



Decision Ref: 2022-0147

Sector: Investment

Product / Service: Investment

Conduct(s) complained of: Mis-selling

Outcome: Rejected

LEGALLY BINDING DECISION OF THE FINANCIAL SERVICES AND PENSIONS OMBUDSMAN

This complaint relates to two pension products as follows:

- An **Executive Retirement Plan** which facilitated a single investment in a **Geared Property Fund** in **June 2005**.

The First Complainant is a Limited Company (“the Complainant Company”) having two shareholders, and it is the Trustee of the Executive Retirement Plan.

The Second Complainant is the sole member of the Executive Retirement Plan and he is also a shareholder and director of the Complainant Company.

- A **Retirement Bond** incepted in **December 2010**.

The Second Complainant is the plan holder of the Retirement Bond.

These pension products were sold by a third-party broker (the “Broker”) but this complaint is maintained against the Provider, which is the product provider of the **Executive Retirement Plan** and the **Retirement Bond**.

The Complainants’ Case

The Complainants submit that this complaint is in respect of the conduct of the Provider as the product provider of the **Executive Retirement Plan** and the **Retirement Bond**.

The Complainants state that the true nature of those pension policies came to light in **2012** following correspondence between the Second Complainant and the Provider. The Complainants say that the issues of trusteeship and commissions were first made clear, in **2012**.

The Complainants state that this complaint relates to:

“... ”

- *Incorrect completion of Occupational Pension Scheme Trust set up documentation June 2005*
- *Lack of provision of requisite documentation at set-up - EG “Rules” - Letter of Appointment of Trustee*
- *Lack of provision of full and clear information to [the First Complainant] regarding scheme assets before and after sale of pension products*
- *Non adherence to the Consumer Protection Code Regulations*
- *Breach of duty of registered administration function to maintain accurate and sufficient records to members and their pension entitlements*
- *Inappropriate Retirement Bond and acceptance of in specie transfers in 2010 as qualifying criteria for such bond not met.”*

The Complainants say that a legal trust was not created at any date in **June 2005** as a result of:

“... ”

1. *[The Provider’s] failure to properly record and identify the parties to the scheme*
2. *Failure to obtain complete and correct completion of Letter of Exchange form*
3. *the failure to adhere to correct procedures and regulations in relation to pension scheme fund set up and investment.”*

The Complainants submit there has been “... a significant loss incurred in the pension provision of the Principal as a result of such failures.”, and part of this loss crystallised in **September 2013**, following the sale of the underlying investment in the **Geared Property Fund**. The Complainants explain the investments made, have resulted in monetary loss but also due to **Approved Minimum Retirement Fund (AMRF)** requirements, there can be no access to pension funds by the Second Complainant, until the Second Complainant reaches 75 years of age in 2031.

The individual headings below are those that were used by the Complainants in their submissions accompanying their Complaint Form.

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Pension Regulations

The Complainants state that there were accumulated funds in a **Defined Contribution Scheme** (the “**DC Scheme**”), of which the Second Complainant was the sole member.

The Complainants say that in late **June 2005**, the DC Scheme assets “*were forwarded to [the Provider]*” and “*converted*” to the Geared Property Fund. The Complainants submit that the Provider processed correspondence, including the application form, and had access to the information in respect of the DC Scheme assets. The Complainants say that the Provider dealt with the registration of the **Executive Retirement Plan** and approval from Revenue.

The Complainants say that even if the First Complainant had been properly appointed under the trust, it should be noted that the assets held in the **Executive Retirement Plan** as at **June 2005**, comprised just one policy and that the investment strategy “*lies/lay with fund managers*” and not with the Trustee.

Set up Documentation for the Scheme

The Complainants submit that “*a legal trust was not created at any date in June 2005*”. The Complainants contend specifically in this respect, as follows:

Letter of Exchange: The Complainants submit that the Letter of Exchange bears a date of **9 June 2005** and is signed by the employer (the First Complainant) and employee (the Second Complainant). They say that the Letter of Exchange, signed by the First Complainant, was not in its capacity as Trustee. They also say that the name of the First Complainant is spelled incorrectly.

Rules: The Complainants submit that a signed Rules document was not received. The Complainants say that the Provider only supplied a copy of the Rules document entitled **Declaration of Trust and Rules of the Scheme** when requested by the Complainants, in **2012**.

However, the Complainants submit: “*The document contains information of correct completion, which includes the affixing of Company Seal and signatures of Directors. The document furnished is blank and bears a 2008 ([reference number]) reference.*”

Deed of Trust: The Complainants say that no specific deed was signed and a Letter of Appointment of Trustee was not received in **2005**.

Contribution funds to the geared fund policy: The Complainants explain that the funds which were invested in the **Executive Retirement Plan** came from the accumulated funds held in the DC Scheme, of which the Second Complainant was the sole member and “[t]he cancellation instruction – with text provided by [the Broker] – issued on the 16th June, 2005 which was the date of the initial contact by him in relation to this fund.”

Letter of Approval of the Scheme from Revenue: The Complainants state that this was given on the basis of confirmation from the Provider, that an irrevocable trust was in place.

Specific Policy: The Complainants state that a specific policy in respect of the Geared Property Fund did not issue in **June 2005** and the policy which issued was the Supplementary Conditions. The Complainants submit that the Provider issued a generic policy document in **2012** which purportedly relates to the Geared Property Fund.

Membership Certificate: The Complainants remark that this certificate issued on **27 June 2005** was for a 100% allocation of contribution to the Geared Property Fund.

Commission: The Complainants state that the actual amount of commission was not disclosed by the Provider when issuing the various documents in **2005**. It was only in **2012**, when the Complainants queried the commission on this transaction, that the Provider gave the percentage allocation as *98% of 103%*, which equates to a 5% commission.

Status: The Complainants state that “*the status as at June 2005 set at ‘frozen’ from the outset.*”

Investment Regulations

Under this heading, the Complainants cite a passage which they submit was taken from the Pensions Board website, in relation to *Frequently Asked Questions* on investment regulations:

‘Investments in insurance policies are governed by article 7(7)(b), (c) and (d). There are different rules for unit linked and non-linked insurance policies.

For linked policies, compliance will depend on the underlying assets of the funds to which the policy proceeds are linked. Where a policy is invested in unit trusts or a fund of funds, it is the ultimate assets and not the trusts that will determine the scheme’s compliance with the regulations. So long as the assets that underly these funds comply with the diversification and regulated market requirements, the

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investment in the insurance policy will be deemed to satisfy those same requirements. Thus, for instance, a typical managed fund is well diversified and primarily invested in equities and bonds. A policy linked to such a fund would satisfy the regulations. On the other hand, were a policy wholly linked to a fund invested in unregulated shares, or in a single property, this investment would not satisfy the investment regulation unless it comprised only a reasonable proportion of the scheme's investments.'

Provision of Information

The Complainants state that a letter did not issue in **June 2005** to confirm the appointment of the First Complainant as Trustee, and the issue of trusteeship was only highlighted in **2012**.

The Complainants also state that *"there was no Key Features document"* in respect of the **Executive Retirement Plan** investment in the **Geared Property Fund**, and *"all that was provided"* was a brochure and verbal assurance from the Broker. The Complainants state that in the years that followed,:

"... values were given in an annual listing of policies. There was no clarification as to the nature of the value assigned (i.e. the geared fund policy value was in fact a nominal value and was deemed illiquid until sale of underlying property sold) and there was no highlighting of the high risk attaching to investment."

The Complainants comment that it would appear that such information may have been forwarded to the Broker, but this cannot be confirmed as the letters received on foot of a data subject access request do not date back that far. Referring to a letter from **November 2011**, the Complainants submit this letter shows that the Provider wrote to the Trustee, care of the Broker, and correspondence issued since **2012** was sent directly to the First Complainant, as Trustee.

The Complainants explain that some details about the value of the property and lease income associated with the investment in the **Geared Property Fund** were given in the promotional brochure, and the value of an outstanding sterling loan was given in an update received in **2011**.

The Complainants say that although the **Geared Property Fund** is now closed, there is no detailed financial information regarding its operation available to investors in the fund. The calculation of the investment value is given by way of a breakdown on percentages

(plus and minus) under various categories, but this does not contain details of the income, expenditure or charges levied to arrive at such an amount.

Documentation relating to the Retirement Bond

The Complainants explain that retirement bonds are issued to preserve pension benefits. The First Complainant's pension assets consisted of the **Executive Retirement Plan** investment in the Geared Property Fund, and an Executive Pension Plan incepted in **2010**. The Second Complainant remained in employment until **September 2012** and the retirement age on the Retirement Bond documentation was set at **2025**, when he would be age 69.

Funds to Retirement Bond

The Complainants state that the funds for the **Personal Retirement Bond** came from the cancellation proceeds of the **Executive Pension Plan** which had been set up in **July 2005**.

At the commencement of the Retirement Bond, the Complainants say that the Provider was supplied with a copy of the application form that had been presented by the Broker to the Second Complainant for signing, and the details were completed by the Broker. The Complainants state that there did not appear to have been any requirement to supply confirmation of employment status or impending company scheme wind-up.

