



<u>Decision Ref:</u>	2021-0107
<u>Sector:</u>	Investment
<u>Product / Service:</u>	Bonds
<u>Conduct(s) complained of:</u>	Mis-selling (investment) Delayed or inadequate communication Complaint handling (Consumer Protection Code)
<u>Outcome:</u>	Partially upheld

LEGALLY BINDING DECISION
OF THE FINANCIAL SERVICES AND PENSIONS OMBUDSMAN

The Complainant invested in a company attempting to establish a man-guard security company in India (the **Company**), through his broker, the Provider, against which this complaint is made. The Complainant financed his investment using funds from two of his pension plans. The Complainant's investment in the Company was by way of a loan note unit trust sub-fund and branded as a corporate bond. The Complainant transferred the investment monies using his pension trustee (**Trustee 1**) to the loan note holder (**Trustee 2**) who then distributed funds to the Company as loan notes which were underpinned by a personal guarantee from the Company's majority shareholder and chairman (the **Chairman/Personal Guarantor**). The Company began to experience funding difficulties and it also transpired that there was an issue with the validity of the personal guarantee which rendered it worthless and ineffective.

The Complainant's Case

The Complainant states that in **February 2017**, he invested in the Company through the Provider. Prior to the Complainant's investment, he met with the Provider on a number of occasions. The Complainant explains that the Provider *"... is a friend and on numerous occasions quoted other friends and family members who had invested in this product."*

In the terms of the Complainant's investment in the Company, the Complainant advises that the Provider "... repeatedly stated that there was a personal guarantee attached to this product and that the capital sum invested was secure.

[The Provider] showed me a document proving the personal guarantee was in place. This was one of the main reasons I invested in this product." The Complainant also remarks the Provider advised him that he was "... getting on very well with [the Company] and was hopeful of being invited onto the Board of the Company."

The Provider asked if the Complainant had read through the Information Memorandum on the product to which the Complainant answered 'no': "*[The Provider] laughed and said there was no worries due to personal guarantee.*"

The Complainant explains that he was asked to sign a number of documents to allow the Provider access to the money in his pension fund. The Complainant also states the Provider did not inform him that his money was being invested in an unprotected fund. Over the next few months, the Complainant explains that, as he had not received any confirmation from the Provider regarding the investment, he enquired as to the whereabouts of the documentation he had signed. The Complainant eventually received confirmation of his investment on **4 May 2017** and **9 May 2017** stating that Trustee 2 were the trustees of the investment.

In **November 2017**, the Complainant received correspondence from Trustee 2, "... who are not my Trustees ...", expressing concern about the Company. Trustee 2 invited the Complainant to join a webinar in respect of the Company. The Complainant "... asked [the Provider] if there was a problem and he assured me there was nothing to worry about." The Provider also advised the Complainant not to engage in the webinar as the investment was not due to mature for a few years and did not relate to the Complainant. The Complainant advises that as he is not a technological person, he did not take part in the webinar.

In **December 2017**, the Complainant received further correspondence from Trustee 2 "... but as [the Provider] had advised that it did not concern my investment I did not engage." It was also the Complainant's understanding that Trustee 1 was the trustee for the Complainant's investment and not Trustee 2. Between **May 2018** and **September 2018**, the Complainant received further correspondence from Trustee 2 expressing concern with the Company.

The Complainant states that he attended an investors' meeting organised by Trustee 2 in **October 2018**. At the meeting, the Complainant "... was effectively told my pension was gone and it appeared that my money was used to pay redundancy packages to employees at some office/warehouse It appears that my money never reached the investment product sold to me."

The Provider was in attendance at the meeting and stated '... that he was aware that mistakes had been made' (This was in relation to large amounts of money having been paid out to people in the company). He also stated that '[Company Director 1] was not to be trusted'.

It is submitted by the Complainant that the Provider “... *appeared to know an awful lot about the issues and problems with my investment and yet had never imparted any of this knowledge to me.*” The Complainant continues, observing that “... [the Provider] had repeatedly stated that there was nothing to worry about.”

The Complainant explains that he left the meeting and received no correspondence from the Provider and it was the Complainant who had to contact the Provider for further information.

A formal complaint was lodged with the Provider on **26 October 2018** regarding the Provider’s handling of the investment. In this complaint, the Complainant also requested confirmation that the personal guarantee was in place and his investment secure. A response was received on **1 November 2018** in which the Provider advised that the Company and personal guarantee were being pursued.

On **12 November 2018**, the Complainant was notified of a second investors’ meeting by Trustee 2. The next day the Complainant received an email from the Provider attaching a letter from Company Director 1 and addressed to the loan note holders.

The second investors’ meeting took place on **28 November 2018** at the offices of Trustee 2. The Complainant’s wife accompanied him to this meeting. At the meeting the Complainant was advised that his investment was gone and Trustee 2 was exploring ways to pursue the Company. The Complainant was also informed that the Personal Guarantor had five addresses lodged with the Companies Registration Office (**CRO**) and two dates of birth. The Complainant received further correspondence from Trustee 2 and the Provider on **12 December 2018** and **17 December 2018** respectively.

The Complainant and his wife met with the Provider on **21 December 2018**. The Provider advised the Complainant that the personal guarantee had not been ring-fenced and his investment was gone. The Provider also advised that the Company was pursuing an investor in the United Kingdom, and the Personal Guarantor was ill and had transferred his share account to his partner’s name to avoid honouring the guarantee.

The Complainant made a further formal complaint to the Provider on **16 January 2019**. This was acknowledged by the Provider on **28 January 2019**, and the Provider also indicated to the Complainant that he was organising an investors’ meeting. On **19 February 2019**, the Complainant received a letter from the Provider “... *washing his hands of my investment.*”

The Provider’s Case

The Provider explains that he has known the Complainant for several years and they were both members of the same golf club.

As a financial adviser, the Provider had agencies with Trustee 1 and Trustee 2. The Provider outlines that Trustee 1 was the portal to transfer the Complainant's pension funds to the loan note which was set up by Trustee 2 on behalf of the Company in **January 2016**. Trustee 1 was employed as the Complainant's pension trustee in order to save money on administration charges which were cheaper than those charged by Trustee 2.

