



<b><u>Decision Ref:</u></b>	2022-0340
<b><u>Sector:</u></b>	Insurance
<b><u>Product / Service:</u></b>	Life
<b><u>Conduct(s) complained of:</u></b>	Failure to provide product/service information
<b><u>Outcome:</u></b>	Rejected

**LEGALLY BINDING DECISION  
OF THE FINANCIAL SERVICES AND PENSIONS OMBUDSMAN**

**Background**

This complaint arises from an investment in a geared property fund, which the Complainant states was mis-sold to him by the Provider in or around **late 2004 / early 2005**.

This complaint was received by the Financial Services Ombudsman Bureau (the “FSOB”) on **2 March 2011**. At that time the FSOB could not investigate a complaint of mis-selling which had occurred before 2 March 2005, because pursuant to **section 57BX of the Central Bank and Financial Services Authority of Ireland Act 2004**, the applicable legislation at that time, the FSOB could investigate complaints, only when the conduct complained of had occurred in the six-year period before the complaint was made. The FSOB did however investigate a secondary complaint the Complainant had also made in **March 2011**, about ongoing advice the Complainant received after the investment’s inception, and a Legally Binding Finding regarding that secondary complaint, was issued to the parties by the FSOB, on **9 January 2012**.

On **12 January 2018**, the Complainant’s solicitors wrote to this Office following the enactment of the **Central Bank and Financial Services Authority of Ireland (Amendment) Act 2017**, (which in July 2017, provided for expanded time limits for bringing a complaint to the FSOB in certain specified circumstances), and they requested that the mis-selling complaint be re-opened and investigated.

In the context of the creation of the Office of the Financial Services and Pensions Ombudsman, ("**this Office**") with effect from 1 January 2018, an assessment of the jurisdiction of this Office to investigate the mis-selling complaint was carried out, and this Office outlined in a Preliminary Opinion on Jurisdiction dated **4 June 2019**, that the mis-selling complaint was made within the applicable statutory time limits, set out in the ***Financial Services and Pensions Ombudsman Act 2017*** (the "**FSPO Act**"). Neither the Complainant nor the Provider disagreed with the Preliminary Opinion on Jurisdiction.

### **The Complainant's Case**

The Complainant states that in **December 2004**, he approached the Provider's representative Mr X, in order to obtain advice about the options available to him regarding his pension arrangements. In particular, the Complainant consulted Mr X and received advice regarding the investment of the proceeds of a personal pension plan he already held (the "**Original Pension Policy**"). The Complainant states that "*as far as I knew at that time, this was worth only €125,000, I felt I had to do something better*".

The Complainant says that on or about **31 January 2005**, he decided to invest the proceeds of his Original Pension Policy in a geared UK commercial property fund. The Complainant entered into a 'Personal Retirement Plan' which was a life assurance-based investment policy, (the "**Investment Policy**") supplied by an Insurer, through which the investment in the geared UK commercial property fund was effected. The investment was ultimately effected on **16 March 2005**, when the Complainant instructed that **€184,940** be invested in the geared property fund.

During the following period, the value of the Complainant's Investment Policy fell dramatically and, in correspondence sent to him in **October 2010**, he was informed that it had a 'nil value'.

The Complainant asserts that the Investment Policy in question was "*wholly unsuitable*" to his needs at the time, having regard to his age and financial position, and in circumstances where the entirety of the proceeds of his only pension, were recommended by the Provider, to be invested in a "*high risk*" geared property fund. The Complainant asserts that this was not a prudent investment. He says that he did not realise the unsuitability of the Investment Policy until it had collapsed in late 2010.

In his response to the Provider's Final Response Letter, the Complainant explains that, contrary to Mr X's assertion, his wife did not attend any meeting with the Provider. He says that while a second investment option was "*mentioned briefly*", the "[Investment Policy] was the one [Mr X] was highly recommending".

The Complainant also disputes the Provider's assertion that Mr X advised the Complainant not to invest all of the proceeds of the Original Pension Policy in the Investment Policy, and

instead to consider partial drawdown of the proceeds of Original Pension Policy and the possibility of taking a percentage of the proceeds as a tax-free lump sum.

### **The Provider's Case**

In its Final Response Letter dated **4 May 2011**, the Provider denies that the advice Mr X gave to the Complainant, was inappropriate or negligent, as the Complainant has suggested.

The Provider submits in its response to the complaint, dated 29 July 2019, that the Complainant telephoned on **20 December 2004**, seeking advice in relation to an existing pension policy (the Original Pension Policy) valued at €125,000.00, as the Complainant stated that if he died, the Original Pension Policy would only pay out the premiums paid, plus 5% interest. The Provider states that the Complainant wanted to review the policy with a view to securing the value.

The Provider states that its representative, Mr X, met with the Complainant on **20 December 2004**. At the meeting with the Complainant, Mr. X. says he completed a General Factfind, as well as giving the Complainant a Statement of Authorised Status and Terms of Business.

The Provider says that Mr. X. says he checked the Complainant's Original Pension Policy and confirmed that in the event of the Complainant's death, the policy would pay out only the premiums actually paid into the policy, plus 5% compound interest per annum. He estimated that this would have amounted to less than €100,000.00, whereas in a letter from the Original Pension Provider to the Complainant dated **1 September 2002**, it was stated that the then current value was €124,592.00 and that the policy was paid up. Mr. X says he confirmed with the Original Pension Provider that the policy terms could not be altered, and as a result, in order to avoid such loss in the event of the Complainant's death, the pension policy would have to be transferred to a new pension policy.

The Provider says that on **5 January 2005**, using the 'Adviser Plus' system, Mr. X searched the market for an alternative pension provider and established that Pension Provider A, offered the best value in terms of charges. Mr. X. says he identified a Balanced Fund as being suitable for the Complainant's circumstances, particularly in view of the fact that the Complainant's 60<sup>th</sup> birthday was coming up in **late 2005**. Mr X has stated that although the Complainant had indicated that he had no need to take the tax-free portion of his pension policy at that time:

*"I was concerned his circumstances might change later and he might need the cash, the pub lease was only for two years for example. I felt the balanced managed fund fitted his circumstances. It was a good compromise between the possibility of needing cash at age 60 or shortly afterwards, or deciding to take the cash free cash up to 15 years later at age 75, in which case the growth of the fund in the meantime would be important."*

Mr. X says he obtained a quotation from Pension Provider A, showing the projected values of the pension fund if invested with it, including the projected value if the policy was surrendered (that is, to take the pension benefits) after circa nine months, at age 60. Mr. X.

/Cont'd...

says he partly completed an application form for the Pension Provider A pension, in preparation for the next meeting.

The Provider asserts that at the next meeting with the Complainant on **31 January 2005**, Mr X advised the Complainant to invest in Pension Provider A, a "*balanced managed fund*", which it contends had less risk associated with it. However, Mr X states that the Complainant did not want the Balanced Fund, because he believed that the returns would be too low.

Mr. X says the Complainant specifically said he wanted a geared property fund instead. Mr. X submits that he went through the details of a Geared Fund with the Complainant and that the Complainant decided to transfer his pension fund to the Geared Fund, instead of to the Balanced Fund. Mr. X says this was a geared UK commercial property fund and he used a hand drawn bar chart, to show the positive and negative effect of gearing and that he went through the information brochure on the Geared Fund, with the Complainant, pointing out particularly the effect of gearing if markets were to fall, the fact that the investment was illiquid, that there would be no chance to withdraw money from the policy (by taking pension benefits) until the properties were sold, and the fact that it was an investment in the UK, so there was an exchange rate risk involved.