In **2010**, the status of this scheme was changed to "*Wound Up*" following an electronic communication from the Provider.

Winding-up of the Scheme

In **2010**, the Complainants state that the Provider forwarded confirmation to the Pensions Board of the status of the Scheme which was "*... put to 'wound-up'*"

The Complainants state that when a scheme is wound-up, a Winding-Up Resolution must be passed. However, the Complainants say that "*no such resolution was passed by the [First Complainant]*".

Customer Query/Dealings and Requests for Review Meetings

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The Complainants explain that the Second Complainant made a number of efforts to secure a policy review. The Broker had, in **2012**, given assurances that a meeting with a pension specialist would be arranged but this did not materialise. Following correspondence from the Broker in **August 2012**, a meeting was arranged with a solicitor from the Provider's Legal Department, but this was cancelled, the day before the meeting.

The Complainants advise that the Second Complainant gave notice of his intention to attend for a review meeting at the Provider's offices on **1 February 2013** and he attended at those offices on the day. However, on the day, on the instruction of the same solicitor, this meeting was refused. The Complainants say that one of the reasons given was that the Broker was recorded as an adviser on the Provider's records.

The Complainants also state that policy review requests were made by letter and via the Provider's website in **2012** and **2013** but these were refused. The Complainants note that a "Red" status was applied to the policies, which meant that all website applications were referred to the Provider's Legal Department.

Notice of Discontinuance of the Broker

The Complainants advise that by letter in **February 2013**, the Broker informed the Second Complainant of his pending retirement, the following month, in **March 2013**. However, the notice published on the Broker's website states the retirement date as **February 2013**. The Complainants state that according to the Central Bank of Ireland, notice of discontinuance should be advised to customers two months before retirement and such notice must be published in the press. They say that the notice was published in the Irish Times in mid-**January 2013** and according to *Iris Oifigiúil, a revocation of authorisation of investments* was given at the request of the *firms* pursuant to section 16(1) of the **Investments Intermediaries Act** (as amended). The Complainants submit "... [i]t is unclear whether the Legal Department in [the Provider] was aware of that fact on the 1st February 2013."

Complaint Handling

The Complainants explain that according to the Provider, their queries were categorised as a complaint and the complaint was recorded and signed off. The Complainants state the Provider has not been able to furnish a copy of the complaint log showing the date of receipt, the action taken to investigate, the action taken to resolve, the date of complaint resolved, and the sign off of the complaint. The Complainants submit that this is "a requirement under the Consumer Protection Code regulations".

The Provider's Case

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For the purpose of setting out the Provider's position in respect of the Complainants' contentions above, certain headings below have been adopted to appropriately outline the Provider's relevant position.

The Executive Retirement Plan and Geared Property Fund

The Provider states that while the Complainants have raised specific complaints about the lack of information provided at the time of sale of the **Executive Retirement Plan** investment in the **Geared Property Fund** in **2005**, they do not appear to have clarified their specific complaints, post the sale of product.

Notwithstanding this, the Provider states that it wishes to point out that the **Geared Property Fund** investment was a syndicated geared property fund with many individual investors. The Complainants requested a significant volume of data with respect to this investment over the years, and the responses provided by the Provider were extensive, and any information requested in relation to the Complainants' specific investment was provided, where possible. The Provider explains that where it was unable to meet a specific request for information (for example, the provision of audited accounts), it informed the Complainants of this.

The Provider states that the **Executive Retirement Plan** was set up in 2005, as a single person scheme. The First Complainant was the only member of this scheme and the Provider is satisfied that records of the scheme were kept and maintained, since commencement.

On **28 September 2012**, the Provider says it wrote to the First Complainant with an update in relation to the Geared Property Fund which advised that following a detailed analysis, it had been decided to put the property on the market.

On **5 May 2013**, the Provider wrote to the First Complainant following receipt of a letter from the Complainants and provided a further update on the sale of the property. It was confirmed that the property had been sold on **30 April 2013** for £16.103 million and that, on average, a return of approximately 55% was expected for all policyholders. The Provider states that it wrote to the First Complainant with a further update on the sale on **27 May 2013** where it was confirmed that the Provider approved the sale of the property for £16.103 million which completed on **30 April 2013**.

The Provider explains that it also confirmed that it would commence the process to close the fund and when completed, it would confirm the final value. The Provider states that it

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advised its pension policyholders, that a return of around 70% of the original investment amount should be expected; the actual return depended on the final sale price, selling costs, and the exchange rate at the time of sale.

The Provider states that it wrote to the First Complainant again on **23 July 2013** with a further update on the status of the Geared Property Fund at the sale price of €19 million. The Provider has quoted two passages from this letter which outline that a loss was sustained on this investment. The Provider advises that the First Complainant questioned the loss and that it responded to the First Complainant on **26 August 2013** explaining the breakdown of the loss of the Geared Property Fund was a sample breakdown, based on the launch of the fund and investing at a unit price of €1.00.

The letter explained that the breakdown was not specific to the First Complainant's policy and therefore, it did not take into consideration the premium allocation rate and pension levies deducted since **2011**. The Provider states that the premium allocation rate was 98%, while the units were purchased at a unit price of €1.099. The Provider advises that a further letter was sent to the First Complainant on **17 September 2013** reconfirming the points which had been explained in its August correspondence.

The Provider submits that it is satisfied with the final valuation of the Geared Property Fund and it is confident that the figures provided were correct. In terms of the valuation provided by the Provider to the Complainants, following the sale of the property in **2013**, the Provider submits that the information given to the Complainants following the sale was correct and accurate. The Provider also submits that it responded to a number of queries in relation to the final value and it is satisfied that it addressed the queries raised.

Retirement Bond

Dealing with the Complainants' position that the Provider failed to assess the appropriateness of the **Retirement Bond** in **2010**, the Provider states the Retirement Bond was sold by an independent broker, the Broker. Therefore, any advice, suitability assessment or establishing the appropriateness of this product, were a matter for the Broker and not for the Provider. The Provider states that it was the responsibility of the Broker to carry out a Fact Find/Financial Review and Recommendations and Reasons Why statement. The application for the Retirement Bond was completed by the Broker and signed by the First Complainant.

Responding to the Complainants' submission that the Provider failed to adhere to the qualifying criteria in the set-up of the Retirement Bond, the Provider again states that the Bond was sold by the Broker. The Provider says it received a fully completed application

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form for a Personal Retirement Bond, in the name of the Second Complainant, accompanied by a transfer cheque, and confirmation of dates of joining and leaving service. The Provider submits that it was provided with everything that it required, to process the set-up of the Bond.

Customer Dealings and Complaint Handling

In respect of its dealings with the Complainants and the failure to provide a pension policy review in **2012** in relation to the **Executive Retirement Plan** and the **Personal Retirement Bond**, the purpose of a financial review is to discuss a customer's existing financial arrangements, along with retirement options, rather than to discuss concerns customers may have with the Provider in relation to the sale or set up of a plan.

The Provider says the Complainants contacted it in **August 2012** to avail of a free financial review service offered on its website. The Provider says the Complainants were advised that the Broker was assigned to the plan as the Complainants' independent advisor and for this reason, it was not possible to appoint a financial adviser employed by the Provider. The Provider explains the Complainants advised that they did not wish to appoint a new financial adviser but wanted to obtain information on the Provider's products held in the Complainants' names and sold by the Broker.

In **August 2012**, the Provider explains that a meeting had initially been agreed between the Complainants and a member of its Legal Department for **31 August 2012** to discuss ongoing legal matters. Following a telephone conversation on **28 August 2012**, the Complainants emailed the Provider to confirm attendance at the meeting, along with a qualified financial adviser. The Complainants also requested that the Provider have a pension specialist at the meeting to explain the promotion, sale and funding of the products.

The Provider says that it responded to the Complainants' email on **29 August 2012** to confirm that the Provider's position had been set out in all correspondence that it had issued to that date. It was pointed out that the Complainants had requested a meeting while the Provider had requested that all communication be in writing, due to the technical and legal queries that had been raised, so that concerns could be addressed in a more timely manner. The Provider states it pointed out in this email that the meeting had been agreed on the basis that it was to discuss the ongoing legal matters; and based on the new terms the Complainants had introduced and in the interest of both parties, the Provider requested that all future correspondence be in writing.

In **September 2012**, the Provider states it confirmed to the Complainants that a financial review would not take place and that all future correspondence should be addressed to its Legal Department. The Provider states the Complainants argued that the Provider had not

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addressed their queries and they requested a financial review from a pension specialist. The Provider states it responded and advised the Complainants that its position had been previously detailed and it would not engage in any future communication in respect of this issue.

The Provider states this was reiterated in a subsequent email to the Complainants on **25 September 2012**, where the Provider requested that all future correspondence from the Complainants be in writing and addressed to its Legal Department. The Complainants were also informed that any review they required should be facilitated by their Broker.

