THE HIGH COURT

[2022] IEHC 560

RECORD NO. 2021/126MCA

BETWEEN

INDEPENDENT TRUSTEE COMPANY LIMITED

APPELLANT

and -

FINANCIAL SERVICES AND PENSIONS OMBUDSMAN

RESPONDENT

and -

DARA KAVANAGH

NOTICE PARTY

JUDGMENT of Ms. Justice Niamh Hyland delivered on 28 October 2022

Summary of Decision

1. This appeal concerns a decision of the respondent of 5 May 2021, wherein it upheld a complaint against the appellant pursuant to s.60 of the Financial Services and Pensions Ombudsman Act 2017 (the "2017 Act") and directed the appellant to pay €2,000 in compensation to the notice party. The essence of the appellant's challenge is that the respondent incorrectly applied the provisions of the 2017 Act by utilising s.60 as opposed to s.61. Section 60 applies to complaints relating to financial service providers ("FSPs"), whereas s.61 applies to complaints relating to pension providers. The

appellant argues that it ought to have been treated as a pension provider by the respondent when determining the complaint.

2. The seemingly net issue as to which section ought to have been invoked requires me to address the following questions:

   (i) Did the appellant come within the definition of a pension provider under the 2017 Act at the relevant time?

   (ii) Did the appellant come within the definition of an FSP under the 2017 Act at the relevant time?

   (iii) Where a body comes within the definition of both an FSP and a pension provider, does the 2017 Act permit the respondent to choose between proceeding by way of s.60 or s.61?

   (iv) If so, what legal principles apply to the respondent's choice as between s.60 and s.61?

   (v) What is the standard of review this Court should apply when reviewing a decision of the respondent to choose one section over the other?

   (vi) In the circumstances of this complaint, was it "appropriate" for the respondent to consider the complaint under s.60?

3. For the reasons set out in this judgment, I answer those questions as follows:

   (i) The appellant came within the definition of a pension provider under the 2017 Act at the relevant time.

   (ii) The appellant came within the definition of an FSP under the 2017 Act at the relevant time.

   (iii) The 2017 Act permits the respondent to choose between proceeding by way of s.60 or s.61 where a complaint is made about a body who comes within both the definition of a pension provider and an FSP.

(iv) The principles that govern the exercise of that choice are identified in s.12(1) and s.56 of the 2017 Act i.e. the respondent shall investigate the complaint in a manner that is appropriate and proportionate to the nature of the complaint.

(v) The appropriate standard of review in respect of the respondent's decision to treat the complaint as one appropriately dealt with under s.60, is that identified in *Ulster Bank v Financial Services Ombudsman* [2006] IEHC 323 i.e. was the decision vitiated by a serious and significant error or series of such errors.

(vi) In the circumstances of this complaint, applying the *Ulster Bank* test, the respondent did not make a serious and significant error in deciding that, having regard to the nature of the complaint, it was appropriate to consider the complaint under s.60.

Facts and Background

4. The appellant is a limited liability company regulated by the Central Bank of Ireland as an FSP and is registered with the Pensions Authority as an authorised provider of Personal Retirement Savings Accounts ("PRSAs").

5. The notice party held two PRSAs with the appellant. By way of a letter of 4 January 2019 the appellant was informed that the notice party wished to transfer the proceeds of his pension to another entity, Zurich. The appellant requested that the notice party complete a "certificate of discharge" to begin the process of transferring the proceeds to Zurich. The notice party signed the certificate but declined to complete it entirely as he felt it was neither legally necessary, in that it was neither a statutory or contractual requirement, nor relevant, and that the transfer should proceed without completion of the certificate. Correspondence ensued wherein the appellant explained the rationale and context for its policy in relation to the certificate and explained that it would not be able to proceed with the transfer without a completed certificate. The notice party then

invoked the appellant's internal dispute mechanism, but no resolution was ultimately achieved. Following this, the notice party made a complaint to the respondent on 12 March 2019.

6. On 7 January 2021 the respondent made a preliminary decision determining that the appellant had impermissibly and unreasonably refused to complete the transfer requested by the notice party. Specifically, the respondent determined the complaint under s.60 of the 2017 Act, finding that the complaint related to the appellant's conduct as an FSP. This was in circumstances where the respondent found that the complaint related to the release of funds from the PRSAs, rather than being in relation to the PRSAs themselves. His preliminary decision was that the complaint was upheld pursuant to s.60(1) and that the appellant should pay a sum of €2,000 in compensation to the complainant.

