



<u>Decision Ref:</u>	2021-0108
<u>Sector:</u>	Investment
<u>Product / Service:</u>	Cash Investment
<u>Conduct(s) complained of:</u>	Mis-selling Delayed or inadequate communication Complaint handling (Consumer Protection Code) Failure to inform of drop in value
<u>Outcome:</u>	Substantially upheld

LEGALLY BINDING DECISION
OF THE FINANCIAL SERVICES AND PENSIONS OMBUDSMAN

The Complainants invested in Company 1 by way of loan note in the amount of €10,000 in **September 2017** (the **Loan Note**) through their broker, the Provider, against which this complaint is made. The Loan Note was for a term of 3 years and offered a return of €3,600 on maturity or 36%. The Loan Note Application Form also contained an option to purchase shares in Company 1. Subsequent to this, Company 1 was struck off the Register of Companies. The Complainants believe the Provider failed to properly advise them about Company 1 and mis-sold this investment.

The Complainants' Case

The Complainants explain that in early **August/September 2017** they met with the Provider at his home. The Complainants invested €10,000 (which was borrowed from family) in a Loan Note with the Company 1 and were told that they would receive €13,600 in three years. The Complainants' son made a similar investment in Company 1. The Provider also advised the Complainants that he expected there to be an option to convert to share options in Company 1, and that the Complainants' original gain would be multiplied. At no point did the Provider state there was any risk with Company 1, and as the Provider was a friend of the Complainants, *"... we stupidly trusted him implicitly to invest our money with due diligence and care."*

During a meeting with the Provider in **December 2018**, the Second Complainant asked the Provider if there was an issue with the Loan Note.

The Provider stated that there was no problem. The Second Complainant also pointed out that the Complainants' son had put all of his savings into Company 1 and the Provider repeated that there was no problem.

On **16 September 2019**, the Complainants received an email from the CEO of Company 1 explaining that it had been struck off the Register of Companies. The Complainants were offered an opportunity to purchase shares at a further cost of €600 in a separate company, Company 2. The Complainants were shocked at this email and the fact they were not notified about this by the Provider.

The Second Complainant telephoned the Provider who advised her that if the Complainants did not invest in Company 2, their money was gone. The Complainants arranged a meeting with the CEO of Company 2 (who was also the CEO of Company 1) on **19 September 2019**. The Complainants refer to a letter dated **27 September 2019** which contains a summary of this meeting. The Complainants remark that they were shocked to learn that Company 1 had a turnover of €20,000 in **2016**. The Complainants submit that the Provider did not make them aware of this and *"... alarm bells would have gone off if we were given this information."*

Following the Second Complainant's earlier telephone conversation with the Provider, the Provider sent an email with a copy of the Loan Note and the option to transfer to share options. The Complainants observe the email states *'assuming that [Company 1] was still running'*. The Complainants remark this was never explained to them when they invested in the Loan Note *"... and would have rung alarm bells."* The Complainants then sent an email to the Provider attaching the notes of the above meeting, *"... asking him [Provider] to confirm his grasp on the situation."* The Provider did not respond but left a voicemail for the Complainants stating that the note of the meeting was effectively correct.

On **20 September 2019**, the Second Complainant emailed the Provider asking him to confirm if he considered Company 2 to be a good investment. The Provider did not respond but telephoned the Second Complainant *"... stating what a wonderful opportunity it was ..."* and that it was likely to make up for the losses incurred on a different investment.

Having made some further inquiries regarding the CEO and Company 2, the Complainants discovered the CEO had been involved in a number of companies that have ceased trading. The Complainants *"... were extremely sceptical and decided not to throw good money after bad."*

The Complainants sent a letter of complaint to the Provider on **27 September 2019**. This was marked *Return to Sender* stating that the Provider no longer operated from that address. The letter was also sent to the Provider via email. On **14 October 2019**, the Complainants received a letter from the Provider notifying the Complainants that he was leaving the industry.

The Complainants state “... we have been left in limbo by [the Provider]. Again, it would appear that [the Provider] did not carry out due diligence when investing our money and has shown absolutely no duty of care to us as we have been unable to get any response to our queries ...”

The Provider’s Case

The Provider explains that he has known the Complainants for several years and they are members of the same golf club.

