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|---|---|
| **Decision Ref:** | 2022-0249 |
| **Sector:** | Investment |
| **Product / Service:** | Pension Transfers |
| **Conduct(s) complained of:** | Failure to advise on key product/service features |
| **Outcome:** | Rejected |

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

The complaint relates to the closure of a fund under a personal pension policy. It is suggested that the clause relied on by the Provider to close the fund in question is an unfair term within the meaning of the European Communities (Unfair Terms in Consumer Contracts) Regulations 1995, SI No 27/1995 (as amended) (**UTCC Regs**).

As the complaint was first received by the Financial Services Ombudsman's Bureau ("FSOB") in 2013, references in this Decision to "this Office" should be taken to include both the Financial Services and Pensions Ombudsman and its predecessor, the Financial Services Ombudsman's Bureau.

### The Complainant's Case

The Complainant argues that in **May/June 2010**, after researching different pension investment options, he decided to transfer his personal pension plan from a third party into the Provider's Gold Fund. The Complainant states that he made it very clear to the Provider that this was his pension fund and he was very specifically investing in the Provider's Gold Fund for the long term. The Complainant states that, entirely against his wishes in **May/June 2015**, the Provider transferred the funds into its high yield fund.

The Complainant argues that the Provider justifies what he refers to as unauthorised actions based on clause 2(3) of the policy terms. The Complainant states on reading these terms, he recognises that clause 2(3) falls within the unfair terms in consumer contract rules, as the provisions are all embracing and unfairly open ended and restrictive.

The Complainant submits that his original pension fund was with a third party incorporating a diversification split of 50/50 between gold and silver. He argues that he very consciously opted for 100% gold for the long term. The Complainant submits that he informed the Provider that he was not consenting to the proposed change and he did so by contacting it by email several times during the appropriate timeframe. He argues that the Provider entirely disregarded his wishes and went ahead and transferred his funds to another entirely different plan.

The Complainant submits that his fund had already suffered a downturn but he was in the fund for the long term and an important part of the strategy was that he would wait for the bounce back from the medium and short term peaks and troughs.

The Complainant alleges that the Provider's response to his complaint demonstrates an effective bias against him. He submits that the comparison of the Gold Fund and the alternative high yield fund at a point in time in **December 2015** is irrelevant, given the intended unexpired medium-term timescale during which the Complainant wished to remain in the Gold Fund. He argues that the giving of notice is of little relevance or merit to him. The Complainant argues that instead of closing off the Gold Fund, the Provider could have geared down the existing Gold Fund over a phased timescale, perhaps while not taking on any new business for the specific fund.

The Complainant takes the view that this Office is entitled to consider the UTCC Regs in adjudicating complaints. In the alternative, the Complainant submits that given that the conduct complained of was the Provider's refusal to provide a financial service, this Office could still determine that the refusal was unreasonable, unjust, oppressive or improperly discriminatory in its application to the Complainant.

The Complainant argues that, having been sold a gold product which incurred short terms losses (as he would anticipate consistent with the product risk-taking), he was compelled to accept substantial losses as the bottom of the gold performance cycle in **2015**. He argues that he was not given the opportunity to allow his gold product to recover and regain continuing profitability. He argues that the Provider was aware of his normal retirement date in **November 2017**.

The Complainant asked for the Provider to either restore his pension investment into a gold related fund henceforth as a medium or long term investment or, in the alternative, to compensate him.

**<u>The Provider's Case</u>**

The Provider submits that a review of its investment fund range was carried out in **2015** to ensure that it offers funds that it believes are most appropriate to all of its customers. It submits that the objective is having a more focused range of funds available, with greater potential growth opportunities in the longer term.

/Cont'd…

The Provider submits that its overall objective is to help customers meet financial goals by offering competitive funds managed by world class fund managers. The Provider argues that it has received consistent feedback centered on the need to take the complexity out of the fund selection process, while retaining the funds that are most likely to help customers achieve their financial goals. The Provider argues that it has acted appropriately in this regard and the needs of its customers have been at the centre of the review of its investment fund range.

The Provider argues that decisions have not been taken lightly and are taken after research, deliberation and a thorough process of review. It argues, however, that it is entitled to take such decisions and the suggestion that it is unable to close, merge, split or replace a fund so as to continue to meet the needs of its customers, is a serious one that would have wide-ranging and negative implications, both on the Provider and its customers and the wider industry.

It submits that it would not be reasonable or practical for a financial service provider to only be able to close a fund once all customers have consented. It argues this would essentially mean that it would be difficult, to the point of impossibility, to close a fund.