Mr. X says that the Geared Fund Brochure drew attention to the 'Risk Factors' set out in section 5, including Gearing and Exchange Rate Risk, and also made it clear that if the properties were not sold within 5-7 years, they "*will be sold at the next suitable opportunity*", in other words, the money could be tied up for longer, which was relevant, given the Complainant's proximity to potentially being able to take a tax free cash sum from the pension. The Provider maintains that it was the Complainant himself who chose to invest in the geared property fund, that he signed a Statement of Suitability to that effect, and that the Complainant "*seemed familiar with the concept of geared property funds*".

Mr. X says the Complainant was quite clear that he wanted to go this route instead of the conventional pension fund recommended, and that he had no need to take any money from the pension fund for the foreseeable future. Mr X states that the Complainant completed an application to transfer 100% of his Original Pension Policy to the geared Investment Policy, with a selected retirement age of 70.

The Provider says that Mr X tried to dissuade the Complainant from "*committing the full amount to the geared property fund*", but that the Complainant "*decided to invest 100% in the [Geared] Fund*".

Mr. X says that on **1 February 2005**, he sent a letter to the Complainant including the signed Statement of Suitability, a Section 30 receipt and the Insurer quotation. Mr. X. says his covering letter pointed out that with the Geared Fund "*the pension benefits cannot be taken until the fund had run its course in 5-7 years*", and that there was "*no guarantees with this fund and the value of property may fall as well as rise*".

On **17 February 2005**, Mr. X says the Complainant received a Form of Discharge from the Original Pension Provider for completion (of which Mr. X received a copy) which showed the

transfer value of the pension policy was **€184,940.00** (which was higher than the transfer value of €124,593.25 previously quoted to the Complainant).

The Provider states that in **February and March 2005**, the Complainant indicated that he may not invest the full value of the pension policy into the Geared Fund, or that he may take 25% of the pension fund tax free and invest the rest in the Geared Fund.

Mr. X. says in this regard that he tried to get the Complainant to invest part only, in the Geared Fund, to reduce the risk. Mr. X. says he was also *“concerned to hold at least part of the pension fund in a liquid form, to facilitate the tax-free cash.”* Mr. X. says that he tried, *“in discussions over several weeks, to persuade [the Complainant] to agree to invest a portion of the pension in a liquid lower risk fund, to reduce the risk and also to facilitate the tax-free cash element. But in the end [the Complainant] eventually decided to invest 100% in the [Geared] Fund.”*

The Provider says that on **16 March 2005**, the Complainant signed a letter to the Insurer confirming that he wished to invest 100% into the Geared Fund, and also acknowledging that *“I will be unable to withdraw any cash from this fund until the 5-7 year term is elapsed even though I will attain the age of 60 in the meantime”*.

Mr. X. says that even though the Complainant wanted to invest in property from the outset, his recommendation was to invest in the Balanced Fund. He says the Complainant rejected that advice and insisted on a geared property fund.

However, Mr X accepts that the Complainant’s wife did not attend any meeting with him, and that the reference in the Provider’s Final Response Letter, to the Complainant’s wife attending a meeting was made in error.

### **The Complaint for Adjudication**

The complaint is that, in breach of his duty to the Complainant, the Provider mis-sold an unsuitable geared Investment Policy to the Complainant in or around **late 2004/early 2005**.

### **Decision**

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

In arriving at my Legally Binding Decision, I have carefully considered the evidence and submissions put forward by the parties to the complaint. Having reviewed and considered

/Cont’d...

the submissions made by the parties to this complaint, I formed the view that the submissions and evidence furnished, disclosed certain conflicts of fact, such that an Oral Hearing was required to resolve those conflicts.

Accordingly, an Oral Hearing took place on **26 January 2022**, at which the parties gave their sworn evidence. This Office is now satisfied that the submissions and evidence furnished are sufficient to enable a Decision to be made in this complaint.

A Preliminary Decision was issued to the parties on **26 September 2022**, 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. In the absence of additional submissions from the parties, within the period permitted, the final determination of this office is set out below.

### ***Investment in the Geared Property Fund***

I note that the Complainant first approached the Provider in **December 2004**, in order to obtain advice about the options available to him regarding his Original Pension Policy. The Provider has supplied a copy of a file note with the Complainant's name at the top, dated **20 December 2004**, which states:

*"Has personal pension with [the Original Pension Provider] surrender value over 120,000*

*On death [the Complainant's] estate would only get contributions paid in plus 5%. Will be 60 in [redacted] 2005.*

*Pension set up by [named individual].*

*Son gone to [abroad], may not come home.*

*Pub is leased for the next two years.*

*Small loan on the pub.*

***Wants to get into property.***

*[Mr. X.] to review the pension with a view to saving the value, [the Complainant] will drop in the policy docs."*

[My Emphasis]

It is clear from this file note that the Complainant expressed an interest in getting "*into property*", although this appears to have been a brief, preliminary discussion. The Complainant at the Oral Hearing stated in this regard:

*"I called [Mr X's] office, made an appointment, the same day I went over and told him, and told him what I wanted to do, transfer the fund, but I did ask for a property fund in the UK and that's the start of the story"*

/Cont'd...

I note that after the initial phone call, a more detailed discussion between the Complainant and the Provider took place at a meeting later that day, on **20 December 2004**, and I note that the following documentation was completed:

- A General Factfind was completed and signed by Mr. X. and the Complainant dated **20 December 2004**. At page 2 of the Factfind, details are recorded in respect of the Complainant's income and net worth. In terms of income, the following information is recorded:

*"Pub is rented out for 2 years – 1000/week  
Guesthouse operation  
35,0000"*

In terms of net worth, the following information is recorded:

<i>"Home</i>	<i>400,000</i>
<i>Property [...] Pub</i>	<i>1,000,000</i>
<i>Upstairs guesthouse</i>	<i>400,000</i>
<i>[...]</i>	
<i>Retirement Funds</i>	<i>125,000 [Original Pension Provider]</i>
<i>[...]</i>	
<i>Mortgage House</i>	<i>100,000</i>
<i>Other Loans Pub</i>	<i>300,000</i>
<i>...</i>	
<b><i>Your Net worth (Exclude Home)</i></b>	<b><i>1,225,000 (Excl Home and Home Loan)"</i></b>

I note that on page 6, the following handwritten note was made:

*"[The Original Pension Provider] Personal Pension policy worth €125k. But if [the Complainant] died he would only get his contributions plus 5% PA. He wants to protect the asset, as if he died there would be a big loss. The [Original Pension Provider] policy cannot be altered so the only alternative is transfer to a new policy."*

On page 7, in respect of the Complainant's level of past experience with investments, it appears to state *"Not much – [...] non property only."* Beneath this, the following question is asked:

***"What is your attitude to Volatility and Risk?"***

<i>Volatility</i>	
<i>Risk to Capital</i>	
<i>Inflation</i>	

/Cont'd...

[...]"

However, this section of the Factfind has not been completed.

