



<u>Decision Ref:</u>	2021-0109
<u>Sector:</u>	Investment
<u>Product / Service:</u>	Cash Investment
<u>Conduct(s) complained of:</u>	Mis-selling (investment) 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 Complainant invested in Company 1 by way of loan note in the amount of €10,000 in **September 2017** (the **Loan Note**) through his broker, the Provider, against which this complaint is made. The Loan Note had a term of 3 years and offered a return of €3,600 on maturity. 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 Complainant believes the Provider failed to properly advise him about Company 1 and mis-sold this investment.

The Complainant's Case

The Complainant explains that he met with the Provider at the Provider's home in **September 2017**. The Complainant invested €10,000 in a Loan Note with the Company 1 and was told he would receive €13,600 in three years. The Provider also advised the Complainant that he expected there to be an option to convert to share options in Company 1, and that his original gain would be multiplied. The Complainant outlines that he had no experience with financial products or investments and the money invested in Company 1 represented "... every penny I have saved since the age of 16 years." The Complainant states that the Provider was aware of this and the Provider was also aware that he was an apprentice tradesman who could not afford to lose his savings.

The Provider made no enquires about the Complainant's attitude to risk. The Complainant's parents also made a similar investment in Company 1.

The Complainant states that at no point did the Provider state that there was any risk with Company 1, and as the Provider was a family friend, "*... I stupidly assumed he would have investigated the legitimacy of the investment thoroughly.*"

On **16 September 2019**, the Complainant's mother "*... said she had received an email from [the CEO of Company 1] (who we had never heard of) and was trying to get some information as to what was going on with my investment.*" The Complainant explains that "*I never received any phone call, email or communication from [the Provider] directly regarding my investment although he was my Broker.*"

The Provider informed the Complainant's mother "*... that if I did not invest €600 in shares in [Company 2] my money was gone.*" The Complainant's parents had a meeting with the CEO of Company 1 (who is also the CEO of Company 2) and the Complainant was unhappy with what his parents told him about this meeting. At this point, the Complainant still did not have any communication from the Provider.

On **19 September 2019**, the Complainant received a copy of his Loan Note through his mother with the option to transfer to share options in Company 1.

The Complainant made a formal complaint to the Provider on **27 September 2019** but this letter was marked *Not at this Address*. The complaint was also sent by email.

On **14 October 2019**, the Complainant's parents received a letter from the Provider advising them that he was ceasing practice and leaving the industry. The Complainant states that he "*... had absolutely no contact directly from [the Provider]. He has not had the courtesy to phone or correspond with me in any way and appears to think it is ok to expect my parents to pass on information to me.*"

The Provider's Case

The Provider explains that he has known the Complainant for several years and that 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 an accounting software package and more connections would come on line. This software is still being used but under the name of Company 2.

The Provider states that the Complainant and his parents attended a meeting with him in **September 2017**. The Complainant had €10,000 in cash and was interested in investing.

With this in mind, the Provider presented the Complainant with an investment opportunity in Company 1 as Company 1 was looking for relatively small investors to support their business and 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 Complainant agreed to invest. The Provider explains that the Complainant made a cash investment in the form of a loan note and received a loan note certificate in return.

The Provider submits that, as a broker, he was offering advice on an investment which he thought was suitable for the Complainant 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 being offered to investors which included the Complainant but he 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. As a broker, the Provider states it was his opinion that the investment was strong and although it had been re-structured, he believes it will be a success.

The Provider 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 states that the Complainant was given an option to invest in Company 2 and that he met with a director of Company 2 in **December 2019**. However, because he did not take up this option, his investment is lost.

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 Company 1;

Failed to provide appropriate advice regarding the investment;

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

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

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

/Cont'd...

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 Complainant for his consideration.

The Complainant made the following enquiries under cover of his e-mails to this Office dated 29 October 2020, 12 November 2020, and 18 November 2020, copies of which were transmitted to the Provider for its consideration.