The Provider argues that as part of its review, the decision was made to close the Gold Fund at issue and any customers invested in that fund were written to in advance, to tell them of the change. The Provider argues that all customers within the fund had the option to switch to an alternative fund if they did not wish to transfer to the fund suggested by the Provider. The Provider argues that it is important to note that the Complainant had and retains the right to transfer his personal pension plan to an alternative financial service provider, which may offer a Gold Fund.

The Provider submits that the Complainant's original investment in **2010** was 50% in the Gold Fund and 50% in a mining fund. The Provider submits that the Complainant moved 100% of his investment to the Gold Fund in **October 2012**.

The Provider denies that clause 2(3) is an unfair term under the UTCC Regs. It refers to the UK decision in *Director General of Fair Trading v First National Bank* [2001] UKHL 52 on the corresponding UK provisions which shows how the courts may interpret the requirements. This decision suggests that the requirement of significant imbalance must result in a term being so weighted in favour of a supplier as to tilt the parties' rights and obligations under the contract significantly. It also suggests that appropriate prominence should be given to terms under the good faith requirement.

The Provider argues that the clause has to be assessed in the context of the contract as a whole, and its relationship and dealings with the customer under the contract. The Provider argues that it is clear to it, that clause 2(3) of its policy terms does not cause a significant imbalance in the parties' rights and obligations under the contract, to the detriment of the customer having regard to "*the nature of the goods or services for which the contract was concluded and all circumstances attending the conclusion of the contract and all other terms of the contract*".

/Cont'd…

The Provider submits that it has acted openly and transparently both in terms of the inclusion of the standard term and in exercising its rights under it, in compliance with its regulatory obligations.

It submits that the inclusion of a provision allowing for life insurance companies to re-organise their fund offerings is a standard term. It submits that its objective in closing some funds, is to have a more focused range of funds available with greater potential growth opportunities in the longer term, in the interests of all customers. It submits that it operated the provision openly and fairly to include giving advance notice to the Complainant with an opportunity to switch into another fund of his choice before switching into the target fund identified by it, in the notice to the Complainant.

The Provider submits that the target fund was chosen as representing the nearest equivalent fund in its fund offering. It submits that to ensure customers are switched to an appropriate fund, factors including a customer's risk appetite, charges applied, and asset mix of the fund are considered. It argues that it no longer offers any gold or other commodities funds so it was not possible to switch the Complainant to an alternative gold or commodities fund. It submits that the high yield fund was the most appropriate fund available and the Complainant could switch out of it at any time. The Provider states that it sent the Complainant a fund factsheet in advance of the switch which included detailed information about the new target fund. It argues that the transferring fund (ie the Gold Fund) was Risk 7 and the target fund (ie the high yield fund) was Risk 5.

The Provider submits that between **June** and **December 2015**, the performance of the high yield fund was +0.1% while the performance of the Gold Fund was -18.9%. It therefore submits that the fund closure has actually been financially beneficial to the Complainant insofar as it has prevented him from sustaining further losses in his investment in the Gold Fund.

The Provider argues that it dealt fairly, openly and equitably with the Complainant and took into account his legitimate interests by giving appropriate notice, an opportunity to switch without charge into another fund of his choice from the fund offering, and selecting an appropriate target fund. It argues that it did not take advantage of the Complainant's lack of experience or unfamiliarity or weak bargaining position. It submits that this demonstrates that the term is not contrary to the requirement of good faith.

The Provider submits that it complied with its obligations under the Consumer Protection Code (**CPC**).

The Provider submits that it has done some research in the market and as far as it is aware, the Gold Fund in question is not currently made available by any other life insurer in Ireland. It submits that the fund is part of an open-ended investment company established in Luxembourg and could possibly be accessed through a fund platform or directly from the product producer. The Provider submits that the Complainant has had the option to switch his personal pension plan to a financial service provider, which may offer an alternative fund that he may prefer, such as another Gold Fund. In that regard it submits he should consult his financial advisor.

/Cont'd…

The Provider argues that it had no plans to close the Gold Fund at the time when the Complainant invested in it in **2010**. It argues that as part of its fund proposition review, it decided to reposition its fund range and in **February 2015**, its strategic change board decided that the Gold Fund would be closed.

The Provider argues that the Complainant was made aware from the outset that the particular fund chosen by him may not always be available to him to invest in. It argues that the wording of the policy documentation given to the Complainant in **2010,** when he took out the policy, includes clause 2(3) which allows it to close funds at any time. It submits that this is a standard term of its investment policies. Further, it submits that the Complainant was furnished with a standard 30 day cooling off notice and could have cancelled the policy if he determined that he did not wish to continue with the product.

