed to the First Complainant prior to his investment and given the passage of time since this occurred, relevant parties' may not be in a position to recall these events."

...

/Cont'd...

“The foregoing clearly illustrates an absence of evidence demonstrating that the Provider furnished the First Complainant with the written or documentary information regarding the Fund in advance of the date of the first contribution. While I accept there were discussions involving the First Complainant, his daughter and the Provider’s Relationship Manager before the investment was made, no evidence or supporting documentation in terms of the nature or extent of these discussions has been produced.

...”

“While the letter enclosing the Fund Documents refers to Policy Documents for Fund B, none appear to have been furnished by either party.”

Furthermore, I cannot rely on the Provider’s understanding, *“that it was the [Provider’s] standard practice to provide the Fund Brochure, the contents of which we are satisfied includes all “important information”*”. I can only arrive at my decision in relation to this complaint based on the evidence available as to what was given to the Complainants in respect of this complaint, not the Provider’s understanding of its standard practices.

Similarly, the Complainants in their post Preliminary Decision submission dated **18 August 2020**, state that they received correspondence from the Provider, which was addressed to a third party investor in the same fund. The Complainant notes the case is separate to theirs, but believes it is *“indicative of the way the [Provider] are treating the small investors”*. I cannot take correspondence to a third party into account in arriving at my decision on this complaint.

In my Preliminary Decision, I outlined my dissatisfaction with the role of the Provider’s Relationship Manager. In response, the Provider in its post Preliminary Decision submission, argues that I was incorrect in my position on the Provider’s Relationship Manager.

The Provider states:

“that the FSPO is not satisfied with the role assumed by the Relationship Manager [name redacted] and it does not accept the Relationship Manager can be both a promotor of Fund B for the Provider, as well as a financial adviser to the Complainant offering impartial investment advice”.

The Provider goes on state that:

“in this regard the FSPO does not appear to accept the bank’s position that [name of Relationship Manager redacted] was not the Complainants financial advisor”.

The Provider notes that:

“the FSPO appears to rely on the fact that documentation which it has been provided with ‘explicitly states that the Relationship Manager was that First Complainant’s financial advisor’ to support this finding”.

/Cont’d...

The Provider argues:

“...the term “Financial Adviser” does not have a statutory or regulatory definition but rather is a term of art and so may not be indicative one way or another for the purpose of the FSPO’s investigation. In considering the relationship that existed between [name of Relationship Manager redacted] and the First Complainant the Bank asserts that reference to the term “Financial Adviser” in the contractual documents relating to Fund B, such as the Personal Pension Plan, Personal Retirement Bond and/or the Contract Schedule, does not equate with [name of Relationship Manager redacted] being the Complainants’ financial adviser in the manner contended for by the Complainants namely as a general wealth manager/adviser. Rather, [name of Relationship Manager redacted] had the authority to act as the First Complainant’s agent in placing his investment in Fund B. In this context [name redacted] was the person assigned with effecting the First Complainant’s investment and acting as the First Complainant’s agent in matters relative to that investment”.

The Provider goes on to submit that in a similar complaint decided by the Financial Services Ombudsman in 2012, the Ombudsman had found in favour of the Provider on this argument.

This Office does not operate a system based on precedent. Each complaint is decided on its own merits and on the particular circumstances of that complaint and the submissions and evidence furnished in relation to the particular complaint.

The Complainant, in his post Preliminary Decision submission dated **30 July 2020**, submit:

“With reference to the mis selling of the shares in [the Provider] when [named redacted] our daughter was told by management to advise us to buy [Provider’s shares], we now know that [the Provider’s management] were aware of the grave situation the bank was in and this was why they were pushing staff to move the shares in order to deceive the public”.

The Complainant goes on to outline details regarding the actions of representatives of the Provider in and around the time of sale of the shares.

The Complainant submits:

“With reference to [named individual redacted] and [named individual redacted] our investments from 2007 when we met both these people individually on separate investments they were always on their own no other representatives of [the Provider] were present...”

The Complainant further argues that their daughter *“was given the forms to bring home for us to sign, we understand this a total breach of banking regulations”.*

/Cont’d...