As a financial adviser, the Provider states that he was approached by the CEO of Company 1 in **January 2017** regarding an opportunity to bring on new investors to build a software based company that had already developed an existing software product to work in conjunction with an accounting product across the globe. The software was capable of connecting with on-premises accounting software and offer real time company information in various formats across the company. The first package of the software worked with certain accounting packages and more connections would come on line. This software is still being used but under the name of Company 2.

The Provider states that he was approached by the Complainants in **September 2017** and had done business with them in the past. The Complainants told the Provider that they had €10,000 to invest and asked if there were any investment opportunities which would be of interest to them. With this in mind, the Provider presented the Complainants with an investment in Company 1. Company 1 was looking for relatively small investors to support their business as its business model was moving towards the marketing stage. The Provider submits it was his opinion at the time and remains his opinion today that there is an ever growing market for the software.

After discussing Company 1, its history, where it was placed in the market and the return on investment, the Complainants agreed to invest. The Provider explains that the Complainants made a cash investment in the form of a loan note and received a loan note certificate in return.

The Provider submits, as a broker, he was offering advice on an investment which he thought was suitable for the Complainants and at no time did he foresee a change of events. The Provider states that although the structure of the investment had changed, an alternative solution was offered to investors which included the Complainants but they did not take up this offer. The Provider remarks that Company 2 is trading and moving forward, and the re-structure was necessary to offer a viable solution to continue with the business.

Referring to Company 1's performance in **2016**, the Provider states its turnover shows that it had a market in which it could sell in **2016**, the company had only started and relied on investors to take it through the development stages. The Provider states that he would not have been concerned with this as Company 1 was only starting to sell its product.

The Provider advises that as at **December 2017** there was no problem with the investment and Company 1 was trading.

The Provider also states that no investment updates were received from Company 1 and nothing was sent out to investors until the re-structure was issued.

The Provider states that there was an option to convert to share options for cash and corporate investors. This was an option given to an investor at the end of the investment period. Company 1 was giving an incentive to cash investors that in the event of the success of Company 1, investors had the option to convert their investment to shares to further enhance their investment. The Provider states that as with all businesses, there is an element of risk. Due to the re-structure of the business, this was offered in a different way. The Provider explains that Company 1 had perceived turnover to be far greater than was realised. There were hard decisions to make to turn the company around, thus necessitating the re-structure.

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 practice 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 1;

Failed to provide appropriate advice regarding the investment;

Failed to advise the Complainants as to Company 1's turnover;

Failed to advise the Complainants that Company 1 had been struck off the Register of Companies;

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Failed to communicate with and/or update the Complainants regarding their investment;

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

Failed to handle the Complainants' 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 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 28 September 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 Provider responded by way of e-mail, together with attachment, to this Office dated 15 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 Complainants for their consideration.

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The Complainants responded under cover of their e-mail to this Office dated 29 October 2020, a copy of which was transmitted to the Provider for its consideration.

The Complainants made a further submission under cover of their e-mail to this Office dated 18 November 2020, a copy of which was transmitted to the Provider for its consideration.

The Provider has not made any further submission.

The Complainants, in a post Preliminary Decision submission, raised issues in relation to the status of the Provider and the enforcement of any Decision by the Ombudsman.

These are not matters that can be dealt with in this Decision.

Loan Note Information Memorandum

The Information Memorandum states as follows:

“ ...

The term of each loan note shall be 36 months and the rate of return is 36% simple interest. The term of 36 months shall be calculated from the day the investment transfers into the company bank account. ...

- *Full capital and interest shall be returned after 36 months. The coupon rate (interest) shall be 36% after 36 months. ... However this investment is not guaranteed and potential investors should note this product is at the high risk end of the risk spectrum. ...*

WARNING: If you invest in this product you may lose some or all of the money you invest.

...

WARNING: If you invest in this product you will not have access to your money for 36 months.

- ...
- *In the event of default, loan note holders hold a charge over the assets of the company. ...Prospective investors should note that the primary assets of the company are [Company 1] products and any goodwill associated with the company. Therefore, any actions to retrieve investments by exercising this charge would be limited to the market value of the product, company and associated goodwill.*
- ...