In **January 2013**, the Complainants contacted the Provider to avail of the free financial review service. The Provider states the Complainants were again advised that as there was an independent broker assigned to their plan, it was not possible to appoint a financial adviser employed by the Provider. The Complainants were advised that if they wished to remove the Broker from the plan, then a written instruction on the First Complainant's headed paper was required.

On **30 January 2013**, the Provider advises that the Complainants emailed the Provider to confirm attendance at the Provider's Head Office on **1 February 2013** to meet with a pension specialist. It was also requested that the Provider familiarise itself with the plans and sought confirmation of the name of the pension specialist. The Provider states that no such meeting had been agreed to, but that the Second Complainant attended its Head Office despite this. The Provider explains that one of its representatives accepted a letter from the Second Complainant which detailed the concerns the Complainants had. This letter was passed to the Provider's Legal Department. The Provider also states that it wrote to the Complainants on **8 February 2013** to confirm that a meeting for **1 February 2013** had not been agreed to by the Provider.

The Provider advises that the Complainants again contacted the Provider in **January 2014** to avail of the free financial review service. It was confirmed that the Complainants' financial adviser had retired. The Complainants requested a meeting to discuss the values of the Fund and the Bond, and the options available with respect to retirement benefits.

The Provider states it wrote to the First Complainant on **28 January 2014** "*... and confirmed that as [the Second Complainant was] over age 50 it was possible to claim both plans.*" The Complainants were informed that a meeting with a financial adviser could be arranged to discuss retirement options in more detail. The Complainants confirmed in writing on **3 February 2014** that they wished to avail of the offer to discuss retirement benefits.

On **10 February 2014**, the Provider says it wrote to the Complainants to confirm the name of the financial adviser (the “Adviser”) appointed to discuss the retirement options. It was stated in this letter that the Adviser was authorised only to discuss retirement options and that any reference to the ongoing matters being dealt with by the Legal Department, would result in the termination of the meeting. In a submission dated **20 July 2017**, the Provider explained that it referenced ongoing legal matters “... *as the Complainant’s complaint was being dealt with by the Provider’s Legal Department.*”

The Provider says that a number of queries were raised during the meeting, some of which the Adviser was unable to address during the meeting. The Provider explains that it wrote to the Complainants on **15 July 2014** outlining details on some of the queries that had been raised and a further letter issued on **21 July 2014** addressing the outstanding issues.

The Provider states the Adviser also made contact with the Complainants in **March 2015** having received a letter from the Complainants on **24 March 2015** about a plan review. The Provider states the Adviser responded to the points that were within his control and forwarded the Complainants’ letter to the Provider to respond to, as it contained historical issues that were beyond his remit.

In terms of the Complainants’ position that the Provider failed to provide them with a copy of their complaint log, the Provider advises that it received a data subject access request on **1 February 2013** and a copy of all data held was sent to the Complainants. The Provider submits that it also sent a copy of extracts from its system with contacts noted for both plans and screenshots from its electronic systems to the Complainants on **24 February 2014** following a request on **27 January 2014**. This record included a log of all complaints received from the Complainants.

In the context of the **Consumer Protection Code 2012**, the Provider refers to provision 1.3 and states that the Code does not apply to occupational health schemes such as the Geared Property Fund. However, the Code applies to the Personal Retirement Bond. The Provider has set out its compliance with the Code in its submissions. The Provider also states that it has certain obligations under **section 64G** of the **Pensions Act 1990** and that it has complied with these obligations.

Jurisdiction

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From **2013** onwards, a number of complex jurisdictional issues arose with respect to this complaint and this complaint file was assessed for jurisdiction on a number of occasions under the following legislation:

- the Central Bank and Financial Services Authority of Ireland Act 2004
- the Central Bank and Financial Services Authority of Ireland (Amendment) Act 2017 and the
- 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 **12 November 2013** to the then Financial Services Ombudsman (the “FSO”) in respect of the conduct of the Provider. Owing to the nature of the conduct complained of and the time this conduct occurred, certain jurisdictional issues arose.

This Office carried out a full and thorough review of the complaint file and wrote to the Complainants on **1 February 2016** detailing its decision in respect of these jurisdictional issues. This letter considered the conduct complained of, with respect to the Executive Retirement Plan investment in the **Geared Property Fund** as follows:

- (i) Failures by the Provider in **2005**, in relation to the set-up of the Fund to include failure to complete documentation correctly, failure to provide information in relation to the scheme assets and failure to supply the Complainants with certain documentation; and
- (ii) Failures by the Provider after the investment in the Geared Property Fund, to include a failure to provide information regarding scheme assets, a failure to adhere to the Consumer Protection Code and a failure to maintain accurate and sufficient records of scheme members and their pension entitlements.

The Complainants were informed that the complaint at (i) could not be investigated because the conduct complained of was outside of the time limits prescribed by **section 57BX(3)(b)** of the **Central Bank and Financial Services Authority of Ireland Act 2004**.

The Complainants were requested to provide further detail in respect of the complaint at (ii) in order to facilitate a determination on jurisdiction in respect of this aspect of the complaint.

With respect to the elements of the complaint about the set-up of the **Retirement Bond in December 2010** and the complaints about customer dealing and complaints handling from **2012** onwards, the letter of **1 February 2016** informed the Complainants that those complaints were within the jurisdiction of the FSO.

The Complainants responded to this letter on **9 February 2016** with further information in respect of the complaint. The FSO wrote to the Complainants on **16 February 2016** and outlined that it could only investigate the conduct of the Provider, on or after **13 November 2007** and, following a consideration of the Complainants' correspondence, it was decided that the following conduct complained of, was within jurisdiction :

“... that the Provider is in breach of the Consumer Protection Code in relation to the Provider's conduct in 2012 & 2013 in relation to meetings, in 2013 & 2014 in relation to refusals to conduct policy reviews when requested to do so and in 2015 in relation to maturity values.”

This was followed by further submissions by the parties and the FSO issued correspondence to the parties on **14 February 2017** confirming the position as to jurisdiction, as set out in the letters of **1** and **16 February 2016**. The Complainants were advised on **24 March 2017**, that this final determination on jurisdiction by the FSO, was contained in the letter dated **14 February 2017**.

The **Central Bank and Financial Services Authority of Ireland (Amendment) Act 2017** was enacted in **July 2017**. The FSO wrote to the parties on **4 August 2017** advising them of this and that a review would take place to determine whether any aspect of this complaint which fell outside of the jurisdiction of the FSO, would now come within its jurisdiction.

By letter dated **9 October 2017**, the parties were then 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 the legislative meaning of a “*long-term financial service*” and whether or not the Scheme, the Geared Property Fund and the Executive Retirement Plan 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**, and a further change to the definition of *long-term financial service* was introduced by the **Markets in Financial Instruments Act 2018**.

Following this and having given the parties the opportunity to make submissions on the new legislative enactments, 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 while it was the view of this Office that the Scheme came within the meaning of "*long-term financial service*", the conduct complained of in respect to the setup of the **Executive Retirement Plan** in **June 2005**, to include the failure to complete documentation correctly, the failure to provide information in relation to the scheme assets and the failure to supply the Complainants with certain documentation, remained outside of the statutory time limits under **s51 of the Act**.

A Preliminary Decision was issued to the parties on **29 July 2021**, outlining the preliminary decision of this Office in relation to the elements of complaint which had been determined to be in this Office's jurisdiction to investigate. The Complainants made many submissions after the Preliminary Decision issued, in relation to jurisdiction of this Office to investigate certain elements of complaint, although previously these elements of the complaint had, in **November 2019**, been determined to remain outside of the remit of this Office, owing to the statutory time limits under **s51 of the Act**. In those circumstances, this Office wrote to the Complainants' representative on **09 November 2021** and detailed as follows:

*"It appears that the Complainants may be of the view that the Preliminary Decision that was issued to the parties on **29 July 2021**, represents a determination as to the jurisdictional limits of the FSPO. This is not correct.*

*The jurisdictional assessment with respect to this complaint concluded 2 years ago by way of final determination on jurisdiction dated **08 November 2019**. It was determined by the FSPO at that time, that certain elements of the complaint were not within the jurisdiction of this Office.*

*The Preliminary Decision that issued to both parties on **29 July 2021**, was the Preliminary Decision of this Office on the merits of those elements of the complaint that were previously determined to fall within the jurisdiction of this Office for investigation, and which have been the subject of an ongoing investigation by this Office.*

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*I note from our records that the Complainants were advised in **November 2019** that if they wished to take any action to challenge the final jurisdictional determination of this Office, they should inform the FSPO of their intention to pursue such action within 15 working days of that date. They elected however not to do so.*

Notwithstanding the period of 2 years which has since elapsed if it is the case that, at this late stage the Complainants wish to now challenge that jurisdictional determination, by proceeding to the High Court by way of Judicial Review application, then the FSPO will not take issue with the period which has elapsed, and this Office remains willing to pause the investigation of this complaint so that the Complainants have that opportunity to take that challenge to the High Court.

