APPROVED **NO REDACTION NEEDED**

THE COURT OF APPEAL

CIVIL

High Court Record Numbers: 2021/137 MCA and 2021/174 MCA

Court of Appeal Record Number: 2023/256

Neutral Citation Number [2024] IECA 231

Allen J.

Meenan J.

O'Moore J.

BETWEEN/

ULSTER BANK DAC

Appellant

- and –

FINANCIAL SERVICES AND PENSIONS OMBUDSMAN

Respondent

- and –

UHK, FK AND KC

Notice Parties

JUDGMENT of Mr. Justice Charles Meenan delivered on the 20th day of September 2024

Introduction:-

1. As was observed in the course of these proceedings, taking out a mortgage is probably the most significant financial responsibility a person takes on in their lifetime. The level of interest payable each month has a direct impact on a person's disposable income, so it is not at all surprising that a close eye is kept on the various interest rates that are available over the term of the loan. In this case, Ulster Bank DAC *("the Bank")* offered a range of interest rates being *"tracker rates"*, *"variable rates"* and *"fixed rates"* (including staff fixed rates).

2. A person paying a particular interest rate has every incentive to move to another rate, if available, to reduce monthly payments. All is well until the interest rate that is moved to becomes much less attractive than the interest rate that was moved from. At the heart of these proceedings is whether or not the borrowers *("the Notice Parties")* having switched their interest rate, had a legal entitlement to move back to an interest rate that has become more attractive than it previously was. In these proceedings there were two borrowers, "A", and "B" (the "complainants").

3. Borrowers "A" and "B" requested, but were refused by the Bank, to revert to an interest rate from which they had moved. Both complained to the Financial Services and Pensions Ombudsman *("the Ombudsman")*. I will set out in some detail the complaints made by "A" and "B" and the decision of the Ombudsman in respect of each complaint. In the course of this judgment, I will also consider the legal role of the Ombudsman and, more particularly, the standard of review to be applied by the High Court on appeal from decisions of the Ombudsman.

Complaint "A": -

4. In August 2006 these complainants were issued with an offer of advance for a mortgage loan for €365,000. The special conditions attached provided, *inter alia*: -

"The rate of the Ulster Bank flexible mortgage tracks the ECB rate with a margin which is fixed for the life of the Home Loan term. The margin for this Home Loan is ECB rate plus 1.15%." (Emphasis added).

5. These complainants (or one of them) were employees of the Bank and thus in a position to avail of a *"staff fixed rate"* offered by the Bank in respect of a portion of the loan to a maximum of €190,000. The *"Staff House Loan Scheme Rules"* provided: -

*"**Interest rates***

The current staff house loan scheme interest rate is 3% per annum fixed for the term of the loan." (Emphasis added)

These complainants availed of this and moved €190,000 of their loan to the staff fixed rate of 3%.

6. By letter dated 6 September 2010, these complainants requested the Bank to move their loan from the *"staff rate"* back to the ECB tracker rate *"as per our loan offer terms and conditions…"*. In response, the Bank, by letter dated 14 December 2010, stated: -

"As we no longer offer Tracker Rates we are not in a position to revert your account to the previous tracker rate."

Complaint "B": -

7. In April 2004 the Bank advanced to these complainants the sum of €253,000 for a term of 25 years at an initial interest rate of 2.95%. This initial interest rate was a reduction on the then applicable Variable Home Loan Rate and would apply until April 2005, at which time the interest rate would increase to the full variable rate, which at the time of the drawdown was 3.5%.

8. In January 2006 these complainants signed an *"Ulster Bank flexible mortgage transfer form"*, which provided that the Bank would provide them with a *"tracker rate"* which *"is fixed for the full life of the Home Loan"* (Emphasis added).