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- ... *Loan note holders will be appraised on a regular basis (quarterly) on the performance and direction of the business.*
- ...”

Loan Note Application

The Complainants signed a *Loan Note Application* on **7 September 2017**. The Complainants agreed to enter into a loan note with Company 1 in the amount of €10,000 for a term of 3 years at an interest rate of 36%. The *Special Instructions* contain a handwritten note stating “*Option to transfer to share options.*” A *Loan Note Certificate* was issued on **19 September 2017** which was signed by a director of Company 1.

Client History Sheet

This document records a meeting with the Complainants on **7 September 2017** where Company 1 was discussed. It also records that the Complainants agreed to make a €10,000 cash investment at this meeting. An entry on **10 September 2017** notes the receipt of the signed Application Form.

Correspondence

The CEO of Company 1 wrote to the Complainants on **16 September 2019** as follows:

“I am writing to you to inform you about matters relating to the Loan Note taken by you in [Company 1]. ...

Background

- *[Company 1] is due for imminent strike off at the CRO.*
- *A new company, [Company 2] had contracted with [Company 1] to build new products and associated services to carry on a new business.*
- *The company [Company 3] will also be struck off – it was originally intended that this company would be licenced to carry on the business that [Company 2] is now engaged in.*
- *[Company 2] owns and operates any IP purchased from [Company 1] and sales commenced in early 2019.*
- *Shareholders in [Company 1] were offered and most took up an arrangement to acquire shares in [Company 2].*

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- *Due to the imminent demise of [Company 1] and [Company 3], [Company 2] is offering a compensatory opportunity for you to purchase shares in [Company 2] to the value of the Loan Note value at a preferential rate.*

[Company 2] is making satisfactory progress and I attach a document revealing the business opportunity. I would ask you to please treat this document as for your eyes only.

Finally, I am making you the following offer that needs to be time constrained because as the business grows and additional investment is required to scale and take advantage of this opportunity the value is growing as sales expand.

Your offer is 86,957 shares costing €600. This offer closes on September 30th, 2019 and relevant Share Certificates will then be issued to those accepting.”

The Complainants met with the CEO of Company 1 on **19 September 2019**. The Complainants prepared a note of this meeting during which the Complainants were advised of, amongst other matters, that Company 1's turnover for **2016** was €20,000; it did not file accounts with the CRO for the year **2017/2018**; and was being struck off the Register of Companies. The Second Complainant emailed the Provider on **20 September 2019** seeking advice as to whether the Provider considered the offer to purchase the shares in Company 2 “... to be the best plan of action ...” for the Complainants and their son. This does not appear to have been responded to by the Provider.

The Complainants made a formal complaint to the Provider on **27 September 2019** in respect of the investment.

Analysis

The Complainants invested €10,000 in Company 1 by way of a Loan Note in **September 2017**. There is a dispute between the parties as to how the investment came about with each party saying they were approached by the other.

While this conflict of fact cannot necessarily be resolved, I do not consider it necessary to do so in order to properly adjudicate on this complaint. The fact remains that the Complainants invested in Company 1 through the Provider acting as their broker.

A meeting took place in or around **7 September 2017**. However, neither party has provided an account of the precise discussions at this meeting. Notwithstanding this, I am satisfied that Company 1 and investing in Company 1 was discussed. Following this, the Complainants completed and signed the Application Form dated **7 September 2017** which included an option to purchase shares in Company 1 on the maturity of the Loan Note. This was received by the Provider on **10 September 2017**.

The Provider has furnished a Company Profile document for Company 1 and the Information Memorandum. The Complainants maintain that they did not receive these documents and that the Provider failed to fully advise them about Company 1.

In this respect, the Complainants cite Company 1's turnover in **2016**, and the fact that the share option would only be effective if Company 1 was a going concern when the Loan Note matured.

There is no evidence to demonstrate the Provider furnished the Complainants with a copy of the Company Profile document or the Information Memorandum nor has any document been signed by the Complainants drawing their attention to, or acknowledging receipt of, these documents. Therefore, I am not satisfied the Provider furnished the Complainants with, or made them aware of, these documents.