*However, this matter has been ongoing for a very considerable period, and it cannot be held open indefinitely. Consequently, if we do not hear from the Complainants within **15 working days from today**, with confirmation of their intention to proceed to the High Court, by way of Judicial Review application, we will take it that the Complainants do not in fact intend to take any such challenge and rather, that they accept the jurisdictional determination of this Office as outlined in our letter dated **08 November 2019** and instead they wish for the FSPO to now continue with the adjudication of those elements of complaint, that are within the jurisdiction of this Office.”*

Following receipt of this clarification from this Office, quoted in detail above, the Complainants’ representative made further submissions with respect to the time limits for making complaints to the FSPO.

The Office wrote to the Complainants’ representative on **07 December 2021** and detailed as follows:

*“A jurisdictional assessment of this complaint has already been conducted and we have taken account of the three amendments to the governing legislation between **July 2017** and **October 2018**. The Complainants will also be aware that significant and lengthy submissions were made by the parties during those assessments, which were exchanged between the parties and considered in detail before the final jurisdictional determination was made on **08 November 2019**.*

I note that Complainants have detailed that they do not consider an application for Judicial Review necessary at this time. The Complainants have outlined that they are awaiting the Legally Binding Decision of this Office and once received, the Complainants will decide whether to appeal that Legally Binding Decision.

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*As outlined in my letter dated **09 November 2021**, if it is the case that the Complainants now wish to challenge the jurisdictional determination of this Office, then the Complainants can do so by proceeding to the High Court by way of Judicial Review application. It is a matter for the Complainants to decide if they wish to take this step and this Office will pause the investigation of this complaint so that the Complainants have the opportunity to take that challenge to the High Court at this time.*

*Consequently this Office again re-iterates that, if we do not hear from the Complainants within **15 working days** from today, with confirmation of their intention to proceed to the High Court, by way of Judicial Review application, we will take it that the Complainants do not in fact intend to take any such challenge and rather, that they accept the jurisdictional determination of this Office as outlined in our letter dated **08 November 2019** and instead they wish for the FSPO to now continue with the adjudication of those elements of complaint, that are within the jurisdiction of this Office."*

This Office did not hear from the Complainants within the specified time period or otherwise since that date, indicating an intention to challenge the jurisdictional determination of this Office by way of Judicial Review.

In these circumstances this Office has taken it that the Complainants accept the jurisdictional determination of this Office as outlined in the letter from this Office dated **08 November 2019** and that the Complainants wish for the FSPO to continue with the adjudication of those elements of complaint, that are within the jurisdiction of this Office.

The Complaints for Adjudication

Taking account of the history of this matter, as outlined above, the complaints for adjudication by this Office are as follows:

1. With respect to the **Executive Retirement Plan** investment in the **Geared Property Fund**, the complaint is that
 - a) from **13 November 2007**, the Provider failed to provide the Complainants with information in relation to the scheme assets and failed to maintain adequate and sufficient records of the scheme members and their pension entitlements.
 - b) the Provider failed to provide an accurate policy valuation of the Fund at maturity in **2013**, and failed to provide information to the Complainants.

/Cont'd...

2. With respect to the set-up of the **Retirement Bond**, the complaint is that in **December 2010**, the Provider failed to assess the appropriateness of the Bond for the Second Complainant and failed to adhere to the qualifying criteria in the setup of the Bond.

3. With respect to **Customer Dealings and Complaint Handling**, the complaint is that from **2012** the Provider:
 - a) failed to provide the Complainants with a Pensions Policy review in relation to the Executive Retirement Plan and the Retirement Bond;
 - b) failed to meet with the Complainants in relation to the Executive Retirement Plan and the Retirement Bond;
 - c) failed to provide the Complainants with a complaint log in relation to the Complainants' respective complaints to the Provider.

Decision

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

Although the permission of the Complainants was sought and was received, to enable additional documentation to be placed on this complaint file, it was subsequently determined by this Office that no such additional documentation was necessary for the adjudication of this complaint.

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.

The Complainants in their submissions received after the Preliminary Decision was issued to the parties, quoted the above paragraph and detailed:

"It is not clear to what this refers but if it is to the exchanges during Dispute Resolution Service between 18 February, 2016 and 21 October, 2016, it should be noted that Consents were given by both parties to the dispute. Those exchanges included a detailed June, 2016 Observations document and rationale for this decision of their exclusion has not been given."

For the avoidance of any doubt, the reference in question above, is to the letter of **01 February 2016** from the then Financial Services Ombudsman, and the Complainants' response. These communications concerned a request for permission (granted by the second Complainant) to include a copy of documentation on the investigation file for this complaint – to be taken from the file regarding the Second Complainant's separate complaint against the Broker. As detailed above, it was subsequently determined by this Office that no such additional documentation was necessary or required for the adjudication of this complaint.

The documentation admitted to the formal investigation of the complaint by way of consent of the parties under **s58(5) of the Act**, as referred to by the Complainants above, was considered by this Office in the course of the formal investigation of this complaint.

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

A Preliminary Decision was issued to the parties on **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 Complainants made further submissions to this Office, copies of which were shared with the Provider. The Provider confirmed on two occasions that it had nothing further to add and was satisfied that the submissions already made, set out its position.

Since the Preliminary Decision issued, the Complainants' representative has made submissions with respect to the application of **s60(2) of the Act** to the complaint and **s44(1)(b) of the Act**. With respect to **s60(2) of the Act**, the Complainants submit:

“Preliminary Decision is that complaint is rejected - this is pursuant to Section 60(1) of the FSPO Act. When reviewing the points made in this submission, please refer to Section 60 (2) in relation to the grounds on which the ombudsman may make Finding”

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With respect to **s44(1)(b) of the Act**, the Complainants submit:

ERROR OF LAW in relation to (b) : the complainant holds that the FSPO erred in its assessment because the Section which relates to complaints against pension providers Section 44 (1) (b) of the Act - the conduct of a pension provider involving— (i) the alleged financial loss occasioned to a complainant by an act of maladministration done by or on behalf of the pension provider, or (ii) any dispute of fact or law that arises in relation to conduct by or on behalf of the pension provider;

While the submissions made by the Complainants with respect to **s44(1)(b) of the Act** relate in substance to the jurisdiction of this Office to investigate certain aspects of the Complainants' complaint (which are not the subject of this Legally Binding Decision as they were determined in **November 2019** to have been made outside of the time limits in the Act) this Office was of the view that it was nonetheless important to ensure that clarification was issued to the Complainants, so that they were aware that this complaint investigation was being completed by this Office under **s60 of the Act**. This Office therefore detailed as follows in its letter of **09 November 2021**:

*“Finally, I note that you have made certain submissions with respect to **s44(1)(b) of the Financial Services and Pensions Ombudsman Act 2017, as amended (the “Act”)**. The Complainants will recall that they made this complaint to the Financial Services Ombudsman’s Bureau (FSOB) in **November 2013**. When the FSOB was dissolved and this Office was established on **01 January 2018**, this complaint file was transferred to be dealt with by this Office under the Act. For the avoidance of any doubt, I can confirm that the elements of the complaint that have been determined to fall within the jurisdiction of this Office are being considered under **s44(1)(a) and s60 of the Act** (i.e. being complaints in relation to the conduct of a financial service provider). These elements of complaint are not being considered under **s44(1)(b) and 61 of the Act** (as they are not complaints in relation to the conduct of a pension provider).”*

The Executive Retirement Plan investment in the Geared Property Fund in 2005

The complaint is that from **13 November 2007**, the Provider failed to provide the Complainants with information in relation to the scheme assets and failed to maintain adequate and sufficient records of members and their pension entitlements and in **2013** the Provider failed to provide an accurate policy valuation of the Fund at maturity and failed to provide information to the Complainants.

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Provision of Information

In a document titled "*Observations on the content of [the Provider's] letter dated 29th April, 2016*", the Complainants state that:

"9. Annual Benefit Statements (note that values given therein were nominal yet this point was not emphasised [or] highlighted) were received from 2005. ..."

Further to this, in a submission dated **3 July 2017**, the Complainants state that:

"... it is noted that July 2006 Annual Report was sent directly to the broker. While no copies for years 2007, 2008, 2009 and 2010 included. There is no point pursuing those now and it is likely they were sent to broker."

The Provider wrote to the First Complainant on **7 April 2011** enclosing a Statement of Reasonable Projections in respect of the **Executive Retirement Plan**. This document contained information regarding the **Executive Retirement Plan** and the **Geared Property Fund**, under a number of headings.

The Provider wrote to the Broker on **26 May 2011** and **16 May 2012** in respect of the **Executive Retirement Plan** as follows:

"I refer to your recent request for retirement options to be provided in respect of the above [Executive Retirement Plan].

I have set out below the current value and the options available. I have also attached a note of our requirements in order to enable us to proceed with the payment of the retirement benefits...."

I note that correspondence issued to the First Complainant from the Provider on **10 February 2012** containing certain information in respect of the **Executive Retirement Plan** and the **Geared Property Fund**.