7. By way of a letter also dated 7 January 2021, the notice party and the appellant were informed that further submissions could be made to the respondent so long as they related to an additional point of fact, an error of law or an error of fact. The appellant made further submissions on 25 January 2021. In relation to errors of law it was submitted, *inter alia*, that the respondent had erred in law in applying s.60 of the 2017 Act. It argued that the applicable provision was instead s.61 of the same Act. On 5 February 2021 the notice party replied to the submissions of the appellant.

8. On 5 May 2021 the respondent issued its final decision. That decision followed the approach identified in the preliminary decision, with the respondent holding as follows:

> "*"The Provider is incorrect in its assertion that I have considered this complaint and its conduct under the incorrect provision of the Financial Services and Pensions Ombudsman Act 2017. As the Complainant has pointed out, his complaint is not about the pension scheme. Rather his complaint relates*

to the service the Provider proffered as a regulated financial services provider. It would therefore not be appropriate, as suggested by the Provider, to consider its conduct as it relates to the Complainant and this complaint under Section 61 of the Act. I remain satisfied that this complaint concerns the conduct of the Provider as a regulated financial services provider and is appropriately dealt with under Section 60 of the Act.

I remain of the view that the Provider was not entitled, under the terms of business or by law, to withhold the transfer in the manner that it did and that to do so was unreasonable. Therefore, I uphold this complaint and direct that the Provider pay a sum of €2,000 in compensation to the Complainant."

Proceedings

9. The appellant brings its appeal under s.64 of the 2017 Act and seeks an Order under s.64(3)(b) setting aside the decision of the respondent. The Originating Notice of Motion was filed on 8 June 2021. The Statement of Opposition was provided on 30 July 2021, on the same day Mr. Deering, the respondent, swore his first affidavit. On 27 October 2021, Mr. Nielsen, solicitor for the appellant, swore an affidavit replacing the original grounding affidavit of 8 June 2021 in circumstances where there was an objection as regards the admissibility of parts of that affidavit. On 29 October 2021, Mr. Deering swore a supplemental replying affidavit.

Legislative framework in respect of the determination of complaints

10. The 2017 Act identifies two separate tracks under which a complaint can be made, identified in s.44 as follows:

"44. (1) Subject to section 51(2), a complainant may make a complaint to the Ombudsman in relation to the following:

(a) the conduct of a financial service provider involving—

(i) the provision of a financial service by the financial service provider,

(ii) an offer by the financial service provider to provide such a service, or

(iii) a failure by the financial service provider to provide a particular financial service requested by the complainant;

(b) 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;"

11. The 2017 Act gives the respondent extensive powers to decide on a complaint relating to an FSP under s.60. Under s.60(2), in respect of complaints made as regards the conduct of FSPs, the respondent may uphold complaints on several wide ranging and broadly phrased grounds, including that the conduct complained of was unreasonable. If the complaint is upheld under one of the s.60(2) grounds, the respondent has extensive powers to give directions under s.60(4) to compel the FSP to give reasons, review, rectify or mitigate its conduct or its consequences, to change practices, to pay an amount of compensation for any loss, expense or inconvenience or take any other lawful action the respondent considers appropriate in the circumstances. Under S.I. 154 of 2018, the Financial Services and Pensions Ombudsman (Compensation) Regulations 2018, the respondent can direct compensation up to €500,000.
12. The respondent's powers under s.61 with respect to complaints relating to a pension provider are significantly less extensive. The respondent may make such directions to

the parties concerned as he considers necessary or expedient for the satisfaction or resolution of the complaint. A direction may not require an amendment of the rules or conditions of a scheme. Nor may the decision supplant the exercise by the pension provider of a discretionary power under the rules of the scheme. Under s.61(4) the respondent may order such redress, including financial redress, as he considers appropriate, but s.61(5) provides that the financial redress shall not exceed any actual loss of benefit under the scheme concerned.

Did the appellant come within the definition of a pension provider under the 2017 Act at the relevant time?

