



<u>Decision Ref:</u>	2022-0145
<u>Sector:</u>	Investment
<u>Product / Service:</u>	Investment
<u>Conduct(s) complained of:</u>	Mis-selling
<u>Outcome:</u>	Partially upheld

LEGALLY BINDING DECISION OF THE FINANCIAL SERVICES AND PENSIONS OMBUDSMAN

This complaint relates to advice given to the Complainant by the Provider, who was a Broker, in relation to three pension products as follows:

- An Executive Retirement Plan which made a single investment in a Geared Property Fund in **June 2005**. The Executive Retirement Plan is a single person occupational pension scheme.
- An Executive Pension Plan incepted in **July 2005**.
- A Retirement Bond incepted in **December 2010**.

The Complainant, who makes this complaint in his personal capacity, is also a director and shareholder of a Limited Company (the “**Company**”). That Company has one other shareholder.

The Company is named as the Employer and sole Trustee of the Complainant’s Executive Retirement Plan and his Executive Pension Plan.

The Complainant is the sole member of both the Executive Retirement Plan and the Executive Pension Plan, and he is the plan holder of the Retirement Bond.

The Complainant’s Case

The Complainant explains that his first business encounter with the Provider Broker, was in **1993** when he started a pension. The Complainant continues to detail that he commenced a **Defined Contribution Occupational Pension Scheme** in **July 1996** (the “**DC Scheme**”) when he was 37 years old and normal retirement age was set at 60.

The Executive Retirement Plan and Geared Property Fund

The Complainant states that some nine years later in **June 2005**, he received a telephone call from the Provider telling him about a product which he should invest in – **the Geared Property Fund (the “Fund”)**. He says that there was no discussion of the features of this product or the risk, and a product features document was not issued to him. The Complainant explains that because there was a time factor involved, the Provider asked that the Complainant fax through an instruction to the pension provider of the DC Scheme, to cancel the **DC Scheme** and to transfer the funds to the provider of the Executive Retirement Plan. The Complainant explains that the Provider sent him the wording to use when sending the instruction to the pension provider of the DC Scheme, to close that scheme.

The Complainant states that on **16 June 2005**, he followed those instructions from the Provider and transferred €83,970.89 into the **Executive Retirement Plan** which made a 100% investment in the **Fund**. At the time of making this complaint, in **2012**, the Complainant said that he had only become aware very recently, that the investment in the Fund yielded a commission of €4,192 for the Provider.

The Complainant submits that from the outset, the Provider was aware of his attitude to risk. The Complainant says he had no financial expertise, and he trusted and relied on the Provider’s recommendations in respect of the suitability and appropriateness of what was recommended. When changes were recommended, the Complainant says he

“... went along with those as I deemed him the expert who would act in my best interests.”

The Complainant explains:

“I have learned that in fact his recommended changes of policy did not match my financial needs, have cost me thousands of Euros in commissions and charges about which there was never any discussion, and have left me with no pension options.”

The Complainant states that the Fund is illiquid, and he asked several times for copies of the Fact Find and Key Features Document relating to the Fund, but nothing has been forthcoming. The Complainant submits that there were never any specific discussions with

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the Provider about the Fund and the Provider has failed to provide review notes. The Complainant states that

“[t]he ‘reviews’ ... are when a listing of the various policies was given to me and when discussion in general terms relating to economic climate took place. There were no specific references to any of my policies and nothing to indicate that any of portfolios merited concern.”

The Complainant submits the Executive Retirement Plan investment in the Fund was not suitable for him and it is unclear to him whether the Provider researched other products in the market and whether existing policy options were examined, before the Provider’s recommendations. Referring to the Fund brochure, the Complainant remarks that the brochure states the Fund is suitable for experienced investors with a tolerance for high risk. The Complainant states he was not an experienced investor, and this product was clearly not suitable for him.

The Complainant submits that the Fund should have been thoroughly explained to him, especially as he was 47 years of age at the time and was about to enter the final decade or so of his working life. The Complainant states that

“[a]t a time when volatility of investments should be lessened, my then accumulated funds, which were invested in a medium-risk fund, were put to a high-risk fund. I know now that this was not a prudent thing to do but I was relying on the expertise of a qualified Financial Advisor and Broker”

The Complainant details that the value given for the Fund in the Annual Reports, hand delivered to him by the Provider each year, was a nominal value rather than an actual value.

Executive Pension Plan

The Complainant details that in **July 2005**, the Provider contacted him again with regard to taking out an **Executive Pension Plan**. He outlines that this was due to him having agreed to transfer the accumulated monies from the **DC Scheme** to **the Executive Retirement Plan**, because under Revenue rules, no further contributions were possible to the **DC Scheme**. The Complainant submits that thereafter, contributions of €1,000 per month were made “*by him*” to the Executive Pension Plan between **July 2005** and **December 2008**.

The Complainant says, however, that in late **2008**, the business climate worsened, such that lack of affordability was a problem, so a premium payment holiday was requested. In

this regard, it appears that the monthly contributions were made by the Company to the **Executive Pension Plan**, rather than by the Complainant himself.

The Complainant explains that there was only one other payment made to the Executive pension plan, by way of lump sum of €5,350.18 in **August 2010**. The Complainant submits that at this time

“there was no review meeting with my financial advisor to discuss my ever-worsening financial circumstances and check the pension and protection policies in place”.

The Complainant details that overall, the contributions into the Executive Pension Plan for the period **01 July 2005 to 06 August 2010**, totalled €51,949.96 and the brokerage commission paid was €4,643.11, of which €3,000 was paid in the first year. The Complainant states that various other charges were also applied. He says in that regard that:

“The fact that there was never any discussion or document issued to detail the level of commissions and to only discover those from recent correspondence from the insurance companies involved is galling. ...

The Complainant says that in **October 2010**, he contacted the Provider to inform the Provider of the worsening trading difficulties and the resulting inability to continue with payment of pension contributions to the **Executive Pension Plan**. The Complainant submits that alternative options were not discussed, such as keeping the policy in force even if that would mean a lower pension sum would be payable at normal retirement age. The Complainant details that his ailing business (the Company) was not closed at that time. He says that rather, the business continued until **September 2012**, when it ceased trading. However, the Complainant says that the Provider advised the pension provider for the **Executive Pension Plan** product, that the Complainant's date of leaving service with the Company, was **15 November 2010**.

Retirement Bond

The Complainant explains that on the advice of the Provider the **Executive Pension Plan** was cancelled and the amount of €42,043.01 was transferred to the **Retirement Bond** in **January 2011**. The Complainant states that *“... the allocation amount of that €42,043.01 was €39,940.85 so there was a difference of €2,102.”* He says that he has sought information on this difference, as to where the funds went.

The Complainant submits that the Provider's Recommendation Document of **2011** was not furnished to him until **November 2012**. He says that the date for leaving service was

recorded by the Provider on the forms as **2010** *“even though [he] continued to work up until July 2012 when [he] ceased trading.”*

The Complainant says that in **February 2012** he received a valuation with respect to the Fund. The Complainant explains that he has written to the Provider requesting copy documentation regarding Fact Finds, Disclosure Notices and recommendations relating to the suitability of the products recommended to him. To date, the Complainant says, he has received copy applications forms, Section 30 letters and the recommendation relating to the Executive Pension Plan. He says however that the:

“[I]ack of explanation and lack of clarity about what happened in the past is frustrating. Failure to discuss the position at present and my options for the future is extremely distressing.”

The Complainant explains that over the years, various changes were made to these policies, and he relied on the Provider’s knowledge and expertise for financial direction to ensure adequate pension and protection provision. The Complainant explains that he feels let down that he was not fully informed by the Provider as to the nature and extent of the risk of the policies in place. He says that his *“loss is not just financial due to the imposition of undisclosed charges and commissions”* but that, in addition, he also lost the *“opportunity to weigh up and fully consider the then current and future pension options.*

The Complainant submits that the Provider’s failures to adhere to the Consumer Protection Code and professional standards, has cost him dearly and that:

To discover, however, that I am not eligible to access anything of accumulated funds - either lump sum or retirement income - ... is not only distressing but tortuous.”

The Complainant says that the value of **the Fund** in **May 2012** was **€68,989.90** and at that time, it appeared to him that if he were to draw from the Fund, that the monies would have to be transferred into an **Approved Minimum Retirement Fund (“AMRF”)** which he would not have access to until he was 75 years old. The Complainant says that during the years **2005 – 2012** he had understood that the greater part of the pension was in a fund that could be drawn from, on his retirement.

The Complainant has set out what he believes to be the loss sustained because of his decision in 2005, to transfer out of his original **DC Scheme**. He says that the transfer value from the DC Scheme as at **June 2005** was €83,970, and when that is added to the amounts paid between **July 2005** and **August 2010** of €51,949, the total would be €135,919 which represents 66.61% of indexed premium payments. He says that 66.61% of the projected pension of €26,000 would come to €17,318 per annum. He believes that if the original **DC Scheme** had remained in force, he would have yielded €17,300 per annum from age 60, such that for the period of 15years from age 60 to age 75 – he would have yielded €276,800.

The Complainant has supplied a second set of calculations based on the sums being lodged into a deposit account, with average interest of 4% per annum, which he estimates as €181,464.07, yielding €7,258.59 per annum to age 66, at which point he could claim state pension which would equate to €43,551.36. He says these amounts combined, total €225,015.43.

The Complainant submits that the amount of compensation payable in respect of this complaint should be an amount equivalent to the maximum amount capable of being directed by this Office:

“... in recognition of loss due to imprudence and non-adherence to professional standards of my financial advisor/broker as well as apparent breaches of the Consumer Protection Code.”

The Provider's Case

The Provider states that a Fact Find was carried out during the first meeting with the Complainant in **June 1993** and thereafter the Complainant's Financial Report was updated on an annual basis, at annual review meetings.

The Provider says the Complainant ran a company (the Company) and his wife also ran a successful company which provided her with an excellent income with pension provision and salary protection. The Complainant had no children or dependents. At that time, the Provider states that he recommended that the Complainant take out a pension plan with salary and contribution protection, with a pension provider.

The Provider explains that in **1993**, he outlined to the Complainant the level of funding that would be needed, to provide the pension benefits he required at retirement age, having taken details of the following information:

- a) the Complainant's salary,
- b) date of birth,
- c) intended date of retirement,
- d) any prior pension arrangements,
- e) any requirements for indexed pension benefits at retirement age.