The Second Complainant wrote to the Provider on **17 February 2012** querying the policies under the **Executive Retirement Plan**:

"I telephoned your offices last week to get full information on pension arrangements with your Company. I was given to understand that there are two policies but I only got information on one. Please let me know the exact position.

/Cont'd...

The page that I received refers to a pension opened in 2005 and you referred to the fund associated with that. I cannot find this fund on your website so perhaps you will forward me the performance details form June 2005 to date.

I shall be obligated if you will also please forward the following:

- 1. Policy document(s)*
 - 2. Copy of all the documentations signed by me at commencement of the pension(s) and investment options at that time*
 - 3. Copy Statements of contributions paid to date and any dividends accrued*
 - 4. Details of all charges and commission paid to date*
 - 5. Confirmation as to whether any charges/commissions being levied at present*
 - 6. Explanation of the 'Paid Up' status and whether charges/commissions are still being levied*
 - 7. Details of age at which I can drawn down any of the pension benefits and/or present maturity value of the fund*
 - 8. Options with regard to fund switching and any associated costs/charges involved*
- ..."*

A response appears to have been subsequently received to this letter, and the Complainants appear to have responded with a further letter. The copy of the letter received from the Complainants is undated. It appears to relate to the **Personal Retirement Bond** and states:

"I received your advices regarding the above policy which is described as Whole of Life with a commencement date of 8th Feb 2011. The Initial premium is given as E42,043.01 and the fund in which it is invested is given as a Cash Fund, which suggests that this fund would not be subject to any market fluctuations.

However, the present value is given as E39,905.66 which represents a 5.08% decrease in value. I need to establish the reason(s) for such decrease and what exposure this fund actually has. Were this drop in value to be replicated every year, the fund value would be depleted at a time when I, hopefully in retirement, may need to draw on same.

I shall be obliged if you will forward the following information:

- 1. Copy of all documentation, including illustrative brochures etc, with regard to this fund supplied to and signed by me at date of commencement last year.*
- 2. confirmation as to the source of funds that paid this premium. Please forward Statement*

/Cont'd...

3. details of commissions and charges levied to date and payable in the future
4. reference is made to unit value attaching to this fund. Please confirm the present number of units and current and past values.
5. please confirm the position with regard to draw down of funds and when they can be drawn
6. what does Whole of Life mean in this instance - is there a sum of life assured a with a life plus a cash value or just the cash value equivalent to what was paid by way of premium
7. please confirm the options plus any attendant costs of fund switching - I shall be obliged if you will forward details of low/no risk funds
- 8 please confirm the amount due were I to withdraw the policy proceeds now ...”

The Provider wrote to the Complainants on **9 March 2012** providing details of the current value of the **Executive Retirement Plan** investment in the **Fund**, fees and charges, and contributions. The letter also stated that the application form, policy document, fund brochure and updates were enclosed.

I note that the Second Complainant wrote to the Provider on **28 March 2012** stating:

“I refer to my letter of the Feb 2012 and have received your letter of the 8th March, 2012. As not all of my queries have been answered, I attach a copy of my Feb letter and shall be obliged if you will kindly address and answer all queries.

I am extremely concerned with the current pension valuation as it seems to be ever-decreasing in a product I was not fully informed about. Your brochure states that “The Geared Property Fund is an investment that is only suitable for experienced investors with a high tolerance for risk” I am not an experienced investor and I certainly do not have high tolerance for risk as the monies invested with your Company were towards a comparatively small pension from a very small business ...

Further queries now arise:

1. Did [the Provider] have a set of investment criteria ... in place that would ensure that potential investors were to meet before investments were accepted to this fund. Was verification of this match of criteria sought from Investors and/or their brokers prior to investment of monies?
2. What was the source of the single premium payment? Please forward any copy documentation you have in respect of ALL policies at present and previously held by me with your company.

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3. The value has again decreased in less than a month - decrease is €526.96. Please advise the reason for this decrease.

4. Management Charge and Administration Fee - this is given as an annual charge of .75% of the property value and .5% of the NAV. I note from the enclosed brochures that there have been decreases in the actual value of the property. What were the corresponding decreases on fees.

5. the allocation of monies from single premiums was 98% - to whom was the 2% commission paid?

6. it is stated in the enclosed literature that you sent me that the initial investment period was to be seven years. What is the present position with regard to sale?

7. It is stated in your letter that the only option with regard to a transfer out of this fund is to an Approved Minimum Retirement Fund/Approved Retirement Fund.

Please let me know: (a) what funds these are (b) must they be with [the Provider] (c) are there charges/fees applicable and (d) would be any further risk of loss of money or would they be deposit-type funds?

I relied (sic) on the services of a financial adviser for many years and will be in contact with their offices also. ..."

The Complainants' letter appears to have been acknowledged as a formal complaint by the Provider on **2 April 2012** and a Final Response letter issued on **16 April 2012**. This letter responded to each of the queries raised in the Second Complainant's letter.

Following this, the Second Complainant wrote to the Provider on **19 June 2012**. Referring to previous correspondence and Geared Property Fund updates from **December 2009** and **August 2011** which had been furnished by the Provider, the Second Complainant explained that:

"I have tried very hard to understand the content of what was sent to me as the way a geared fund actually operated was never fully explained to me. ..."

The letter then set out a number of queries in respect of the operation of the **Geared Property Fund**. This letter was acknowledged by the Provider on **29 June 2012**. The Provider issued a Final Response letter on **17 July 2012** which addressed a number of matters in respect of the **Executive Retirement Plan** and the Geared Property Fund.

The Second Complainant wrote to the Provider's Managing Director on **20 July 2012** and raised further queries with the Provider by letter dated **25 July 2012**. In the letter of **25 July 2012**, the Second Complainant expressed his dissatisfaction with the Provider's replies to date.

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In the penultimate paragraph of this letter, the Second Complainant stated:

“... I need to know exactly what the position is in relation to both of those policies in terms of risk, operation and access. I would very much appreciate that, rather than the use of obscure language and references to policy conditions, plain intelligible language be used in direct response to my queries.”

The Provider responded to this letter on **27 July 2012**. This was followed by a further letter from the Second Complainant on **14 August 2012**. The Second Complainant acknowledged that his previous correspondence *“... was indeed quite detailed and raised technical and financial queries.”*

However, the Second Complainant believed that these had not been adequately addressed or resolved by the Provider. In particular, it was requested that the Provider furnish:

“... the specific amounts charged by way of commissions and fees to date be detailed rather than the percentages listed in previous correspondence ... [and] ... [w]hat is deemed to be an experienced investor by [the Provider] and were there criteria applied in relation to maxima and minima amounts of investment in the geared fund totalling millions?”

A letter in almost identical terms dated **16 August 2012** was also sent to the Provider, which responded to the Second Complainant on **22 August 2012**. In this letter, the Provider stated that:

“... Your requests for information are understandable and do not, in [the Provider’s] view, constitute an ‘excessive demand’. However, I respectfully suggest that [the Provider’s] letters dated 9 March 2012, 16 April 2012 and (particularly) 17 July 2012 together with copy fund brochure, application form and several yearly fund updates furnished to you address your queries and comply with [the Provider’s] regulatory disclosure obligations in full. ...”

The Provider wrote to the Complainants on **27 September 2012** advising that it would issue a fund update on **28 September 2012** in respect of the **Geared Property Fund**. On **28 September 2012**, the Provider issued the update which discussed, in particular, the expiry of the lease in respect of the property and the then current tenant. It also advised that a decision had been taken to market the property for sale, and it supplied details of the selling agent, the value of the property, and the value of the First Complainant’s investment.

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The Second Complainant wrote to the Provider on **4 October 2012** stating that his queries in relation to the **Geared Property Fund** remained unanswered. The Provider wrote to the Second Complainant on **9 October 2012** as follows:

“Please note that the queries raised in your letter have already been dealt with professionally and in full by [the Provider] in its letters dated 9 March 2012, 16 April 2012, 17 July 2012, 27 July 2012, 22 August 2012, 25 September 2012, 27 September 2012, 28 September 2012 and 3 October 2012 and emails dated 29 August 2012, 30 August 2012, 5 September 2012, 7 September 2012 and 10 September 2012.

Please note that this represents [the Providers’] final response to the queries raised by you. ...”

The Second Complainant requested a copy of the Scheme Rules by email dated **19 November 2012**. These appear to have been furnished by the Provider on **30 November 2012**.

The Second Complainant emailed the Provider on **20 December 2012** advising that he had been in contact with the Office of the Revenue Commissioners, and he requested the full name of the Scheme, confirmation as to whether the Scheme was Revenue approved, and the Revenue reference number. The Provider responded on the same day and referred the Second Complainant to a previously furnished Revenue letter dated **18 July 2005**, and the Second Complainant replied that day, attaching that letter, stating: *“Can you please supply me with the information from it as requested by me today?”* The Provider responded to this on **3 January 2013**.