13. The heart of the appellant's case is that the respondent ought to have treated it as a pensions provider and determined the complaint under s.61. If I find the appellant did not come within the definition of a pension provider, then that ends its appeal as it could not have been determined under s.61. For that reason, I have decided to determine this issue first.
14. As recited above, the decision the subject of this appeal concluded that it would not be appropriate to consider the complaint under s.61 as it concerns the conduct of the provider as a regulated FSP.
15. The appellant notes that it is not in dispute that the appellant was a pension provider within the meaning of the definition under s.2(1) of the 2017 Act.
16. In the affidavit of Mr. Deering in these proceedings, sworn 30 July 2021, he takes the position that the refusal of the appellant to release the notice party's funds was not the conduct of a pension provider in relation to a scheme as defined in the 2017 Act and therefore it would not be appropriate to consider it under s.61.
17. It is pleaded in the Statement of Opposition that the respondent "*having considered all the evidence before him and the submissions made by the parties, made a decision*

which was reasonably open to him in the circumstances", relying in particular on s.12(11) which identifies that the respondent, when dealing with a complaint, shall act, *inter alia*, according to the substantial merits of the complaint. At paragraph 53 of the written submissions, it is noted that the respondent determined the matter would "*more appropriately*" be decided under s.60. It is also argued that the definition of pension provider is concerned with matters directly relating to a pension scheme and these were not at issue in the notice party's complaint.

18. To decide whether the complaint could have been dealt with under s.61, the relevant statutory definitions require consideration.

19. The definition of pension provider may be found at s.2, the definition section. In that section "pension provider" is defined as follows:

> "*pension provider, in relation to a scheme, means any of the following:*
>
> *…*
>
> *(b) any person or undertaking that provides services to the scheme as a trustee, administrator, registered administrator for the purposes of Part VIA of the Act of 1990, consultant or advisor, investment manager, custodian, paying agent, insurer or actuary;*
>
> *(c) any person to whom the implementation or interpretation of the rules of the scheme is entrusted"*

20. Scheme is defined as follows: "[*S*]*cheme", in relation to a pension, means an occupational pension scheme, a PRSA or a trust RAC".*

21. A PRSA is defined as: "… *a personal retirement savings account established by a contributor with a PRSA provider under the terms of a PRSA contract*".

22. The operative time for the review is the time period during which the appellant refused to transfer the pension because of the notice party's refusal to complete a certificate of

discharge. At that time, the appellant was the provider of two PRSA's to the notice party. It was regulated as a PRSA provider and registered administrator by the Pensions Authority.

23. In those circumstances, I am satisfied that the appellant came within the definition of a "pension provider".

Did the appellant come within the definition of an FSP under the 2017 Act at the relevant time?

24. I must next address the appellant's argument that it was not an FSP at the relevant time. If that argument is correct, then the respondent's decision is necessarily unlawful. As identified above, under s.42 a complaint may be made in respect of the conduct of a financial service provider *inter alia* involving the provision of a financial service by the FSP or a failure by the FSP to provide a particular financial service requested by the complainant. An FSP includes a regulated FSP within the meaning of s.2(1) of the Central Bank Act 1942.

25. The appellant accepts that it is an FSP regulated by the Central Bank in respect of specific activities, namely as an insurance, reinsurance and ancillary insurance intermediary, as an investment firm and as a product producer (paragraph 54 of the appellant's written legal submissions). However, it argues that the services it provided to the notice party in its capacity as a PRSA provider were regulated by the Pensions Authority and not by the Central Bank and therefore it was not captured by the definition of regulated FSP in respect of the complaint the subject matter of these proceedings. It adds that it does not in fact provide any services regulated by the Central Bank.

26. The respondent argues that the appellant is an FSP being a regulated FSP within the meaning of the Central Bank Act. The respondent relies in this respect upon the footer

of the appellant's letters which states that the appellant is regulated by the Central Bank of Ireland. The respondent also notes that the appellant's terms of business detail that it is regulated both by the Central Bank and the Pensions Authority as follows:

> *"In this booklet we will outline the terms which apply when you engage Independent Trustee Company Limited ("ITC", "we", "us") to provide services to you. You should read the terms in conjunction with any letter of engagement which you receive in respect of the services(s) you have asked for. Independent Trustee Company Limited, part of ITC Group, is regulated by the Central Bank of Ireland.*
>
> *All our pension schemes are subject to the regulatory oversight of the Pensions Authority and the Revenue Commissioners.*
>
> ***Please note that the provision of some of our products or services do not require licensing, authorisation, or registration with the Central Bank of Ireland and, as a result, it is not covered by the Central Bank of Ireland's requirements aimed at protecting consumers or by a statutory compensation scheme**."* (Emphasis original).

27. The respondent also relies on paragraph 49 of the affidavit of Mr. Nielsen of the appellant where he says that it is an FSP regulated by the Central Bank as an insurance intermediary investment firm and a product producer. The respondent notes that a product producer is listed by the Central Bank on its website as an FSP which provides financial products and issues appointments to intermediaries or an intermediary which may issue appointments to other intermediaries.
28. Additionally, the respondent draws my attention to the following section from the website of the Pensions Authority setting out the division between their regulatory responsibilities:

"The Authority and Revenue are jointly responsible for approving PRSA products. The Authority supervises the activities of PRSA providers in relation to their approved products and monitors compliance with PRSA legislation. The Central Bank of Ireland is responsible for the prudential supervision of PRSA providers and the supervision of the sales process of approved PRSA products."