The Provider states that, based on this information, he outlined to the Complainant the pension options available and the cost of providing the pension and benefit plan he required. The Provider states that the Company

"was either unwilling or unable to fund the pension to a level that met [the Complainant's] required return and accordingly [the Provider] suggested that the Company make a monthly contribution that it could afford to provide salary protection and pension contribution".

The Provider submits that the *"... Company could not fund the premia required to provide the Complainant with the generous pension benefits that he expected (two thirds of his salary at age 60)."* As a result, the Provider says that the Complainant was restricted in his options and consequently, the Provider was limited in the options it could propose to the Complainant.

The Provider states that *"[it] is a stranger to the question of the reliance by the Complainant on his advice but assumed in advising him that the Complainant was reliant."*

The Executive Retirement Plan and Geared Property Fund

The Provider states that an annual review was undertaken in **2005**, but 15 years later, the Provider no longer has access to these records.

The Provider explains that the investment in the Geared Property Fund was intended to create a managed equity portfolio over a period of 10 - 15 years with a 97% allocation rate having regard to the Complainant's stated risk appetite. The Provider says it is not accepted that any particular urgency arose, although it is generally accepted that funds of this nature, have closing dates.

The Provider states that *"all clients were provided with a Reasons Why Statement as per normal business practice and it is not accepted that [the Company] did not receive one"*.

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The Provider also rejects the Complainant's contention that the Geared Property Fund was unsuitable, due to his age at the time. The investment period was 5 - 7 years, which was a viable period for investment, prior to the Complainant's intended retirement.

The Provider states that the Complainant was made aware of the risks of this Fund which were also highlighted in the application form executed by the Complainant. The Provider says the Complainant was given a copy of the Fund brochure, which clearly sets out the risks involved. The Provider says that it verbally advised the Complainant of the advantages and disadvantages of the Geared Property Fund, which were also highlighted above the Complainant's signature on the application form.

The Provider explains that it did not charge fees in respect of the investment. Commission was received directly from the Geared Property Fund. The Provider submits that it:

"advised the Complainant in [the Provider's] Terms of Business that commission would be received although there was no obligation on [the Provider] to do so".

The charges were outlined in *Technical details* section of the brochure. The Provider also states that before **2010**, intermediaries were not required to present notices of commission, to their clients.

At the time of replying to this complaint, the Provider stated that *"almost 15 years have passed since this investment was made on behalf of [the Company]"* and the Provider is since retired. The Provider has submitted that he is significantly prejudiced by the need to recall events from memory.

The Executive Pension Plan

The Provider states that *"commission would have been received"* by him indirectly from the sale of the Executive Pension Plan in **July 2005**. The Provider states that the Complainant was advised in the Terms of Business, that commission would be received, although there was no obligation on the Provider to provide this information.

The Provider submits that of crucial importance is the context of the instruction received to suspend premium payments in **2008**. The Company was in significant financial difficulty and could not meet its obligations to discharge pension contributions to its employees. Therefore, there were no funds to make the payments and there was no alternative to a suspension. Furthermore, the economic climate was extremely uncertain, particularly in Ireland.

The Provider explains that in the desperate and dramatic financial circumstances that prevailed at the time, many investors were trying to procure premium holidays at short notice. As a result, the premium holiday effectively arose because of an emergency review, given the extraordinary circumstances.

The Provider submits, therefore, that it is incorrect to say that a review did not occur and in fact, if a review had not occurred, a premium holiday would not have happened, as it did. The Provider states that the instruction from the Complainant to put a moratorium on pension payments was unequivocal and *“[h]ad [the Provider] ignored same, the Company could have folded”*

The Provider explains that the pension premium holiday was intended to be for a period of six months to see *“whether the Complainant’s liquidity issues would resolve”* and even when the premium holiday came up for review in **June 2009**, a premium holiday for a further six months was requested by the Company and implemented. The Provider states that when this occurred, a financial review for the Complainant and his wife took place in **September 2009**. At this meeting, the Provider was instructed to cancel their joint life mortgage protection policy, as they had repaid their mortgage.

The Provider advises that up to **June 2005** the Company was contributing to the **DC Scheme** whereby the pension benefits that the Complainant would receive at retirement were based upon the following criteria:

- a) contribution amount,
- b) fund performance,
- c) retirement age
- d) previous pension benefits,
- e) indexed pension benefits or level pension benefits.

The Provider states that in view of the fact that the Complainant had very little pension provision, before his first meeting with the Provider in **1993** and given that the Company was not in a position to fund the desired pension benefits, the effect of discontinuing contributions in **December 2008** when the Complainant was age 52 with a selected retirement age of 60, was such that the Complainant’s pension was inevitably going to experience a funding shortfall.

The Provider submits that as the Complainant was aware, this in turn meant that the Complainant would receive a reduced pension benefit at 60, and he therefore needed to think about altering his chosen retirement age.

The last contribution of €5,350 to the **Executive Pension Plan** in **August 2010** was a transfer from a previous occupational pension scheme, not a contribution from the Company. The Provider states that the Complainant contacted him and requested that this fund, from the previous occupational pension scheme, be transferred into the Executive Pension Plan. The Provider states that he requested a member of his team to meet with, review and discuss the matter with the Complainant following which, paperwork was completed and confirmation from the previous occupational pension scheme provider, was sent to the Provider on **31 August 2010**. In addition, the Provider states that a further financial review was imminent in **October 2010**.

The Provider explains that the reason for the Complainant contacting the Provider in **October 2010** was not, as the Complainant contends, to inform the Provider of "*worsening trading difficulties and his inability to continue with the payment of Pension contributions*" into the Executive Pension Plan. Rather, it was in fact to request that the Provider try to draw down the Complainant's retirement benefits, as he wanted to get access to his tax-free lump sum due to the Company's cash flow problems.

The Provider submits that the Complainant made his last pension contribution in **July 2010** so there would have been no logic to the Complainant contacting the Provider to explain that the Company was unable to continue with the payment of pension contributions, particularly when there had been a premium holiday in place on the Company's contributions since **January 2009**. The Provider states that the Complainant wanted to draw down his tax-free lump sums from his pension policies, and the Provider told him that he would do his best to see if anything could be done to help him.

The Retirement Bond

The Provider states that in **October 2010**, the position of the Complainant's overall pension portfolio was assessed, to include the Geared Property Fund. The Provider explains that at this point, neither the Complainant nor the Company were making any regular pension contributions, since the premium moratorium in **January 2009** (other than the single premium transfer from a previously paid-up pension in **August 2010**).

The Provider states that the Complainant wanted access to his tax-free lump sum and following a discussion, assessment and review, the Provider says the Complainant instructed him to make contact with the provider of the **Executive Retirement Plan**.

The Provider submits that he made that contact, on the Complainant's behalf, and was advised by the provider of the Executive Retirement Plan, that the Complainant could not yet access his funds directly, but it was prepared to give an *in specie* transfer value, by taking into account the value of the Geared Property Fund and any other pension funds the Complainant had with the provider of the Executive Retirement Plan, and then the Complainant could draw down 25% of the total fund tax free.

The Provider states the Complainant was advised that he could not access his 1.5 times salary tax free lump sum option, because the majority of his pension fund was in a Geared Property Fund. As a result, the balance of the remaining pension fund (once the 1.5 times salary was drawn down) could not be transferred into an annuity, which was the requirement if this option was selected.

The Provider says there was no other Life and Pension Office in the market that he was aware of at that time, that would take into account the value of the Geared Property Fund that had yet to mature. As a result, any existing Geared Property Fund investors who wished to have access to their 25% tax free lump sum and met the Revenue requirements, would need to transfer any pension funds that were not with the provider of the Executive Retirement Plan, to that same provider. This was the reason the **Retirement Bond**, which was a product on offer by the same provider of the Executive Retirement Plan, was recommended by the Provider and was selected by the Complainant.

The Provider states that the Complainant was advised of the value of the Executive Retirement Plan investment in the Geared Property Fund. The Provider was instructed in **2010** by the Complainant to proceed with the transfer from the **Executive Pension Plan** to the **Retirement Bond**. The Provider states that on **9 December 2010**, the Complainant signed a **Withdrawal Options Discharge Form**, which confirmed the instruction to the Provider to transfer his pension from the Executive Pension Plan. The Provider states that on **10 December 2010** the Complainant also signed a Retirement Bond application form. It says that he also signed an AMRF application form dated **29 January 2011**, requesting drawdown of retirement benefits via AMRF and ARF routes. The Provider submits that this latter form is very important, because it confirms that the Complainant, having signed the Withdrawal Options form and the Retirement Bond application form, had time to review his options before he signed the application for an AMRF and ARF drawdown. The Provider also states that the Complainant forwarded a copy of his P60 and passport, in compliance with drawdown requirements. In respect of the Retirement Bond application form, the Provider explains that he and the Complainant went through the form together and, as it was being explained to the Complainant, the Provider filled out the application, based on the Complainant's express instructions. The Provider states that, at the conclusion of that process, he asked the Complainant to read the completed application form and if satisfied with the information on the form, to sign it.

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The Provider states that a further assessment was carried out in early **2011**, following the transfer of the Executive Pension Plan to the Personal Retirement Bond. The Provider says he advised that the Complainant should consider the 25% drawdown option more carefully, if the Company had a serious cash flow problem.

The Provider says that this was because the combined pension funds were just under €100,000, which would provide €25,000 as a tax-free lump sum, while the remainder of the fund would be transferred into an AMRF which would tie up most of the remaining proceeds until the Complainant reached the age of 75 years old. This option was to be viewed as against waiting until the Geared Property Fund matured, which would have allowed a greater tax-free lump sum of more than €50,000 to be drawn down, with the balance to be put into an annuity.

The Provider submits that notwithstanding this advice, the Complainant decided to proceed with the 25% drawdown, with the balance to be invested in the AMRF. The Provider also submits that there were never any issues voiced by the Complainant at that stage, regarding the transfer of the Executive Pension Plan to the Retirement Bond, nor at the next review meeting in **November 2011**.