9. In May 2007 these complainants signed an *"Ulster Bank house mortgages fixed rate mortgages"* form, which provided that they were moving to a *"fixed rate"* until 31 August 2010. The form stated: -

> *"**At the end of the fixed period:***
>
> *Ulster Bank Ireland Limited may offer to continue the advance for such a period and such a fixed rate as it may decide. It may also offer alternative available products. If such offer is made and you elect to accept then you must do so in writing, your acceptance ... . If no such offer is made or if an offer is made and no acceptance is received ... then the 'Ulster Bank Home Loan Rate' shall apply ..."*

10. At the end of the fixed rate period, 31 August 2010, these complainants wished to revert to the *"tracker rate"*. However, the Bank's position was that a tracker rate was no longer available. By a letter dated 14 August 2010, the Bank outlined a number of other fixed rate options. The letter stated: -

> *"Please note if you opt for a further fixed rate and your current default interest rate option is a tracker rate, at the end of this new fixed rate period the tracker interest rate option will no longer be available, and your mortgage will default to a standard variable rate."*

Role of the Ombudsman: -

11. Before considering the decisions of the Ombudsman in the complaints of "A" and "B", it is necessary to look at the role and legal powers of the Ombudsman when considering such complaints. The office of Ombudsman was created by the Financial Services and Pension Ombudsman Act 2017 ("the Act of 2017"). Section 7 establishes the Office of the Ombudsman and s. 8 provides for his or her appointment. Part 6 of the Act sets out a Complaints Procedure and s. 60 provides: -

"60. (1) On completing an investigation of a complaint relating to a financial service provider that has not been settled or withdrawn, the Ombudsman shall make a decision in writing that the complaint –

(a) is upheld;

(b) is substantially upheld;

(c) is partially upheld; or

(d) is rejected.

(2) A complaint may be found to be upheld, substantially upheld or partially upheld only on one or more of the following grounds:

(a) the conduct complained of was contrary to law;

...

(g) the conduct complained of was otherwise improper."

Section 64 of the Act of 2017 provides that a party to a complaint before the Ombudsman may appeal to the High Court against a decision or direction of the Ombudsman.

12. Section 60(2)(a) and (g) have been considered in a number of decisions of the High Court. Hyland J. in *Danske Bank A/S v FSPO* [2021] IEHC 116, in considering an appeal under s. 64 of the Act of 2017, stated: -

"27. Those subsections make it clear that the Ombudsman both has jurisdiction to uphold on grounds involving what I might describe as black letter law issues i.e. contrary to law, or based on a mistake of law but also to uphold on grounds where there has been no breach of law at all, including quite strikingly upholding a complaint where the conduct is in accordance with law, but the Ombudsman holds that the application of that law was detrimental to the complainant. The breadth of the Ombudsman's jurisdiction under s.60(2) cannot be underestimated: he or she is effectively given a jurisdiction to override the law in certain situations, in the sense

that although a complainant may have no remedy in law, including under the law of contract, nonetheless they can have their complaint upheld. In other words, a financial service provider can act perfectly lawfully but nonetheless find that a complaint is upheld against it carrying with it an obligation to make specified redress."

13. In the course of her judgment in *Danske Bank A/S*, Hyland J. considered an earlier decision of Hogan J. in *Irish Life and Permanent Plc v Financial Services Ombudsman and Thomas* [2012] IEHC 367, a case in which identical wording to that found in s. 60(2)(g) of the Act of 2017 was considered. Hyland J. stated: -

"33. He [Hogan J] observed that the Ombudsman was entitled to think that the conduct was 'otherwise improper' as per the relevant subsection, and that:

'... the Ombudsman was entitled to conclude that a retail bank should properly alert its customers – if only in the most general of terms – of the potentially serious adverse consequences of a particular decision, especially where it seems clear where those customers were seeking advice and guidance from the Bank's mortgage advice centre and that these are standards which modern retail Banks might reasonably be expected to uphold' (para. 56)."

14. In *Hiscox v FSPO* [2022] IEHC 557, Paul Burns J., having considered said judgment of Hyland J., observed: -

"62. ... The grounds for upholding a complaint under the other provisions of s. 60(2) must be regarded as separate from and not merely repetitious of s. 60(2)(a), albeit there may be a degree of overlap between them and that particular conduct may fall into a number of the grounds provided for. The point is that conduct contrary to law does not automatically fall into one of the other grounds although it may do so in the particular circumstances. There should be some additional factor or circumstances to justify holding the conduct to be unreasonable, unjust or improper."