The Provider outlines that he was promoting an opportunity in **2016** to invest in the Company which had identified an opportunity to build a substantial security business in India. The Provider was referred to the Complainant who was seeking financial advice in respect of two pension plans he had in place: a buy out bond with a pension provider and a previous employment pension.

The Provider states that he met with the Complainant in **December 2016** with a view to discussing his options. Three options were presented. Option 1 was to transfer funds to another pension provider, option 2 was to invest in a wind energy company, and option 3 was to invest with the Company and its security business. The Provider submits that supporting documentation was provided to the Complainant in respect of all options.

The Provider expresses the view that the investment with the Company seemed favourable to the Complainant as he was interested in the personal guarantee that attached to the investment. The Provider advises that *"... at that time I did feel that the Personal Guarantee attached to the investment was very strong ..."* The Provider states that *"... I did explain to him that he could split the investments option by way of diversification, however [the Complainant] opted for the total amount to be invested in [the Company]."*

In **January 2017**, the Provider and the Complainant set up the transfer of funds to Trustee 1, the pension trustees acting for the Complainant. In **February 2017**, the funds were transferred to the Company.

The Provider explains that it was from **July 2017** that problems began to emerge regarding the funding of the Company. Trustee 2, who was the loan note holder, started to ask questions regarding the stability of the investment. The Provider states that *"... I was informed of the situation however I was advised that all would be rectified and the funding would resume very shortly."* It was in **September 2017** that all funding through Trustee 2 was stopped until all investors were paid up to date.

The Provider explains that he met with the Company on several occasions to see what could be done to bring the Company back *on line*. In **October 2017**, the Personal Guarantor re-invested €800,000 back into the Company to cover the shortfall. The Provider advises that *"... it was made believe that the funds would be used to pay the outstanding balance that was due to the initial investors and that there was a new Loan Note set-up direct with [Trustee 2] which had not had the facility to fund the company."* The Provider states that none of the initial investors were paid and it was then decided by Trustee 2 to call in the personal guarantee.

The Provider states Trustee 2 called in the personal guarantee in early **2018** only to find out that the Personal Guarantor's net worth was held in trust. The Provider refers to a document furnished to him by the Personal Guarantor's accountants outlining his net worth, noting the Personal Guarantor's assets were the property of a trust company. The Provider submits this "... *deemed the Personal Guarantee null and void, in my opinion, [Trustee 2] were the trustees who had drawn up the Personal Guarantee, [the Personal Guarantor's] Net worth should have been ring-fenced from the start.*"

During this time, the Provider advises that he took legal advice on behalf of his investors to see if anything could be done regarding the ring-fencing of the personal guarantee but was advised this would be *fraught with difficulty*. The Provider explains that he approached the Personal Guarantor and asked that he honour the guarantee and return the money to investors. The Provider was advised by the Personal Guarantor repeatedly that he had other options on the table and he was seeking other external investors to keep the venture alive. The Provider states that "*I was continuous[ly] for 8 months informed that a new solution was on the horizon, however, still to this day they are saying the same things.*" However, having exhausted his efforts to protect investors, the Provider states he had no choice but to inform all of his investors of the situation and each investor was written to in **September 2019**.

The Provider states that several investment meetings/webinars were organised by Trustee 2 on behalf of investors which discussed options as to what could be done regarding their investments. The Provider's understanding is that the Complainant attended these meetings/webinars. The Provider further states that at no time did he advise the Complainant that he was not to engage in the webinar. The Complainant was notified of the webinar directly by Trustee 2 and not the Provider.

The Provider explains that, as a broker, he was offering advice on an investment which, deeming suitable for the Complainant, did not foresee the present outcome. The Provider states that it was dealing with one of the largest pension trustees in the country, Trustee 2, which has a large legal department to oversee investment structures. This, coupled with the fact Trustee 2 had drawn up the Personal Guarantee on behalf of the Company, the Provider submits he did not see any reason to refrain from recommending an investment in the Company as an investment option for his clients.

The personal guarantee was drawn up by Trustee 2 which was a guarantee to protect lump sum capital as each investment was taken in by Trustee 2 before being transferred to the Company. The Provider states it does not have a copy of the personal guarantee as it is held by Trustee 2.

The Provider advises that he did not confirm the ring-fencing of the personal guarantee prior to recommending the investment to the Complainant as he is not a solicitor and Trustee 2 has its own in-house solicitors. Ring-fencing only came to light when a copy of the Personal Guarantor's net worth was received on **5 October 2018**. The Provider advises that it brought this issue up with Trustee 2's solicitors at one of the investor meetings but it was immediately dismissed.

The Provider has also advised that the Complainant's investment in the Company was deemed a non-regulated product which does not come under the investors compensation scheme. The Provider states the Complainant *"... was made aware that this investment was a no-regulated (sic) investment, it was stated, he was also give the option to invest in regulated fund (sic) of which he chose not to do so."*

In terms of the provision of information regarding confirmation of the investment, the Provider advises that once he receives confirmation that the investment has commenced, Trustee 1 sends him a statement but in a case like the present, there was a long process before funds were transferred to the Company and it was not until **May 2017** that the various documentation was sent to the Complainant.

The Provider advises that the Complainant was sent correspondence by Trustee 2 informing all investors of the situation in respect of the Company. The Provider states that at no time did he advise the Complainant that this correspondence did not concern him.

The Provider explains his understanding was that money received by investors was to be invested in the manner stated in the Information Memorandum. The Provider has no control over where money is spent once it is sent to the Company. It states that *[a]fter the fact and working tirelessly with the company to seek a solution to the problems, only then did I feel the money was not used correctly as to what it was supposed to be invested in. It is my opinion the money was managed poorly."* The Provider also advises that he was not aware of the severity of the situation for some time and there were several solutions given in the hope that the investment would turn around. The Provider explains that he did not see the relevance of questioning these as he was hoping there would be a change for the better for his investors.