Addressing the suitability of the Retirement Bond, the Provider states that it would have been preferable for the Complainant not to have had to transfer from the **Executive Pension Plan** to a **Retirement Bond** and he advised the Complainant of this, but his instructions were to do so, notwithstanding the Provider's concerns, due to the Complainant's circumstances and requirements. The Provider states that he had advised the Complainant since **1993** and was not in the business of recommending the transfer of pension funds in an existing Executive Pension Plan, to a Retirement Bond, even where the pension contributions were on moratorium.

The Provider states, in relation to AMRF rules, that the Retirement Bond was recommended to the Complainant based on the Complainant's instructions that he needed to draw down his pension benefits to get access to 25% of his pension fund. The Provider says the Complainant was fully aware of the AMRF and ARF rules from the very beginning, even before the Complainant contacted the Provider in **October 2010**. In the annual financial review, the Provider stated that he would keep the Complainant updated on any changes that took place, which would be of interest during the year. The Provider says he met again with the Complainant on **29 January 2011** in order for the Complainant to review, complete and sign AMRF and ARF applications. The Provider states that he again requested that the Complainant reconsider his options, because the Provider had become aware that the Geared Property Fund might possibly mature in the next year or so, which would give the Complainant a greater tax-free lump sum and indeed, the Geared Property Fund was increasing in value.

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In respect of a Fact Find, Key Product Information, a Reasons Why Statement and Disclosure Notice, the Provider states that while it is standard practice to issue these documents at the time of, or prior to, inception:

“... on this occasion it did not occur due to clerical [error] albeit that was to a large extent due to the urgent difficulty in which the Complainant said that he found himself given the state of his business.”

The Provider submits that while it is unfortunate that this oversight occurred

“... in the highly unusual prevailing circumstances that occurred at that time, it is perhaps understandable, and it would be unconscionable were the Complainant to profit given the clear absence of any causal link between the miniscule loss suffered by him and the failure to send out the said documentation.”

In response to the Complainant's position that no amount was ever paid, the Provider states that although the Complainant signed a completed application form to draw down his retirement fund via the AMRF and ARF route, and also provided the necessary documentation for the provider of the Executive Retirement Plan and the Retirement Bond to do so, the Complainant was reconsidering the route he was going to take, because the Geared Property Fund was increasing in value and he wished to hold back the drawdown because, if it transpired that the Complainant could take the option of 1.5 times final salary, he could then drawdown a greater tax free lump sum.

In terms of brokerage fees and commissions charged, the Provider says that during the entirety of his professional relationship with the Complainant, at no point did he charge the Complainant fees.

The Provider advises that he received a commission from the provider of the Executive Retirement Plan, the Executive Pension Plan and the Retirement Bond for business placed on behalf of the Complainant, as is set out in the Terms of Business Schedule. The Provider also states that he did not receive trailer charges from the provider of the Executive Retirement Plan, in respect of the Complainant's investment.

Jurisdiction

From **2013** onwards, a number of complex jurisdictional issues arose in the consideration of this complaint and this complaint file was assessed for jurisdiction on a number of occasions, taking account of the provisions of the following legislation:

- Central Bank and Financial Services Authority of Ireland Act 2004
- Central Bank and Financial Services Authority of Ireland (Amendment) Act 2017 and
- Financial Services and Pensions Ombudsman Act 2017, as amended by the Markets in Financial Instruments Act 2018 (the “**Act**”).

Each jurisdictional assessment involved an exchange of lengthy and detailed submissions made by the parties. The final determination on jurisdiction having regard to the then applicable legislation, was made on **08 November 2019**.

This complaint was made on **29 August 2012** to the then Financial Services Ombudsman (the “FSO”) in respect of the conduct of the Provider. The FSO wrote to the Complainant on **12 September 2012** noting that the main aspect of complaint appeared to relate to the suggested mis-selling of the Geared Property Fund in **2005**. The letter referred to the time limit contained in **section 57BX** of the **Central Bank and Financial Services Authority of Ireland Act 2004** (the **2004 Act**) and advised the Complainant that, to meet that six-year time limit, only the conduct of the Provider which occurred after **29 August 2006**, could be investigated by the FSO. Whilst this excluded the Provider’s actions and conduct in 2005, the letter also noted that there was additional conduct referred to in the Complaint Form which occurred after **29 August 2006** and the FSO requested that the Complainant clarify the conduct complained of in light of provisions of **section 57BX**.

The Provider’s solicitors wrote to the FSO on **8 April 2013**, challenging the jurisdiction of the FSO to investigate this complaint. It was submitted that the matter had already been determined by the Office of the Pensions Ombudsman, as evidenced in a letter from the Pensions Ombudsman dated **20 September 2012**. In addition, the Provider noted that the Company had been dissolved (which, it was argued, was the appropriate sole Complainant) and accordingly, the Company had no legal status and could not maintain the complaint.

The letter also stated that the complaint “... falls foul of Section 57BZ(a), Section 57BZ(d) and may indeed fall foul of Section 57BX(1).” In response to this, by letter dated **15 April 2013**, the Complainant submitted that this complaint related to the services provided to him in his personal capacity by the Provider. The Complainant also supplied a letter from the Pensions Ombudsman dated **9 August 2012** which stated: “It appears to me that the matter falls directly into the sphere of the Financial Services Ombudsman”

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The FSO wrote to the parties on **24 April 2013** to advise that the complaint file had been passed to the Legal Department for consideration. Ultimately, having considered the parties' submissions, the FSO determined that

- (i) the conduct complained of came within its jurisdiction and the original submission of the complaint to the Pensions Ombudsman was not a bar to making a complaint to the FSO;
- (ii) there was no evidence to substantiate the position that the complaint fell foul of **section 57BZ(a), section 57BZ(d) or section 57BX(1)** of the 2004 Act;
- (iii) the Company was the correct Complainant insofar as the complaint concerned any products sold to or held by it. However, as the Company was dissolved, it did not have the appropriate standing to bring the complaint in the absence of it being re-instated to the Companies' Register; and
- (iv) the Complainant was entitled to pursue a complaint against the Provider, in respect of the products sold to him or held by him in his personal capacity, subject to the appropriate time limits.

The Complainant queried whether the FSO could accept a complaint from the Company, if it was reinstated and restored to Companies Register. By email dated **17 July 2013**, the FSO informed the Complainant that if the Company was restored to the Companies Register, a complaint could be accepted from the Company subject to the provisions regarding jurisdiction contained in the 2004 Act.

The FSO wrote to the Complainant on **28 July 2014** noting that the Company had been restored to the Companies' Register and requested that the complaint being made on behalf of the Company be clarified, to facilitate a determination on jurisdiction. In a letter dated **6 August 2014**, the Provider's solicitors argued that the Company could not continue with the complaint once restored. This was followed by correspondence from the Complainant in **September 2014**.

On **1 February 2016**, the FSO wrote to the Complainant (with a similar letter issuing to the Provider's solicitors) explaining that a thorough and full review of the complaint file had been carried out. Addressing the jurisdictional issues, the Complainant was advised that the conduct complained of in respect of the Geared Property Fund, fell outside the 6 year time limit prescribed by **section 57BX(3)(b)** of the 2004 Act.

In terms of the Executive Pension Plan, the conduct complained of was identified as follows:

- (i) The Provider failed to advise the Complainant in **2005**, in relation to the commission levels, charges and fees that arose on the Plan.
- (ii) The Provider failed to carry out a review of the Complainant's position in **January 2009** and **August 2010**.
- (iii) The Provider failed to advise the Complainant appropriately when the Plan was being cancelled, as to the options that were available at that point in time in the context of the overall position in relation to the Complainant's pension funds.

As the conduct in respect of (i) above related to when the Plan was entered into in **July 2005**, the six-year time limit was not met and therefore the FSO did not have jurisdiction to investigate this aspect of the complaint. However, it was determined that the conduct at (ii) and (iii) above, were within the jurisdiction of the FSO.

In relation to the Retirement Bond complaint, the letter noted that the conduct complained of had occurred in **December 2010**, and the complaint having been made within the six-year time limit, it was therefore within the jurisdiction of the FSO. The letter also advised that it was the understanding of the FSO that the complaint was made by the Complainant in his personal capacity.

As the formal investigation of the Complainant's eligible complaints progressed, the Provider's formal response to this complaint was delivered by its solicitors on **25 November 2016**. This response articulated an objection as to the jurisdiction of the FSO to investigate this complaint. The FSO wrote to the Provider's solicitors on **2 December 2016** reminding them that a determination as to jurisdiction has been set out in the FSO's letter of **1 February 2016**, which at that time had invited further submissions from the parties in respect of jurisdiction, within a specified period, but no such submissions had been received by or on behalf of the Provider.

The FSO wrote to the Provider's solicitor again on **17 December 2016** expressing the view that it was not considered appropriate at that juncture, to seek to re-open or re-visit the jurisdictional determination of the FSO, but the Provider's solicitors were reminded of the Provider's right to challenge the FSO's jurisdictional determination, by way of application to the High Court.

The ***Central Bank and Financial Services Authority of Ireland (Amendment) Act 2017*** was enacted in **July 2017**. As the provisions of this act amended the time limits for bringing a complaint to the FSO, the FSO wrote to the parties on **4 August 2017** advising them of this legislative change and advising that a review would take place to determine whether any aspect of this complaint, which previously fell outside of the FSO's remit, would now come within its jurisdiction.

By letter dated **9 October 2017**, the parties were informed that the jurisdictional amendments introduced by the 2017 amendment did not alter the previous determination on jurisdiction. This was followed by extensive correspondence regarding a "*long-term financial service*" within the meaning of the legislation, and whether or not the Geared Property Fund, Executive Pension Plan and the Retirement Bond satisfied the relevant statutory definition.

The ***Central Bank and Financial Services Authority of Ireland Act 2004*** and the ***Central Bank and Financial Services Authority of Ireland (Amendment) Act 2017*** were repealed and replaced by the ***Financial Services and Pensions Ombudsman Act 2017*** effective from **1 January 2018**.

Subsequently, in **October 2018**, a further legislative change to the definition of "*long-term financial service*" was introduced by the ***Markets in Financial Instruments Act 2018***.

Following this, the parties were invited to make submissions regarding the impact of these new enactments. Thereafter, this Office wrote to the parties on **08 November 2019** setting out its position on its jurisdiction to investigate the conduct complained of in this complaint, in light of the various legislative enactments.