29. I think a distinction must be drawn between the statutory definition and the evidence that I have from publicly available material emanating from the Central Bank and Pensions Authority in relation to the types of activity that are regulated. Neither of those bodies were consulted or made submissions to the respondent prior to the decision being made. Trying to draw a conclusion as to whether the activity the subject of the complaint is or is not a matter regulated by the Central Bank from publicly available material, where that material is not entirely clear, and where both parties are adopting conflicting positions, gives rise to obvious difficulties. These difficulties are accentuated where neither this Court, nor the respondent when making the decision, have heard directly from the Central Bank or the Pensions Authority. In those circumstances, it seems to me that I should proceed by considering whether the appellant should be treated as coming within the definition of an FSP exclusively by reference to the terms of the 2017 Act.

30. The definition of an FSP includes, "*a regulated financial service provider within the meaning of section 2 (1) of the act of 1942.".*

31. Section 2(1) of the Central Bank Act 1942 (the "1942 Act") as amended, *inter alia,* provides that "*financial service provider" means a person who carries on a business of providing one or more financial services".*

32. The 1942 Act defines "regulated financial service provider" at s.2 as:

"(a) a financial service provider whose business is subject to regulation by the Bank under this Act or under a designated enactment or a designated statutory instrument,

…"

Section 2 of the 2017 Act provides that financial services include financial products.

33. As identified earlier, the 2017 Act provides under s.44 that a complainant may make a complaint to the Ombudsman in relation to the conduct of an FSP, *inter alia*, involving the provision of a financial service by the provider or a failure to provide a financial service requested by the complainant. The core position of the respondent is that the appellant is an FSP because in this case it is a regulated FSP within the meaning of the 1942 Act. As identified above, to be a regulated FSP, a body must be an FSP whose business is subject to regulation by the Central Bank. That is the case here.

34. To come within s.44(1)(a), it must be an FSP engaged in conduct involving a financial service. Financial services include financial products. There is no definition of financial products in the 2017 or 1942 Act. The definition of financial service is so extensive that it appears to me to include the transfer of the proceeds of a PRSA. Because the appellant was a registered FSP under the 1942 Act and thus within the definition of an FSP, and because it was providing a financial service when transferring the proceeds of a PRSA, I conclude that it comes within the definition at s.44(1)(a) i.e. it was engaged in conduct involving a financial service.

35. Given the breadth of the statutory definitions, I cannot uphold the appellant's argument that it does not come within the definition of an FSP. The appellant's argument that it is an FSP regulated by the Central Bank only in respect of specific activities i.e. as an insurance, reinsurance and ancillary insurance intermediary, an investment firm and a product producer, ignores the width of the definition in the 2017 Act of an FSP and

financial services. Those definitions focus upon the fact of being regulated by the Central Bank and not the purpose for which the entity is regulated. Section 44(1) permits a complaint to be made about conduct involving the provision of a financial service. The fact that the regulation of the appellant by the Central Bank is apparently employed to authorise activities other than those the subject of the complaint cannot, in my view, be used to conclude the appellant is not an FSP providing a financial service. The statutory definitions simply do not provide for any such distinctions to be drawn in that regard.

36. Moreover, that approach is inconsistent with the appellant's approach to the interpretation of "pension provider" under the same Act. In that context, the appellant is at pains to point out that the 2017 Act operates in a purely descriptive manner, meaning once a body meets the description (distinct of any other question e.g. the conduct at issue) it is captured by that section (see paragraph 45 of its submissions). In my view, precisely the same approach is taken by the 2017 Act in relation to a complaint under s.44(1)(a).

37. Indeed, in the appellant's written submissions, the width of the definition is acknowledged. In the alternative, it argues that if the definition of an FSP is sufficiently broad to encapsulate the appellant on account of the fact that certain of its activities are regulated by the Central Bank, then, even if the appellant was acting as both pension provider and an FSP, it remains the case that it was not open to the respondent to treat the notice party's complaint as anything other than a complaint to be determined under s.61.

38. Accordingly, I reject the appellant's argument that the respondent's decision must fail as the appellant did not come within the definition of an FSP.

Where a body comes with the definition of both an FSP and a pension provider, does the 2017 Act permit the respondent to choose between proceeding by way of s.60 or s.61?