The Factfind then asks that the Complainant select the order of priority he would put on his financial objectives from the list of options provided. The only option selected was:

*"Protect my Financial Security in case of Death, Serious Illness".*

On page 8, under the heading '**What do we need to do now?**', the following is stated:

*"[The Original Pension Provider] Pension Fund approx. 125k to be transferred to another company."*

- An acknowledgement signed by the Complainant dated 20 December 2014 which states:

*"I confirm that I have received a copy of the Statement of Authorised Status and Terms of Business of [the Provider]"*

When asked by the Complainant's representative whether the Complainant had come to the meeting looking for a particular type of investment, the Complainant responded:

*"[n]o, I didn't, as long as it was UK property in the south of England, around the London area, if possible, you know, which had a better potential for growing."*

The Provider states that after Mr X's first meeting with the Complainant in **December 2004**, Mr. X. searched the market for an alternative pension provider using the 'Adviser Plus' system and identified a Balanced Fund offered by Pension Provider A, as being suitable for the Complainant's circumstances.

The documentation on file in this regard includes:

- '**Adviser Plus' System Print-offs** dated **5 January 2005** relating to single premium pensions and to a retirement bond supplied by Pension Provider A.
- A document titled '**[Pension Provider A] Personal Options Plan Presentation'** dated **6 January 2005**, which appears to be a **Quotation** containing statements of projected benefits regarding a Pension Provider A fund.
- An undated **Application Form** for a Pension Provider A retirement plan, which was partially completed with the Complainant's details.

/Cont'd...



- A **Compliance Checklist** dated **20 December 2004**, which states beside the heading 'Note re Identification of most suitable Product', "*cannot switch to another [Original Pension Provider] policy. Advisor Plus shows [Pension Provider A] to be the most cost effective. Can choose the [Pension Provider A] fund which is low risk but should give a reasonable return*". The Provider's representative, Mr X, confirmed at the Oral Hearing that while the Compliance Checklist is dated 20 December 2004, it was an evolving document, where items were ticked off and notes added, when completed, and that the checklist concluded on 12th May 2005.

I accept from this documentation that Mr X researched options available to the Complainant in **January 2005**, and that Pension Provider A's balanced fund was identified by Mr X, as a potential option suitable for the Complainant. I note that thereafter, the Complainant met Mr X a second time, on **31 January 2005**. The documentation on file in relation to this meeting includes:

- A **Statement of Suitability** dated **31 January 2005**, signed by the Complainant and the Provider, which states:

*"The purpose of this letter is to set out my reasons for recommending the [Geared Fund] to you. The policy documentation will give you a full technical description of the policy, but the main points are as follows:*

***Your own Financial Objectives***

*Your [Original Pension Provider] Personal Pension will only pay out your contributions plus 5% PA in the event of your death. This would cause a major loss of value and you wish to protect this asset. The [Original Pension Provider] policy cannot be altered to another fund – so the only option is to transfer the fund to another policy.*

***Why this particular policy is right for you and meets your needs***

*Description, Access, Risk, Return, Tax, Income, Capital Security*

*You wish to invest the money in a geared property fund in order to gain extra leverage on the investment. The [Geared Fund] is designed to invest in properties which can be enhanced in value by active fund management. While the gearing involves increased risk, it offers the opportunity of better returns also.*

***Other possible choices considered, and why this one was chosen***

*The other option considered was a [Pension Provider A] conventional pension fund. You wished however to invest in a geared property fund."*

- A Quotation for the Investment Policy dated **31 January 2005**
- An **Application Form** for the Investment Policy dated **31 January 2005**, which was signed by Complainant and Provider

/Cont'd...

- An **Instruction** to the Original Pension Provider to transfer funds from the Original Pension Policy to the Investment Policy, dated **31 January 2005**, and signed by Complainant
- A **Brochure** in respect of the Geared Fund (which the Complainant states he received prior to the 31 January 2005 meeting, whereas the Provider states it was supplied to him at the meeting)

I note that the Brochure states, on the first page, as follows:

*“Important Notice*

*.....*

*You should note that the value of investments may fall as well as rise. The financial projections included in this document are for illustrative purposes only and **your attention is specifically drawn to the “Risk Factors” set out in section 5 ...**”*

In terms of risk, section 5 of the brochure states, as follows:

**“Section 5 Risk Factors**

***Property Market Performance***

*This Fund is being established on the basis that the UK Commercial Property market offers the prospect of rental growth and an uplift in capital values over the next five years (5) to seven (7) years. [The Geared Fund] Management have researched and analysed this market. We are confident that this investment will offer good diversification of property type, location and tenants. However the overall performance of property markets over the next five (5) to seven (7) years cannot be accurately predicted.*

***Tenant Default***

*Any property investment involves the risk of tenants defaulting on their lease obligations or not renewing at the end of leases. It is intended that the properties in the fund will be let to multiple tenants reducing exposure to any one tenant.*

***Gearing Risk***

*By using borrowings the [Geared Fund] has the potential to deliver higher returns but there is also increased risk. If property values rise, any increase in capital values translates into an exponential increase in the return on equity. Conversely, if property values fall the return on the investment will be disproportionately affected on the downside, i.e. your original investment could be substantially eroded.*

***Exchange Rate Risk***

/Cont'd...

Exchange rates are unpredictable. However some of the exchange rate risk in relation to this investment is neutralized by the gearing within the fund as the borrowings on the property portfolio will all be denominated in Sterling.

Investors are therefore exposed to an exchange rate risk on their equity investment and any increase or decrease in the value of that investment.

**Interest Rate Risk**

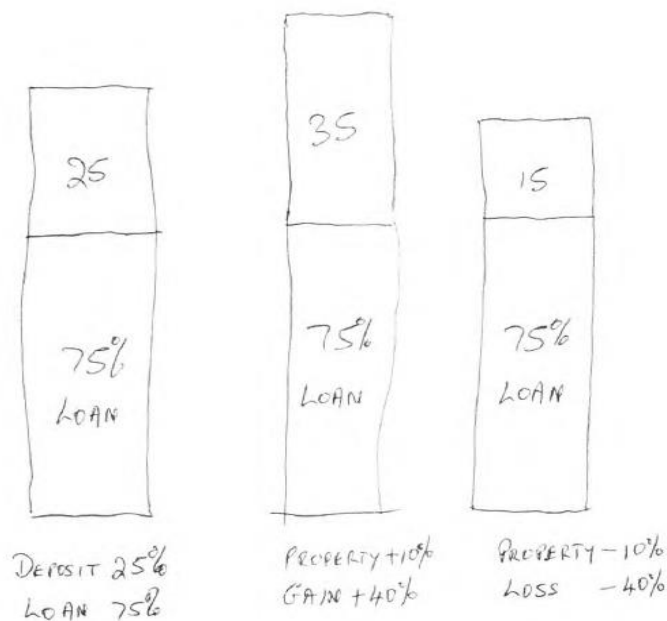
The borrowing rate will be fixed to reduce the risk of interest rate inflation.

**Liquidity**

There is a fixed period investment and investors (with the exception of death) will not be able to exit from the Fund prior to its liquidation (between 5 and 7 years). In the event of being unable to sell the properties after 7 years properties will be sold at the next suitable opportunity."

- A diagram, which the Provider states is the same type of diagram Mr [X] used to explain the effect of gearing to the Complainant in the meeting on **31 January 2005**. (The Provider states that it did not retain a copy of the actual diagram Mr [X] showed to the Complainant in the meeting on 31 January 2005). The diagram is as follows:

"  
THIS IS HOW I EXPLAINED THE EFFECT  
OF GEARING (THIS IS NOT A  
DOCUMENT FROM [REDACTED] FILE)



/Cont'd...