In this letter, the parties were advised that the FSPO was of the view that the Geared Property Fund and the Executive Pension Plan each came within the meaning of a "*long-term financial service*". Consequently, it was the view of this Office that arising from these legislative changes, the following aspects of the complaint, which had previously been outside the jurisdiction of the FSO, now came within the jurisdiction of this Office:

- (i) The conduct of the Provider in **June 2005** in relation to the sale of the Geared Property Fund, to include the suitability of the product, failure to advise in relation to the level of risk associated with the Fund, and a failure to advise in relation to the commission, charges and fees that arose.
- (ii) The failure of the Provider to advise in relation to the commission, charges and fees associated with the Executive Pension Plan when the Plan was inceptioned in **July 2005**.

/Cont'd...

The Complaints for Adjudication

The complaints for adjudication are as follows:

1. In **June 2005** the Provider mis-sold the **Executive Retirement Plan** to the Complainant, because it was not suitable for him and because the Provider failed to advise him in relation to the level of risk associated with the investment, or as to the commission levels, charges and fees which would arise.
2. With respect to the **Executive Pension Plan**, the Provider:
 - (a) failed to advise the Complainant in relation to the commission levels and the charges and fees associated at the time it was set up in **July 2005**.
 - (b) failed to carry out reviews of the Plan in **January 2009** and **August 2010**; and
 - (c) failed to appropriately advise the Complainant as to his options, when the Plan was being cancelled in **2010**, and the overall position of his pension fund.
3. In **December 2010**, the Provider mis-sold the **Personal Retirement Bond** to the Complainant, in so far as he:
 - (a) failed to carry out standard Fact Find procedures
 - (b) failed to provide certain information, including Key Product Information, Reasons Why Letter/Statement of Suitability, Disclosure Notice and Cooling Off Notice.
 - (c) failed to advise on the level of commission payable to the Provider on the sale of the Bond.

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.

/Cont'd...

A Preliminary Decision was issued to the parties on **29 July 2021**, outlining the preliminary determination of this Office 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 the Preliminary Decision, the parties made further submissions to this Office, copies of which were exchanged between the parties, and details of which I have considered in the adjudication of this complaint. I note that the Complainant in his submission dated **26 August 2021** details that:

“There was a presumption that all submissions had been considered in order to prepare the Preliminary Decision. However, this does not appear to be the case despite the many reviews undertaken by the various Case Officers over the past 8 years, there are inaccuracies in setting out:”

I have considered all submissions and evidence furnished by both parties to this Office, including the additional submissions made by the parties since the Preliminary Decision was issued to them on 29 July 2021. Having done so, the final determination of this Office is set out below.

The Executive Retirement Plan

The Complaint is that in **June 2005** the Provider mis-sold the **Executive Retirement Plan** because it was not suitable for the Complainant and the Provider failed to advise the Complainant in relation to the level of risk associated with the investment, or as to the commission levels, charges and fees which would arise.

I note the following documentary evidence:

- **On 09 June 2005**, an **Executive Retirement Plan Application Form** was completed and signed (i) by the Complainant on his own behalf as a member of the plan and (ii) by the Complainant on behalf of the Company, as Employer.

The Application Form contained an Employer Details section, which contained details of the Company of which the Complainant was director and shareholder and a Member’s Personal Details section, which recorded the Complainant’s details. The Plan Details section recorded that a single contribution of €83,970.89 was to be made in the Geared Property Fund.

/Cont’d...

- A *Statement of Suitability/Reasons Why Letter* dated **15 June 2005** was signed by the Complainant. This letter states:

“Following an analysis of your existing Pension Portfolio, I am recommending that you affect an Executive Pension Plan as my analysis has identified:

- *[Complainant], you have agreed to transfer the total value of your Company Pension Plan with [named pension provider] into the [Geared Property Fund] with [another named pension provider]*
- *You have been offered to participate in a UK commercial property geared investment whereby there is a sitting tenant of substantial financial standing contracted to the property up until the year 2017*
- *This investment vehicle offers you the potential to receive higher returns because of the gearing & the sitting tenant as well as UK property portfolios have proven to be sound investment*

I would therefore recommend that you put in place an Executive Pension Plan with [named pension provider] for the following reasons:

- *[named pension provider] have a well proven investment track record with substantial funds under management*
- *The [named pension provider] has an (sic) Standard & Poors financial rating of AA*

The enclosed Key Features document explains how the Plan works in more detail.

...

I have read the above and confirm that I agree with the recommendation made and wish to effect the transaction recommended.

...”

- The Complainant and the Provider signed the **Geared Property Fund Application Form** dated **15 June 2005**. The declaration section states:

“I/We declare that all the above statements are true and complete. I/We understand that this application shall form the basis of the contract between the investor(s)/applicant and the company, the terms and conditions of which shall be those contained in the standard policy issued by the company.

I/We have received and read through the illustration which complies with the Life Assurance (Provision of Information) Regulations, 2001 and fully understand its contents and I/We are fully satisfied that this policy suits my/our particular needs.

...

/Cont'd...

Understanding the Effects of Borrowing

I/We understand that by using borrowing in the Geared Property Bond, the fund has the potential to deliver higher returns than a traditional property fund but that there is also increased risk. The value of a property may fall as well as rise, and my capital is more at risk in an investment that is partly funded by borrowing than in an equivalent investment without borrowing. I/We have read and understood the information contained in the Brochure and Technical Details and update on the product outlined overleaf.

...

Warning

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

Declaration of Insurer or Intermediary

I hereby declare that in accordance with Regulation 6(1) of the Life Assurance (Provision of Information) Regulations, 2001, that [the Complainant] the above named client has been provided with the information specified in Schedule 1 to those Regulations and that I have advised the client as to the financial consequences of replacing an existing policy with this policy by cancellation or reduction, and of the possible financial loss as a result of such replacement. ...”

- The **Fund Brochure** provides details about the Geared Property Fund, the nature of the investment and the underlying property.

At page 5 in the *How does it works?* section, it states that:

“... To finance the purchase, borrowings of two-thirds of the estimated final purchase price ... will be arranged on behalf of investors in the fund. After meeting the cost of borrowing, investors will get the full benefit of any returns on the property value, including the part financed through borrowing, However, borrowing to invest increases the risk of the investment. Please see the section entitled “Risks” for further details.”

I note that the risk of gearing is explained at pages 7 and 8 of the brochure.

/Cont’d...

In particular, it states on page 8 that:

“The Geared Property Fund is an investment that is only suitable for experienced investors with a high tolerance for risk.

The increased risk to capital which results from borrowing to invest means that the Geared Property Fund is recommended for use as part of a diversified investment portfolio.”

In terms of fees and charges, the **Technical details** section states:

“What are the charges for managing my investment?”

The total cost of purchase is approximately 6.3% of the property value and includes costs of conveyancing, stamp duty, taxation advice, as well as survey, loan arrangement, legal fees and underwriting fees.

A renewal charge may be deducted annually through the cancellation of units. Your broker or [named pension provider] Adviser will tell you if this charge applies.

There will be a charge of 0.75% per annum of the value of the property, which includes the cost of managing the property. This management charge does not include exceptional costs ...”

- The Complainant has submitted in evidence a copy of the letter which was faxed to the pension provider of the Complainant’s DC Scheme on **16 June 2005** which details as follows:

“I authorise [named pension provider] to make my Executive Pension Plan paid up as of today’s date 16th June 2005 and all funds to be transferred to [other named pension provider]”

This letter was signed by the Complainant as Managing Director of the Company.

- A cheque was made payable by the pension provider of the **DC Scheme** to the provider of the Executive Retirement Plan, in the sum of €83,970.89 on **23 June 2005**.
- A section 30 receipt dated **27 June 2005** was included on the Provider’s file.

/Cont’d...

Analysis

It is important to note that the **Consumer Protection Code 2006** (the “**CPC 2006**”) was not fully effective until **July 2007**. The General Principles in Chapter 1 took effect on **01 August 2006** and certain other provisions were effective from **31 August 2006**.

However, the provisions with respect to *Knowing the Consumer, Suitability, Terms of Business* and *Charges* in Chapter 2, were not effective until **July 2007**, some two years after the **Executive Retirement Plan** and the associated investment in the **Geared Property Fund** had been sold to the Complainant.

Accordingly, the Provider was not required to adhere to these code provisions during the period which gives rise to this aspect of the complaint.

In terms of the decision to invest in the Fund and the reason for doing so, I note the following passage from the Provider’s letter dated **13 July 2012**, where the Provider wrote that:

“Due to the insufficient funding by your company into your pension fund, the unlikelihood for this to change for the foreseeable future and taking into account the amount of years left to your preferred retirement age, you agreed to take certain risks in your investment pension planning with the intention to accumulate a reasonable pension fund at retirement age. This is why you agreed and instructed me to proceed with the offer of investing into the [Geared Property Fund].”

The evidence also indicates that a certain level of discussion about the Geared Property Fund took place between the Complainant and the Provider.

In a letter to the then Pensions Ombudsman dated **25 July 2012**, the Complainant explained:

“In June 2005, [the Provider] telephoned me and recommended a [named pension provider] pension product in which he thought I should invest. There was a degree of urgency in getting the transfer of money to [named pension provider] organised to ensure that I could be part of this fund and he asked that I fax through my instruction to [the Pension Provider] to cancel my policy. I faxed through the instruction some two days later to transfer the sum of €83,970.89 into the Geared Property Fund.

There was very little discussion with regard to this [named pension provider] policy. ...”

/Cont’d...

In a letter to this Office dated **23 April 2013**, the Complainant enclosed a response (dated **20 April 2013**) to a letter from the Provider dated **17 September 2012**.

At paragraph 22, the Complainant states:

“... it should be noted that [the Provider] first contacted me by telephone on the 16th June, 2005 in relation to this Geared Fund investment. It was on the 16th June, 2005 that he forwarded the text of instruction for cancellation of the [Pension Provider’s policy]. I faxed through this instruction to [the Pension Provider] on that day.

Having considered the evidence, I am satisfied that it is likely that the telephone conversation during which the investment in the Fund was recommended, took place around **14 June 2005**; prior to the signing of the Reasons Why letter and the Application Forms referred to above which took place on **15 June 2005**, and prior to the issuing of the transfer instruction on **16 June 2005** to the pension provider of the Complainant’s DC Scheme. I am also satisfied that the Fund was discussed during this initial telephone conversation and also when the Complainant signed the Reasons Why letter and the application form.