***Complaint "A"*: -**

15. In a lengthy decision, the Ombudsman concluded ... *"this complaint is substantially upheld on the grounds prescribed in section 60(2)(a) and (g)."* At the outset of his decision, the Ombudsman stated: -

> *"Following the consideration of additional submissions from the parties, I am satisfied that the submissions and evidence furnished were sufficient to enable me to arrive at my decision in this complaint without the necessity for holding an Oral Hearing."*

16. On the construction of the contract for the mortgage which these complainants had with the Bank, the Ombudsman stated: -

> *"... therefore, I do not agree with the Provider's [the Bank's] contention that a finding that the 'staff rate tranche' was fixed at 3% for the entire term of the loan should have been the starting point for the determination of this complaint. The obvious and correct starting point of my determination must and does focus on the original contractual terms that the complainants entered into by signing the Acceptance and Authority to the Offer of Advance on 14 September 2006. The next matter for consideration is what effect, if any, did the application of the Staff Home Loan Scheme Rules have on those contractual terms."*

and: -

> *"... Consequently, I am of the view that the contractual entitlement to the tracker interest rate of ECB plus 1.15% operated such that it was 'fixed for the life of the home loan' and therefore was not removed and remained in being at the time the preferential staff rate was applied."*

This would appear to be the basis for the finding that, on the construction of the mortgage contract, these complainants had a contractual entitlement to return to the *"tracker rate"*

when they sought to leave the staff rate. Thus, according to the Ombudsman, *"the conduct complained of was contrary to law"* as per s. 60(2)(a) of the Act of 2017.

17. In respect of his finding that the conduct of the Bank *"was otherwise improper",* as per s. 60(2)(g), the Ombudsman considered the position of the Bank when it maintained that by moving to the *"staff rate"* these complainants were giving up their contractual entitlement to a *"tracker rate"*. The Ombudsman stated: -

> *"I acknowledge that the Staff House Loan Scheme Rules existed and that the Provider [the Bank] may have intended those rules to apply to and/or in some way amend or vary the original terms and conditions attaching to the Complainants' mortgage loan, however, the Complainants did not sign any documentation to affect the application of the staff interest rate to a portion of their mortgage loan such that the terms of the Staff House Loan Scheme Rules were incorporated into the then existing terms and conditions of the Complainants' mortgage loan."*

18. Having referred to the General Principles of the Consumer Protection Code 2006, the Ombudsman stated: -

> *"The Provider owes a duty to all its customers, whether they are staff or not, to ensure that all documents or instructions that change or amend contractual entitlements are clear as to the changes or amendments that are being made. In the circumstances of this particular complaint, the Complainants did not sign any documentation to make a change to their contractual entitlements under the terms of the original contract."*

19. The Ombudsman found, based only on documentation, that the Bank had failed to explain to these complainants that by opting for the fixed *"staff rate"* of 3% they would lose their entitlement to a *"tracker rate"*. Hence, the conclusion that the complaint was substantially upheld under section 60(2)(g).

20. In upholding the complaint, the Ombudsman directed the Bank to re-pay any overpaid interest and made an award for €3,500 compensation for *"loss, expense and inconvenience"*.

***Complaint "B"*: -**

21. In reaching his decision on complaint "B", the Ombudsman followed his reasoning in complaint "A". The request for an oral hearing was refused on the same grounds as in complaint "A". Again, the Ombudsman set out in some detail the supporting documentation.