- A letter dated **1 February 2005**, which Mr. X. wrote to the Complainant a day after meeting him, which states as follows:

*“You have decided to transfer the fund value (approximately €125,000) from your [Original Pension Provider] Personal Pension to the above fund. This is a 5-7 year Investment in a General Commercial Property Fund in the UK. The retirement benefits cannot be taken until the fund has run its course ie in 5-7 years. The charges are (a) an initial charge of 5% of the amount invested and an annual charge of 1.25%. There are no guarantees with this fund and the value of the property may fall as well as rise...”*

It is clear from the evidence that after the meeting on **31 January 2005**, the Complainant proceeded to invest in the Geared Fund.

The Complainant’s representative stated in evidence at the Oral Hearing that

*“[i]t’s clear from the Statement of Suitability, which we’ll look at later, that [the Complainant] was trying to protect an existing asset and instead what was recommended to him and sold to him quite strongly was to gamble his entire pension and he lost almost all of it as a result. And [the Complainant’s] complaint is that by giving him that advice and advising him very clearly and singularly to invest in the [Geared] Fund offered by the [Promoter], he acted improperly, negligently, unreasonably and not in [the Complainant’s] best interest. Clearly what was in [the Complainant’s] best interest was to invest his existing pension fund in a safe pension such as the [Pension Provider A] Pension, which it is alleged was offered to him. But [the Complainant] will say that, in fact, that was never really offered to him at all and all that he was ever offered was the [geared] investment, which was a highly geared investment and not what he was looking for at all and as a result he has lost his entire pension.”*

The Provider contends that at the meeting on **31 January 2005**, Mr X advised the Complainant to invest in Pension Provider A’s balanced managed fund that had less risk associated with it, but the Complainant rejected this advice because he believed that the returns would be too low, and that he specifically stated that he wanted a property fund instead. The Provider states that Mr. X explained the positive and negative effects of gearing, and that the investment was illiquid.

In my opinion, the documentary evidence on file, such as the partially completed Application Form for Pension Provider A, and also the fact that Mr X noted Pension Provider A’s fund as the most suitable product on the Compliance Checklist, because it was *“the most cost effective”* and *“low risk but should give a reasonable return”*, supports the Provider’s contention that it recommended Pension Provider A’s balanced fund to the Complainant at their meeting on **31 January 2005**.

I am of the view that it is unlikely that Mr X, in early **January 2005** partially completed an Application Form for a policy, obtained a Quotation and noted Pension Provider A's policy as the most suitable on a Compliance Checklist, unless he was going to recommend that policy to the Complainant. Consequently, I am satisfied on the evidence available, that it was more likely than not that Mr X recommended Pension Provider A's balanced fund to the Complainant during the meeting on **31 January 2005**.

I do not agree, as suggested by the Complainant, that the recommendation of the balanced fund to the Complainant was a "box-ticking exercise". The documentary evidence demonstrates that Mr X performed searches on the 'Adviser Plus' System (which Mr X states was a research tool), that he obtained a relatively detailed Quotation for the Pension Provider A balanced fund, and that he had started to fill out an Application Form for the balanced fund with the Complainant's details, which I am satisfied went beyond mere "box-ticking".

However, the Complainant contends that the Pension Provider A balanced fund (which was a lower risk fund than the geared investment fund which the Complainant ultimately invested in) was only mentioned briefly to him by Mr X during the meeting on **31 January 2005**, and that "*the [geared] fund was the one he was highly recommending...[t]here was never much discussion about an alternative investment...*".

In that regard, I note that at the Oral Hearing the Complainant stated the following in relation to Pension Provider A's balanced fund:

[Complainant's Rep.] "*Okay. So then: "Other possible choices considered and why this one was chosen. The other option considered was a [Pension Provider A] Conventional Pension Fund"?*

[Complainant] *I didn't consider it. I had no interest in it. What that is there for I don't know. I never asked for – I keep saying, I just asked for a property fund in the UK, that's it. I wasn't interested in anything else.*

[Complainant's Rep.] *I suppose the question is, was it offered to you?*

[Complainant] ***This may have been offered, you know, as a throwaway remark, or something. There was a lot of things said, you know. I'm not saying he didn't offer that. But it certainly wasn't all the rigmarole that shows up later about drawing so much down and you know, that, if he had pushed it that hard I'd like to think I would say, thank you very much and I'd have got up and walked out the door because what I wanted, I went in and told him what I wanted, simple as that....."***

[My Emphasis]

Mr X stated at the Oral Hearing in this regard, in response to a question:

[Provider's Rep.] *"And why did you think that a diversified fund would be appropriate for [the Complainant]?"*

/Cont'd...

[Mr X] *I know he said to me that he wanted to put it into a UK Property Fund, but when you look at [the Complainant's] situation he was, you know, he was in a good financial position, but all his wealth really was in property and to put his, even his pension fund as well into property was putting all the eggs in the one basket. And I would normally recommend anyway that a person invest in a diversified fund with a mix of assets. Just putting all the eggs in the one basket is a bad idea as we now know.....*

[Mr X] *So basically I put to [the Complainant] my recommendation, which was to go with the [Pension Provider A] Fund, a balanced managed fund. I suppose **I tried to explain the reasons for it but I can tell you, I was shot down straight away, absolutely no way, end of story, end of discussion.***

[Provider's Rep.] *What did [the Complainant] say?*

[Mr X] *Well, he basically said that he would not go with something like that. He wanted far, far bigger returns than that, far bigger returns than [sic] you would get with an ordinary kind of fund and anyway, he wanted to invest in geared property and he wanted it in the UK ...*

[Complainant's Rep] *And at that meeting you didn't give him any documentation concerning the [Pension Provider A] fund or make any kind of presentation to him?*

[Mr X] *Well, you know, I told him what my recommendation was, which was the [Balanced] Fund and I explained it to him, or tried to explain it to him. But as I have said, **I was shot down very, very quickly. So how much explanation I got across to him I don't know. I cannot say now.***

[My Emphasis]

While I accept that there may not ultimately have been much discussion in relation to the Pension Provider A balanced fund (which I accept the Provider recommended to the Complainant) and that the documentation that Mr X had prepared in respect of the Pension Provider A policy does not seem to have been supplied to the Complainant, this appears to have arisen because the Complainant had no interest in a conventional pension such as the Pension Provider A balanced fund, and was not prepared to engage with Mr X's recommendation, as the Complainant wished to invest in a property fund. The Complainant's evidence was that if the Provider pushed the lower risk balanced fund "*I'd have got up and walked out the door*".

The Complainant further explained "*I had no interest in any other fund except the property fund in the UK. That's what I went in to ask for. You know, if I go into a shop to buy a pint of milk, I don't walk out with a bucket of coal, or something.*"

I have given consideration to how the decision was made to invest in a geared property fund (as opposed to a non-geared fund) and the question of whether the Provider adequately explained the risks of investing in a geared property fund to the Complainant.

/Cont'd...

It is clear from the evidence that the Complainant's attitude to volatility and risk was not recorded on the Fact find completed in **December 2004**. At the Oral Hearing when queried whether there was a "discussion about your appetite for risk when it came to investment at that meeting", the Complainant responded "[t]here'd be nothing, there was nothing seriously gone into that day I don't think, from my memory of it anyway."