The Provider has also outlined certain matters regarding his personal and financial life. The Provider explains that he consulted with a Personal Insolvency Practitioner and applied for bankruptcy on **16 November 2019**. As the Provider declared bankruptcy, he had no option but to revoke his licence to provide financial advice with the Central Bank of Ireland. This was applied for in **September 2019** and confirmed by the Central Bank of Ireland in **February 2020**.

The Complaints for Adjudication

The complaints are that the Provider:

Mis-sold the investment in the Company;

Failed to provide appropriate advice regarding the investment;

Failed to advise the Complainant he was investing in an unprotect fund;

Failed to act with due skill, care and diligence in the best interest of customers;

/Cont'd...

Wrongfully advised the Complainant not to engage with Trustee 2 when concerns were raised regarding the Company;

Failed to communicate with and/or update the Complainant regarding his investment; and

Failed to handle the Complainant's formal complaint in line with the provisions of the Consumer Protection Code, 2012.

Decision

During the investigation of this complaint by this Office, the Provider was requested to supply its written response to the complaint and to supply all relevant documents and information. The Provider responded in writing to the complaint and supplied a number of items in evidence. The Complainant was 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 9 October 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 Complainant made submissions under cover of his e-mails, together with attachments to this Office dated 23 October 2020, 4 November 2020, 19 November 2020 and 20 November 2020, copies of which were transmitted to the Provider for its consideration.

Following the issue of my Preliminary Decision, the Provider responded by way of e-mail, together with attachment, to this Office dated 28 October 2020 to advise that *“I am no longer practising as a Financial Advisor, as I had no choice but to revoke my licence, as part of the rules of the Central Bank Of Ireland. I have been declared Bankrupt as for the 18th of November 2019. Please see the attached document regarding same, should the decision become final please refer all correspondence to the Official Assignee”*, a copy of which was transmitted to the Complainant for his consideration.

Copies of the above submissions were exchanged between the parties.

The Provider has not made any further submission.

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

Fact Find and Recommendation

A signed copy of a Fact Find has been furnished by the Provider dated **17 January 2017**. However, only one section of this document was completed: the *Person Details* section. The penultimate page also contains some handwritten notes, however, these are indecipherable. The *Declaration* has been signed by the Complainant. This states:

“I/We confirm that I/We have read through this document and it accurately reflects the information provided by me/us. I/We understand that the recommendations are based on the information I/We have provided. Examples have been given to me of the benefits that the proposed plan(s) might provide in the future and I/We have discussed it with your consultant. Please Tick

To be completed if some or all of the sections above have not been filled out. I/We confirm that I/We do not want to discuss my/our personal or financial details, or details in relation to the sections of this Fact Find left blank. I/We also confirm that no advice has been given to me/us on any of these areas.

I/We further understand that by not discussing these facts with your consultant it may affect his/her ability to make appropriate recommendations. Please tick ”

The Provider wrote to the Complainant on **17 January 2017** in respect of the Fact Find and the investment in the Company:

“Following our recent financial review I would like to confirm the following information regarding your investment decision:

You have decided to invest in [the Company] ...

/Cont’d...

** This investment or product does not require licensing, authorisation or registration with the Central Bank of Ireland/Financial Regulator and as a result, it is not covered by the Central Bank/Financial Regulator's requirement designed to protect customers or by a statutory compensation scheme.*

This is a speculative investment and returns are not guaranteed, however there is a personal guarantee associated with this investment which is held in trust with [Trustee 2] your loan note provider.

You are familiar with the risks involved in investing.

You are familiar with the terms and conditions of this investment as per the product information document of which you have a copy.

Past performance is not a reliable guide to future returns.

The value of your investment can fall as well as rise.

You are happy to proceed with the investment, based on the personal guarantee which has been put in place to protect your investment."

This was signed by the Complainant.

Corporate Bond

The Complainant's investment in the Company was by way of a loan note. The investment was offered was a *40% - 48 Month Corporate Bond*. The Complainant signed a single page document with this heading on **17 January 2017**. This document contained the following declaration:

"I HAVE RECEIVED A COPY OF THE INFORMATION MEMORANDUM DATED SEPTEMBER 2016 WHICH DETAILS THE TERMS AND CONDITION OF THE LOAN NOTE."

The Information Memorandum

The Provider has furnished a copy of the **June 2016** Information Memorandum. This states:

"Notice to Investors

...

Prospective investors must conduct their own research and inquiries into the viability of their investment in the Company (the "Project") and satisfy themselves that the investment is suitable for them.

/Cont'd...

Investors should be satisfied that they fully understand all aspects of the Project before making their investment. Investors should examine this Information Memorandum and all associated documentation.

The contents of this document should not be construed as advice or an offer or invitation to invest in the Project and should be viewed for information purposes only.

The Company has sought to ensure that the Project is outlined only to those who have the ability to take the risks associated with it. However, investors should be aware that they will be required to bear the financial risks of the Project and that they may lose their entire investment.

An investment in the Project should not constitute the sole or principal component of an investor's portfolio and should only be made by those persons who can sustain the loss of their investment.

Investors should understand the risks and should satisfy themselves that this type of investment is suitable for their personal circumstances and financial resources. Their attention is drawn to the "Risk Factors" section of this Memorandum. The value of investments may fall as well as rise.

Prospective investors should make their own commercial assessment of the proposal contained herein and obtain professional tax, legal and financial advice. ..."

A statement regarding the regulated status of the investment is set out on page 2 in bold print and is essentially identical to the one contained in the Provider's letter of **17 January 2017**.

The Information Memorandum is 40 pages in length and describes, in detail, the intention behind the investment as funding the establishment of a private security company in India. It further describes how the venture would run and operate. In particular, certain risks associated with the investment are set out in section 12.

Personal Retirement Bond

The Complainant completed and signed two *Personal Retirement Bond Application Forms* dated **17 January 2017** in respect of each of his pension plans. These documents were executed for the purpose of creating a personal retirement bond and thus, facilitating the transfer of the Complainant's pension fund monies to Trustee 1 for onward transmission to Trustee 2 and investment in the Company.