22. In this case, the complainant drew down their mortgage in 2004 on a variable rate, moved to a *"tracker rate"* in 2006 and, the following year, to a fixed rate. The fixed rate was applicable until 31 August 2010, when the complainant sought to return to a *"tracker rate"*. The Ombudsman expressed the view that Flexible Mortgage Transfer Form had the effect of altering the terms and conditions of the complainant's mortgage loan by providing a *"tracker rate"* which was *"fixed for the life of the home loan"*. The Ombudsman held that on his construction of the mortgage contract, the refusal of the Bank to return the complainant to a *"tracker rate"* on the expiry of the term of the *"fixed rate"* was *"contrary to law"* for the purposes of s. 60(2)(a) of the Act of 2017.

23. As in complaint "A", the Ombudsman considered whether there had been a breach of s. 60(2)(g) stating: -

> *"I do not accept the Provider's submissions as to the purported effect of the Fixed Rate Authority signed on 28 May 2007 had on the Complainants' entitlement to [the 'tracker rate']. While I accept that the complainants signed the Fixed Rate Authority Transfer Form to confirm that they read the information above regarding 'the process that the expiry of the fixed rate', it is not appropriate for the Provider to suggest that this information was understood by the Complainants. The Provider owed a duty to the Complainants to ensure that all documents or instructions that change or amend*

contractual entitlements are clear as to the changes or amendments that are being made."

and: -

"Having considered the documentary evidence before me, there is no evidence that the Complainants agreed to this amendment to their contractual terms."

and: -

"... I do not consider the language and information contained in the Fixed Rate Authority Transfer Form to be so explicit and unequivocal in nature, as submitted by the Provider, such that the Complainants could fully understand that they were giving up their entitlement to a tracker interest rate by signing the form."

24. Like the determination in complaint "A", the Ombudsman directed the Bank to re-pay overpaid interest and made an award of €3,500 compensation.

Judgment of the High Court: -

25. The Bank appealed both decisions of the Ombudsman to the High Court under s. 64 of the Act of 2017. The trial judge (Bolger J.) first considered whether the Bank was entitled to an oral hearing before the Ombudsman. The trial judge concluded: -

"35. The FSPO [the Ombudsman] exercised his discretion properly here in finding that there was no necessity for an oral hearing where he had been furnished with ample and clear documentary evidence from the parties and where there was no suggestion by either party that the terms of their contract fell to be determined by [reference to] anything other than documentary evidence. The approach of the FSPO was to look at the reasonableness of what was done by way of an objective assessment of the documents and submissions and having regard to the Central Bank's Code. An oral hearing was not required in order to do this fairly and lawfully."

26. The trial judge considered the *"standard of review"* to be applied on appeals such as this, stating: -

> *"38. The statutory appeal afforded by s. 64 of the 2017 Act is, like many statutory appeals, limited to an appeal on a point of law. This is different to a de novo appeal on the merits of a complaint. Whether this court would have reached the same decision on the evidence before the FSPO is irrelevant as the only issue for this Court is whether there was a serious or significant error or series of errors perpetrated by the FSPO in reaching his decision. That assessment is likely to involve affording the FSPO some level of curial deference, at least on his analysis of the facts. No deference is afforded to him on his analysis of the law, but some deference arises in findings involving mixed questions of law and fact. The case law makes clear that this Court must have regard to the particular expertise of the FSPO in interpreting contractual arrangements or documents. For example, Barrett J. in Minister for Education and Skills v Pensions Ombudsman [2015] IEHC 466 stated at para. 14*
>
> > *'As most complaints to the Financial Services Ombudsman, and perhaps also the Pensions Ombudsman, seem likely to concern a difference of interpretation of contractual arrangements or documentation, the effect of Millar [Millar v. Financial Services Ombudsman [2015] IECA 126] appears to be that unless the Financial Services Ombudsman, clothed in the expertise of his office, commits a serious error of law in how he approaches matters, as opposed to how he interprets arrangements or documentation, his view as to what a contract means, being a mixed question of law and fact, will now generally be final.'*
>
> *In Danske, Hyland J. stated at para. 63 'I must defer to the [the FSPO's] evaluation of the contractual material, given his extensive experience of dealing with complaints from consumers relating to the clarity of mortgage documentation.' More recently Barr J. in KBC*

Ireland PLC v FSPO [2023] IEHC 234 said at para. 99 '[T]he court should afford the decision of the Ombudsman some curial deference, as he is the person who has expertise in relation to the conduct of a vast range of service providers in the relevant market.'"