If so, what legal principles apply to the respondent's choice as between s.60 and s.61?

39. The question as to whether the respondent has the power under the 2017 Act to elect to deal with a case either under s.60 or under s.61 and, if so, how that decision is to be made, is a question of pure statutory interpretation. As such, according to well established principles of review, any decision made by the respondent in this respect is not entitled to deference from a court and will not be judged according to the *Ulster Bank* standard.

40. On this question, the appellant makes various arguments. Principally it submits that the gateway provisions in s.44 of the 2017 Act, separating complaints as against FSPs and pension providers, create a clear distinction between the two regimes. It argues that the respondent sought to disregard this distinction in purporting to choose to apply s.60 in circumstances where there was no express power allowing for this course. Additionally, the appellant goes on to argue that utilising non-statutory factors, other than the status or description of the party complained of, to differentiate between complaints, is inconsistent with large swathes of the 2017 Act which, it is submitted, demonstrate a clear preservation of the distinction between both regimes.

41. Finally, it is contended that were the respondent's statutory construction adopted, it would render s.44(1)(b) a nullity as each pension provider, who also happened to be an FSP, that provided a service to a complainant could potentially and without limitation be subject to the procedure under s.44(1)(a). It is argued that such a construction is not only inconsistent with the broader statutory scheme, but it could lead to the circumvention of the strictures imposed on the respondent preventing interference in

respect of the rules of schemes and the exercise of discretionary powers by pension providers.

42. The respondent similarly argues that s.44(1)(a) and (b) are gateway provisions that distinguish between two separate forms of complaint. However, in circumstances where the provider is both an FSP and a pension provider, the respondent submits it must be entitled to determine which section the complaint should be completed under. The respondent argues that construing the 2017 Act as a whole, he is entitled to determine whether it is appropriate to complete a complaint investigation under s.60 or s.61 and that, even if the power to make such a determination is not provided for in Part 6, it must be found by implication having regard to the statutory scheme as a whole.

43. In that respect he identifies s.56 and sections 12(1), 12(2), 12(3), 12(4) and 12(11) as the relevant sections that govern both his entitlement to select a route and identify the criteria he should apply when so selecting. Those sections provide in relevant part as follows:

> *"56. (1) The conduct of investigations under this Part shall be undertaken as the Ombudsman considers appropriate in all the circumstances of the case and in a manner that is appropriate and proportionate to the nature of the complaint.*
>
> *12. (1) The principal function of the Ombudsman shall be to investigate complaints in an appropriate manner proportionate to the nature of the complaint by—*
>
> *(a) informal means,*
>
> *(b) mediation,*
>
> *(c) formal investigation (including oral hearings if required), or*

(d) a combination of the means referred to in paragraphs (a) to (c).

(2) The Ombudsman shall have such powers as are necessary or expedient for the performance of the functions conferred by this Act.

(3) The Ombudsman shall endeavour to—

(a) be accessible to the public and ensure that complaints about the conduct of financial service providers or pension providers are dealt with in an informal manner efficiently, effectively and fairly,

…

(4) The Ombudsman shall establish and maintain efficient and effective systems and procedures for the investigation and adjudication of complaints in a timely and effective manner.

…

(11) Subject to this Act, the Ombudsman, when dealing with a particular complaint, shall act in an informal manner and according to equity, good conscience and the substantial merits of the complaint without undue regard to technicality or legal form."

44. The respondent argues that accordingly he must investigate complaints in a manner proportionate to the nature of the complaint and has such powers as are necessary or expedient for the performance of his functions. Having regard to those statutory provisions, he argues that the appellant is incorrect to suggest that the 2017 Act does not allow him to differentiate complaints by reference to their substance.

45. In respect of the question as to whether he is entitled to select the appropriate route, he places particular emphasis upon s.12(2), which gives him such powers as are necessary or expedient for the performance of the functions conferred by the 2017 Act.

46. Section 44 has been described as a gateway but in this case the gateway has opened in respect of both categories. The 2017 Act does not explicitly, as the appellant notes above, address the situation where a complaint is made against a body that can be characterised as both a pension provider and an FSP. Significantly however, s.12(2) gives the respondent such powers as are necessary or expedient for the performance of the functions conferred by the 2017 Act. The resolution of complaints is undoubtedly a function conferred by the 2017 Act. Where a complaint potentially falls under s.44(1)(a) and (b), and there is no explicit mechanism in the 2017 Act as to how to identify the appropriate route, it seems to me that the entitlement to select the appropriate route is a necessary power to allow the respondent to resolve the complaint. Were this not so, the outcome could result in the absurd situation where the respondent could not resolve a complaint falling under both s.44(1)(a) and s.44(1)(b). Accordingly, it seems to me that the respondent must be taken to have the power to select the appropriate route.