Section E of the PRB Application Forms state:

"1. I wish for [Trustee 1] to invest in the product mentioned in Section B. I understand that this investment will be made by a Unit Trust and will be subject to the provisions of the ... Unit Trust Deed as amended.

/Cont'd...

2. *If I decide to exercise my cooling off option ... my fund will be refunded less the adjustment for any downward movement in the value ...*
3. ...
4. *I certify that I have received independent financial advice prior to the making of this investment. I understand that [Trustee 1] will not be involved in providing investment advice in relation to investment selected under this PRB. I understand that value can go down as well as up. ...”*

The following warning is set out beneath Section F:

“WARNING: If you propose to take out this bond in complete or partial replacement of any existing pension scheme/PRB, please take special care to satisfy yourself that this PRB meets your needs. In particular, please make sure that you are aware of the financial consequences of replacing your existing plan. If you are in doubt about this, please contact your current provider or financial adviser.”

Page 7 of the PRB Application Forms also contain a number of warnings:

“Warnings:

- ***This Pension Retirement Bond does not require licensing, authorization, or registration with the Central Bank of Ireland, and, as a result, it is not covered by the Central Bank’s requirements to protect consumers or by a statutory compensation scheme. However, the Central Bank is aware that [Trustee 1] is providing this product to the market ...***
- ...”

The *PRB Investment Instruction Form* which has been signed by the Complainant and dated **17 January 2017** states:

“Declaration

1. *I hereby request that [Trustee 1] invest in the above mentioned product. I understand that this investment will be made by an exempt Unit Trust and will be subject to the provisions of the ... Fund ...*

Warning: The assets will be held in an exempt under trust, the provision of this product or service does not require licensing, authorization or registration with the Central Bank and, as a result, it is not covered by the Central Bank’s requirements designed to protect consumers or by a statutory compensation scheme.”

The Complainant wrote to Trustee 1 on **17 January 2017** (copying Trustee 2) in respect of his pension funds as follows:

"I refer to my fund transfer from my [pension provider] into my new established [personal retirement bond].

Once my funds have been transferred into my PRB, I wish to transfer the maximum allowable to take out a Loan Note with [the Company].

I wish to access this loan note via [a Trustee 2] Unit Trust. I have completed the necessary [Trustee 2] documentation as required for this. ..."

Trustee 2

The Complainant transferred the investment monies to Trustee 2 for the purpose of investing in the Company in **January 2017**. This was done by way of a transfer letter and *Sub-fund Application Form*. Each of the transfer letters are dated **17 January 2017** and have been signed by the Complainant and the Provider. The Sub-fund Application Forms are dated **17 January 2017** and have also been signed by the Complainant.

The transfer letters state:

"I wish to use the Investment Amount from my Scheme to purchase units in the Sub-fund for the purpose of investing in [the Company] (the "Investment") in accordance with the Information Memorandum produced by [the Company] dated September 2016. I understand that my Scheme will hold an interest in the Investment solely through its ownership of units in the Sub-fund.

I confirm that I understand and accept the terms and conditions, including the fees, relating to this Investment. ...

I hereby declare the following for the benefit of [Trustee 2] as trustee and administrator of the Sub-fund:

- *I confirm and acknowledge that the Investment is being undertaken from my Scheme at my request and direction and I understand that [Trustee 2] has no responsibility or liability for the decision I have made to invest in the Investment, including any underlying assets held by the Investment. I will be responsible for all decisions regarding the subscription and redemption of the units in the Sub-fund without prejudice to the powers and discretion of [Trustee 2] as an administrator and trustee of the Sub-fund.*

/Cont'd...

- *I have been advised to obtain independent professional investment, legal and tax advice on the Investment. I am aware of, understand and have taken such independent professional advice as I deem appropriate in connection with the quality, suitability and appropriateness of this Investment for inclusion in my Scheme and acknowledge that I do not rely on [Trustee 2] in this respect.*
- *I understand that [Trustee 2] will not advise me about the merits of the Investment nor assess the suitability or appropriateness of the Investment for me. I further understand that [Trustee 2] is not carrying out due diligence for this Investment that I will have to rely on my own assessment of the Investment.*
- *I confirm (i) that the initiative to request the establishment of the Sub-fund and purchase units in it was mine and entirely based on the desirability of using the Sub-fund as a custodial vehicle for my pension scheme, (ii) that I am the sole investor in the Sub-fund, and (iii) that no subscription with a view to raising capital in the Sub-fund has been undertaken.*
- *I understand that [Trustee 2] will not carry out any on-going monitoring or management of the Investment and that such monitoring and management will be my sole responsibility.*
- *I understand that all Scheme investments must be made for the sole purpose of providing me with benefits in retirement.*
- *...*
- *Neither [Trustee 2] nor any of their respective subsidiaries, affiliated or associated entities, shareholders, directors, officers, agents, employees, advisers or representatives (each an "Indemnified Party") will be responsible for or liable for any costs, losses or expenses incurred by me in connection with the Investment.*

I will release, indemnify and hold harmless [Trustee 2] and each other Indemnified Party from and in respect of any and all losses, liabilities or claims, howsoever arising, in connection with or arising from the Investment, except upon such Indemnified Party's fraud or willful default.

- *...*

I hereby authorise [Trustee 2] to take all steps required to enter into the Investment on my behalf and to transfer the Investment Amount to the account of the Sub-fund."

/Cont'd...

The Sub-fund Application Forms state as follows:

“I/we apply to subscribe for Units in the [Sub-fund], a Sub-fund of the Investments Trust constituted by Declaration of Trust dated 24th April 2014 (the “Declaration of Trust”) and the Supplemental Declaration of Trust dated _____ in relation to the Sub-fund (the “Supplemental Declaration of Trust”).

This application form relates to the above initial subscription and all subsequent subscriptions for Units in the Sub-fund made by us as evidenced by the transfer of subscription monies into the Sub-fund account.

...

Representations and Warranties

...

1. ...