27. In setting out her view as to the appropriate *"standard of review"* the trial judge did not set out what, in her view, was the correct construction of the mortgage contracts. She had *"regard to the particular expertise of the FSPO in interpreting contractual arrangements or documents."* It was submitted by the Ombudsman in the course of this appeal that the trial judge was correct in doing so following the decision of this Court in *Millar v. Financial Services Ombudsman* [2015] 2 I.L.R.M. 337 is said toto preclude a High Court judge on appeals such as this from examining *"afresh"* the contractual construction placed by the Ombudsman.

28. In the course of its appeal to the High Court the Bank submitted that the Ombudsman fell into error in failing to have regard to a *"tracker mortgage examination"* carried out by the Central Bank of Ireland, the object of which was to assess the Bank's compliance with its legal and regulatory obligations generally concerning tracker mortgages including compliance with the Consumer Protection Code. The Bank stated that the Central Bank of Ireland permitted it to conclude this examination on the basis that borrowers in the position of the complainants were deemed not to be impacted. Further, the Central Bank had carried out a *"tracker mortgage investigation"* which ran in parallel with the *"tracker mortgage examination"*. That investigation had been concluded by a settlement agreement between the Central Bank and the Bank wherein the Bank admitted breaches of the Consumer Protection Code. The trial judge found no merit in these submissions as, firstly, whether or not the loans in question were impacted by the investigations carried out by the Central Bank, did not impact on the complainants' rights to maintain their complaints to the Ombudsman.

Secondly, issues concerning the Central Bank investigations had not been raised before the Ombudsman in the course of hearing the complaints.

29. The Bank further submitted that the decisions of the Ombudsman on these complaints departed from previous decisions which involved essentially the same documentation and contractual terms. Again, these submissions were rejected by the trial judge on the grounds that previous decisions were not only not binding on the Ombudsman but were also not available to the complainants. The Bank did not place any reliance on these previous decisions in its submissions to the Ombudsman. In any event, as found by the trial judge, the Ombudsman provided to the complainants and the Bank lengthy and detailed decisions setting out the reasons which enabled the Bank to appeal the decisions.

The appeal: -

30. In each case, on the application of the Bank and without opposition from the Ombudsman, the Bank was granted leave to appeal in respect of the following questions of law: -

Question A:

Did the High Court afford deference to the Ombudsman's interpretation of the contract here, and if so, did the High Court afford excessive deference in that regard which was material to its conclusions?

Question B:

Did the High Court err in law in holding that the Ombudsman's upholding of each complaint was not seriously and significantly in error regarding the interpretation of the contract?

Question C:

Did the High Court err in applying the law regarding the duty to give reasons to the Ombudsman's two decisions here, and, if so, what consequence arises from each decision?

Question D:

Was the High Court correct in law in its holdings regarding the Central Bank's findings for the purpose of the Ombudsman's application of the Consumer Protection Code?

Question E:

Was the High Court correct in law in holdings regarding the treatment and status of previous findings of the Financial Services Ombudsman's Bureau?

There was no appeal against the decision of the Ombudsman to refuse an oral hearing.

31. Much of the hearing of the appeal concentrated on Questions A and B. At the heart of these questions is the nature and extent of the High Court's review of decisions of the Ombudsman on questions of law. In particular, a question arises as to what deference, if any, the High Court should give to the Ombudsman on reviewing such decisions.

Standard of review: -

32. There was little disagreement on a number of basic principles. The test was set out by Finnegan P. in *Ulster Bank v Financial Services Ombudsman* [2006] IEHC 323 where he stated at para. 15 that: -

> *"To succeed on this appeal the Plaintiff must establish 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 such errors. In applying the test the Court will have regard to the degree of expertise and specialist knowledge of the Defendant. "*

The first part of this test is clear. However, more problematic is the degree of deference which a court should show to the *"expertise and specialist knowledge"* of the Ombudsman when considering a finding that the conduct of the financial service provider complained of was contrary to law and/or was otherwise improper.