The Provider responded under cover of his e-mail to this Office dated 28 November 2020, a copy of which was transmitted to the Complainant for his consideration.

The Complainant, 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.

- *...*

/Cont'd...

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

Loan Note Application

The Complainant signed a *Loan Note Application* on **7 September 2017**. The Complainant 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 shares.*” A *Loan Note Certificate* was issued on **19 September 2017** and was signed by a director of Company 1.

Client History Sheet

This document records a meeting with the Complainant on **7 September 2017** where the Complainant was introduced to an investment in Company 1. An entry on **11 September 2017** notes the receipt of the signed Application Form.

Correspondence

The CEO of Company 1 wrote to the Complainant 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.*

- *Shareholder in [Company 1] were offered and most took up an arrangement to acquire shares in [Company 2].*
- *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 Complainant made a formal complaint to the Provider on **27 September 2019** in respect of the investment.

The Central Bank of Ireland wrote to the Provider on **20 February 2020** referring to his recent correspondence requesting the cancellation of the firm’s registrations and revocation of the firm’s authorisations confirming this was effective from **20 February 2020**.

Analysis

The Complainant invested €10,000 in Company 1 by way of a Loan Note in **September 2017**. A meeting took place in or around **7 September 2017** with the Complainant and the Provider. However, neither party has provided an account of the precise discussions at this meeting. Notwithstanding this, I accept that Company 1 and investing in Company 1 was discussed. Following this, the Complainant 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 in or around **11 September 2017**.

The Provider has furnished a Loan Note Opportunity document for Company 1 and the Information Memorandum. The Complainant maintains that he did not receive these documents and that the Provider failed to fully advise them about Company 1. There is no evidence to show the Provider furnished the Complainant with a copy of the Loan Note Opportunity document or the Information Memorandum nor has any document been signed by the Complainant drawing his attention to, or acknowledging receipt of, these documents. Therefore, I am not satisfied the Provider provided the Complainant with, or made him aware of, these documents.

In a submission dated **12 May 2020**, the Complainant states that the Provider advised him that there was little or no risk to the investment.

/Cont’d...

The Complainant adds that:

“The risk attached to my investment was brushed over by [the Provider] and I was led to believe that this was not something I would have to worry about.”

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 Complainant’s appetite for risk and the suitability of such an investment for the Complainant. 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. The Provider states that he was offering advice on an investment he thought was suitable for the Complainant. Yet there is no evidence to show that a *Reasons Why* letter or *Statement of Suitability* for example was issued to the Complainant 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. This is rather worrying given the fact the Complainant had no investment experience and the investments funds apparently represented the majority of his savings.

While I accept the Complainant was aware or ought to have been aware that there was some risk attached to the Loan Note, I do not accept that the Provider properly assessed the Complainant’s appetite for risk or the suitability of this investment for the Complainant nor am I satisfied the Provider adequately advised on or explained the risks associated with this investment to the Complainant.

Considering the matter from the Complainant’s position, he invested €10,000 in Company 1 on foot of a single meeting with the Provider and essentially without any information about Company 1 or the Loan Note. The only document the Complainant had prior to or at the time of the investment was the Application Form.

The Complainant placed a lot of trust in the Provider and invested in Company 1 on the Provider’s advice alone. A meeting took place on **7 September 2017**, the Complainant states that he was never advised Company 1 was moving the marketing stage and seeking to promote its product. The Complainant asserts he was led to believe Company 1 was a well established company.

As noted above, 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 Complainant. The Complainant’s connection with or trust in the Provider does not obviate the need to or the requirement for the Complainant to satisfy himself about nature or suitability of the investment. In the circumstances, I accept that it was not prudent for the Complainant to invest in Company 1 without requiring certain basic information or making certain basic inquiries despite the Complainant’s impression of Company 1 having met with the Provider. However, I also accept, having considered the evidence in this complaint, that the Provider did not explain the stage at which Company 1 was at in terms of developing, marketing and selling its product.