However, the Complainant gave the following evidence at the Oral Hearing about how the decision was made to invest in a geared property fund

[Complainant's Rep.] *"So was there any discussion at the December meeting about the different types of property investments there could be, so geared versus not geared and how risky one or the other might be, or any discussion about the details of how the funds might operate?"*

[Complainant] *When the property fund came up first, now I don't know whether it was December the 20<sup>th</sup>, or January the 5<sup>th</sup>, he gave me a full rundown about how they operate .... And he obviously highlighted the fact that, you know, the managers only got their commission when it crossed the 10% threshold....*

[Complainant's Rep.] ***And did he tell you what the worst case scenario might be if you invested in this?***

[Complainant] ***That I would be wiped out, well nobody ever expected that ...***

[Complainant's Rep.] *Yeah. But I suppose what's important here is what you were told by Mr. [X] in relation to the risks?*

[Complainant] *There wouldn't have been a huge discussion about it. He probably figured I knew a bit about it because in one of the responses on page 3, yeah page 3, paragraph 1, he says it appeared I understood what gearing was and then he included a little sketch in his response. **But there was no explanation of gearing. I know what gearing is, I know what borrowing is, call it what you want.***

[Complainant's Rep.] *So you don't recall any explanation of gearing or the risks involved?*

[Complainant] *I don't recall any serious downside of it. I mean in the Section 30 one he does point out at the start, the Section 30 Form that I signed on the 31<sup>st</sup> of January that, you know, there can be big rewards but there's also the downside now. It doesn't say what the downside is or what percentage, but everybody and their mother knows that it's 10, 15%, it can go up or down and it happens all the time....*

[Complainant's Rep.] *And was there ever any discussion about the fact that a property investment could be a simple property investment like you've previously described when you buy a property, you do it up, you sell it, as opposed to a geared property investment, was there a distinction explained to you between those?*

[Complainant] *Well, if it's geared property, you know, if the ratio is, you know, the loan to value, if it's a reasonable amount of money put down and even if interest rates group, or there's a property crash, it should still cover itself. Now unfortunately, I never asked what the gearing ratio was or was never told ...*

/Cont'd...

[Complainant's Rep.] *And do you think if you had understood that it was a very highly geared investment, at the time, you might have made a different decision?*

[Complainant] ***I would not have touched it. I mean I'm probably foolish. I look foolish now, but I wouldn't be that foolish.....***

[Complainant's Rep.] *So the first part [of the Statement of Suitability] I've already read out, ... I'll read out each sentence and you can tell me whether it's true or not as we go along?*

[Complainant] *Okay.....*

[Complainant's Rep.] *"Why this particular policy is right for you and meets your needs: **You wish to invest the money in a geared property fund in order to gain extra leverage in the investment**"?*

[Complainant] ***Yeah, I'd agree with that, yeah, as long as the ratio was right, as long as it wasn't 20% down and 80% borrowings, you know?***

[Complainant's Rep.] *Well the word 'geared' is used in that sentence, so it's important that you're clear whether you were asking for a Geared Fund or just a property fund simpliciter?*

[Complainant] ***I may have asked for a Geared Fund if it was the right one or you know, a regular property fund. You know, as long as the gearing was okay, as long as it was a reasonable down payment it wouldn't have bothered me because I would have taken a chance ... I could have used 'geared'. I can't say I didn't, you know ...***

[Complainant's Rep.] *"While the **gearing involves increased risk, it offers the opportunity of better returns also.**" And did you understand that at the time?*

[Complainant] ***Yeah, I did.....***

Thereafter, arising from the cross-examination, I noted the following:

[Provider's Rep.] *So, if I can turn to No. 14, this is the diagram by which [Mr X] explains gearing.*

[Complainant] *I didn't see this though, or one like it ... But as I've said earlier, on page 3 on the top line it says, he states it appears I understood what gearing was.*

[Provider's Rep.] *Would you disagree with that?.....*

[Complainant] ***I know what gearing is, yes***

[Provider's Rep.] *So even if he hadn't drawn this for you, I mean he says that he did draw this diagram for you, but even if he hadn't ... He wouldn't have improved your state of knowledge about gearing?*

[Complainant] *No. It was the first thing that jumped out at me in the response ...*

[Provider's Rep.] *Why did that jump out of the pages at you?*

[Complainant] ***Because it's so ridiculous looking ... Well, I think it is because I never seen it. I understood what gearing was. He wasn't talking to a five-year old ..."***

[My Emphasis]

/Cont'd...



During the Oral Hearing the Provider stated the following in relation to how the decision was made to invest in a geared property fund:

[Provider's Rep.] *"Specifically how did the [Geared] Fund come up?*  
[Mr X] *Well, basically the [Pension Provider A balanced] Fund was off the table, it was not going to happen. So then he said, **look I want to invest in a property fund, a geared property fund -- well, I don't know about 'geared', but a property fund in the UK.** So basically, I actually had researched a lot of the different property funds around because everybody wanted to invest in property at that time. I had gone over to the UK several times ... **I thought it was the best Geared Property Fund around at the time...***

[Provider's Rep.] *How was the brochure introduced into the meeting and was it introduced in the meeting on the 31st of December -- of January rather, I beg your pardon?*

[Mr X] *The 31st of January. **When he shot down the [Balanced] Fund he said that he wanted way, way bigger returns than you would get from any kind of an ordinary fund...But like, if you want extra large returns you've got to introduce gearing.** Now he had said he wanted to invest in the UK, in property in the UK, whether he used the word 'gearing' or not I honestly can't remember ... he was looking for extraordinary returns and the only way you can get that is through gearing. **So that's why I introduced the [Geared] Fund to him at that point.** I did not introduce it to him before that because, as far as I was concerned, the fund he should have gone into was the [Balanced] Fund. That was my recommendation to him and I'm sorry he didn't do that and that's why we're here today now.*

[Provider's Rep.] *Notwithstanding that, did you take him through the [Geared Fund] brochure?*

[Mr X] *Yes I did, yeah*

[Provider's Rep.] *And specifically, section 5, which deals with the risk factors, and I appreciate that in his evidence he said that he was aware of all of that, all of those risks, but that he read the brochure anyway. But you had a conversation with him, or took him through those risks, did you?*

[Mr X] *Yes I did. Well I did, yeah ... Look, I'd say **there was a fairly long discussion about gearing because I definitely produced a little diagram and I would have insisted on going through that.** I know [the Complainant] says he doesn't remember it and you know, I accept he's telling the truth, he probably doesn't remember it, but I definitely went through it and I'm here on my oath today and I am one hundred percent certain I would have gone through that.*

[Provider's Rep.] *And to be fair to everybody, it is almost two decades ago since the events occurred and it's questionable as to, you couldn't really expect anybody to fully remember everything that occurred on those dates?*

[Mr X] *No and **I would not be able to say that I remember doing it either,** but it was, **it is the way I explain gearing and I am one hundred***

/Cont'd...

**percent satisfied in my mind that I would have gone through that procedure.**

[Provider's Rep.] *Did you get an indication from him as to what levels of return he hoped to achieve?*

[Mr X] *No. I mean, if you're looking for a number, no. But he shot down the [Balanced] Fund. He recognised it straightaway as an ordinary run-of-the-mill fund, if you want to call it that and he shot it down straightaway because he wanted much, much higher returns. Like, he didn't say, I want 20% per annum or, there was nothing like that. But I got the impression, you know, it needs to be multiples of, that sort of a return ....*

[Complainant's Rep:] *And did you specifically draw [the Complainant's] attention to the items we've just looked at on page 5 and 9, the very high gearing levels in the brochure when you gave him the brochure and suggested this investment to him? ...*

[Mr X] ***I did. Of course, I did. There was quite a discussion about the effect of gearing and, I suppose the diagram that I drew really, for me it was the clearest way to explain it to somebody.***

[My Emphasis]

In my opinion, it is certainly disappointing that Mr X did not record the Complainant's attitude to risk in the Factfind on **20 December 2004**. It is not clear why this section of the Factfind about "**What is your attitude to Volatility and Risk?**" was not completed.