33. In considering the issue of deference, a good starting point is the passage from the judgment of Kenny J. in the decision of the Supreme Court in *Mara (Inspector of Taxes) v*

Hummingbird Limited [1982] 2 I.L.R.M. 421. That case concerned a case stated from the Income Tax Appeal Commissioners on the appropriate tax to be paid arising from a commercial transaction. Kenny J. stated: -

> *"... These findings on primary facts should not be set aside by the Courts unless there was no evidence whatever to support them. The Commissioner then goes on, in the Case Stated, to give his conclusions or inferences from these primary facts. These are mixed questions of fact and law and the court should approach these in a different way. If they are based on the interpretation of documents, the court should reverse them if they are incorrect for it is in as good a position to determine the meaning of documents as is the Commissioner. If the conclusions from the primary facts are ones which no reasonable Commissioner could draw, the Court should set aside his findings on the ground that he must be assumed to have misdirected himself as to the law or made a mistake in reasoning. Finally, if his conclusions show that he has adopted a wrong view of the law, they should be set aside. If however they are not based on a mistaken view of the law or a wrong interpretation of documents, they should not be set aside unless the inferences which he made from the primary facts were ones that no reasonable Commissioner could draw..."*

34. In *Orange Limited v Director of Telecoms (No. 2)* [2000] 4 I.R. 159, the Supreme Court considered curial deference in reviewing a decision of the Director of Telecommunications Regulation. Keane C.J. referred to the following passage from the judgment of Kearns J. in *M & J Gleeson v Competition Authority* [1999] 1 I.L.R.M. 401: -

> *"It seems to me clear that the concept of curial deference of necessity takes the court to this further position, namely that the greater the level of expertise and specialist knowledge which a particular tribunal has, the greater reluctance there should be on the part of the Court to substitute its own view for that of the authority."*

At page 190, Keane C.J. stated: -

> *"I have already emphasised the importance in a case such as this of the High Court recognising that the Oireachtas has entrusted the impugned decision to a body with a particular level of expertise and specialised knowledge or which, at the least, has the capacity, which the court has not, to draw on such specialised knowledge, as the [first defendant] did in this case."*

I think it is correct to say that the import of these decisions is to limit curial deference to the particular area of expertise of the decision maker in question.

35. It was submitted by the Ombudsman that a more recent decision of this Court, *Millar* limits or reduces the scope of the High Court's review of decisions of the Ombudsman. This limitation or reduction was said to stem from what appears to be greater curial deference. It is therefore necessary to consider the decision in *Millar* to see if this is so.

36. Kenneth and Donna Millar made a complaint to the Ombudsman in respect of a number of mortgage accounts held with Danske Bank. They claimed that the increase in the variable interest rate charged by the said bank was in breach of the terms and conditions of their loan agreements. Clause 3 of these agreements provided that: -

> *"Rates of interest are altered in response to market conditions and may change at any time without prior notice and with immediate effect."*

The Millars contended that this meant that *"The variable rate of interest can only be increased in line with general market interest rates."* The Ombudsman rejected the Millars' complaint.

37. In the High Court, Hogan J. upheld the Millars' appeal. On the issue of curial deference, Hogan J. stated: -

> *"18. Although both Mr. McDermott, counsel for the Ombudsman and Mr. White, counsel for Danske, urged that I should defer to the expertise of the Ombudsman on*

the question of the construction of the applicable contractual terms and conditions, it must be observed that the issue presented here involves the straightforward application of ordinary principles of contract law governing the construction of contractual documents. It follows, therefore, that for all the reasons which I have just advanced, it would be inappropriate for this Court to defer to the Ombudsman on these issues and thus only interfere if the interpretation of the contract which was arrived at was somehow unreasonable or irrational."

The decision of Hogan J. was appealed to this Court.