The Information Memorandum describes the Loan Note as being "*at the high risk end of the risk spectrum.*" With an investment of this nature, it is reasonable to expect the Provider to have assessed the Complainants' appetite for risk and the suitability of such an investment for the Complainants. The Provider has not provided any evidence to demonstrate that this occurred. Further to this, the Provider has not confirmed or explained in his Formal Response whether any such assessment was carried out prior to or at the time of the investment. There is also no evidence to show that a *Reasons Why* letter or *Statement of Suitability* for example was issued to the Complainants prior to or at the time of the investment; setting out the nature, risks, and suitability of the investment, and containing the appropriate investment warnings.

Accordingly, I do not accept the Provider properly assessed the Complainants' appetite for risk or the suitability of this investment for the Complainants nor am I satisfied the Provider advised or explained the risks associated with this investment.

The evidence then, looking at it from the Complainants' standpoint, is that they invested €10,000 in Company 1 on foot of a single meeting with the Provider and having received no information about the investment. The only document the Complainants had prior to or at the time of the investment was the Application Form.

The Complainants explain that they trusted the Provider implicitly. The Complainants appear to have invested in Company 1 without any knowledge of the company or risk. While a meeting took place on **7 September 2017**, neither party has given an account as to the exact information conveyed by the Provider about Company 1 or what, if any, questions or queries were raised by the Complainants. The Complainants' connection with or trust in the Provider does not obviate the need to or the requirement for the Complainants to satisfy themselves about nature or suitability of the investment. As noted above, the Complainants state that had they known about Company 1's turnover or the precise conditions for exercising the share option, this would have rung alarm bells. If this was such important information, it is not clear why it was not sought prior to the investment. Furthermore, it is not clear why apparently no information about the investment was requested by the Complainants.

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In the circumstances, it does not appear prudent for the Complainants to have invested in Company 1 without requiring certain basic information or making certain basic inquiries.

The Information Memorandum states that quarterly updates would be given to investors. The Complainants explain that they did not receive any correspondence to this effect following their investment. While it is not uncommon for companies to issue investment updates to investors and their brokers, this is not always the case. It was Company 1 that stated quarterly updates would be issued and not the Provider. Although the Provider was the Complainants' broker, I am not satisfied that he was necessarily obliged to ensure quarterly updates were issued to the Complainants. Additionally, the Complainants were aware they had not received any form of communication from Company 1 whether in the form of an update or otherwise, however, there is no evidence that the Provider was aware, or made aware, of this.

There is also no evidence to suggest that Company 1 was not a going concern or was in financial difficulty at the time of the Complainants' investment. Furthermore, I am not satisfied that the Provider was responsible for monitoring the performance or status of Company 1 following the Complainants' investment. The Complainants state in a submission dated **11 May 2020** in respect of Company 1's letter of **16 September 2019** that:

"We know for a fact that [the Provider] was fully aware of difficulties with [Company 1] and that we were going to receive this email from the CEO of [Company 1]. He informed another investor of these difficulties long before we received this email."

However, I have been provided with no evidence to support this submission. While the Provider was the Complainants' broker, this does not mean he was required to track the performance or status of Company 1 or periodically update the Complainants in this regard. I would note that it was, at all times, open to the Complainants to do this and make whatever inquiries were deemed necessary.

A formal complaint was made on **27 September 2019**. The **Consumer Protection Code 2012** (the **Code**) details the manner in which a complaint should be handled by a regulated entity.

It is patently clear, having considered the evidence in this complaint, or lack thereof, that the Provider did not in any way endeavour or attempt to respond to the complaint in compliance or purported compliance with the Code. The complaint was effectively ignored by the Provider. This is extremely disappointing and unprofessional conduct.

For the reasons set out in this Decision, I am not satisfied the Provider acted in a reasonable or professional manner in respect of the Complainants and their investment. Therefore, I substantially uphold this complaint and direct that the Provider pay a sum of €7,000 to the Complainants in compensation.

Conclusion

My Decision pursuant to **Section 60(1)** of the **Financial Services and Pensions Ombudsman Act 2017**, is that this complaint is substantially upheld, on the grounds prescribed in **Section 60(2) (b), (f) 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 €7,000, 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**

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,

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**(ii) a provider shall not be identified by name or address,
and**

(b) ensures compliance with the Data Protection Regulation and the Data Protection Act 2018.