The Provider submits that it has a clear, unambiguous and fair contractual entitlement to close the fund. Further it submits that the decision to close the fund, was taken after a detailed process of review and consideration. The Provider submits that the Complainant sustained losses on this investment within the Gold Fund, and while the Provider sympathises with this and can understand his desire to maintain his investment for a hoped-for bounce back, it had to act on the needs of its wider customer base.

In respect of jurisdiction, the Provider accepts that this Office is entitled to consider whether a contractual term is unfair in accordance with the UTCC Regs in a particular complaint but it argues, however, that the Office would be precluded from making a direction prohibiting the Provider's use of the clause more generally and in respect of other policyholders.

The Provider submits that such a direction would impact its fund offering and current business model. It submits that the ability to close funds is fundamental to delivering a fund proposition range which best meets the needs of its customers. It submits that this would also have potentially significant repercussions for the life insurance industry more generally. The Provider argues that such a direction could constrain the exercise of long established contractual rights that it has demonstrated to have been exercised in a manner that is fair and transparent to customers.

The Provider argues that Reg 8(1) UTCC Regs reserves to the courts the power to make a declaration that any term drawn up for general use in contracts concluded is unfair, and/or that there should be a prohibition on the continued use of the term. In that context, the court must consider all interests involved, including the public interest.

<u>**The Complaint for Adjudication**</u>

The complaint is that the Provider acted incorrectly when it sought to transfer the Complainant's money out of its Gold Fund.

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**Decision**

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

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

A Preliminary Decision was issued to the parties on **20 June 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. Following the consideration of additional submissions from the parties, the final determination of this office is set out below.

I note that the Complainant opened a personal pension policy with the Provider in and around **June 2010**. He surrendered a previous plan held with a third-party provider in the sum of **€49,357** and invested it in the new personal pension plan with the Provider.

The Complainant's application form dated **3 June 2010** indicated that he was applying for a single premium pension. This was submitted through a third-party intermediary/broker.

By letter dated **19th June 2010**, an ***Important Notice*** was sent to the Complainant in the following terms:

> *"**Make Sure The Policy Meets Your Needs***
>
> *Your [personal pension] is a single premium pension, designed to encourage you to save for your retirement.*
>
> *The transfer value invested is €49,357.13.*
>
> *Your policy is a unit linked plan. As each premium is paid, units are bought in the fund of your choice. Units are purchased at the offer price, which is determined by the total value of the fund and the number of units in existence. When you encash your policy, units are sold at the bid price.*

/Cont'd…

*The number of units allocated to your policy at any given time with the price of those units determines the value of your policy. You have a wide choice of funds available, including Irish and international equities, Cash and Gilts. You may if you wish, switch to different funds of any time, however there may be a small switching charge and switching restrictions may apply to some funds. Please consult your Policy Conditions for details.*

*The value of your policy is based on the value of the assets in the unit fund of your choice….*

***Right of Cancellation***

*If, after reading this notice carefully and having examined your policy document, you feel the policy is not suitable for your particular needs, then you may cancel the policy by sending a written instruction – both signed and dated – directly to [the Provider] within a period of 30 days from the date of this notice. Because this is an investment bond, you will be subject to any fall in the price of the units invested in the intervening period. On cancellation all benefits under the policy will stop immediately. …*

*The information contained in this document does not form any part of the contract between you and [the Provider]. The detailed terms and conditions of your Policy are contained in the Policy Schedule and Policy Conditions. …"*

According to his ***Policy Schedule*** dated **18 June 2010**, the Complainant's normal retirement date fell in [Month] **2017**. The allocation rate was 99% and the transfer value was €49,357. The Schedule stated that it was "*issued subject to the Policy Conditions*" and the application had been made by a third party intermediary.

The defined Benefit under the plans was as follows:

"***Pension Benefit***
*On the Insured's survival until [normal retirement age] or on prior death, the amount payable will be the Fund Value subject to the Policy Conditions.*

***Initial Fund Choice***
*Fund Name*
*[Gold Fund]* *50%*
*[mining fund]* *50%"*

I note that the Conditions of the personal pension provide as follows:

"*This policy consists of these general conditions and the Policy Schedule and any other schedule issued at a later date, which refers to these conditions.*

/Cont'd…

*This policy is a contract of assurance between us ([the Provider]) and you (the Person Assured named in the Policy Schedule) based on the application you made to us.*