38. This Court gave two judgments on the appeal. Firstly, I will consider the judgment of Finlay Geoghegan J., in particular the following passages: -

"15. I agree with the trial judge that where the Ombudsman has made a decision or determination on a pure question of contract law which forms part of the finding under appeal, that the court should not adopt a deferential stance to the decision or determination on the question of law. This follows from the statutory scheme applicable to the Ombudsman and the judgments in Orange Ltd. v the Director of Telecommunications (No. 2) & Anor [2000] 4 IR 159 and Ulster Bank Investment Funds Ltd. v. Financial Services Ombudsman [2006] IEHC 323 and those following. ... The relevant deferential stance on appeal as explained by Keane C.J. in Orange at p.185 is that '...the High Court will necessarily have regard to the degree of expertise and specialised knowledge available to the [Ombudsman].' With respect to the Ombudsman he does not have expertise or specialised knowledge, certainly relative to the High Court, in deciding questions of law.

16. However, it does not appear to me that it follows from this conclusion that as put by the trial judge where the appeal is taken against a finding of the Ombudsman which includes a decision on the question of a contractual construction that the High

Court is required 'to examine afresh' that issue in the course of the appeal. Rather the correct position is that the general principles set out in Ulster Bank Investment Funds Ltd. v. Financial Services Ombudsman still apply to the determination of the appeal save that the High Court in considering a decision of the Ombudsman on a pure question of law will not take a deferential stance to that part of the finding. "

Later in her judgment, Finlay Geoghegan J. states that the construction of a contract is not a pure question of law but a mixed question of law and fact. The learned Judge continued: -

"19. Accordingly it appears to me that the trial judge was in error in the conclusion reached at para. 20 of his judgment. It is not permissible for the High Court on an appeal pursuant to s. 57CM to 'examine afresh' a contractual construction placed by the Ombudsman on a relevant term of a contract. Rather he should consider whether an appellant has established on the balance of probabilities that on the materials before him the Ombudsman's construction contains a serious error."

39. It was submitted by the Ombudsman that the statement by Finlay Geoghegan J. that it was not permissible for the High Court on appeal to *"examine afresh"* a contractual construction reached by the Ombudsman limited the scope of an appeal. Implicit in this submission is that curial deference should be shown to the Ombudsman where the construction of the contract in question is a mixed question of law and fact.

40. I do not believe that this submission is correct. I refer to the judgment of Kelly J. in *Millar* (with whom Finlay Geoghegan J. agreed). In the course of his judgment, Kelly J. clearly sets out the case that was being made by the Millars. Having set out the clause that was in the loan agreements, Kelly J. continued: -

"40. From the very outset of their complaint the Millars have contended that this means that 'the variable rate of interest can only be increased in line with general market interest rates'.

> *41. I am of the view that this contention does not involve a construction of clause 3, but rather a recasting of it. It seeks to read into it something which is not there. The case which was made by the Millars was not an invitation to construe clause 3, but to rewrite it in accordance with a script prepared by them. This the Ombudsman quite correctly refused to do. Instead, he considered the actual wording of clause 3 on the evidence placed before him. "*

It seems to me that where Finlay Geoghegan J. was stating that it was not permissible for the High Court on an appeal to *"examine afresh"* a contractual construction by the Ombudsman, she was doing so in a situation where the complainants were, as Kelly J. stated, not asking the Ombudsman to construe the relevant term of the contract but rather *"rewrite it in accordance with a script prepared by them."* I would suggest that this *"script"* was not evidence or materials which the Ombudsman would consider in construing the contract, hence the restriction of not examining *"afresh"* the contract.