The Second Complainant wrote to the Provider on **27 March 2013** raising a number of issues in respect of the **Geared Property Fund, the Retirement Bond** and the refusal of the Complainants’ meeting requests. The Provider appears to have responded to this letter in two separate letters dated **8 and 11 April 2013**. The first letter advised that the property was still on the market. It also outlined the number of units purchased and held by the First Complainant in the Fund. The second letter sought to address the queries raised in the Second Complainant’s correspondence.

The Second Complainant wrote to the Provider again on **12 and 17 April 2013** in respect of the operation of the **Executive Retirement Plan** investment in the Geared Property Fund. The Provider responded on **18 April 2013** advising, in essence, that several of its previous letters had addressed the matters raised by the Complainants.

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The Provider wrote to the Second Complainant on **2 May 2013**, stating, in particular, that it had provided sufficient information to the Complainants, and it was entitled to refer the parties to the Broker regarding the suitability and sale of the Fund/Bond. On **5 May 2013**, the Provider wrote to the Second Complainant, addressing the issues raised; in particular it provided information on the expected return on the Fund.

The Second Complainant wrote to the Provider on **7 May 2013**, stating that the Provider had failed to address the issues raised in his correspondence. In this letter, the Second Complainant requested audited accounts in respect of the Geared Property Fund and the Scheme, confirmation of the Notice of Discontinuance from the Broker, a copy of the complaint log, a signed copy of the *Declaration of Trust and Scheme Rules*, and “... *the signed authorisation for release of copy Scheme documentation held by Revenue.*”

On **16 May 2013**, the Second Complainant wrote to the Provider’s Managing Director as follows:

“... The position appears to be that the documentation relating to the Pension set up is invalid and that my pension monies should not have been invested in the [Geared Property Fund]. ...

The Letter of Exchange relating to my above pension policy:

- (a) Is dated 9th June 2005 – the Draft payment was not received until 27th June 2005. See notation on the bottom of Page 1 of copy Executive Retirement Plan Application Form and commencement date on Retirement Plan*
- (b) has the Company name listed as [incorrect spelling] – the actual name is [correct spelling]*
- (c) the Letter of Exchange has not been signed on behalf of the Trustee*
- (d) has specific reference to Scheme Rules – the only document furnished to me in this regard was a blank Declaration and Scheme Rules which bore a 2008 reference. No signed copy dated 2005 was ever forwarded to me. ...”*

The Provider wrote to the First Complainant on **27 May 2013** to inform it that an offer of £16.103M had been received in respect of the property the subject of the **Geared Property Fund** and the sale of the property had closed on **30 April 2013**. The Provider wrote to the First Complainant again on **23 July 2013** to advise that the property had sold for €19 million. This letter also outlined the final value of the First Complainant’s investment and provided a sample breakdown of how the final value of the investment was calculated.

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The Second Complainant emailed the Provider on **1 August 2013** in respect to this letter, requesting details of the form of instruction required for a fund switch. This information was provided by the Provider the same day.

This was followed by a letter from the Second Complainant on **7 August 2013** containing questions in respect of the sale of the property comprised in the **Geared Property Fund**, and the value of the fund, and it sought explanations for the Fund's operation and performance. This letter was acknowledged by the Provider on **14 August 2013**.

A Final Response letter issued on **26 August 2013** in which the Provider explained the sample breakdown contained in its letter dated **23 July 2013** and a number of matters previously raised by the Second Complainant including the information contained in the Fund Brochure, the Policy Conditions and the Scheme Rules.

This was followed by a letter from the Second Complainant on **4 September 2013** in respect of the operation of the Fund, the sample breakdown and the First Complainant's return on the investment. The Provider responded on **17 September 2013**, referring to its letters of **26 August** and **4 September 2013** which the Provider advised dealt with the sample breakdown and the reasons why the actual percentage return on the Fund was different from the sample breakdown.

Referring to an email received by its Customer Services Department the previous week, the Provider wrote to the Second Complainant on **28 January 2014** confirming that the final value of the Fund was switched to a new fund (the Liquidity Fund) and outlined the value of the units purchased. The First Complainant was supplied with a retirement options pack on **4 February 2014**. This was followed by further correspondence during **February** and **July 2014**.

From the evidence, it appears that the Second Complainant wrote to the Provider on **27 May 2014** with certain queries. The Provider wrote to the Second Complainant on **15 July 2014** addressing points 1, 3, 4, 5 and 6 of his letter and advised that the remaining queries would be addressed by another of the Provider's agents. The Provider wrote a further letter to the Second Complainant on **21 July 2014** which was intended to address the outstanding queries. It does not appear that the letter of 27 May 2014 and 21 July 2014 have been furnished in evidence. However, it is not in dispute between the parties that letters issued on these dates, and the content of these letters are not the subject of any specific allegation in this complaint.

Meeting Requests

The Second Complainant emailed the Provider on **28 August 2012** referring to a telephone conversation earlier that morning and indicating that he was looking forward to the meeting with the Provider on **31 August 2012**. The email concluded by stating that:

“[h]opefully [the Provider] can provide a Pension specialist to explain the promotion, sale and funding of this product at said meeting.”

I note that the Provider responded on **29 August 2012** as follows:

“... During our call I outlined that [the Provider’s] position has been set out in the correspondence to date. You suggested a meeting. I suggested that your QFA correspond with me in writing so that I could deal with any technical legal queries she may have. You said you would prefer to have a face-to-face meeting with your QFA present. My understanding was that you wished to discuss legal matters which I could explain to you.

It was not mentioned that you required a [Provider] pensions expert to attend as well. Therefore, I think that, in the circumstances and in the interests of both parties, it would be more appropriate at this stage for your QFA to correspond with me in writing so that I can deal any new technical legal queries ... in a timely manner. ...”

The Second Complainant requested a free financial review through the Provider’s online system on **31 August 2012**. The Provider responded to this request on **3 September 2012** explaining that because the Complainants already had a Broker in respect of the **Executive Retirement Plan**, the Provider could not appoint one of its financial advisers. The Second Complainant was advised that if he wished to speak to a financial adviser, the Broker would first have to be removed.

In response to this, the Second Complainant stated, on the same day, that he was not looking for advice or to appoint a new financial adviser, but he wanted a review in order to get clarification/information on the Provider’s products held in the Complainants’ names and sold to him by the Broker. By reply, the Provider advised the Second Complainant that a branch manager would contact him for a financial review.

The Provider emailed the Second Complainant on **5 September 2012** explaining that *“[a] meeting was agreed by telephone on certain terms. Your subsequent email confirming introduced a new term and, on that basis, a meeting was duly declined. ...”*

/Cont’d...

The Provider emailed the Second Complainant on **7 September 2012** informing him that the Provider was not in a position to follow up on the request for a free financial review because “... *you are involved in direct communication with our legal department in relation to your policies.*” In response to this, the Second Complainant explained that the reason for requesting the free financial review, was that the Provider had been unable to answer his queries.

The Second Complainant wrote to the Provider’s Customer Service Manager on **20 September 2012** enclosing previous correspondence with its Legal Department stating: “*Now that it has been established that direct contact with [the Legal Department] has ceased, perhaps you will advise when a Pension Specialist will be available to review my [Provider] policies.*”

The Provider wrote to the Complainants on **25 September 2012** explaining that it would not be facilitating a meeting with a Pension Specialist, and it requested that all correspondence be in writing and marked for the attention of the Legal Department. The letter also advised that any financial review should be facilitated by the Broker.

The Second Complainant wrote to Customer Service Manager on **28 September 2012** advising that he would no longer be engaging in correspondence with the Provider’s Customer Services Department, and he enclosed a letter to be passed to the Provider’s Head of Legal and Compliance Department. The Provider responded to this letter on **3 October 2012** stating that the matters raised had been dealt with by the Provider and referring the Second Complainant to its email dated **7 September 2012** and the letter dated **25 September 2012**.

The Second Complainant wrote to the Provider again on **4 October 2012** requesting a meeting “... *to discuss past, present and future position of the two policies*”

The Second Complainant made an online *free financial review application* on **14 January 2013**. The Provider responded the same day advising that it could not provide any financial advice or conduct a financial review, because there was already a financial adviser (the Broker) in place in respect of the Scheme.

Following a further email from the Second Complainant later that day requesting an annual review, the Provider advised the Second Complainant that the Broker was already assigned to the Second Complainant and if he no longer wished to deal with the Broker, a signed instruction to that effect was required. Once the Provider received such an instruction, it could arrange for one of its financial advisers to contact the Second Complainant.

The Second Complainant emailed the Provider on **23 January 2013** explaining that he had not received confirmation of a meeting. The Provider responded on **31 January 2013** attaching an email from the Legal Department (it is not clear what email was attached) and requested that all correspondence be directed to the Legal Department. Separately, the Second Complainant emailed the Provider's Customer Services Department on **30 January 2013** stating that:

"... I will call to your office ... on this Friday, February 1st 2013 at 11.00am to meet with one of your Pensions specialist[s] to discuss the two [Provider] policies.