/Cont’d...

The Information Memorandum states that quarterly updates would be given to investors. The Complainant explains that he did not receive any correspondence to this effect following his 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 Complainant's broker, I am not satisfied that he was necessarily obliged to ensure quarterly updates were issued to the Complainant. Additionally, the Complainant was aware he 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.

A copy of a letter dated **16 September 2019** has been furnished. While this is addressed to the Complainant, the Complainant states this was sent to him via his mother's email address and not sent to him directly. The Complainant has furnished an email from the Provider to his mother dated **19 September 2019** referring to and attaching correspondence in respect of the share option in Company 2 and detailed in the **September 2019** letter. The file attached to this email is saved under the names of the Complainant's mother and the Complainant. The Loan Note was entered into by the Complainant in his own right and was not a joint investment with his mother. In these circumstances, while I am satisfied the Complainant was aware of the option to purchase shares in Company 2, it was not appropriate to send such important correspondence to the Complainant via his mother, especially as the Complainant's mother does not appear to have authority to accept correspondence on the Complainant's behalf.

There is 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. 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 Complainant to do this and make whatever inquiries were deemed necessary.

In a submission dated **12 May 2020**, the Complainant states:

"I am aware that another investor was informed by [the Provider] of difficulties with [Company 1] in advance of the re-structure being issued on 16th September, 2019."

In an email to this Office dated **18 June 2020**, the Complainant explains that his uncle was an investor in Company 1 and met with the Provider in **July 2019**. He states that the Provider was fully aware of difficulties with Company 1. The Complainant's uncle had a further meeting with the Provider on **29 August 2020** to discuss these difficulties.

/Cont'd...

In a second email dated **18 June 2020**, the Complainant states that his uncle did not tell him or his parents about the difficulties being experienced by Company 1 as the Complainant and his parents were abroad at a family wedding. The Complainant's uncle did, however, tell the Provider that he should make contact with the Complainant and his parents. The Complainant states that these conversations were recorded by his uncle.

The Provider responded to this on **4 July 2020**:

“For the record, I wish to state that at no time was I aware that any conversation was recorded nor was I informed prior to this that the meeting would be recorded between myself, [the CEO of Company 1] and [the Complainant’s uncle].”

While the Complainant's position is quite clear, the Complainant has not provided any evidence to support this position. While Complainant states his uncle has voice recordings of his meetings with the Provider and is willing to share them with this Office, a recording has not been provided and neither has a statement been submitted from the Complainant's uncle.

A formal complaint was made to the Provider 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. While the written complaint was return to the Complainant, it was also sent to the Provider by email. Receipt of the complaint has not been disputed by the Provider. Accordingly, 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.

Finally, the Provider has advised that his has ceased to practice financial advice and has furnished a copy of a letter from the Central Bank of Ireland in support of this. The Complainant has submitted a copy of a *Notice of Transfer of Regulated Activities* issued by the Provider to the Complainant's father (who also invested in Company 1) which advises of the Provider's departure from the broker/financial advice industry. The Complainant states that he did not receive any such notice from the Provider.

I note the Provider has not furnished any evidence to demonstrate that he notified the Complainant of his ceasing to trade nor has Provider furnished any *Notice of Transfer of Regulated Activities* that was issued to the Complainant. As the Provider was ceasing to practice and as the Complainant was a client of the Provider, the Provider should have notified the Complainant of this. There is no evidence of this having occurred.

Taking the foregoing into consideration, I am not satisfied the Provider acted in a reasonable or professional manner in respect of the Complainant. Therefore, I substantially uphold this complaint and direct the Provider to pay a sum of €8,500 to the Complainant in compensation.

/Cont'd...

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 Complainant in the sum of €8,500, 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**.

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,

/Cont'd...

**(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.