The Provider made a post Preliminary Decision submission dated **11 August 2020** rejecting these allegations.

Similar allegations were made against a named representative of the Provider by the Complainants, in the past. The Complainants were informed at that time that such allegations are outside the jurisdiction of the Office. Therefore, neither those allegations nor the allegations made in the Complainants' post Preliminary Decision submissions have been investigated. Accordingly, they do not form part of this Decision.

While I make no comment on the allegations made by the Complainants in their post Preliminary Decision submission, I remain dissatisfied with the role assumed by the Relationship Manager in relation to the matters that have been investigated by this Office.

The Provider has denied throughout its submissions that the Relationship Manager was the First Complainant's financial adviser. However, this is completely at odds with the documentation I have previously referred to which explicitly states that the Relationship Manager was the First Complainant's financial adviser. These documents have also been signed by the Relationship Manager.

I do not believe that the Relationship Manager can be both a promoter of Fund B acting for the Provider and a financial adviser to the First Complainant offering impartial investment advice. Furthermore, there is nothing to indicate that the First Complainant received any advice about this investment beyond the Relationship Manager or his daughter, who was also an employee of the Provider. That said, I am nevertheless satisfied that the First Complainant was fully aware of the positions of these individuals and their roles within the Provider.

Therefore, I partially uphold this aspect of the complaint.

The Third Complaint

The third complaint is that the Provider's shares were mis-sold to the Complainants. The basis for this aspect of the complaint centres on a conversation that took place between the Complainants' daughter and the Provider's Associate Director. However, I note that in the Complainants' daughter's email of **8 February 2011**, she states that this investment was made on foot of advice from the Relationship Manager. The advice was that the Provider's shares "...were a 'great buy' and advised her to tell her father to buy, as they were likely to rebound quickly." This was conveyed by the Complainants' daughter to her parents who then purchased 8,000 shares in the Provider.

The conduct complained of occurred almost 13 years ago and there is a significant evidential deficit surrounding this aspect of the complaint. First, no precise details of when or where the conversation occurred have been given, who exactly was party to this conversation, what was said beyond the identified statement, when was this conveyed to the Complainants, the precise nature of this conversation, the steps taken by the Complainants following this and, in particular, whether they sought any independent advice. Second, the Complainants' daughter has not provided any evidence regarding this conversation.

/Cont'd...

Third, the Provider's agent who proffered this advice has not given a statement. Fourth, there is no documentation or statements from around the time the conversation took place. Fifth, no statements appear to have been furnished by the relevant parties at the time the complaint was made to the Provider or generated following the Provider's investigation of the complaint.

Furthermore, it is not unreasonable to expect the Complainants to have carried out their own due diligence prior to making this investment and not rely solely on a brief and apparently unsupported statement from one of the Provider's agents, passed on by a third party, regardless of the position of this individual within the Provider. I do not consider it reasonable or prudent to make an investment of this nature simply on the basis of a statement that the Provider's shares were a *great buy* particularly at such a volatile point in the national and world economy, and having done so, I do not accept that the Provider is responsible for the adverse consequences arising from the collapse in share price.

Finally, in light of the information contained in the Complainants' financial reviews concerning their investments, I do not accept the assertion that "*I held no other shares and never had an appetite for shares.*"

The financial reviews clearly indicate that the Complainants invested in direct investments which included stocks and shares. As such, on the basis of the evidence, I am not satisfied that the shares in the Provider were mis-sold to the Complainants.

Therefore, I do not uphold this aspect of the complaint.

In my Preliminary Decision I indicated my intention to partially uphold this complaint and direct the Provider to pay a sum of €7,500 in compensation to the Complainants. I note the Complainants have expressed their dissatisfaction with this amount of compensation in their post Preliminary Decision submissions. Having considered all of the circumstances of this complaint I believe this to be an appropriate amount of compensation. I therefore partially uphold this complaint and direct the Provider to pay a sum of €7,500 in compensation to the Complainants.

Conclusion

My Decision pursuant to **Section 60(1)** of the **Financial Services and Pensions Ombudsman Act 2017**, is that this complaint is partially upheld, on the grounds prescribed in **Section 60(2) (b) and (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 €7,500, 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.

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

20 April 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.