2. *I/We each confirm that we have been given the opportunity to review the Declaration of Trust and Supplemental Declaration of Trust and confirm that [Trustee 2] has no liability for any loss suffered by us should we choose not to review these documents.*

3. *I/We each confirm that this application is based solely on the Declaration of Trust and the Supplemental Declaration of Trust and we are not relying on any other information or representation in relation to the constitution of the Sub-fund.*

...

12. ...

We, the trustees of the Scheme have read and agree to be bound by the terms and conditions as outlined above.”

Confirmation of Investment

The Provider received various documentation from Trustee 1, in respect of the Complainant’s investment from each of his pension funds in the Company, on **3 May 2017**. The Provider forwarded this documentation to the Complainant on **4 May 2017** and **9 May 2017**. The Provider’s letters state:

“Please find enclosed documentation relating to your pension bonds as requested.

Please note, [Trustee 1] are the trustees of your pension plans and the money has been transferred and invested with [the Company].”

/Cont’d...

A *PRB Receipt* was amongst the documents enclosed with this letter. A warning regarding the regulated status of the Complainant's personal retirement bond, identical to that contained on the PRB Application Form, is also set out on the PRB Receipts. These receipts are dated **3 February** and **7 February 2017**.

Performance of the Investment

One of the Company's directors and its Chairman wrote to the Provider by email dated **2 November 2018** advising that:

"... [the Company] has been unable to operate in India or Ireland, due entirely to the unilateral decision of our Trustees [Trustee 2] to cut off our funding model. We believe this action was wholly unwarranted and was to the severe detriment of the company and that of its loan note holders. ..."

Trustee 2 wrote to the Complainant on **6 December 2017**, following a webinar in respect of the Company held on **29 November 2017**. This letter states:

"Further Action

In the Webinar [Trustee 2] provided a summary of the concerns it has in respect of the Company and gave details of the breaches made by the Company under the legal agreements (the "Agreements"). This summary was followed up by an outline of the remedies available to investors under the Agreements by [solicitors]. A copy of the Webinar presentation slides (the "Slides") is attached to this letter.

It is now a matter for each investor to decide if they wish to take any further legal action to recover those amounts outstanding under the Agreements. Once you have listened to the Webinar and reviewed the Slides you should make a decision as to how you wish to proceed. ..."

The Complainant received further correspondence from Trustee 2 on **11 May 2018** advising that the concerns about the Company remained and since the webinar, the Company had defaulted on a number of repayment obligations under the loan notes. The letter also stated that legal advice had been sought regarding issuing legal proceedings against the Company.

The Chairman of the Company wrote to Trustee 2 on **29 August 2018** stating that the Company had been *working tirelessly* to secure new capital investment and outlined where it was hoped this new investment would come from. In order to facilitate this, the Chairman requested that the threat of legal action be withdrawn.

Trustee 2 wrote to the Complainant again on **18 September 2018**, updating him as to the then present position and to notify him of an upcoming investors' meeting on **9 October 2018** where potential legal action would be discussed. A further letter was issued by Trustee 2 following the meeting on **16 October 2018**.

/Cont'd...

The Complainant made a formal complaint to the Provider on **26 October 2018**. This is outlined separately below.

Another investors' meeting was held on **28 November 2018** and follow up correspondence was issued by Trustee 2 on **12 December 2018**.

The Provider wrote to the Complainant by email dated **17 December 2018** attaching a statement from the Company which advised that progress continued to be made in securing investment and that a UK company would take over the Company to allow trading to recommence in India. The statement also outlined a proposal regarding payments being made towards loan notes and the like. Additionally, the statement outlined the Company's position as to why difficulties were being experienced, pointing to the conduct of Trustee 2:

"... We were late submitting accounts to [Trustee 2], which precipitated them holding up the transfer of funds. After we submitted the accounts they then miscalculated the amount of interest due by a factor of around 10. When this was pointed out, they refused to back down and actually admitted they thought the company was a Ponzi scheme and they didn't understand our business model. For a trustee to admit this it is a damning indictment. At that time we had funds available to us of over €1 million, which would have transformed the trading position of the company. Our position remains that the company's difficulties were overwhelming (sic) caused by the reckless actions of [Trustee 2]."

Further correspondence was received by the Complainant from the Provider and Trustee 2 following this. The Provider wrote to the Complainant on **19 February 2019**:

"You are aware that the company is not performing and your investment is not in a healthy financial state. It is with huge regret that I have to for the record finally put this in writing to you.

You took this investment out hoping to get a return after 3 or 4 years and this is not the case.

*I have over the last 18 months spent a huge amount of time trying to liaise with [the Company] through emails, phone calls and meetings. I thought there would be a solution to the problem the company was having but **clearly it now appears** to me that this is not the case and as you are the investor I regret I must inform you of this. I have been promised solutions after solutions, but to no avail.*

I have sought independent legal advice myself regarding the Personal Guarantee on your behalf, you are aware that [Trustee 2] have offered to pursue the Guarantee so that is a decision you would have to make yourself.

/Cont'd...

Separate from that I have also sought Legal advice myself regarding how the Investment was set-up from the start with the Loan Note Trustee [Trustee 2] as it had come to light the Personal Guarantee was not protected by [Trustee 2] themselves on initial setup, however to quote my Solicitors ...

'[We] have been looking at this in more detail. At present, given (1) the disclaimers and express acknowledgements that [Trustee 2] had no role in the original decisions to invest and (2) they have in our view discharged their limited duty of care by immediately flagging the issue with [the Company's] accounts (versus that company's investment memorandum estimates), we would see a potential case against [Trustee 2] as being fraught with difficulties.'

By pursuing this legal action i'm afraid that we might be throwing good money after bad.

I have to be totally honest with you at this stage and say [the Provider] can do no more. If you wish to seek advice and take matters into your own hands I suggest you contact the company chairman [the Guarantor] ..."

Formal Complaint

The Complainant made a formal complaint to the Provider by letter dated **26 October 2018** regarding the handling of his investment in the Company. The Provider wrote to the Complainant by email dated **6 November 2018** to advise the Complainant that his complaint had been received. The Provider also acknowledged the Complainant's concerns regarding the lack of updates, stating:

"... I am in a very difficult position as I am hearing options that the company are pursuing to resolve this matter. Until I hear definitive positive information going forward, I will be in touch with you immediately. ..."