*The pension Benefit under this contract is governed by Section 784 of the Taxes Consolidation Act 1997.*

*…*

***2. FUNDS***

*This section describes the operation of our investment-linked and with profit funds, how the unit price of a fund is determined and how allocations and switches are affected.*

*2.1 Each of our funds is divided into units. When a regular single premium is paid to this policy, the Investment Content of that premium is used to allocate funds at the unit price in your choice of funds.*

*2.2 The units are allocated solely for the purpose of determining your Benefits. You will not hold the units directly and the assets of each fund will at all times belong to us.*

*2.3 We can close, merge, split or replace any existing funds and we can set up new funds at any time. We can at any time restrict the number of funds that can be used for this policy. There may also be a minimum and maximum number of units held in any fund at anytime*

[my underlining added for emphasis]

*2.4 A list of our investment-linked funds and their details are available from us on request. Each investment linked fund has its own objectives. Within these objectives, we decide what investment-linked funds to invest in (which may include direct holdings and/or holdings and collective investment vehicles). We will add the income from the assets of any fund to the fund and any losses relating to the assets or met from the fund.*

*…*

*2.15 You can require us by notice in writing to change the funds in which your units are held. This will be affected through the cancellation of some or all of your existing units and the use of the proceeds from the cancelled units to allocate units in the chosen fund(s). The unit cancellation and the unit allocation will be affected at the unit price applicable in accordance with our then current practice on unit cancellations and unit allocations.*

/Cont'd…

*You may choose any investment-linked fund which is available when you are making your choice but we may refuse to agree to a change into a With Profits Fund in order to ensure fairness to existing policyholders with units in that fund. …*

*2.16 We may make a charge for switching funds. Currently the first six switches you make in each Policy Year are free. The seventh and every subsequent switch in that Policy Year will attract a charge. The charge will be that which applies at the time of the switch.*

*…*

***6. BENEFITS AT RETIREMENT***

*This section outlines the options available to you when you become entitled to your benefits on retirement.*

*6.1 The Policy Schedule shows your Normal Retirement Age.*

*…*

*6.4 At Vesting Date units will be cancelled to pay for the sum payable. The unit cancellation will be affected at the unit price applicable in accordance with our then current practice on unit allocation. …*

***7. GENERAL CONDITIONS***

*This section sets out the general terms relating to your policy. They should be read very carefully.*

*…*

*7.6 You can transfer a policy where payment of premiums has ceased to another approved pension plan. If you choose this option we will pay a transfer value. Units will be cancelled to pay for this sum payable. The unit cancellation will be effected at the unit price applicable in accordance with our then current practice on unit cancellation….”*

In **October 2012**, the Complainant exercised his entitlement under the policy to make a fund switch, choosing to place 100% of his investment in the Gold Fund. It appears that the value of his investment in the Gold Fund reduced considerably over the next few years. Thereafter, the Provider wrote to the Complainant by letter dated **8th May 2015** as follows:

"***Important change in your policy***

*…*

*We are getting in touch with you about the funds in which you are invested.*

/Cont'd…

*We are currently reviewing the investment solutions we offer our customers. As part of the review we have decided to have a more focused range of funds.*

*So in June 2015 we will close a small number of funds including the following funds you are invested in. You can switch funds at any time however if we do not hear back from you by 12 June we will transfer you into the new fund(s) listed below.*

| ***Current Fund*** | ***Risk Rating*** | ***New Fund*** | ***Risk Rating*** |
|---|---|---|---|
| *[Gold Fund]* | *7* | *[High Yield Fund]* | *5* |

*Each fund has a risk rating based on a scale of 1 to 7 with 1 being the lowest and 7 the highest.*

*We can also confirm that the changes which apply are in accordance with the terms and conditions of your policy.*

*We recommend that you talk to your financial broker to make sure the new funds suit your needs.*

***How do you find out more about your new funds?***

*It is important that you read the enclosed fact fun sheets for the new funds …. You can follow the performance of all funds in our fund center on [Provider's website]. Here you can view daily prices and performance, chart the performance of your funds and see daily and monthly fund summaries.*

*…*

***What do you need to do?***

*It is important that you satisfy yourself that the new funds meets your investment needs. … You should read the enclosed fund fact sheets carefully and pay particular attention to the investment warnings. We recommend that you contact your financial broker [X] prior to making any investment decisions*.”

In response, the Complainant sent an email to the Provider dated **21st May 2015** advising the Provider that he wished to have his funds remain in the Gold Fund, and stated that under no circumstances should his funds be altered or changed without his consent.