The Complainant's attitude to volatility, risk to capital and inflation were important factors in identifying the Complainant's appetite for, and tolerance of, risk and accordingly, the suitability of a particular investment. Given the purpose of the Factfind, particularly this section of the Factfind, it is my opinion that this section should have been completed in order to demonstrate that a complete assessment of the Complainant's attitude to risk was conducted, and better care should have been taken to ensure its completion.

However, it is clear that both the Complainant and the Provider are in agreement that at the relevant time, the Complainant wished to invest in a UK property fund. Neither the Complainant nor the Provider can recall if the Complainant specified whether he wished to invest in a geared property fund, although it is clear that the Complainant accepts that he was willing to invest in a geared property fund, and that he understood the concept of gearing.

The Complainant's dissatisfaction with the advice supplied by Mr X appears to arise because the Complainant states that Mr X never informed him that the investment portfolio was highly geared (approximately 70%), and therefore at the riskier end of gearing. The Complainant referred during the Oral Hearing to putting "**40 down**", and he made clear in his evidence at that time, that the maximum gearing he would have been prepared to accept in 2005, was 60:40 (i.e. 60% geared).

/Cont'd...

There is some dispute between the parties as to whether Mr X showed the Complainant a diagram explaining the effects of gearing during the meeting on **31 January 2005**. There was also a conflict in evidence as to whether Mr X had explained the gearing ratio to the Complainant.

However, I am satisfied that regardless of whether or not the Complainant was aware of the exact gearing ratio, the Complainant was aware that this was a high-risk investment. While the Complainant stated during the Oral Hearing that he did not recall Mr X explaining any serious downside of the investment to him, I cannot accept that this is correct, in circumstances where the Complainant also acknowledged during the course of the Hearing that Mr X advised him that the worst-case scenario if he invested in the Geared Fund, was that he could be “wiped out”. I consider this to be a very clear explanation of a very serious potential downside to the investment. Furthermore, during the Oral Hearing, when asked, “do you feel you were properly warned about the very serious risks involved”, the Complainant responded:

***“Yes, I would feel that I was properly warned, but not to any extent that, okay nobody knew what was going to happen in 2008 but, as I said, it's in the brochure. There's warnings everywhere, in every paper you look at there's a warning at the bottom, "Investments may go up or down". It's not, you know, it's a standard procedure.”***

[My Emphasis]

Consequently, it is clear to me from the evidence, that the Complainant acknowledges that he was warned of the very serious risks involved with the investment that he ultimately selected. The Complainant also acknowledged during the Oral Hearing that he read the investment Brochure supplied to him by Mr X, which states at page 9:

***“Gearing Risk***

*By using borrowings the [Geared Fund] has the potential to deliver higher returns but there is also increased risk. If property values rise, any increase in capital values translates into an exponential increase in the return on equity. Conversely, if property values fall the return on the investment will be disproportionately affected on the downside, i.e. your original investment could be substantially eroded.”*

[My underlining for emphasis]

The fact that the Complainant was prepared to accept the risk that his investment could be “wiped out” or “substantially eroded”, appears to me to be consistent with the fact that the Complainant was prepared to accept gearing to generate a return, stating that:

***“I may have asked for a Geared Fund if it was the right one or you know, a regular property fund. You know, as long as the gearing was okay, ... it wouldn't have bothered me because I would have taken a chance”.***

[My Emphasis]

/Cont'd...

This indicates to me that the Complainant had a high tolerance for risk.

I am mindful that the Complainant's wish to gain extra leverage on his investment was also recorded in the Statement of Suitability dated **31 January 2005**, which was signed by the Complainant, and which states:

*“[the Complainant] wish[es] to invest the money in a geared property fund **in order to gain extra leverage on the investment** .... While the gearing **involves increased risk, it offers the opportunity of better returns also**”*

[My Emphasis]

Furthermore, the Complainant clearly and very openly acknowledged throughout the Oral Hearing that he understood what gearing was, when he entered the investment, and that he was willing to invest in a geared product (and that he may have even requested a geared property fund).

Although the Complainant states that he would never have accepted the gearing ratio of the Investment Policy, had it been explained to him by Mr X, and that the maximum gearing ratio he would have accepted was 60:40, I did not find the Complainant's evidence convincing in this regard. This is because, as explained above, the evidence illustrates that the Complainant was prepared to invest in a high-risk product to generate a return.

I also note that the investment Brochure states at:

- section 2.1 under the heading 'Financing' that “[t]he fund will be geared to a maximum of circa 2.5 times equity raised” (which the Provider states equates to 70% gearing); and
- at section 5 under the heading 'Liquidity' that “[t]he table below shows the value of a €100,000 investment based on different assumptions about the value of the property in 7 years' time.

*Change in portfolio value over 7 years*

*Value of €100,000*

-15%	0%	+15%
€77,694	€121,910	€166,127

*The above table has been prepared on the following basis:*

- *Portfolio is geared 75/25....”*

and the Complainant acknowledged during the Oral Hearing, that he read the content of the Brochure.

/Cont'd...

In addition, I am conscious that during the course of the Oral Hearing, the Complainant acknowledged that he had entered into another property investment that was 100% geared (i.e. the Complainant borrowed all of the €100,000 invested). This geared investment with a third-party bank appears to have been made on **7 March 2005**.

While clearly, the investment by the Complainant in a 100% geared property fund with a third party bank, is not determinative of the gearing ratio the Complainant was prepared to accept in respect of the investment which is the subject of this complaint, I am satisfied nevertheless that this indicates that the Complainant was prepared to accept a high-risk investment product, such as the investment product sold to him by Mr X. It also calls into question his evidence that:

[Provider's Rep.] *But I'm asking you a question about gearing because you have said very fairly that you understood what gearing was?*

[Complainant] *I understood it, but if I was buying a property myself you would be putting probably 40% down.*

[Provider's Rep.] *So **the ratio of 40:60 would have been satisfactory from your perspective, would it?***

[Complainant] ***It would, yeah....***

.....

[Provider's Rep.] *.....I'm asking you a different question, **what ratio would you have been prepared to accept, you have said 60:40 if [sic] fine?***

[Complainant] ***I think 40 down.***

[Provider's Rep.] *Would you have taken 80:20? Would you have taken 75:25?*

[Complainant] ***No....Definitely not.***

.....

[Provider's Rep.] ***...And you say that you would have had a level of tolerance for a 60:40 split ratio?***

[Complainant] ***That would be 60%, yeah 40% down, yeah. Nothing less....***

[My Emphasis]

On balance, I accept that during the meeting on **31 January 2005**, Mr X supplied the Complainant with a diagram explaining gearing. Whilst understandably, Mr X, due to the passage of time, could not recall specifically supplying the Complainant with the diagram, he was adamant in his evidence, and indeed I accept that it was his established practice to always make available to customers considering gearing products, a diagram of that nature, which he considered to be the best practical way of explaining gearing, and that he was certain he would have done so in the very same manner, in the Complainant's case. While the Complainant disagreed, the Complainant also acknowledged that he was unable to recall much of the detail of the meeting on **31 January 2005**:

[Complainant's Rep.] *"But if you could just tell us what actually happened at the meeting, I think that would be helpful?"*

[Complainant] *I wouldn't be able to tell you ... I can't say. I could make it up now if you wanted, but I can't."*

/Cont'd...