The Complainant wrote to the Provider on **16 January 2019** stating that he wished to make a second complaint regarding the handling of his investment in the Company.

The Complainant wrote to the Provider on **5 April 2019** *"... requesting a "final response letter" from you with regard to your handling of my investment in [the Company]"* The letter continues:

"I invested in [the Company], through you as my Broker, in February 2017. You assured me there was no risk to my investment as there was a personal guarantee in place. In November 2017, I received communication from [Trustee 2] that there were issues with my investment. In October 2018 I attended a meeting at [Trustee 2's] offices where I was effectively informed that the pension, I have worked for all of my working life, was gone.

/Cont'd...

You were fully aware that I am not a risk taker and would never have taken the risk with my pension. You repeatedly assured me there was no risk with my investment as there was a personal guarantee in place.

I am now requesting a "final response letter" from you regarding my investment in [the Company] ... I require clarification of what exactly happened to my investment and if due diligence was adhered to when investing my pension. I further require an explanation as to why the personal guarantee that you assured me was in place appears not to be in place and if due diligence was adhered to with regard to ensuring same."

The Provider responded on **12 April 2019**:

"Thank you for your letter date 5th April 2019, regarding the above investment. You are requesting a "final response letter" from me, however I am not in a position to offer a final response letter to you at present, due to discussions that have arisen from the company itself.

The letter from me dated 19th of February was the position that if (sic) felt at that time, as to where your investment was. It has come to light that the company are and I have mentioned to you in passing, seeking new investors to re start the business over in India, please see attached letter from the company. This letter has not been made available to the investors, as the outcome is not fully completed, I have to on behalf of my investors and the information provided by [the Company], take this letter at face value, should the outcome prove fruitful, the company will be in a position to offer investors a solution to the problems that have arisen.

Your investment is not due to mature until February 2021; I would suggest that we at least give the company a chance to resolve the issues before us, seeing that the lines of communication are opened.

... I am in constant contact with the company and hope that there will be a decision will be made in the near future."

The letter from the Company enclosed with the Provider's letter is dated **12 April 2019**. This letter states:

"As you are aware, our Trustees took certain actions in the summer of 2017 which eventually resulted in the funding model for [the Company] being closed off. Many of our loan notes holders are examining the feasibility of suing the Trustees because of those actions.

As of now, the operational business in India has ceased. However, our majority shareholder ... remains confident of the long-term viability of the business. He is seeking fresh investment to get back off the ground. As you are aware, he has already invested substantial funds of his own.

/Cont'd...

He has told me that should he secure investment he will invite the existing loan note holders to come forward with him. That decision will of course be for each individual to decide for themselves.

I believe the most practical solution, and the one which will have the best outcome for the loan note holders, is to get the business in India going again. Suing the Trustees is another avenue which is being explored.

The negotiations with potential investors are positive and ongoing. As these negotiations progress, I will share this information."

The Complainant made a further request for a Final Response Letter on **22 April 2019**. This was followed up with an email from the Complainant on **1 July 2019**. The Provider responded to this email on **2 July 2019** explaining that he had not received the Complainant's letter on **22 April 2019**. The Provider also advised the Complainant that "... until I have full and final verification that this investment is gone I am not in a position to issue you a final response letter."

The Complainant wrote to the Provider by email on **22 July 2019** referring to the fact that he was seeking a Final Response in respect of the personal guarantee. The Provider responded on **24 July 2019**:

"... I wish to advise you that it is in place and is located within [Trustee 2], all pension investments that went through [Trustee 2] had to be signed by [the Chairman/Personal Guarantor] before monies were released to [the Company], so they have a copy of the Guarantee on their file, I would not have this on my file as it was set-up between [the Company] and [Trustee 2], so you can request a copy from [Trustee 2] ..."

Final Response

The Provider issued a Final Response Letter on **5 November 2019**, addressing the complaint as follows:

"...

With regard to [the Company], the investment was presented to me offering an opportunity to receive a 36% return over 3 Years for my investors. This investment was, backed up by a personal guarantee being in place to protect the investors in the event of default. [Trustee 2] were acting as the trustee of this investment and also set-up the Loan Note, on behalf of the investors. The Personal Guarantee was signed by the Chairman of [the Company], and this guarantee resides with [Trustee 2], each investment was signed separately for each individual investor.

/Cont'd...

As with all of my investors, whom I recommended this investment option and there have been close family and friends, I never once thought that it was a high risk option.

The strength of the investment was that the Chairman ... was Guaranteeing that all investors would be covered, in the event of default, with this in place I had no reason to think that this investment would not perform, coupled with the fact, that in my opinion the business model was very strong and that [Trustee 2] was behind the Loan Note and Personal Guarantee, one of the largest Independent pension trustees in the country.

In October 2017 a Letter from [the Chairman's accountants] outlined the strength of the [Chairman's] net worth, of which I discovered that his net worth had been transferred in trust to [Trust]. It is my opinion that [the Chairman] was protecting himself and moving his wealth out of his name, rendering the Personal Guarantee which resided with [Trustee 2] null and void, I believe that it was [Trustee 2's] duty of care to have ring fenced this personal guarantee from the start, to avoid this from happening.

I was the broker who presented the investment believing it to be an opportunity for my investors, [the Company] are the company who in my opinion wasted the investors' money.

All investment have risks involved and this was outlined to you, however I had no reason not to think that it was unsuitable."

Analysis

It is important to note that the time for determining whether an investment was mis-sold is the time the investment was made/entered into.

The evidence indicates that the Complainant and the Provider met on more than one occasion prior to the investment, in particular, in **December 2016**. The Provider's *Client History Sheet* records a meeting on **6 December 2016** where the Complainant's pension plans were discussed. It is likely the case that it was at these meetings that investment options were discussed. It is not disputed that Option 2, the wind farm investment; and Option 3, the investment in the Company, were discussed at the one the meetings prior to the investment in the Company being made in **January 2017**.