47. The question then arises as to what criteria are to be employed by the respondent in choosing whether to proceed under s.60 or s.61. Under s.12(11) when dealing with a complaint, the respondent is entitled to act *inter alia* according to the substantial merits of the complaint and without regard to technicality or legal form. As a matter of statutory construction, it seems to me that s.12, and especially s.12(1), as well as s.56(1), when read together, give the respondent significant discretion as to how to approach an investigation, including selecting the appropriate complaint route when a provider meets both the definition of an FSP and pension provider. Section 56 identifies

that the test is one of appropriateness and proportionality having regard to the nature of the complaint. Assuming a provider is both a pension provider and an FSP, that means the respondent is entitled to consider the factual nature of the complaint and decide whether resolution under s.60 or s.61 is more appropriate and/or proportionate, depending on the characteristics of the complaint.

48. The essence of the appellant's objection to the respondent's approach is that he has not applied the language of the statute but has instead impermissibly relied on "nebulous, ambiguous, uncertain and…subjective criteria" in coming to his determination.

49. The appellant, on these arguments, ignores the entitlement under s.56 and s.12 to decide which provision is more "appropriate" and/or "proportionate", having regard to the "nature" of the complaint. Accordingly, the respondent has not impermissibly engaged in the application of vague criteria. Rather he has simply exercised the very significant discretion conferred on him by the Oireachtas. However "nebulous" or "ambiguous" the standard of appropriateness/proportionality may be on the appellant's contention, that is the rubric identified by the legislature.

50. Insofar as the appellant argues that this approach would subvert the clear distinction between a complaint under s.60 and s.61 where a complaint potentially comes under both sections, the statutory scheme requires the respondent to justify his choice by reference to the nature of the dispute and the test of appropriateness. If a dispute was squarely about the interpretation of the rules of a scheme for example, it is difficult to see how the respondent could justify a finding that the nature of the dispute made it appropriate for resolution under s.60. Accordingly, the statutory provisions constrain the exercise of the discretion by the respondent. This means that the legitimate fear identified by the appellant i.e. that the strictures imposed on the respondent under s.61

in respect of the rules of schemes and the exercise of discretionary powers would be circumvented, is unlikely to be realised.

What is the standard of review this Court should apply when reviewing a decision of the respondent to choose one section over the other?

51. As observed above, deciding whether the respondent has power to elect between s.60 and s.61, and the statutory criteria applicable to that choice, is a question of pure statutory construction and the respondent is not entitled to deference in respect of his decision in that respect. However, the position alters when I am considering the legality of the respondent's decision that the appropriate way to proceed was to treat the complaint as one against an FSP.

52. The appellant argues that because questions of statutory interpretation lie at the core of this appeal, the approach adopted in *Quinn Direct Insurance Limited v Financial Services Ombudsman* [2007] IEHC 323 and *Millar v Financial Services Ombudsman* [2015] IECA 126 is particularly apposite i.e. in relation to pure questions of law, the High Court should not adopt a deferential stance to a decision of the respondent. The appellant notes that in *Millar* the Court of Appeal held that the issues to be determined, being the construction of contractual provisions, concerned a mixed question of fact and law.

53. The respondent identifies the factual element of his decision as relating to the nature of the complaint and the service the appellant proffered as a regulated FSP. He submits curial deference must be afforded on that aspect of the finding. He identifies that the question as to whether a complaint should be dealt with under s.60 or s.61 is a mixed question of fact and law. As such, the traditional *Ulster Bank* test applies i.e. the appellant bears the onus of establishing as a matter of probability that, taking the adjudicative process as a whole, the decision reached was vitiated by a serious and

significant error or series of errors and the Court has regard to the degree of expertise and specialist knowledge of the respondent.

54. I agree that the nature of the review is one of appropriateness and proportionality having regard to the circumstances and/or the nature of the complaint. Consequently, the question as to whether the respondent acted correctly in determining this complaint under s.60 as opposed to s.61 must be a mixed question of fact and law, as opposed to one of statutory construction. That is because the respondent is entitled to look at the facts and circumstances of the complaint and to evaluate the nature of same accordingly. His experience and expertise undoubtedly come into play at this point. Equally, his review as to what is "appropriate" (or proportionate, if that is relevant) is likely to involve both factual and legal considerations, and to be informed by his expertise and experience. In the circumstances, the respondent's decision is entitled to significant deference.