After the Preliminary Decision was issued to the parties, on 29 July 2021, the Complainant in his submission of **06 August 2021**, stated as follows:

“What evidence? There are no contemporaneous notes/records and in the absence of those, left with one’s word against the other.”

The evidence referred to within this decision, is the evidence made available by the parties in the investigation of this complaint. The Complainant has submitted that the telephone call took place on **16 June 2005**, however certain documentation was signed by the Complainant in advance of that date.

Having regard to this and in the absence of any evidence to the contrary, I have taken the view that it is likely that the telephone call took place before **16 June 2005**, and not on **16 June 2005**, as the Complainant suggested in one of his submissions to this Office.

As is evident from the extracts above, on one occasion the Complainant submitted that the first telephone call and the fax instruction took place on the same day, on **16 June 2005**. In another submission the Complainant details that there was a telephone call during which the recommendation took place and that he faxed through the instruction some two days later.

/Cont’d...

The Complainant in his further post-Preliminary Decision submission of **26 August 2021** details:

“neither of the parties has ever made reference to any June 2005 telephone call other than the one regarding policy cancellation. Because the broker did not hold written records of contacts, specific evidence will be helpful”

I am conscious however that it was the Complainant himself who referred to a call having taken place, in his submissions which are quoted from above at page 23 and 24 of this Decision.

The Complainant complains that the Provider did not carry out an up-to-date fact find at the time when the **Executive Retirement Plan** investment in the **Geared Property Fund** was sold to the Complainant in **June 2005**. As outlined above, the CPC 2006 was not in effect at the time of the sale. Furthermore, it does not appear that the **Code of Practice on Fact Finds** which applied to insurance company direct sales by life assurance members of the Irish Insurance Federation, applied to the Provider who was a broker.

The Complainant in his post Preliminary Decision submission of **06 August 2021**, details as follows

“The date on which the Consumer Protection Code 2006 became effective is noted but the duties of a broker to clients do not just arise from statutory and written codes. There is a Common Law duty of care that all professionals must adhere to – act with due reasonable care and skill, understand the product being recommended, advise of the implications and avoid negligent misstatements as that information will be relied on.”

The Complainant also details:

“in this regard, it is worth noting that there were voluntary codes in place in relation to the different industry sectors. An informative piece is contained in 2005 publication on CP10 by the then Financial Regulator, prior to the introduction of the CPC. This was at a time when the FSO had already been established

“The Code will require that consumers be given appropriate and relevant information before, during and after the sales process. We indicated that while we agreed that voluntary codes had an important role in ensuring improved services for customers, there was a concern about the effectiveness of their enforcement.

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The obligation to act in the best interests of customers has its origin in the IOSCO2 international conduct of business principles. This was carried forward into the EU Investment Services Directive and subsequently into the Investment Intermediaries Act, 1995.

A view expressed is that the only benefit to customers from commission disclosure was where the product was an investment product and the commission had an impact on the final investment value Under the current Codes and Handbooks, insurance intermediaries, insurance companies and those firms authorised to conduct investment business are required to seek sufficient information in order to provide them with a suitable product or service that suits customer's needs. When firms are assessing the suitability of product, they must go beyond mere eligibility""

The Complainant, during the investigation of this complaint placed particular reliance on the provisions of the **CPC 2006**. The Complainant in his post Preliminary Decision submissions, does not dispute that ultimately the CPC was not effective at the time of the conduct complained of. The Complainant makes reference to voluntary codes and a 2005 publication by the then Financial Regulator. As detailed above, this Office has considered those voluntary codes in the context of this complaint and it does not appear that the **Code of Practice on Fact Finds** which applied to insurance company direct sales by life assurance members of the Irish Insurance Federation, applied to the Provider who was a broker.

Further having considered whether there were any codes applicable at the time of the conduct complained of, and even though this Office has concluded that there were not, this Office has proceeded to consider any other obligations or duties on the Provider at the time of the conduct complained of. The Complainant's submission appears to suggest that there has been no further consideration of the conduct of the Provider given that the CPC 2006 was not effective at the time of the conduct complained of, but this is not correct. The consideration of the conduct of the Provider continues in the following paragraphs of this Decision.

I note that it appears to be accepted between the parties that a fact find was carried out in **1993**, when the Complainant's relationship with the Provider commenced. The Provider appears to accept that a fact find was not completed in **2005**, as he submits that an annual review was undertaken at the time, but owing to the elapse of time since the product was sold, the Provider no longer has access to records.

The Provider has not submitted any evidence of that annual review in **June 2005**. However, I note from the contemporaneous evidence in the form of the Reasons Why letter, which the Provider issued to the Complainant, and which was signed by the Complainant on **15 June 2005**, that it commences with *“Following an analysis of your existing Pension Portfolio...”*

In these circumstances, it appears that some form of analysis of the Complainant’s then pension provision was conducted by the Provider. However, there was no requirement on the Provider at the time to complete a full fact find, which would have included capturing details of existing pension provision.

As noted above, the Complainant signed the Reasons Why letter and the application form on **15 June 2005**. In the letter dated **23 April 2013**, the Complainant states:

“... I confirm that I signed the Application Form and that [the Provider] presented to me. I signed at the spaces that indicated that the product had been explained to me and the implications of switching pension plan - there was no detailed discussion of what was already held”

I note that the Reasons Why letter signed by the Complainant, gave a brief explanation of the Fund and the application form referred to the increased risk associated with a geared fund. A number of related documents were referenced in the Reasons Why letter and the application form, such as a Key Features document, the standard policy, and the Brochure and Technical Details.

In the letter dated **23 April 2013**, the Complainant writes, at paragraph 20, that:

“... There was no discussion meeting and no Reasons Why document was ever produced. I received a copy of the brochure. I have made a number of attempts to procure a copy of the original policy, with the stated terms and conditions and signed Scheme Rules issued in July, 2005.”

[My emphasis]

Therefore, of the various documents referenced in the Reasons Why letter and the application form, I am satisfied that the Complainant was supplied with the Fund brochure. The Fund brochure provides information about the Fund, its risks, and fees and charges.

Having considered the evidence, while the Complainant maintains that he was a medium risk investor and/or his DC Pension Scheme had been a medium risk investment, I am satisfied that the Provider reasonably assessed the suitability of the Geared Property Fund in light of the Complainant’s circumstances pertaining in **June 2005**.

/Cont’d...

I am also satisfied that the Complainant was provided with a sufficient amount of information to enable him to appreciate the risks associated with the proposed investment in the Geared Property Fund. A number of documents were referred to in the Reasons Why letter and the application form.

If the Complainant did not receive these at the time, or if he had queries regarding the Fund, it is reasonable to expect him to have raised any such queries at the time. In this regard, I note in the Complainant's letter dated **9 June 2012** where he states that he did not consider the brochure in any great detail:

"In [named pension provider's] initial brochure which, I have only studied in recent months, states that it is a product suitable for experienced investors and that there is a potential loss of their investment."

Further to this, in the letter of **25 July 2012**, the Complainant states:

"Now with the benefit of hindsight, I should have asked more questions as to why exactly he deemed this to be a better investment, but I relied on his financial expertise as I have no such expertise. ..."

I take the view that if the Complainant believed **in 2005** that he did not have enough information, he was free to ask questions or seek further information from the Provider. Furthermore, if the Complainant was satisfied with the existing DC Scheme that contributions were being made to at that time, then he could have decided, in **June 2005**, not to make any changes to his existing pension provision.

The Complainant in his post Preliminary Decision submission of **06 August 2021**, details as follows:

"Although it was in 1993 that I completed the one and only FactFind with broker, I had indicated my attitude to risk and studies have shown that willingness to take risks declines with age. In 2005, I was aged 49 and about to enter my last decade of employment. In the 'evidence' that has been considered, there is nothing that I have seen that describes the high risk (possible wipe-out of investment) and illiquidity attaching"

The Complainant further details as follows in his post Preliminary Decision submission of **26 August 2021**:

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“Suitability determination re product should include consideration of whether client is able to financially bear the investment risks (including actual losses or loss of access to funds), meets client’s objectives and that client understands the risk. The complainant’s query 2012 letters show that he did not understand the high risk as he queried the exact pension position and when he could access funds. A reference to and/or production of evidence which shows the Provider’s assessment will be helpful.”

The Complainant in his post Preliminary Decision submission of **06 August 2021**, also details as follows:

“complainant relied totally on Provider’s financial expertise and believed that he, the Provider, was acting in his best interests. Complainant signed the prepared text for cancellation of policy because he had been assured by the Provider that this was the best course of action.”

I am conscious that many of the Complainant’s post Preliminary Decision submissions are effective re-statements of his previous submissions made during the investigation of the complaint. In making my Decision in this complaint, I have had regard to the Complainant’s position that he relied on the Provider, but having considered all of the evidence and the documentation made available, I am satisfied that the Provider reasonably assessed the suitability of the Geared Property Fund in light of the Complainant’s circumstances pertaining in **June 2005** and that the Complainant was provided with a sufficient amount of information to enable him to appreciate the risks associated with the proposed investment in the Geared Property Fund. Ultimately it was a matter for the Complainant to decide having regard to all of the information that was made available to him, whether he wished to proceed with the proposed investment or remain in the existing DC Scheme, and he chose to progress with the investment in the Fund at that time.

With respect to the complaint that the Provider failed to advise the Complainant as to the commission levels that arose in relation to the fund, it is not clear whether a Terms of Business letter was given to the Complainant at the time when the Geared Property Fund was entered into. The Terms of Business furnished in evidence to this Office were noted by the Provider in his letter dated **12 November 2012**, to be *“provided for clients in 2010”*.

I note that there is also no evidence or suggestion that the Complainant was charged any fees or commission directly by the Provider. Rather the Provider was paid a commission directly from the Geared Property Fund. In these circumstances while it does not appear that it was explained to the Complainant directly by the Provider, that the Provider was to be paid by way of commission from the Geared Property Fund, in my opinion by implication, it was clear that the Provider was being so paid.

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The Complainant has not indicated how he expected that the Provider would otherwise be paid for services to him, in circumstances where, the Complainant himself was not paying the Provider. As detailed above, there were no **CPC 2006** obligations on the Provider to furnish terms of business or details of fees to the Complainant, as the relevant provisions of the CPC 2006 were not in place at the time.