The Complainant received another letter from the Provider dated **27 May 2015** as follows:

“*Please note that due to fund rationalisation [Gold Fund] is going to close on 29 May 2015 and this fund will be automatically switched into the [high yield fund] as this is the alternate fund*.”

Following the letter of **27 May 2015**, the Complainant wrote again to the Provider by email dated **30 May 2015**, arguing that the Provider’s disregard of his email of **21st May** was unacceptable.

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The Complainant stated that the Provider was purporting to make very significant changes to his investment decision, without discussion and without his consent. He argued that he decided to invest in the Gold Fund for the long term, as it was a solid investment plan for the future with growth potential. He said he has not agreed to or consented to the change of investment fund. He further argued that the Provider was in breach of contract and had changed his fund without his consent.

By letter dated **18 June 2015**, the Provider wrote to the Complainant to confirm that it had closed the fund and that the value of **€19,802.46** which he held in the Gold Fund, had been transferred into the high yield fund.

The Provider responded to the Complainant's complaint by letter dated **25 June 2015** as follows:

> *"Thank you for your email dated 30 May 2015.*
>
> *I am writing to tell you I have now completed my investigation into the issues you raised.*
>
> *I see from your email dated the 30 May 2015 that you received a letter from [the Provider's agent] dated 27 May 2015 and are not happy that the [Provider's Gold Fund] is going to close and automatically switch into the [Provider's high yield fund].*
>
> *[The Provider's investors] are part of the [Provider's group] and are our main fund manager. In recent months, they have undertaken a review of the investment solutions they offer. As part of the review they decided to have a more focused range of funds and the [Gold Fund] is not part of that fund offering going forward and will be closed on June 12th.*
>
> *We feel that the remaining funds on our platform will give customers opportunities to grow their funds into the future.*
>
> *You can switch to an alternative fund of your choice at any time. We selected the [high yield fund] for you however we have a broad range of investment funds that you can choose from. We recommend your (sic) talk to your Financial Broker before making any investment decisions.*
>
> *You have 6 free switches available to you and are not affected by these closures. If you decide not to go with the default funds which are specified by [the Provider]; and make an alternative switch of your own choosing, this will not count as one of your free switches and the you (sic) will still have 6 free switches remaining.*
>
> *I know that you believe that [the Provider] are in breach of the contract. I have attached policy conditions for your policy. In section 2 Subsection (2.3) Funds. These conditions state We can close, merge, split or replace any existing funds and we can set up new funds at any time. Our letter of May 2015 also gave policyholders thirty days' notice of the fund closure as required by the Consumer Protection Code."*

/Cont'd…

On the basis of the above, in **May/June 2015**, the Complainant's investment was transferred by the Provider from its Gold Fund to a high yield fund, contrary to his specific wishes. The Provider relies on its entitlement to proceed with the transfer of the funds, in circumstances where the Gold Fund was closed in **June 2015**. The Provider emphasises that all customers, including the Complainant, were written to in advance, to notify them of the fund closure and to offer options for switching to an alternative fund, if the customers were disinclined to transfer to the fund suggested by the Provider. Reliance is placed by the Provider on clause 2.3 of the investment policy conditions, which prescribes as follows:

> "*We can close, merge, split or replace any existing funds and we can set up new funds at any time.*"

The Complainant has argued that this clause – which purports to allow the Provider to close funds at any time – is an unfair term within the meaning of the European Communities (Unfair Terms in Consumer Contracts) Regulations 1995, SI No 27/1995 as amended (**UTCC Regs**). The UTCC Regs implement Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts (**UTCC Directive**).

***Is Clause 2(3) Unfair?***

The UTCC Regs apply only to natural persons acting for purposes outside their business. As the contract at issue is a personal pension product, I am satisfied that the Complainant is such a person and hence is a consumer within the meaning of the UTCC Regs.

Further, the UTCC Regs apply only to contractual terms that have not been individually negotiated. It is common case that the term in dispute forms part of the Provider's general terms and conditions, so is a standard form clause that was not individually negotiated with the Complainant.

Reg 6(1) of the UTCC Regs provides that "*An unfair term in a contract concluded with a consumer by a seller or supplier shall not be binding on the consumer*."

Reg 3(2) defines an unfair term as follows:

> "*a contractual term shall be regarded as unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations under the contract to the detriment of the consumer, taking into account the nature of the goods or services for which the contract was concluded and all circumstances attending the conclusion of the contract and all other terms of the contract or of another contract on which it is dependent.*"

Reg 3(3) provides that regard should be had to the matters specified in Schedule 2, in determining whether a term satisfies that requirements of good faith. These will be considered below.