In the circumstances of this complaint, was it "appropriate" for the respondent to consider the complaint under s.60?

55. At paragraph 53 of its submissions, the appellant argues that the respondent fundamentally erred in determining the complaint was not about or did not concern a pension scheme. It notes that the PRSA lay at the core of the relationship between the appellant and notice party. The complaint related to the transfer of the scheme. There were no contracts in being between the parties, other than that of PRSA provision. The respondent had previously accepted in the decision that the complaint related to a pension scheme.

56. The arguments at para. 56-57 of the submissions are in similar terms, essentially submitting that the proposition relied upon that the complaint did not relate to a pension scheme is incorrect, and that no elaboration was provided by the respondent other than

stating that a consideration under s.61 would be inappropriate. It is submitted s.44(1)(b) and s.61 must therefore apply to this complaint.

57. The operative part of the decision in this respect is brief and I have already cited it above. In short, the respondent concludes that the *"complaint is not about the pension scheme"* but rather "*relates to the service the Provider proffered as a regulated financial services provider*". As such, the respondent concludes it would not be "*appropriate*", to consider the appellant's conduct as it relates to the complainant and the complaint under s.61 of the 2017 Act, as it concerns the conduct of the appellant as a regulated FSP.

58. To evaluate the legality of the decision, it is necessary to consider the substantive conclusion reached on the complaint. The complaint, as summarised by the respondent at page 2 of his decision, is that the appellant has wrongfully refused to transfer the notice party's pension as requested i.e. the refusal to transfer same on terms acceptable to the appellant. The respondent concludes that it was unacceptable to impose a term requiring the notice party to complete a certificate of discharge despite the existence of a "willing and able" letter from the new provider, where the terms of business between the parties did not provide for a certificate of discharge.

59. This conclusion is based upon the appellant's terms of business in relation to the scheme. At page 7 of the decision, quoting his own preliminary decision, the respondent held as follows:

> *"If the Provider intends to rely on such a policy [requiring a certificate of discharge be fully completed before transfer], I believe this should form part of the terms of business between the parties at the outset and it should be expressly explained and set out in the terms of business. In addition, any such term could not operate to interfere with Section 108 (1) of the Pensions Act (as amended).*

It is not sufficient to seek to unilaterally impose this company policy with the net effect of withholding a transfer because the policy wasn't adhered to when in fact the Provider was required by law and in compliance with the terms of business to give effect to the transfer."

60. The terms of business are exhibited to the affidavit of Mr. Nielsen sworn 27 October 2021. They identify that a number of documents make up the PRSA, including the appellant's terms of business. When one reviews the terms of business exhibited to Mr. Nielsen's report, there are no specific rules within them about the transfer of a PRSA to another provider. The only reference to transfer to another provider may be found at section 4H.2 where it is stated that ITC *"can only transfer investment funds to other providers where all fees and expenses are paid up until the date when the new provider takes custody*". No reference is made in the terms of business either to the necessity for a certificate of discharge nor indeed a willing and able letter.
61. The respondent notes that the appellant's PRSA brochure provides at page 12, s.3.8.1 under the sub heading "*Transfer of your policy*" that "*You may transfer your accumulated PRSA portfolio to another PRSA provider*".
62. The respondent contrasts the terms of business in relation to PRSA's with those applicable to a different pension product, an SSAS. In those terms, there is a specific provision headed up "Transfers" at section 2C. Section 2C.2 provides as follows: *"Transfers from an ITC SSAS are subject to the Provider of the recipient pension scheme providing us with evidence that it is willing and able to receive the benefit.".* This is what is known as the "willing and able" letter.
63. He acknowledges in his decision that the appellant would have been entitled to request that a certificate of discharge be completed but that same would have to be explicitly provided for in the terms of business. In this respect, he noted that any such term could

not operate to interfere with s.108(1) of the Pensions Act as amended which provides, *inter alia*, that any provision of a PRSA contract purporting to prohibit a contributor from entering into another PRSA contract and transferring his PRSA assets to the PRSA provider with whom he has entered into the other such contract shall be void.

64. He notes that the provider had sought to rely on Section 1A.3 of the terms of business - "*You must provide us with complete and accurate requests, information and documentation and disclose all facts that may be relevant to the engagement or that we may otherwise request*" - but concludes that such a broad general statement was not sufficient to justify a requirement for further documentation.