It is not surprising that neither Mr X nor the Complainant could fully recall the events of a meeting which occurred some 17 years before the Oral Hearing, and I found both witnesses to be credible and truthful in acknowledging that there are some aspects of the events of 2004 and 2005 which they do not recall. However, in circumstances where neither party could fully recall the meeting of **31 January 2005**, I am of the view that it is appropriate to accept Mr X's very firm evidence that he was certain that he adhered to what he referred to as his standard practice of producing a diagram, to explain gearing to the Complainant - because it was always his practice to do so.

Mr X's evidence at the Oral Hearing is that his practice was to draw a diagram similar to the one which he submitted in evidence to this Office (which is detailed above) and that his practice was to explain:

*"..... this is the advantage of gearing -- an increase of 10% in the price of the property gives you a return of 40%. It multiplies your return by four. Then I would draw the next column, which says, if the price of the property falls by 10%, the bank is still owed 75,000, but your investment now is only 15,000, which is a 40% fall in the value of your investment. So, a 10% fall in the value of the property gives you a 40% loss and that's the double edge sword of gearing."*

I accept that an explanation of this type, clearly illustrates in a very practical way, how gearing works and how gearing magnifies both the potential risks and returns of an investment. In any event the Complainant acknowledged that he understood gearing at the time when he made the investment (regardless of any explanation supplied by Mr X).

I note that after the meeting on 31 January 2005, Mr X also sent a letter to the Complainant dated **1 February 2005**, which advised that there was *"no guarantees with this fund and the value of property may fall as well as rise"*.

Having regard to all of the above, I do not accept that Mr X failed to adequately advise the Complainant of the risks attaching to this investment.

Turning to the suitability of the Investment Policy, I note that the Complainant contends that Mr X recommended an unsuitable investment to him, having regard to his age and circumstances; he states that while he wanted to invest in property, he did not wish to risk his entire pension by investing in a highly Geared Fund.

I accept that a high risk geared investment product will not, generally, be suitable for an individual approaching retirement age, who wishes solely to protect their assets. However, in the particular circumstances of this complaint, I do not accept that that Mr X recommended an unsuitable investment.

As outlined in greater detail above, I am satisfied that Mr X in fact recommended a lower risk balanced investment product to the Complainant, and that it was the Complainant who rejected Mr X's recommendation, because the Complainant was adamant that he wanted to invest in a UK property fund.

As also outlined above, the evidence available suggests that at the time of the investment, the Complainant had a high tolerance for risk and wanted to gain extra leverage on his investment, rather than solely protecting an existing asset. Given that the Complainant only wished to invest in a UK property fund, and was prepared to invest in a Geared Fund to gain extra leverage on his investment (and may indeed have requested a Geared Fund) I do not accept that Mr X's recommendation for a geared investment was unsuitable, following the Complainant's refusal to engage with Mr. X's original recommendation.

In terms of the Complainant's age, and his age relative to his retirement, the Complainant's position is that he wanted an investment, such that he would have access to his pension funds at his 65th birthday, which was approximately five and a half years after the investment was made in the Geared Fund. In this respect, I note that the Geared Fund was intended to be a five-to-seven-year investment, in that investors would not be able to exit the fund, prior to its liquidation, which was expected to be between five and seven years after 2005, when the underlying properties would be sold, or at the next available opportunity. It is clear that the Complainant was advised that the duration of the Investment Policy was 5-7 years and that he accepted this duration. On **16 March 2005**, the Complainant signed a letter to the Insurer acknowledging that *"I understand that I will be unable to withdraw any cash from this fund until the 5-7 year term is elapsed even though I will attain the age of 60 in the meantime"*. Consequently, I accept that the duration of this investment was aligned with the Complainant's requirements.

In terms of the Complainant's financial position, the Factfind which Mr X completed on **20 December 2004**, indicated that the Complainant's net worth was €1.225 million excluding the value of his home, and that his annual income was €87,000. This means that the geared investment of €184,940, in this instance represented approximately 15% of the Complainant's net worth.

In this instance the Complainant rejected the Provider's recommendation to invest the proceeds of the Original Pension Policy in a lower risk balanced fund. Furthermore, and as outlined in greater detail below, the Complainant acknowledged that he would not have agreed with any suggestion by Mr X to retain any portion of the Original Pension Policy, or to withdraw the 25% tax free portion of the Original Pension Policy (instead of investing it in the Investment Policy), even if such a suggestion had been made by Mr X.

Consequently, I do not agree that Mr X recommended an unsuitable investment having regard to the Complainant's financial position and particular preferences, and my view in that regard is reinforced by the evidence that the geared property investment recommendation only arose after the Complainant had rejected Mr X's recommendation of a lower risk more diversified product.

I also note that the Complainant acknowledged during the course of the Oral Hearing that he did not disclose certain financial details to Mr X when he completed the Factfind in **December 2004**, and before effecting his investment in the Investment Policy in **March 2005**.

The details which he did not share with the Provider, included his wife's salary, certain aspects of his business, and the other 100% geared investment which the Complainant ultimately made on 7 March 2005 after approaching a third party bank in February 2005:

[Provider's Rep]        *"And why didn't you tell him your business?"*  
[Complainant]        *Why should I? I come from a school where you don't let the right hand know what the left hand is doing. Why should I tell him?*  
.....  
[Complainant]        *I didn't tell him about, for instance, we were going to go to the bank and ask to re-finance. I told him none of that ... I didn't tell him what bank we were with. I didn't tell him what accountant we were with*  
...  
[Provider's Rep]        *Yes. So why at no point in February did you tell Mr. [X] about this other investment and these other plans that you had and the re-financing that you were doing with [a third party] Bank?*  
[Complainant]        *I just don't think it was any of his business. Why should I tell him?*  
[Provider's Rep]        *None of his business. So your complaint is that the investment was mis-sold to you because it was unsuitable, having regard to your financial needs at the time, but you consider that your financial needs and financial position, at the time, was none of his business?"*

It is very difficult to understand the Complainant's position that aspects of his financial circumstances were none of Mr X's business, in the context of him nevertheless seeking investment advice from Mr X. In any event, it is clear that the adequacy of the advice that Mr X supplied, can only be assessed by reference to those aspects of the Complainant's financial circumstances that the Complainant disclosed to him, and not by reference to any undisclosed aspects of the Complainant's financial circumstances, that Mr. X was therefore unaware of.

In this regard I also note that that Mr X originally stated in a submission dated 29 May 2018, that the Complainant already had *"another geared property investment with his bank"*. However, Mr X subsequently clarified at the Oral Hearing that he was not aware in 2005, when he sold the Investment Policy to the Complainant, that the Complainant had another geared investment.

The Complainant also accepted at the Oral Hearing that he did not inform Mr X in 2005 of this other geared investment. However, the Complainant stated during the Oral Hearing that it was not the case that he withheld information about the other geared property investment with a third-party bank from Mr X, but rather that this investment with a third-party bank had not yet been made, at the time when he decided to enter into the Investment Policy.