Please ensure that the person has familiarised him/herself with my policies and queries regarding same to date.

Can you also confirm the name of the person with whom I am to meet."

The Second Complainant sent a similar email to the Provider on **31 January 2013**. The Provider responded on **1 February 2013**, explaining that it had no record of a meeting scheduled for that morning.

It appears from the evidence of the parties that the Second Complainant attended at the Provider's Head Office on **1 February 2013**. One of the Provider's representatives briefly met with the Second Complainant and accepted a letter from the Second Complainant. The Provider wrote to the Second Complainant on **8 February 2013** acknowledging receipt of these documents and confirming that a meeting had not been agreed to.

The Second Complainant wrote to the Provider on **27 March 2013** stating:

"In order to give you ample notice and allow time for arrangement of a mutually-suitable appointment date, I will be available to meet with a pension specialist on any of the following dates – 15th, 16th or 17th April, 2013 and can attend at your [Head Office]."

The Second Complainant wrote to the Provider again on **12 and 17 April 2013** in respect of this meeting.

The Second Complainant emailed the Provider on **9 January 2014** expressing his desire to avail of a free review to discuss the Scheme. In particular, the Second Complainant wanted to discuss *"... the present values of the policies. An actual value for the [Geared Property Fund] will now be established as the sale of the property has taken place. ..."* and *"... the options available to me with regards to drawdown of those funds."*

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The Provider responded on **28 January 2014** advising that the final value of the **Geared Property Fund** was confirmed on **23 July 2013**, was switched to the Liquidity Fund as advised in the letter of **26 August 2013** and stating the value of the Liquidity Fund as at **22 January 2014**.

The letter also stated that as the Second Complainant was over the age of 50, he was entitled to take his retirement benefits and if he wished to discuss retirement options, the Provider could arrange for a financial adviser to contact him. The Second Complainant responded on **29 January 2014** welcoming the Provider's letter and requested to meet with a financial adviser to discuss his pension options.

The Second Complainant emailed the Provider on **5 February 2014** explaining that an initial review request was forwarded to the Provider on **9 January 2014** and a letter was received on **28 January 2014** confirming that a review would be forthcoming. I would note at this point, contrary to the Second Complainant's email, the Provider's letter of **28 January 2014** did not confirm that a review meeting would take place. In any event, the Provider responded on **10 February 2014** advising that it was in the process of arranging for a financial adviser to contact the Second Complainant.

The Provider wrote to the First Complainant on **10 February 2014** advising that it had arranged for a financial adviser, the Financial Adviser, to meet with the Complainants. However, the letter advised that the Financial Adviser was only authorised to discuss retirement options and

"[i]f you seek information on anything other than an explanation of retirement options or raise any issues that have been addressed in previous correspondence, our advisor is instructed to end the meeting with you."

Analysis

In terms of the provision of information regarding the **Executive Retirement Plan** and the **Geared Property Fund**, having considered the evidence of the parties and the correspondence outlined above, I am satisfied the information provided by the Provider in respect of the **Executive Retirement Plan** and the Fund from **13 November 2007** onwards, was reasonable and adequate. In response to this complaint, the Provider has supplied this office with copies of correspondence addressed to the First Complainant, who was Trustee of Scheme and to the third-party Broker.

The Complainants in their post Preliminary Decision submission of **06 August 2021** detail:

“FACT Complainant also received copies by way of documentation furnished under SAR but that correspondence relating to Complainant was sent by the Provider directly to the broker.”

While the Complainants maintain (and since the Preliminary Decision was issued, they continue to submit) that information furnished to the Broker by the Provider, was not sent to them, I do not accept that this can be the fault of the Provider, nor do I accept that the Provider was obliged to ensure that such information was subsequently communicated to the Complainants by the Broker.

I detailed as follows in the Preliminary Decision:

“The Complainants should also be aware that the First Complainant as Trustee of the scheme has obligations to ensure that appropriate member communication takes place. The First Complainant, as Trustee, should in my opinion, have recognised that communications were not coming through the Broker for the member, if this was in fact the case, and should have addressed that as part of the First Complainant’s Trustee duties to the member.”

The Complainants in their post Preliminary Decision submission of **06 August 2021** details:

“FACT He had not been made aware of the trusteeship until 2012”

The First Complainant disputes that it was made aware of the existence of the Trusteeship until **2012**. The issues with respect to the establishment of the Trust are matters that remain outside of this Office’s jurisdiction to investigate. This Office notes the Complainants’ position in this respect. However, in any event and regardless of whether the First Complainant was aware that it was a Trustee, I am satisfied that the information supplied by the Provider in respect of the **Executive Retirement Plan** and the Fund, from **13 November 2007** onwards, was reasonable and adequate. As detailed above, if communications were not sent by the Broker to the Complainants, this cannot be found to be the fault of the Provider.

As can be seen, the Second Complainant raised a number of queries in respect of the **Executive Retirement Plan** investment in the Geared Property Fund beginning in **2012**. This was followed by a series of exchanges between the parties. In particular, the Second Complainant believed the information furnished by the Provider did not address his queries and that he did not fully understand the responses.

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However, having considered the queries raised and the Provider's responses, I am satisfied the Provider's responses and the information provided, reasonably addressed the queries raised.

The Complainants argue that the Provider failed to maintain adequate and sufficient records of members and their pension entitlements. This largely appears to be based on the position that the Provider should have checked or verified the information given to it by the Broker, at the time when the **Executive Retirement Plan** was setup in **June 2005**. The Complainants have been informed by this office that their complaints with respect to the setup of the **Executive Retirement Plan** in **June 2005** were not made within the time limits under **s51 of the Act** and for this reason such complaints are not the subject of this investigation. The Complainants were informed that the consideration of the element of their complaint that the Provider failed to maintain adequate and sufficient records of members and their pension entitlements, could only be considered by this Office, from on or after **13 November 2007**. In response to this complaint, the Provider has furnished this office with a volume of documentation with respect to the **Executive Retirement Plan**, to include the application form, the plan schedule, the policy conditions and the supplemental conditions. I am satisfied that the evidence submitted demonstrates that the Provider held adequate and sufficient records of the **Executive Retirement Plan** and its sole member, the Second Complainant.

The Complainants also complain that the Provider failed to provide an accurate policy valuation of the Fund at maturity in **2013** and that it failed to provide information to the Complainants. I note that the Provider engaged in significant communications with the Complainants at this time, to explain the difference between the information provided with respect to the valuation and the losses of the Geared Property Fund, which was based on assumptions and was general in nature, and the information that was specific to the Second Complainant's policy which was based on the number of units held, allocation rate and deductions for the pension levy. In my opinion, there is no evidence that there were any failures on the Provider's part, with respect to this valuation.

The Personal Retirement Bond

The complaint is that with respect to the set-up of the **Retirement Bond** in **December 2010**, the Provider failed to assess the appropriateness of the Bond for the Second Complainant and failed to adhere to the qualifying criteria in the setup of the Bond.

In terms of the **Personal Retirement Bond**, the Complainants maintain that the Provider failed to assess the appropriateness of the Bond. The Second Complainant signed a **Retirement Bond Application Form** dated **10 December 2010**.

/Cont'd...

The application form is also signed by the Broker, as the witness of the signing of the form. I note that the Provider wrote to the Broker on **8 February 2011** acknowledging receipt of the application form, and policy documents were furnished under cover of letter dated **9 February 2011**.

Importantly, the Bond was entered into, using the services of an independent broker. The Broker was a separate and distinct entity and was not an employee of the Provider. As a result, I do not accept that the Provider was obliged to assess the suitability of the Bond nor was it obliged to review or verify the Broker's assessment of the suitability of the Bond. This was solely the responsibility of the Broker.

The Complainants in their post Preliminary Decision submission of **06 August 2021**, detail as follows:

"Retirement Bond – Copy contacts furnished under SAR show that broker consulted with the insurance company in relation to the partial drawdown of accumulated pension monies.

Broker has stated that it was the only company to which an 'in specie' transfer could be made so while it states that appropriateness of product is matter for the broker, the Provider was also clearly involved. It appears that the commencement of a Retirement Bond was the only method by which such a transfer could be effected"

It is not in dispute that the Provider furnished information to the Broker with respect to the **Personal Retirement Bond**. However, it remains that the Bond was entered into, using the services of an independent broker and in the circumstances, I am satisfied that the Provider was not obliged to assess the suitability of the Bond, nor was it obliged to review or verify the Broker's assessment of the suitability of the Bond.

The Second Complainant details that the eligibility criteria for the **Personal Retirement Bond** are "*leaving service, transfer to another scheme or scheme winding up*". He submits that he did not "*leave service*" at the time. I note that the **Retirement Bond Application Form** was signed by the Complainants on **10 December 2010** both in the Second Complainant's capacity as a scheme member and also on behalf of the Company Trustee. This application form recorded the member's details, including date of joining service as 11 July 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.