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The UTCC definitions mirror those of the parent Directive, the UTCC Directive. In particular, Art 6(1) states that:

> "*Member States shall lay down that unfair terms used in a contract concluded with a consumer by a seller or supplier shall, as provided for under their national law, not be binding on the consumer*"

A term cannot be found to be unfair under the UTCC Regs if it relates to the main subject matter of the contract or to the adequacy of the price and remuneration, provided that the term in question is expressed in plain, intelligible language. I do not consider that clause 2(3) relates to the main subject matter of the contract or to the adequacy of price and, therefore, it is appropriate for this Office to consider whether it is unfair, under the UTCC Regs.

As set out above, Reg 3(2) defines an unfair term as follows:

> *""a contractual term shall be regarded as unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations under the contract to the detriment of the consumer, taking into account the nature of the goods or services for which the contract was concluded and all circumstances attending the conclusion of the contract and all other terms of the contract or of another contract on which it is dependent."*

In assessing the requirements of good faith, account must be taken of the following factors set out in Schedule 2:

i. the strength of the bargaining position of the parties,
ii. whether the consumer had been offered an inducement to agree to the term,
iii. whether the goods or services were sold or supplied to the special order of the consumer, and
iv. the extent to which the seller or supplier has dealt fairly and equitably with the consumer whose legitimate interests he has to take into account.

Factors (ii) and (iii) do not appear directly relevant to the situation complained of by the Complainant. In terms of factor (i), I am satisfied that the Provider had the stronger bargaining position in this case and the standard contractual terms were offered to the Complainant on a '*take it or leave it'* basis. That said, the Provider was not the only entity offering personal pension products at the time, and so the Complainant was not without choice of provider in entering the contract in **2010**. As a matter of fact, he transferred his funds from a third-party provider to the Provider in **2010**.

In terms of factor (iv), I do not accept that there was anything unfair or inequitable in the manner that the Provider dealt with the Complainant. It is true that the Complainant did not want the Gold Fund to be closed and clearly expressed that he wished to continue his investment in that fund. His opinion on the matter was not taken into account by the Provider and the decision to close the fund had already been made by the Provider, on a unilateral basis. The Complainant had a number of options available to him, however, in light of the Provider's decision to close the Gold Fund.

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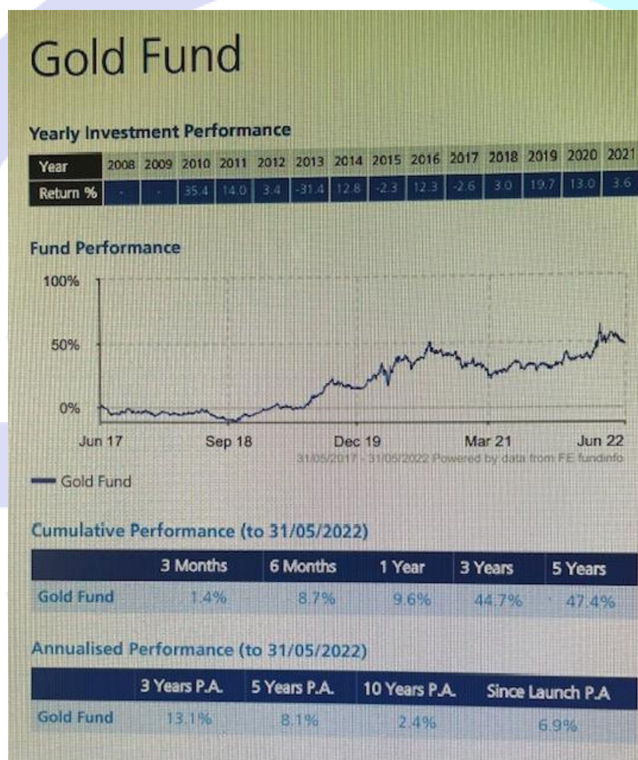
There were a number of alternative fund options available to the Complainant, to choose to invest his funds in, on the closure of his original fund choice. There was no cost to him in selecting another fund or funds to move his pension funds to. Further, he was entitled at all times, to move his pension funds to another pension provider who may have offered a fund that was more appealing to him. Indeed, I note that since the preliminary decision of this Office was issued in June 2022, the Complainant, in reiterating his belief that the Provider's terms *"created a "significant imbalance" within the meaning of the UTCC Regs"* has sought to rely on the performance of Gold, as a pension investment over time, and he maintains that his position regarding that imbalance, is supported by a graphic which he supplied in evidence, of the performance of another Gold Fund made available by a different financial service provider, up to 2022:


Gold Fund

Yearly Investment Performance

| Year | 2008 | 2009 | 2010 | 2011 | 2012 | 2013 | 2014 | 2015 | 2016 | 2017 | 2018 | 2019 | 2020 | 2021 |
|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|
| Return % | - | - | 35.4 | 14.0 | 3.4 | -31.4 | 12.8 | -2.3 | 12.3 | -2.6 | 3.0 | 19.7 | 13.0 | 3.6 |



Cumulative Performance (to 31/05/2022)

| | 3 Months | 6 Months | 1 Year | 3 Years | 5 Years |
|---|---|---|---|---|---|
| Gold Fund | 1.4% | 8.7% | 9.6% | 44.7% | 47.4% |

Annualised Performance (to 31/05/2022)

| | 3 Years P.A. | 5 Years P.A. | 10 Years P.A. | Since Launch P.A |
|---|---|---|---|---|
| Gold Fund | 13.1% | 8.1% | 2.4% | 6.9% |

The significant entitlements available to the Complainant however, under his contract with the Provider, whereby it was open to him to switch funds, or to move his pension funds to another pension provider, go some way, in my view, to undermining any argument that clause 2.3 caused a significant imbalance in the parties' rights and obligations under the contract to the detriment of the consumer, contrary to the requirement of good faith.

The definition of "*unfair term*" obliges this Office to consider any imbalance in the context of the nature of the services, for which the contract was concluded and all other terms of the contract. The contract is this case is for the provision of a personal pension.

While the Complainant invested in his pension with the Provider, 7 years before his normal retirement date, many pension products are taken out for much longer periods.

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As appears from the Policy Schedule and terms and condition cited above, the chosen product is an investment bond or single premium life insurance policy, paid for with a single upfront payment rather than monthly premiums. The value of the pension was linked to the value of units held in the chosen funds. The conditions clarify that units are allocated solely for the purpose of determining benefits and the customer does not "*hold the units directly*" (clause 2.2). The conditions provide a list of the Provider's unit-linked funds, and their details are available on request (clause 2.4). There is no suggestion in the documentation that a particular fund or funds will be available at any given time, for the purposes of a fund switch and the contract provides that a customer can "*choose any investment-linked fund which is available*" when making their fund choice (clause 2.15).

In my opinion, the pension policy is not the same as a direct investment by an individual customer in a particular fund or funds. The policy is a type of insurance policy which commits to the payment out of defined benefits on a particular date or dates. The value of those benefits is linked to units allocated in funds offered by the Provider, and chosen by the customer. The policy conditions envisage up to six free fund switches in any given year.

When viewed from the perspective of the nature of the services for which the contract was concluded and all other terms of the contract (including allowing the Complainant to transfer his funds to another provider at any time) I do not consider that clause 2(3) creates a significant imbalance in UTCC terms.

The UTCC Regs were recently considered by the Supreme Court in *Pepper Finance Corp v Cannon* [2020] ILRM 373, [2020] IESC 2 where, after consideration of relevant European case law, O'Malley J stated as follows:

> "*83. In summary, the question of whether a term creates a "significant imbalance" within the meaning of the Directive should be assessed by asking whether the consumer has been placed in a less favorable position than would be the case, under the relevant provisions of national law, if the term was not there. This assessment should have regard to the means available to the consumer, under national law, to prevent continued use of unfair terms. The "good faith" assessment, in relation to a term, requires the court to ask whether a seller or supplier could reasonably assume that the consumer would have agreed to such a term if the contract had been negotiated individually.*"

I do not consider that clause 2(3) places consumers in a less favorable position than would be the case under any relevant provisions of national law. This is because there are no apparent relevant provisions of national law, that would determine the issue of fund choice, within this context.

Neither do I accept the Complainant's recent contention that "*CPC was not complied with here in terms of failing to act in the Customer's best interests.*" I take the view that there is no adequate evidence available to bear out such a contention.

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Further, in respect of good faith, I think it is reasonable to assume that a consumer is likely to have agreed to clause 2(3) if the contract had been negotiated individually. The reason I believe this to be the case, is because of the fact that consumers can select from any fund option on offer at any given time and, in the Complainant's case, can transfer to another provider offering a different fund selection at any time.

I further believe a consumer would have agreed to the clause because of how important such a power must be in this context. Were it otherwise, for example, fund offerings which consistently performed badly over a long period of time, would have to continue to be offered by the Provider if one or more customers wished to continue to invest in them, regardless of how imprudent such a decision might be, and over a period of 40 years or more under certain policies.