In the Preliminary Decision I outlined that:

"I note that the fees and charges associated with the Fund, were set out in the Fund brochure, which the Complainant had a copy of at the time he made the investment."

The Complainant in his post Preliminary Decision submission of **06 August 2021**, details as follows:

"FACT - Complainant was not financially literate and how can a consumer, financially literate or not, be expected to discern the type and level of sales (e.g. 25% of first year's contributions in [the Executive Pension Plan] taken out to replace the 1993 DC) and trail commission paid."

The Complainant in his post Preliminary Decision submission of 26 August 2021, further submits:

"no brochure was made available at the date of investment so complainant was not on notice. Besides that (a) those fees and charges are technical in nature and (b) the insurance company sent documentation directly to broker"

The Complainant appears to now dispute having received a copy of the Fund brochure. However, as detailed above, the Complainant signed the declaration in the **Geared Property Fund Application Form** on **15 June 2005**, which provided:

I/We have read and understood the information contained in the Brochure and Technical Details and update on the product outlined overleaf.

...

The fees and charges associated with the Fund, were set out in the Fund brochure, which the Complainant had declared to have read and understood at the time he made the investment. As a result, and having regard to all of the evidence before me, I am satisfied that the Complainant was given sufficient notice of the fees and charges associated with the Fund.

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The Executive Pension Plan

With respect to the Executive Pension Plan, the complaint is that the Provider failed to advise the Complainant in relation to the commission levels and the charges and fees associated at the time it was set up in **July 2005**, failed to carry out reviews of the Plan in **January 2009** and **August 2010** and failed to appropriately advise the Complainant as to his options when the Plan was being cancelled in **2010** and the overall position of his pension fund.

- The Complainant signed a *Statement of Suitability/Reasons Why Letter* dated **13 July 2005** in respect of the Executive Pension Plan. This letter states:

“Following an analysis of your existing Pension Portfolio, I am recommending that you effect an Executive Pension Plan as my analysis has identified:

- *[Complainant] as you have agreed to transfer the total value of your Company Pension Plan with [pension provider of the Complainant’s DC Scheme] into the [Fund] (with [pension provider of the Executive Retirement Plan]), under Revenue rules you cannot continue to contribute into the [DC Scheme].*
- *Therefore you need to effect a new plan to enable you to continue paying your regular monthly premiums in order to boost your retirement benefit*
- *This plan is a Revenue approved retirement benefit scheme and therefore both you and your company can claim full tax relief on contributions paid to the Plan.*

I would therefore recommend that you put in plan an Executive Pension Plan with [pension provider of the Executive Retirement Plan] for the following reasons:

- *[Pension provider of the Executive Retirement Plan] is part of the [name].....*
- *[Pension provider of the Executive Retirement Plan] have a well proven investment trade with substantial funds under management*
- *[.....] is backed by impressive strength and has life assurance operations in over [X] Countries worldwide and funds under management of over €300 billion*

The enclosed Key Features document explains how the Plan works in more detail.

...

/Cont’d...

I have read the above and confirm that I agree with the recommendation made and wish to effect the transaction recommended.

...”

- This office has not been provided in evidence with an Application Form, however, I note from the **Policy Schedule** that the application date is recorded as **13 July 2005**, with the normal retirement dated recorded as **25 September 2016**. The Policy Schedule records a 97% allocation rate.

- The **Conditions** of the **Executive Pension Plan** in Section 4 record the charges applicable to the policy. The conditions detail as follows:

“Each month units are cancelled to pay for

- (i) A monthly policy servicing fee*
- (ii) Any additional management charge which applies:*
- (iii) Any levy or duty imposed by the government or any body acting on behalf of the government in a regulatory or compliance role.*

The charges each month will be the charges applying at that time under our then current scales”

- I note that the pension provider of the **Executive Pension Plan** set out the charges and commissions in a letter to the Complainant dated **28 May 2012**, as follows:

“The commission basis on the plan was 25/3 (with initial commission reducing if term is less than ten years). This is 25% initial commission and 3% renewal commission. Details of commission paid are shown below.

<i>Initial commission paid: 25%</i>	<i>01/07/2005 – 30/06/2006</i>	<i>€250.00 x 12</i>	<i>€3,000.00</i>
	<i>01/07/2006 – 30/06/2007</i>	<i>€12.50 x 12</i>	<i>€150.00</i>
	<i>01/07/2007 – 30/06/2008</i>	<i>€38.13 x 12</i>	<i>€457.50</i>
	<i>01/07/2008 – 31/12/2008</i>	<i>€13.53 x 6</i>	<i>€81.16</i>
<i>Renewal Commission paid: 4%</i>	<i>01/07/2006 – 30/06/2007</i>	<i>€30.00 x 12</i>	<i>€360.00</i>
	<i>01/07/2007 – 30/06/2008</i>	<i>€31.50 x 12</i>	<i>€378.00</i>
	<i>01/07/2008 – 31/12/2008</i>	<i>€36.08 x 6</i>	<i>€216.45</i>
<i>Single premium commission: 5%</i>	<i>06/08/2010</i>		<i>€267.51</i>

/Cont'd...

Charges taken on the plan from 1 July 2005 to 20 December 2010 are broken down as follows:

<i>Allocation expense</i>	<i>€1,855.93</i>
<i>Policy fee</i>	<i>€324.00</i>
<i>Fund Administration Charge</i>	<i>€1,577.08</i>
<i>Pension board fee</i>	<i>€19.00</i>

Please note the commission payments are not deducted from the plan fund value but are paid directly to the financial adviser by [pension provider]. However, the commission basis does determine the allocation rate applied to the premiums”

Analysis

Again, I note that the **CPC 2006** was not fully effective until **July 2007**. The General Principles in Chapter 1 took effect on **01 August 2006** and certain other provisions were effective from **31 August 2006**. However, the provisions with respect to Terms of Business and Charges in Chapter 2 were not effective until **July 2007**, some two years after the **Executive Pension Plan** was entered into.

Accordingly, the Provider was not required to adhere to these CPC provisions during the period to which this aspect of the complaint relates.

It is not clear what, if any, documentation, outside of the Reasons Why Letter and the Policy Schedule and Conditions, were provided to the Complainant in **July 2005** regarding the **Executive Pension Plan**. As noted above, it is not clear whether a terms of business letter was given to the Complainant at the time the Plan was entered into. As detailed above the Terms of Business furnished in evidence were noted by the Provider in his letter dated **12 November 2012**, to be “*provided for clients in 2010*”.

However again there is no evidence to suggest that the Complainant was charged any fees or commission directly by the Provider. Rather as outlined in the letter dated **28 May 2012** from the pension provider of the Executive Pension Plan to the Complainant, the commission was paid by the pension provider to Provider and the commission was not deducted from the plan.

The details of the charges applicable to the **Executive Pension Plan** were contained in the Policy Schedule and Conditions, which were furnished to the Complainant.

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The Complainant in his post Preliminary Decision submission of **06 August 2021** details as follows:

“Non charging of fees by the Provider – the fact that the Complainant was not charged any fees directly by the Provider has been referred to a number of times. The fact that the “churning” (as described by the Pensions Ombudsman when he referred Complainant’s file to FSO in August, 2012) generated significant sales commissions.”

The Provider in its post Preliminary Decision submission, of **13 August 2021**, details as follows:

“The Complainant’s Submission simply repeats misrepresentations that are debunked in the Preliminary Decision and which we will not again rebut, other than to observe that paragraph 9 of the Submission contains a regrettable misrepresentation which does a disservice to the Office of the former Pensions Ombudsman. We again attach, for ease of reference, the letter of 20 September 2012 from the Pensions Ombudsman which speaks for itself, both in terms of its criticism of the Complainant’s conduct and its endorsement of the conduct of the Respondent.”

This Office has noted that, in 2012, the Complainant originally submitted his complaint to the then Office of the Pensions Ombudsman. At that time, the Pensions Ombudsman referred the complaint to the then Financial Services Ombudsman’s Bureau (FSOB) because the complaint was not a matter that fell within the jurisdiction of the Pensions Ombudsman. I am satisfied that this initial review of this complaint by the Pensions Ombudsman, leading him to refer it to the FSOB, did not constitute a formal examination of the merits of the complaint. Nor indeed, in my opinion, did the Pension Ombudsman’s determination that it was appropriate for him to refer the matter to the FSOB, constitute any sort of formal finding regarding the merits of this complaint.

An independent investigation of the Complainant’s complaint was commenced by the FSOB, and is now concluded by this Office, in reaching the within decision regarding the conduct complained of, taking account of the submissions and evidence made available by the parties to the complaint.

The Complainant maintains that the Provider failed to carry out a review in **January 2009** and again in **August 2010**. The evidence shows that a premium holiday began in **January 2009** for 6 months.

This office has been supplied with a copy of the instruction that issued to the pension provider of the Executive Pension Plan which is dated **05 December 2008**. It is a pro forma

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document which is presented on the headed paper of the Provider with the heading “Trustee and Member Instruction Sheet”. The Instruction is signed by the Complainant.

It appears that a further premium holiday was applied to the **Executive Pension Plan** from **July 2009** to **February 2010**. A single premium of €5,350.18 was then paid in **August 2010**.

The Provider states that the premium holiday in **January 2009** would not have occurred without a review, and that he requested a member of his team to meet with, review and discuss the single premium with the Complainant in **August 2010**. There does not appear to be any contemporaneous documentation to show what review, if any, took place, however I do not consider it necessary to determine whether or not a review took place at these points in time. The reason for this is because there was no obligation on the Provider to proactively take steps to arrange reviews with the Complainant in **January 2009** and **August 2010**.

The Complainant poses the following questions in his submissions to this office:

“Did the Respondent seek copy of company accounts? Did he establish this problem was a temporary one or envisaged to be a long-term problem? Did the Respondent carry out a fresh assessment of pension provision and financial circumstances?”

The Complainant further advises:

“The fact that the lump sum payment in 2010 came from a previous occupational scheme rather than from earnings should surely have been a cause for greater concern. This transfer...was after all routed through his office and the member of his team whom I met delivered the documentation for signing.”