65. In summary, in coming to his conclusion that the appellant was not entitled to withhold the transfer due to the lack of a certificate of discharge where such certificate was not a legal or contractual precondition to a transfer, the respondent relied on two core points:

    (i) that the terms of business relating to the PRSA did not require a certificate of discharge and;

    (ii) if the appellant wished to rely on its policy necessitating a certificate, it was necessary that same would form part of the terms of business between the parties at the outset, bearing in mind that s.108 of the Pensions Act makes void, *inter alia*, any provision of PRSA contract purporting to prohibit a contributor from transferring his PRSA assets to a new provider.

66. I have already identified that the respondent enjoys very considerable discretion in deciding whether to dispose of a complaint under s.60 or s.61 and that a court should only interfere with his choice if the decision is vitiated by a serious error.

67. The approach the respondent took in deciding upon the complaint was to consider the terms of business that applied to the PRSA in question. Because the rules of the scheme

i.e. the terms of business in this case, did not include a provision in respect of certificates of discharge on transfer, the respondent decided such a requirement could not be imposed. In other words, the complaint about the appellant's conduct was resolved by looking at the rules in relation to the scheme. The absence of any provision requiring a certificate of discharge in the case of a transfer in the terms of business led the respondent to conclude the requirement for a certificate of discharge was impermissible. He acknowledged that had the terms included provisions requiring transfers to be subject to a certificate, the outcome of the complaint might have been quite different. In other words, he looked to the terms of the scheme to resolve the complaint.

68. But critically, he concluded that nothing in the rules of the scheme applied to the decision of the appellant to request a certificate of discharge. The respondent is not making a finding that transfers cannot be the subject of a pension scheme or the rules governing the scheme but rather that, in this case, the specific issue that arose i.e. whether it was permissible to restrict transfer because of the lack of completion of a certificate of discharge, was not addressed in the rules of the scheme and therefore the complaint was not "about" the scheme. I can find no serious mistake in that conclusion.

69. The fact that the scheme could have provided for such a requirement, as explicitly found by the respondent, does not in my view bring the complaint within the remit of the scheme. Nor does the fact that the respondent referred to the Pensions Act in observing that such a rule would have to be provided for explicitly, mean that the complaint was about the pension scheme or had to be determined under s.61. The position would have been different, for example, if the dispute had been about whether the appellant had correctly refused to transfer because of outstanding fees, since as identified above, the entitlement to refuse a transfer where fees are outstanding is an explicit part of the terms

of business in relation to PRSAs. In such a situation, the rules of the scheme would have clearly covered the issue and it is difficult to see how the respondent could justify a decision that it would not be appropriate to decide the complaint pursuant to s.61.

70. But that was not the case here. The dispute was not governed by the rules of the scheme and therefore the conclusion of the respondent that the complaint was not "about" the pension scheme cannot be characterised as a mistake. An argument might be made that if one looks to the rules of scheme to see whether they cover a particular dispute, then the dispute is *ipso facto* "about" the scheme; but that is a somewhat strained and unsatisfactory approach in my view. Where the legal test is one of appropriateness, and the respondent has significant discretion, a decision that the complaint is not "about" the scheme, where it is not covered by the rules of the scheme, cannot be treated as a serious mistake.

71. Complaint has also been made by the appellant that there is no factual nexus between the activity being carried out by it in transferring the pension, and its activities as an FSP. It is undoubtedly the case that the decision does not in any way seek to explain why the dispute as to transfer came within the activities carried out by the appellant. The approach by the respondent appears to have been that because it was inappropriate to treat the complaint as one coming under s.61, by default, in the absence of any other available provision, the conduct was that of a regulated FSP and thus appropriate for determination under s.60. In other words, if it was not appropriate to treat the complaint under s.61, then it must be appropriate to treat it under the only other available route i.e. s.60.

72. I have already identified that the appellant is an FSP. If the appellant did not come within the definition of an FSP, then clearly it would not be appropriate to proceed on that basis. But where there was no other alternative open to the respondent on his own

approach, and where the appellant comes within the definition of an FSP, I cannot conclude that a serious mistake was made in treating the complaint as one under s.60. This is particularly so given the wide scope available to the respondent in evaluating what is “appropriate”.

73. In summary, the respondent clearly had regard to the nature of the complaint as he was obliged to do. His conclusion that that s.60 was the appropriate route cannot be characterised as a serious error given the context as identified above. In the circumstances I cannot agree that there was a serious error in his decision to proceed under s.60.

Conclusion

74. In the premises I refuse the relief sought.

75. I propose 4 November at **10.30am** for a **remote hearing** on costs and final orders. The parties have liberty to apply for a different date but if they wish to do so, they should agree a date and propose same in writing to the Registrar.