The Complainant seems to suggest that the fact that the Gold Fund was on offer from the Provider, influenced his decision to switch to the Provider in **2010**. Accordingly, the quality and range of funds on offer by a particular pension provider must influence customer choice. In my opinion, I must accept that the Provider must be entitled to review its fund offerings to ensure that it offers a diversified range of fund choices that perform well for its customers. Whilst the Complainant may believe that *"a Gold-fund is much more focused than the alternative High-yield fund as proposed",* I am satisfied that there were other options open to the Complainant, if he did not wish for his funds to be transferred to the high yield fund.

The entitlement of a provider to review its fund offerings to ensure that it offers a diversified range of fund choices, is essential; if a pension provider offered only or mainly badly performing funds, one would not expect it to attract many customers. It is simply prudent that it would regularly review its fund offering in this regard and I am satisfied that this can be regarded as being in the best interests of its customers, as a whole.

I am satisfied that there is no evidence of bad faith by the Provider in this case. I am conscious that the Provider wrote to the Complainant giving him 30 days' notice of its intention to close the Gold Fund. It notified him that on closure, his funds would be invested in its high yield fund which it had assessed as being most appropriate for him but that he was entitled to select from any other fund an offer. It provided a deadline for him to select an alternative fund, failing which his funds would be transferred into the high yield fund selected for him. I am satisfied that the Complainant was given appropriate notification of the intention to close the fund and given adequate opportunity to consult with his financial broker in respect of an appropriate fund or funds to transfer his investment to.

I am conscious that even after the transfer was completed by the Provider in **June 2015**, the Complainant was entitled at any time thereafter to switch his investment into any of the other available funds or to transfer his investment to another provider. The crux of the Complainant's complaint seems to stem from the fact that, at the time when the transfer occurred into the high yield fund in **June 2015**, the value of his investment in the Gold Fund had fallen substantially. It appears that considerable losses were made on that fund between **2012** and **2015**, ultimately resulting in the value of the Complainant's funds being less than half they were, when he took out the policy with the Provider in **2010**.

/Cont'd…

It is notable in this regard that the risk rating associated with the Gold Fund was at the highest level of 7. The Provider has submitted that if he had continued his investment in the Gold Fund, the value of his investment would have fallen by more than 18% by the end of **2015**. The Complainant has argued that as this was intended to be a long-term investment, he was confident that there would eventually be an upswing in the value of the fund, and he was in for the long term. The Complainant says that he:

> *"… is fully aware that it would not be reasonable nor practical for a Provider to only be able to close a fund once all customers have consented. Instead, the Provider should have made provision for the orderly handling of the potential considerable risk in terms of the peaks & troughs (designated with Risk-rating 7), the Complainant should have been given some additional time to encash his gold investments (the 30-days' notice offered by the Provider was wholly inadequate for this purpose)."*

I do not accept this. I consider the period of one month's notice, to have been adequate in the circumstances, given that the Complainant had options open to him to transfer to another provider, if he wished to ensure that his pension monies remained invested in gold.

It should also be noted that even if a continued investment in the Gold Fund would have benefited the Complainant financially, as opposed to an investment in the high yield fund (or whatever funds the Complainant ultimately transferred his investment into) this would not, in my view, mean that the clause allowing the Provider to close a fund, is unfair in the sense that it significantly imbalanced the respective rights and obligations of the parties under the contract contrary to the requirement of good faith. I see no evidence of bad faith on the part of the Provider here, or of any unreasonable behaviour. I see no attempt by the provider to disguise or minimise clause 2(3) in its conditions. Further, I accept that the inclusion of a provision allowing for life insurance companies to re-organise their fund offerings, is a standard term and common across the industry, and I do not accept that this is evidence of wrongdoing.

For all of the reasons set out above, I do not consider clause 2(3) to be an unfair term within the meaning of the UTCC Regs. In light of this determination, I do not consider it necessary or appropriate to consider the Provider's arguments that this Office would be precluded from making a direction prohibiting the Provider's use of the clause more generally, and in respect of other policyholders.

For the reasons outlined above, the complaint is not upheld.

**Conclusion**

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

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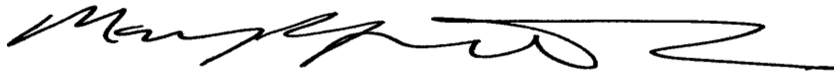
**The above Decision is legally binding on the parties, subject only to an appeal to the High Court not later than 35 days after the date of notification of this Decision.**



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

26 July 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.