In a submission dated **1 April 2020**, the Complainant states:

*"Option 1 ... was **NOT** offered to me. Options 2 and 3 were and I was given documentation relating to same. [The Provider] was informed at our next meeting that I had not read this documentation ... [The Provider] did provide me with booklets on [the Company] and the [Option 2] investment ..."*

/Cont'd...

Accordingly, in light of this statement and the documentation signed by the Complainant, in particular the *Corporate Bond*, I accept that the Complainant was furnished with a copy of the Information Memorandum. While it is contended that the Provider was aware the Complainant did not read this Information Memorandum, the Complainant was nonetheless given a copy to review and consider, and afforded time to do so. The Information Memorandum is quite a detailed and comprehensive document and contains reasonably detailed information about investing in the Company.

The Complainant signed a number of documents and forms on **17 January 2017**. Though essentially incomplete, the Complainant signed the declaration on the Fact Find. The Complainant also signed the letter from the Provider dated **17 January 2017**. This letter identified the unregulated status of the investment (as did a number of other documents signed by the Complainant at that time), the speculative nature of the investment and that returns were not guaranteed, the existence of the personal guarantee, and that there were risks associated with the investment. Various application forms and related documents allowing for the transfer of the Complainant's pension fund monies to the Company were also signed by the Complainant. These documents explain the purpose for which they were being executed and also contain a number of warranties and warnings.

The Complainant maintains the position that he did not read the documents and forms supplied to him, and in essence, relied on what he was told by the Provider. There is a conflict of fact between the parties as to what was and was not explained to the Complainant. It is not, however, possible to resolve this. Notwithstanding this, as noted above, I am satisfied the Complainant was given a copy of the Information Memorandum in advance of **17 January 2017** and therefore, had time to review and consider this document. Given the amounts invested by the Complainant in the Company; the fact the investment monies were his pension; and the fact he was signing a number of investment related documents and forms, it was reasonable and would have been prudent to expect the Complainant to have read or familiarised himself with these documents.

It is not sufficient for the Complainant to state that he did not read the investment documentation and that the Provider was aware of this. The Complainant appears to be making the point that because the Provider was aware that he did not read the various documents, the Provider was obliged to advise the Complainant on every aspect of the investment or at least, beyond what was discussed. I do not accept this. The Complainant was provided with sufficient information to enable him to understand the nature and risks associated with investing in the Company. Simply because he chose not to read these documents does not mean the investment was mis-sold.

Not too long after the Complainant's investment, the Company began to experience funding difficulties. Trustee 2 took the position that the Company had breached certain conditions under the *legal agreement* and/or defaulted in its repayment obligations under the loan notes. The Company on the other hand, argued that Trustee 2 overstated interest repayments, misunderstood its business model, and withheld funds. This resulted in the Company ceasing operations in India.

/Cont'd...

These are matters which transpired some months after the Complainant invested in the Company and were matters that could not have been known to the Provider or something that he could reasonably have been expected to have been aware of or advise on at the time of the investment.

The funding difficulties encountered by the Company were compounded by the fact that the personal guarantee had been undermined by the manner in which the Chairman/Personal Guarantor structured the ownership of his assets. The Complainant and the Provider relied on the personal guarantee in terms of their assessment and appreciation of the risk involved with this investment. There is no evidence of the Provider or the Complainant requesting sight of, or being provided with, a copy of the personal guarantee. While I had stated in my Preliminary Decision that in relation to the personal guarantee, "*neither party has been able to furnish a copy, which was executed by the Chairman of the Company, guaranteeing the loan notes (that is, the Complainant's investment)*", the Complainant has, together with his post Preliminary Decision submission, since supplied to this office a copy of the guarantee which he states was "*received from [Trustee 2] recently*".

Having reviewed the content of this, it remains my view that the personal guarantee was dealt with by Trustee 2, the loan note holder. The Provider was not involved in the negotiation or execution of the loan note nor was he required to be involved. It has not been disputed that Trustee 2 is a large and reputable trust company, and it seems the Provider took this as an assurance that the personal guarantee was valid and enforceable. As such, given the personal guarantee and the effect this should have had on mitigating the risk of the investment, I consider that it was not unreasonable for the Provider to form the view that this was not necessarily a high risk investment.

In the circumstances, I do not accept the Provider's conduct was wrong or unreasonable in not requesting sight of the personal guarantee nor do I accept the Provider was required to perform any due diligence in respect of the validity or enforceability of the personal guarantee. These are not matters the Provider was obliged to verify prior to recommending an investment in the Company which I consider are beyond the scope of the Provider's duty and more properly a matter for Trustee 2.

In terms of the appropriateness or suitability of the investment, the Complainant has not stated precisely how the investment was mis-sold. Essentially, mis-selling occurs when an investment is not suitable or appropriate for an investor, or it is misrepresented in some material respect. I have been provided with no evidence to suggest this investment was unsuitable for the Complainant, particularly in light of the documentation signed by him. The Complainant has not finished a risk assessment/questionnaire to demonstrate that he was a particularly risk averse investor; thus, rendering the investment unsuitable. Separately, the Provider has not provided any evidence to show that he carried out an assessment of the Complainant's appetite for risk. However, the Provider's letter of **17 January 2017** suggests that some form of financial review or assessment of suitability was carried out by the Provider. However, again, there is very little evidence to support this.

/Cont'd...

Further to this, having reviewed the documentation provided to and signed by the Complainant, it is clear there were a number of warnings across the various documents (which I have identified above) regarding the unregulated status of the investment. Therefore, I accept that the Complainant was aware, or ought reasonably to have been aware of this information.

The Complainant states in a submission dated **1 April 2020** that:

*“[The Provider] **never** explained to me that I was investing in a non-regulated product. If this was brought to my attention it would have immediately raised a number of queries for me and I would have investigated before investing. Furthermore, he **never** explained about the “investors compensation scheme” ...”*

This statement would tend to suggest that had the Complainant been aware of the unregulated status of the investment that, while he would have raised certain queries, he would not have been automatically deterred from or rejected this investment option. In any event, I note that the Provider wrote to the Complainant on 17 January 2017 clearly setting out the unregulated status of the investment and the risks involved.