It appears from the Complainant’s submission that he is of the view that the taking a premium holiday and making a lump sum payment from a previous scheme, should have triggered the Provider to seek certain documentation from the Complainant or the Company and to enquire into the Complainant’s personal and business affairs, to ascertain if he was making appropriate pension provision, in the circumstances that he found himself in at the time. However, in my opinion, there was no obligation on the Provider to do so. There is also no evidence that the Complainant himself raised any concerns or sought any advice from the Provider at those times, which might have prompted the Provider to suggest that a review would be appropriate.

The Retirement Bond

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The complaint is that in **December 2010**, the Provider mis-sold the **Personal Retirement Bond**, insofar as he failed to carry out standard Fact Find procedures, failed to provide certain information, including: Key Product Information; Reasons Why Letter/Statement of Suitability; Disclosure Notice; and Cooling Off Notice and failed to advise on the level of commission payable to the Provider on the sale of the Bond.

- The **Compliance File Checklist** dated **25 March 2010** records that the “*Terms of Business*” were “*Given/Explained*” to the Complainant and copied to the file. With respect to question on the Compliance File Checklist that records whether a Factfind was “*Given/Explained*” and “*Copied to file*”, the answer recorded is yes and “*previously*” is handwritten on the checklist.

- I note that the Provider’s **Terms of Business**, which the Provider submits were in place from **2010** detail as follows:

“Commission and Charges: [The Provider] is remunerated by fees for advice and commission and other payments for receiving and transmitting business with the product producers listed in appendix 1.

Fees: Two models can be used for fees – hourly rates or case fees / commission equivalents. We at [the Provider] choose the latter of the two and that system is explained as follows:

Commission equivalent model / fixed fee model: We will charge a fee equivalent to the commission generated on products offered by product producers listed in Appendix 1”

- The Complainant signed a **Withdrawal Options Discharge Form** on **09 December 2010** both (i) in his capacity as a member of the plan and (ii) on behalf of the Company Trustee. This form recorded as follows:

“Following my withdrawal from employment with the company shown above. I have been made aware that I have an entitlement to assets held within the company pension scheme. Having received my options relating to these assets, I hereby chose (please tick)”

The option to “*Transfer my entitlement to a Buy Out Bond*” was selected. The other options were “*Transfer my entitlements to my new employer’s pension plan*”, “*Defer (delay receiving) my benefit*” and “*Transfer to a PSRA*”.

- The Complainant signed a **Retirement Bond Application Form** dated **10 December 2010** both in his capacity as member and on behalf of the Company Trustee. This

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application form recorded the member's details, including date of joining service as 1991, and date of leaving service as 01 December 2010. The basic salary at date of leaving was recorded as €33,000. The investment option selected was 100% Cash.

The Retirement Bond Application Form was also signed by the Complainant, as member under the following text:

"I have read through the replies to all the questions in the application form and declare that to the best of my knowledge and belief all information and statements given, whether in my handwriting or otherwise are accurate and complete."

The Retirement Bond Application Form was signed by the Complainant, on behalf of the Company Trustee under the same text quoted above and also the following:

"We hereby apply to purchase a retirement bond with [pension provider] and agree that this application form shall form the basis of the contract between [pension provider] and ourselves and that the retirement bond shall be governed by the normal policy conditions of [pension provider]."

➤ The **Retirement Bond brochure** details information with respect to the product. The Overview section details as follows:

<i>Aim</i>	<i>To invest in a single premium transfer value from an exempt approved occupational scheme.</i>
...	
<i>Time Period</i>	<i>A pension plan is generally a long-term savings plan with no access to funds before retirement age (with certain exceptions – see <i>When can I retire? On page 17</i>). Access to funds at retirement will be subject to legislation and Revenue Rules.</i>
<i>Suitable</i>	<i>As a lump sum investment for your pension fund if you have to leave your company or your occupational pension scheme is wound up.</i>
<i>Charges</i>	<i>The charges on the [named] Retirement Bond are dependent upon premium size, term to retirement and fund choice. More details on charges can be found in <i>Technical Details on page 18</i>. The policy will also be subject to the Pension Levy as outlined above."</i>

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Pages 19 and 20 of the **Retirement Bond Brochure** provide details of the Allocation rates, Annual Management and Switching charges.

- A letter was issued from the provider of the Executive Pension Plan to the Provider dated **04 January 2011** which detailed as follows:

“Please find enclosed cheque for €42,043.01 in respect of the full transfer payable under the above pension scheme. This is to be invested in a new Retirement Bond with [new pension provider].

The breakdown of the cheque is as follows –

....

- *Date of joining service – 01 – 07- 1991*
 - *Date of leaving service – 15 - 11 – 2010*
 - *Confirmation of Final Salary - €40,000.00”*
- An **AMRF application form** was signed by the Complainant on **29 January 2011**.
 - This office has been supplied with a Statement of Suitability/Reasons Why Letter dated **02 June 2011**.

The letter is not signed by the Provider or the Complainant. It details as follows:

“Retirement Options (AMRF) Recommendation for [the Complainant]

Following an analysis of your existing Pension Portfolio, I am recommending that you transfer your pension benefits into an Approved Minimum Retirement Fund Retirement Bond as my analysis has identified:

- *[The Complainant] currently you have opted to take your tax free Lump sum on retirement benefits which will be 25% of your built up fund*
- *The balance of your fund is to be placed in an Approved Minimum Retirement Fund using an In-specie Transfer as you are invested in a Geared Property Fund*
- *The Approved Minimum Retirement Fund is being set up as you are not presently withdrawing on an annuity and would need a guaranteed income of at least €18,000 per annum under legislation to invest into an Approved Retirement Fund*

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- *With an Approved Minimum Retirement Fund you[r] funds will be tied (sic) up till the age of 75 and cannot be accessed until then.*

I would therefore recommend that you transfer the value of your Pension Benefits into a[n] Approved Minimum Retirement Fund with [pension provider] for the following reasons:

- *[Pension provider] have a well proven investment record with substantial funds under management and have been operating in Ireland for many years*
- *[Pension provider] have a wide range of funds to choose from in order to boost your retirement funding such as...[names of funds]*
- *The [pension provider] has a Standard & Poors financial rating of AA (currently the highest financial rating of any life assurance company in Ireland)"*

Analysis

It is accepted by the parties that there was contact between them from **October 2010** onwards, because the Complainant wanted access to a lump sum payment from his pension fund. When the Complainant received the Provider's original Formal Response to this investigation, the Complainant wrote a letter dated **13 December 2016** and stated that:

"The contact of October 2010, was initiated by me, as had been rightly stated. The reason for this contact was to check re possible access to my pension monies and my reason was due to worsening trade conditions."

The letter also suggests that a discussion regarding the access to the pension monies took place:

"I confirm that, having consulted with the [Provider], I signed the documentation presented to me for signing"

The Provider' representative has submitted as follows in response to this complaint to this office:

"... the Complainant wanted access to his tax-free lump sum. The [Provider] contacted [provider of the Executive Retirement Plan] on his behalf to make enquiries. [The provider of the Executive Retirement Plan] advised that the Complainant could not yet access this fund directly however [the provider of the Executive Retirement Plan] were prepared to give an "In specie transfer value", by taking into account the value of the Geared Property Fund and any other Pension

/Cont'd...

Funds that the Complainant had with [that pension provider] and the client could draw down 25% of the total fund tax free which also included the value of the Geared Property Fund in the calculation.

The Complainant was advised that he could not access his 1.5 times salary Tax Free Lump Sum option because the majority of his Pension Fund was in a Geared Property Fund so that the balance of the remaining Pension Fund once the 1.5 times salary was drawn down could not be transferred into an annuity which was the requirement if this option was selected. We are instructed by [the Provider] that no other life and Pension office in the market that he was aware of at that time would taken into account the value of the geared Property fund that had yet to mature, so any existing geared Property Fund investors with [the pension provider of the Executive Retirement Plan] that wished to have access to their 25% tax free lump sum and obviously met revenue requirements would need to transfer Pension Funds that were not with [the pension provider of the Executive Retirement Plan] to [it]. This was the reason the Retirement Bond was recommended by [the Provider] and selected by the Complainant and the Respondent was instructed by the Complainant to proceed with the Transfer from the [Executive Pension Plan] to [the Personal Retirement Bond].

.....

Following discussion, assessment and review, the Complainant instructed the Respondent to make contact with [the pension provider of the Executive Retirement Plan]

A further assessment was made by the Respondent regarding the Complainant when they met again in early 2011 following the transfer of his [Executive Pension Plan]. The Respondent advised that the Complainant should consider the 25% draw down option more carefully even if the Complainant's company had a serious cash flow problem as the combined Pension Funds taking into account the geared Property Fund in specie Transfer Value was just under €100,000 which would provide €25,000 as a tax free lump sum based upon 25% of Fund Value, while the remainder of the fund would be transferred into an AMRF which would tie up most of the remaining proceeds until the Complainant reached the age of 75, as against waiting until the geared Property Fund matured (which based on the figures at the time would allow the Complainant to draw down 1.5 x salary as a tax free lump sum of over €50,000 – P60 y/e 2007 €35,521, P60 y/e 2008 €35,539 and P60 y/e 2009 €29256 = €100,316 divided by 3 €33438 by 1.5 €50,157) with the balance then to be put into an annuity). Notwithstanding that advice, the Complainant decided to proceed with the drawdown of the 25% tax free lump sum with the balance to be invested into an AMRF and if there were any additional funds on the maturity of the geared Property Fund, they were to be invested into an ARF. ...

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The reason to the Complainant's submission that no amount was ever paid is because although the Complainant signed a completed application form to draw down his retirement fund via the AMRF and ARF route and also providing the necessary documentation [...] to do so, he was reconsidering the route that he was going to draw down his pension benefits because the Geared Property Fund value was increasing and he wished to hold back the drawdown of his Retirement Benefits, because if he could take the option of 1.5 x final salary he could then draw down a greater tax free lump sum (.....)....

Because the Complainant did not sign this form or indeed the Discharge form (...) the transfer was delayed and the drawdown of the Complainant's Retirement Funds."

It appears that the only option available to the Complainant to access the maximum amount possible, by way of tax-free lump sum from his pension, was to move the funds held from the **Executive Pension Plan** to a **Personal Retirement Bond**, because the pension provider of the Personal Retirement Bond was in a position to take account of the **Executive Retirement Plan** investment in the **Geared Property Fund** for the purposes of the calculation of the tax-free lump sum. The reason for this is the **Executive Retirement Plan** and the **Personal Retirement Bond** were products either held with or on offer from the same pension provider.