Having regard to the available evidence, I am satisfied that the geared investment with the third-party bank appears to have been made on **7 March 2005**, shortly before the Complainant signed an instruction on **16 March 2005**, directing that €184,940 be invested in the investment the subject of this complaint.

/Cont'd...



Whilst I note that the Complainant did not disclose this **7 March 2005** investment to Mr X, before instructing that €184,940 be invested in the geared UK property fund, as explained above, the adequacy of the advice that Mr X supplied can only be assessed by reference to those aspects of the Complainant's financial circumstances that the Complainant disclosed to him. Consequently, this Office does not consider the existence of the geared investment with a third-party bank relevant to the assessment of Mr X's advice to the Complainant at the relevant time.

In terms of the Original Pension Policy, being the Complainant's sole pension investment, the Complainant has not, in my opinion, established how this rendered an investment in the Geared Fund, unsuitable. The Complainant's wish to "*gain extra leverage on the investment*", his rejection of a lower risk product, his willingness to invest in a geared product, and the fact that there was no apparent need for immediate access to the pension funds, was in my view, consistent with investing the proceeds of the Original Pension Policy in the Geared Fund.

After the meeting on **31 January 2005**, the Complainant and the Provider became aware, in **February 2005**, that the value of the Complainant's original pension policy was €184,940 and not as originally thought, €125,000.

The Provider states that Mr X tried to persuade the Complainant not to invest all of the proceeds of the Original Pension Policy into the Investment Policy, so as to reduce the risk, and that Mr X was of the view that the Complainant should leave open the option of taking the 25% tax free portion of the Original Pension Policy proceeds, but in the end, the Complainant eventually decided to invest 100% in the Geared Fund.

At the Oral Hearing Mr X stated that he:

*"was trying to pull him back to maybe put part of it in and keep some of it in a more liquid form. I mean, the obvious issue was the 25% tax-free, I wanted to try and keep the option open, okay, he didn't need it at that time. But like, his circumstances could have changed and he might have needed it in the future ... there were several discussions where I tried to get him to put less than a hundred percent into the [Geared] Fund."*

The Complainant submits that the Provider did not attempt to persuade him to invest a portion of the original pension in a lower risk fund or to withdraw the tax-free cash element of the original pension. The Complainant further states that he did not have any immediate need for the funds at age 60, so he would not have agreed to a tax-free lump sum at 60.

The following documentary evidence on file, suggests to me that there were some discussions between Mr X and the Complainant around this time, as to whether or not all of the value of the Complainant's Original Pension Policy should be invested in the geared Investment Policy:

/Cont'd...

- A letter dated **21 February 2005**, from Mr. X. to the Geared Fund Promotor advising that the Complainant wanted to invest €134,000.00 in the Geared Fund and retain €50,000.00 *“to avail of another opportunity later.”*

- A file note dated **10 March 2005**, which states:

*“[the Complainant] wants to exercise his retirement option at age 60, ie leave [the Geared Fund] untouched and take 25% tax free ie convert [the Geared Fund] into ARF/AMRF.”*

- A file note dated **11 March 2005**, which states:

*“Was speaking to [named individual] [Insurer]*

*[The Complainant] wants to take some or all of the 25% tax free when his is 60 (Nov 2005).*

Options

*Same policy – 25% cash 75% [Geared Fund] Can convert [Geared Fund] into ARF/AMRF and take the 25% tax free.*

*2 policies (a) 25% cash (b) 75% [Geared Fund]*

*The main point is that [the Geared Fund] can be converted to ARF/AMRF seamlessly.*

*Letter requested by [the Insurer] from [the Complainant] confirming that he understands that [the Geared Fund] cannot be cashed until the fund has run its course ie 5-7 yrs.”*

- A file note dated **11 March 2005**, which states:

*“Rang [the Complainant] about this – he may actually put all into [the Geared Fund]. Or possibly take out €10-15k at age 60. Will ring me Monday.”*

However, I note that the Complainant ultimately invested all of the original pension policy into the geared pension policy. The Complainant signed an instruction to this effect dated 16 March 2005, which stated:

*“[t]his is to confirm that I wish to invest the whole of the transfer value of my [Original Pension Provider] Personal Pension, ie €184,940 in the above Fund. I understand that I will be unable to withdraw any cash from this fund until the 5-7 years term of the fund is elapsed, even though I will attain the age of 60 in the meantime.”*

I also note that in an undated letter from the Insurer to the Provider (which appears to have been received by the Provider on **11 May 2005**) the Insurer advised that a copy of the policy conditions, policy specifications and Cooling-Off Pack had been sent directly to the Complainant. By letter dated **12 May 2005**, Mr. X wrote to the Complainant enclosing a copy of the Insurer's 'Personal Retirement Plan Policy Conditions'.

At the Oral Hearing, when asked whether the file note dated **10 March 2022** suggested that he had a conversation with Mr. X about whether he wanted to take some or all of the 25% tax free element of his pension when he turned 60, the Complainant stated:

*"[m]ost definitely not. At that time, for me to do something like that there would have been 40% of it going back to the Government if I drew a pension down at 60. We had good rent out of the pub. We had good income coming from the rooms upstairs. It would have been an absolutely crazy idea to do something like that."*

The Complainant, when queried about the investment options outlined in the **11 March 2005** files notes, also confirmed that he "*never any intention of doing any of this*".

Although the Complainant disputes that Mr X tried to persuade him not to invest all of the proceeds of the Original Pension Policy into the Investment Policy, in circumstances where the Complainant accepts that it was never his intention to take a tax free portion of his pension or to proceed with any of the alternative investment options outlined in the file notes and correspondence dated **February** and **March 2022**, it is not necessary for this Office make any finding as to whether or not Mr X attempted to dissuade the Complainant from investing all of the original pension in the geared pension in February and March 2022. It appears that regardless of whether or not Mr X did so, this would not have changed the outcome of the matter, whereby the Complainant was somewhat determined to invest all of the proceeds of the Original Pension Policy into the Investment Policy.

In conclusion, on the basis of the evidence available and for the reasons outlined above, I am satisfied that the Provider did not mis-sell the Investment Policy to the Complainant, in late **2004/early 2005**.

While I am not satisfied that the Factfind was properly completed in order to accurately document the Complainant's attitude to risk, taking account of all of the evidence available, I do not consider this to be sufficient to show that the investment in the Geared Fund was unsuitable for the Complainant, or that the Complainant was wrongly advised to invest in the Geared Fund.

Based on the evidence, I am satisfied that the Complainant rejected Mr X's recommendation to invest in a lower risk balanced fund, and that the Complainant specified that he wanted to invest in a UK property fund. I also accept that the evidence indicates that the Complainant wished to gain extra leverage on his investment, and it was within that context, that Mr X recommended the geared Investment Policy to the Complainant.

/Cont'd...

I am also satisfied that discussions surrounding an investment in the Geared Fund, including the risks involved, took place between the parties, and on the basis of that evidence, I am satisfied that the Complainant was placed on notice in 2005 of the nature and the extent of the risks attaching to the investment he was proposing to make, at that time. In these circumstances, I am not satisfied that, nor do I accept that the Provider wrongly advised the Complainant to invest in the Geared Fund in 2005, or that the investment in the Geared Fund was unsuitable for, or mis-sold to, the Complainant at that time. Consequently, I do not consider it appropriate on the evidence, to uphold this complaint.

### **Conclusion**

My Decision pursuant to **Section 60(1)(d)** 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)**

18 October 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.