I note that the Retirement Bond Application Form was signed by the Second Complainant, as member under the following text:

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“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 also signed by the Second 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 Complainants, in their post Preliminary Decision submission of **06 August 2021**, detail as follows:

“8. Retirement Bond application form (completed by broker) – this form bore inaccurate employment details but were not confirmed”

13.

FACT : Complainant did not leave service and the dates of employment given on application form and the [pension provider] letter did not match.

Although the Complainant maintains that the details in the application form were completed by the Broker, and were not confirmed by the Provider, it appears from the contemporaneous evidence that the information was declared by the Complainants to be accurate and complete and as a result, the Personal Retirement Bond was set up on that basis. In the circumstance, it was a matter for the Complainants to check those details and to be satisfied that they were correct, before declaring that the information was accurate and complete.

Customer Dealings and Complaint Handling

The complaint with respect to **customer dealings and complaint handling** is that from **2012** the Provider failed to provide the Complainants with a Pension Policy review in relation to the Executive Retirement Plan and the Retirement Bond; the Provider failed to meet with the Complainants in relation to the **Executive Retirement Plan** and the **Retirement Bond**; and failed to provide the Complainants with a complaint log in relation to the Complainants' complaint to the Provider.

Details of the interactions between the Provider and the Complainants are outlined above and accordingly, I do not propose to detail those interactions again.

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It appears the Second Complainant's meeting requests began in or around **August 2012**. The evidence shows that these requests were preceded by an extensive exchange of correspondence between the parties regarding the performance and operation of the **Geared Property Fund**. At this point, the Provider had made significant efforts to explain and provide information to the Second Complainant regarding the **Executive Retirement Plan** investment in the **Fund** and the **Personal Retirement Bond**. The Second Complainant also requested to meet with the Provider through its free financial review service.

The Provider explains that the free financial review service

"...was not a specific pensions policy review service, but a means for [a] customer to arrange to speak to their/a [Provider] adviser about their plan"

Further to this, the Broker was listed as the Complainants' financial adviser, and as a result, the Provider would not appoint one of its financial advisers to discuss the Complainants' investments or meet with the Second Complainant to offer financial advice. I accept that this would not have been appropriate, in the circumstances. The Second Complainant was also advised that if he wanted to avail of this service, he would first have to remove the Broker, as his financial advisor. This information was communicated to the Second Complainant on several occasions.

As can be seen, the purpose of the meetings, from the Second Complainant's perspective, was to discuss the promotion, sale and funding of the existing investments. These were matters in respect of which the Second Complainant was already engaging with the Provider's Legal Department and had been extensively dealt with in its previous correspondence.

Taking the evidence of this complaint into consideration, I am satisfied that the Provider acted reasonably when it refused to meet with the Second Complainant or the Complainants to discuss matters regarding the sale, operation or performance of the existing investments.

The Second Complainant attended at the Provider's Head Office on **1 February 2013** to meet with the Provider and a pension specialist to discuss the investments. However, I am not satisfied that this meeting was pre-arranged or that it had been agreed to by the Provider. While the Second Complainant informed the Provider of his intended attendance, the Provider was not obliged to facilitate this meeting, and it was unreasonable for the Second Complainant to expect the Provider to do so, particularly in light of the previous correspondence exchanged between the parties.

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Further to this, I am satisfied that the Provider was reasonably entitled to decline the Second Complainant's requests for a policy/financial review meeting. I accept that the Second Complainant wished to avail of this service to pursue matters unrelated to the purpose for which the service was being offered by the Provider. In addition, he already had an appointed financial adviser (the Broker) and he was unwilling to remove the Broker in order to use this service. However, a financial review meeting was arranged for **February 2014**. As can be seen, this was solely for the purpose of discussing retirement options and took place following the retirement of the Broker.

The Complainants, in their post Preliminary Decision submission of **06 August 2021**, detail as follows:

5. It should be noted that, when the Complaint made numerous attempts to secure meeting with [Provider's] specialist, it was in the context of:

- *Complaint not becoming aware until 2012 of the illiquidity status of the 2005 pension product into which 12 years' accumulated pension savings invested*
- *The broker's very limited understanding of the geared property fund product*
- *the arrangement with [the Provider] for the acceptance of 'in specie' transfer of proceeds from cancelled [former pension] policy into Retirement Bond*
- *the promised meeting with a Pensions Specialist which did not materialise*
- *the scheduled meeting with solicitor from legal department cancelled last minute*

FSPO is "satisfied that the provider acted reasonably when it refused to meet with the Second Complainant to discuss ..." The Preliminary Decision document has included details of correspondence from 2012 and 2013 and The words reasonable to describe Provider's dealings and unreasonable to describe Complainant's dealings have been used frequently in the Preliminary Decision."

I am conscious that the Second Complainant's purpose for seeking a meeting at that time, is not in dispute between the parties. However, the issue that arose was that the Second Complainant sought to arrange a meeting for the purpose of discussing the issues that he had raised, and he sought to do so, through the Provider's policy/financial review meeting offering.

I accept that the purpose of a policy/financial review meeting, was to discuss retirement options. However, the Complainants did not want to discuss retirement options and rather wished to discuss the promotion, sale and funding of the existing investments. As detailed above, these were matters in respect of which the Second Complainant was already engaging with the Provider's Legal Department, and which had been extensively dealt with in its previous correspondence. Taking the evidence of this complaint into consideration, I am satisfied that the Provider acted reasonably.

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The Complainants have noted the use of the words reasonable and unreasonable within the content of the Preliminary Decision, in their subsequent submission. The Complainants do not elaborate any further as to whether an additional point of fact, an error of fact or an error of law arises. In any event, I am satisfied that the function of this Office is to assess the reasonableness of the conduct of the Provider, in order to decide if a complaint should be upheld, whether in whole or in part, under **s60 of the Act**.

The Complainants state that the Provider failed to provide a complaint log when requested. A data subject access request was made by letter dated **14 February 2013**. The Second Complainant wrote to the Provider on **27 March 2013** referring to the documentation furnished on foot of the data subject access request. In this letter, the Second Complainant states that:

“From my initial reading of what has been sent by [the Provider], it would appear that there is some documentation missing:

- *Copy of the signed Scheme Rules relating to [the Geared Property Fund]. ...*
- *Copy of signed Consumer Notices relating to the Cooling Off period*
- *Copies of Files Notes relating to ... telephone conversation[s] ...*
- *Copy of the documentation that relates to the recording, categorisation and closure sign off of what [the Provider] deemed as complaint.*
- *Brochure relating to Customer Complainant and Complainants Procedure within [the Provider].*

...”

The Second Complainant appears to have repeated his request for a complaint log in a letter dated **7 May 2013**. Again, this appears to have been in the context of the data subject access request. On the basis of the evidence, it is clear to me that the request for the complaint log was made in the context of a data subject access request. For the avoidance of any doubt in light of **section 50(3)(c)** of the **Financial Services and Pensions Ombudsman Act 2017**, it is not within the jurisdiction of this Office to adjudicate on the adequacy of the Provider’s compliance with a data subject access request. I am satisfied that such matters come within the remit of the Data Protection Commission.

The Second Complainant wrote to the Provider on **27 March 2012** raising a number of further queries in respect of the **Executive Retirement Plan** and the **Geared Property Fund**. This was acknowledged as a complaint by the Provider within 5 business days in accordance provision 10.9(a) of the **Consumer Protection Code 2012** (the “Code”).

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This letter also provided the identity of the individual appointed as the Second Complainant's point of contact, as required by provision 10.9(b) of the Code. Under the Code, the Provider was required to issue regular updates in respect of a complaint every 20 business days and to provide a final response within 40 business days (provisions 10.9(c) and 10.9(d) of the Code).

In this instance, I note that a Final Response letter issued in less than 20 business days. This letter informed the Second Complainant of his right to refer the matter to the Financial Services Ombudsman and it supplied the contact details of the Financial Services Ombudsman, as prescribed by provision 10.9(e)(iii) and (iv) of the Code.

The Second Complainant wrote to the Provider again on **19 June 2012**. However, it is not clear what day this was received by the Provider. This was acknowledged by the Provider as a complaint on **29 June 2012** on the eighth business day after the date of the letter. This letter is drafted in similar terms to the acknowledgment referred to in the previous paragraph. A Final Response letter issued on **17 July 2012**, 20 business days after **19 June 2012**.

Having considered the documentation furnished by the parties to this complaint, while it appears that the Provider maintained a log of interactions with the Complainants, this does not appear to have taken the form of a complaint specific log as set out in the provision 10.10 of the Code.

However, in light of the correspondence comprising the Complainants' complaints and the Final Response letters issued by the Provider, I am satisfied the complaints were properly addressed by the Provider, and the absence of a complaint specific log does not appear to have prejudiced the Complainants in terms of the Provider's handling of or response to the complaints.

For the reasons outlined in this Decision, I do not consider there to be any reasonable basis upon which it would be appropriate to uphold any aspect of this complaint.

Conclusion

My Decision pursuant to **Section 60(1)** of the **Financial Services and Pensions Ombudsman Act 2017**, is that this complaint is rejected.

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

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.