However, there is no evidence to support that Provider's submission that this was explained to the Complainant at the time in late 2010 and early 2011 when the **Withdrawal Options Discharge Form** was signed on **09 December 2010**, when the **Retirement Bond Application Form** was signed on **10 December 2010** or when the **AMRF application form** was signed by the Complainant on **29 January 2011**.

The Provider acknowledges that a Fact Find, Key Product Information, Reasons Why Statement and Disclosure Notice were not provided to the Complainant. Separately, an unsigned Reasons Why letter dated **2 June 2011** which has been supplied in evidence, is acknowledged not to have been provided to the Complainant at that time.

Chapter 2 of the CPC 2006 requires regulated entities to take certain steps to gather and record certain information before recommending a product or service and to assess suitability of products before recommending a product, as follows:

"12 A regulated entity must ensure that all information it provides to a consumer is clear and comprehensible, and that key items are brought to the attention of the consumer. The method of presentation must not disguise, diminish or obscure important information.

/Cont'd...

- ...
- 24 *Before providing a product or service to a consumer, a regulated entity must gather and record sufficient information from the consumer to enable it to provide a recommendation or a product or service appropriate to that consumer. The level of information gathered should be appropriate to the nature and complexity of the product or service being sought by the consumer, but must be to a level that allows the regulated entity to provide a professional service.*
- ...
- 25 *A regulated entity must gather and record details of any material changes to a consumer's circumstances before providing that consumer with a subsequent product or service*
- ...
- 31 *Before providing a product or service to a consumer, a regulated entity must prepare a written statement setting out:*
- a) the reasons why a product or service offered to a consumer is considered to be suitable to that consumer;*
 - b) the reasons why each of a selection of product options offered to a consumer are considered to be suitable to that consumer; or*
 - c) the reasons why a recommended product is considered to be the most suitable product for that consumer.*
- The regulated entity must give a copy of this written statement to the consumer and retain a copy”*

The Fact Find, Key Product Information, Reasons Why Statement and Disclosure Notice were all documents which should have been presented to the Complainant in or around **10 December 2010**.

I note that **Compliance File Checklist** dated **25 March 2010** records with respect to the Factfind, that it was “*Given/Explained*” and “*Copied to file*” and “*previously*” is handwritten on the checklist. An updated Compliance File Checklist from December 2010 has not been furnished in evidence to show that any Factfind was completed at this time. It remains unclear when the “previous” Factfind mentioned in the March 2010 Compliance File Checklist was completed, or in what context.

I am satisfied that the Provider should have completed an up to date Fact Find with the Complainant in late 2010. While the Provider makes detailed submissions as to the Complainant’s circumstances at the time and it appears to me that the Provider had knowledge of those circumstances, there is no contemporaneous record notwithstanding that **provision 24 of Chapter 2 of the CPC 2006** required that this information be gathered and recorded by the Provider at that time.

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The Provider has submitted that the Reasons Why document was not sent and was not signed, owing to a clerical error. Quite apart from the fact that the Reasons Why document was not furnished or signed by the Complainant, I am not satisfied that the Reasons Why document, as drafted contained sufficient detail. This is particularly so when compared with the subsequent explanation for the recommendation given to this Office, as quoted above, which was more comprehensive and clearly illustrated the circumstances for the advice and reasons why the recommendation was given.

I am of the view that the Provider did not act in accordance with **provisions 12, 24, 25 and 31 of the CPC 2006** at the time the **Executive Pension Plan** was being cancelled and the **Personal Retirement Bond** was being incepted. However, as outlined above, it appears that this product was in fact suitable given the actions the Complainant proposed to take at that time, which was the drawdown of a lump sum. However, it appears that the Complainant ultimately decided to take a different course of action.

The Complainant in his post Preliminary Decision submission of **06 August 2021** details as follows:

“FACT : as detailed in previous correspondence to FSPO, the AMRF pension rules then prevailing were the deciding factor. The Provider had misrepresented the position.”

In my opinion, there is no evidence of a misrepresentation by the Provider at that time. I take the view that, given the actions the Complainant proposed to take at that time (the drawdown of a lump sum) the **Personal Retirement Bond** was a suitable product to allow the Complainant access to the maximum amount possible, by way of tax-free lump sum from his pension.

The Complainant also takes issue with the record of his date of leaving service in the **Retirement Bond Application Form** which is recorded as 01 December 2010, and the letter from the pension provider to the Provider dated **04 January 2011** which records *“Date of leaving service – 15 - 11 – 2010”*. He says in that regard that he continued to operate his business after that date until **September 2012**.

This Office understands that that these details were provided before the Complainant ultimately decided not to continue with the drawdown of the tax-free lump sum and instead to continue with his business.

With respect to the **Retirement Bond**, the Complainant also complains that the Provider failed to advise him as to the level of commission payable to the Provider on the sale of the Bond.

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I note that the records, **Compliance File Checklist** dated **25 March 2010**, show that the Provider furnished the Complainant with a copy of the **Terms of Business** at that time. The Terms of Business, as quoted from above, detail that the Provider was payable by way of commission. Again, there is no evidence to suggest that the Complainant was charged any fees or commission directly by the Provider. Rather the pension provider paid the commission to the Provider.

To conclude with respect to the Complainant's complaints about the three pension products, in my opinion, the evidence does not support the Complainant's complaints with respect to the alleged failures of the Provider in relation to the sale of the **Executive Retirement Plan** investment in the **Fund in June 2005** or the alleged failures of the Provider with respect to the **Executive Pension Plan** in **July 2005, January 2009 and August 2010**.

I am satisfied that the evidence shows however that the Provider failed to meet his regulatory obligations, or to act in accordance with **provisions 12, 24, 25 and 31 of the CPC 2006** at the time when the **Executive Pension Plan** was being cancelled and the **Personal Retirement Bond** was being incepted in **2010**. This is disappointing, and I am satisfied that such conduct was unfair to the Complainant and was unjust within the meaning of **section 60(2)(b) of the Act** and was also otherwise improper, within the meaning of **section 60(2)(g) of the Act**.

In those circumstances, on the basis of the evidence available, I am satisfied that this complaint should be partially upheld, only to the limited extent outlined, as a result of the Provider's failure to meet his regulatory obligations under the Central Bank of Ireland's **CPC 2006**.

The Complainant in his post Preliminary Decision submission dated **06 August 2021** submits:

"12. Duties of broker – are fiduciary, regulatory and common law and in assessing possible breaches, the issue is to do with were the actions of the broker contributory or the cause of foreseeable loss. The changing of pension products over the years with resultant charges and fees resulted in smaller pension pot but the 2005 investment into the high-risk Geared Property Fund had the most impact.

...

15. High Court 2020 Ruling the judgment of Mr Justice Simons provided useful clarity in relation to the FSPO's jurisdiction. He noted that the FSPO enjoys a "hybrid" jurisdiction, making decisions based on both contractual (purely legal) issues, and non-contractual (non-legal) issues. Non-contractual issues include the conduct of the

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FSP which, even if it is technically found not to be unlawful, may be considered unreasonable or unjust in some way. This provides an important reminder to all FSPs, from banks dealing with a mortgage customer in arrears to an investment manager processing a complaint from a retail investor, to ensure that their interactions with customers are not only lawful, but fair and just.”

In reaching my decision with respect to this complaint about the conduct of the Provider, I have had regard to the grounds upon which a complaint can be upheld, substantially upheld or partially upheld under **s60(2) of the Act**. However, the evidence does not support the Complainant’s complaints with respect to the suggested failures of the Provider in relation to the sale of the **Executive Retirement Plan** investment in the **Fund in June 2005** or the alleged failures of the Provider with respect to the **Executive Pension Plan in July 2005, January 2009 and August 2010**. While the Complainant does not accept this to be correct, this Office has fully considered all submissions and evidence made available to it in the investigation of this complaint.

As detailed above, the Complainant has submitted calculations of the losses, he submits he sustained, arising from his decision in **2005**, to transfer out of his original **DC Scheme** and to make the investments in the three pension products which are the subject of this complaint (the Executive Retirement Plan, the Executive Pension Plan and the Personal Retirement Bond). In those circumstances, the Complainant has sought to have this Office direct the Provider to pay him the maximum amount of compensation permissible to redress those losses.

At the time of the Complainant’s complaint this was €250,000, but that figure has since increased to €500,000. In any event, I do not consider a direction for the payment of such a level of compensation, to be in any way appropriate, in the circumstances of this matter.

Rather, taking account of the limited failures of the Provider in his dealings with the Complainant, I consider it appropriate to direct the Provider to pay the Complainant a sum of **€5,000** by way of compensation for the inconvenience sustained by the Complainant, as a result of those regulatory failures by the Provider in 2010.

The Complainant submits as follows in his post Preliminary Decision submission dated **06 August 2021**:

“Award of €5,000 against Provider – this is to pay the Complainant by way of compensation for the inconvenience sustained by the Complainant as a result of those regulatory failures by the Provider in 2010. It should be noted that Provider retired with effect from Feb 2013. Provider confirmed in 2013 (8 years ago) that his Professional Indemnity is held with [named insurer].”

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The direction contained in this Legally Binding Decision is made to the respondent financial service provider, who is the subject of this complaint investigation, in accordance with **s60(4) of the Act**. It may be that the Provider concerned has a professional indemnity policy in place and it may be that the policy extends cover to a direction of compensation made by this Office to Provider in this matter. Any such insurance arrangement however is a matter as between the Provider and his insurer, and the direction is made, whatever the Provider's insurance arrangements, if any.

Conclusion

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

Pursuant to **Section 60(4) and Section 60 (6)** of the **Financial Services and Pensions Ombudsman Act 2017**, I direct the Respondent Provider to make a compensatory payment to the Complainant in the sum of **€5,000 (five thousand Euros)** 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.



**MARYROSE MCGOVERN
FINANCIAL SERVICES AND PENSIONS OMBUDSMAN (ACTING)**

22 April 2022

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PUBLICATION

Complaints about the conduct of financial service providers

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.

Complaints about the conduct of pension providers

Pursuant to *Section 62* of the *Financial Services and Pensions Ombudsman Act 2017*, the Financial Services and Pensions Ombudsman will **publish case studies** in relation to complaints concerning pension 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.