From around **November 2017**, Trustee 2 notified the Complainant of its concerns regarding the Company. The Complainant states that the Provider advised him to ignore this and subsequent correspondence and that there was no need to attend the webinars/meetings. This is disputed by the Provider. While this is the Complainant’s position he has not identified when and where these statements were made by the Provider nor does there appear to have been any witnesses to these conversations. There is also an absence of any correspondence to suggest the Provider made such statements. Therefore, while I am not able to determine whether the alleged statements were made, there is a lack of detail and evidence to support the Complainant’s position. Further to this, despite any statements allegedly made by the Provider, when the correspondence sent to the Complainant by Trustee 2 is considered, it is clear that certain issues had been identified regarding the management of the Company. In that instance, and the Provider’s statements aside, the Complainant was reasonably aware of Trustee 2’s concerns and could have attended the meetings.

It also appears the Complainant was provided with links to access the webinars he did not attend and was given copies of the slides presented at the webinars together with a number of updates from Trustee 2.

The Complainant appears to have engaged in ongoing exchanges with both Trustee 1 and Trustee 2. In his post Preliminary Decision submission, the Complainant has submitted that on foot of my Preliminary Decision, he made a complaint to Trustee 2 and received a response that he is not a client of Trustee 2. As a result, the Complainant has sought an increase in the compensation I indicated, in my Preliminary Decision, that I intended to direct on the basis that he asserts *“it appears [the Complainant] would have great difficulty taking a case against [Trustee 2] as they are maintaining they are not my Trustee”*.

/Cont’d...

As this complaint is made against the respondent Provider only, it is the conduct of this Provider and not the Trustees which has been investigated and dealt with in this Decision. Therefore, the conduct of the third party Trustees does not form part of this investigation and Decision, nor can it influence my direction for compensation.

I accept that the Provider was aware of the concerns regarding the operation of the Company. However, there is no evidence to demonstrate that the Provider notified the Complainant, or kept the Complainant apprised of, the situation. The Provider appears to have hoped that, for the various reasons outlined above, matters would be resolved. Unfortunately, this was not the case. It was not acceptable for the Provider to take this course of action regardless of the representations being made by the Company or his hopes that matters would be resolved. Even though Trustee 2 had notified the Complainant of its concerns, the Provider should have written to the Complainant advising him of these issues and updated him over time and as matters progressed. Therefore, I accept that the Provider failed to inform and update the Complainant regarding the performance of the investment/Company; particularly when problems began to emerge in **July 2017**.

The Complainant is also dissatisfied with the time taken by the Provider to furnish him with confirmation of his investment which was only received in **May 2017**. The correspondence outlined above shows that the Provider received the documentation being referred to by the Complainant on **3 May 2017** from Trustee 1. These documents were forwarded to the Complainant on **4 May** and **9 May 2017**. The Provider has outlined that there was a long process before the Complainant's funds were transferred to the Company. However, there is no evidence of the Provider seeking to follow up with Trustee 1 or the Complainant in this regard. While the Provider acted promptly in forwarding the documents once he received them, efforts should have been made to follow up with Trustee 1 and to update the Complainant.

The Complainant made a formal complaint to the Provider on **26 October 2018**. Clause 10.9 of the Consumer Protection Code 2012 (the **Code**) sets out the general procedure for responding to and investigating complaints. The complaint was acknowledged on **6 November 2018**. In this acknowledgment, the Provider advised the Complainant that owing to the nature of the situation, he would not be in touch with the Complainant until he had more definitive news regarding the Company.

The Complainant made a second and similar complaint on **16 January 2019**. This does not appear to have been acknowledged by the Provider. The Complainant wrote to the Provider again on **5 April 2019**, requesting a Final Response Letter. The Provider responded on **12 April 2019**, acknowledging the Complainant's request but advised that a Final Response Letter could not be issued at that time due to discussions that had arisen with the Company. The Provider subsequently outlined the then position and furnished the Complainant with a letter from the Company.

This was followed by a further request for a Final Response Letter on **22 April 2019**. Following an email from the Complainant, the Provider advised the Complainant on **2 July 2019** that he had not received his previous letter.

/Cont'd...

The Provider also stated that until he had confirmation that the Complainant's investment was *gone*, he would not be in a position to issue a Final Response Letter. The Complainant wrote to the Provider by email on **22 July 2019** referring to the fact that he was seeking a Final Response in respect of the personal guarantee. The Provider responded on **24 July 2019**. A Final Response Letter was issued on **5 November 2019**.

While the Provider explained to the Complainant the reason why it believed a Final Response Letter could not be issued, the Provider was nonetheless obliged to periodically update the Complainant as to the status of his complaint, and endeavour to issue a Final Response within 40 business days. This did not occur and updates were only provided in response to the Complainant's correspondence. I do not accept that it was appropriate for the Provider to refrain from issuing a Final Response Letter on the basis of the apparently organic and developing situation regarding the Company. It was at all times open to the Provider to issue a Final Response on the basis of the circumstances that pertained at a particular time and the information available to the Provider.

The Provider could then have updated the Complainant as matters progressed. Despite this, reasonably comprehensive responses were sent by the Provider on three occasions prior to the Final Response Letter on **5 April, 12 April and 24 July 2019**. However, a significant period of time passed between **24 July 2019** and **5 November 2019** where very little, if anything, appears to have happened. Therefore, examining the Provider's handling of the formal complaints made by the Complainant, I am not satisfied they were responded to appropriately or in line with the provisions of the Code.

For the reasons outlined in this Decision, I partially uphold this complaint and direct the Provider to pay a sum of €2,500 to the Complainant.

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), (d) 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 Complainant in the sum of €2,500, to an account of the Complainant's choosing, within a period of 35 days of the nomination of account details by the Complainant 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**.

/Cont'd...

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



GER DEERING
FINANCIAL SERVICES AND PENSIONS OMBUDSMAN

21 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.