41. If there was doubt on the standard to be adopted by the High Court on appeal from the Ombudsman, this was clarified by a later decision of this Court in *Utmost Pan Europe v FSPO* [2022] IECA 77. One of the questions considered in this case was: -

> *"Is the High Court, in the exercise of its appellate jurisdiction in a statutory appeal under section 64 of the Act of 2017, entitled to draw different inferences from documentation (in this case, correspondence) than those of the Ombudsman? Put otherwise, to what extent do the principles in Fitzgibbon v Law Society [2014] IESC 48; [2015] 1 I.R. 516 (at paragraphs 127 and 128 of the reported judgment) apply to a statutory appeal under section 64?"*

42. In giving the judgment of the Court, Binchy J. (with whom Costello and Collins JJ. agreed) referred to the following passages from the judgment of the Supreme Court in *Fitzgibbon* (Clarke J.): -

"127. The applicable principles were helpfully summarised by McKechnie J. in Deely v. Information Commissioner [2001] 3 I.R. 439 at p. 452, which concerned an appeal under s. 42 of the Freedom of Information Act, 1997, as follows:-

> *'There is no doubt but that when a court is considering only a point of law, whether by way of a restricted appeal or via a case stated, the distinction in my view being irrelevant, it is, in accordance with established principles, confined as to its remit, in the manner following:-*
>
> *(a) it cannot set aside findings of primary fact unless there is no evidence to support such findings;*
>
> *(b) it ought not to set aside inferences drawn from such facts unless such inferences were ones which no reasonable decision making body could draw;*
>
> *(c) it can however, reverse such inferences, if the same were based on the interpretation of documents and should do so if incorrect; and finally;*
>
> *(d) if the conclusion reached by such bodies shows that they have taken an erroneous view of the law, then that also is a ground for setting aside the resulting decision.'*

...

128. In one sense it may be said that two types of points of law can legitimately be raised in an appeal which is limited to points of law alone. First, there may be an error of law in the determination of the first instance body. Second, it may be the case that the way in which the first instance body has reached its conclusions on the facts involves an error which itself amounts to an error of law. There may have been no evidence to support a finding or inferences may have been drawn on the facts which no reasonable decision-maker could have drawn. It follows that a higher degree of

deference, so far as the facts are concerned, is paid by the appellate body to the decision of the first instance body in an appeal on a point of law only, as opposed to an appeal against error. In the latter case the court is entitled to form its own view on the proper inferences to be drawn (although not on primary facts).”

43. Turning to the decision of the Ombudsman, Binchy J. stated: -

“90. This was an inference drawn not from a contract but from correspondence. The interpretation of this correspondence is not a matter of law, but nor is it a matter of any particular expertise of the FSPO. That being the case, there is no reason why a court should be required to afford deference to the interpretation of the FSPO of a letter or an email as a matter of general principle, although it is possible to envisage circumstances where deference is appropriate. For example, in circumstances where the correspondence uses specialist terminology, or where evidence was given to the FSPO about the correspondence, or where the correspondence concerned is just a small part of a much greater volume of correspondence considered by the FSPO. But none of those considerations arise here.

91. Fitzgibbon (which was neither cited nor discussed in Millar), makes clear, inter alia, that in considering an appeal on a point of law, an appellate court may set aside primary facts if there was no evidence to support such findings. Moreover, it may reverse inferences drawn from such facts, if those inferences were based on the interpretation of documents, and should do so, if incorrect. This must apply, a fortiori, to the court of first instance hearing a statutory appeal. It would be entirely illogical that an appellate court is free to correct such errors, but the court of first instance is precluded from doing so (I appreciate of course that the appellate court is reviewing the decision of the lower court, and not the decision of the statutory body, but this is immaterial for this purpose).”

44. The above passages clearly limit the scope of curial deference. Although *Utmost* concerned the interpretation of correspondence by the Ombudsman, it must follow that there be even less scope for curial deference to the Ombudsman in the interpretation of contracts.

45. The test as described by Finnegan P. in *Ulster Bank Investment Funds Limited* requires a court, when reviewing a decision of the Ombudsman on the construction of a contract, to reach its own conclusion as to what that proper construction is. Having done so, the court then has to consider whether the decision of the Ombudsman *"was vitiated by a serious and significant error or series of such errors"*. In carrying out this exercise, the court extends no curial deference to the Ombudsman on issues of law. Insofar as facts are involved, curial deference to the Ombudsman is limited to facts of a specialist or technical nature.

Consideration of appeals: -

46. As outlined earlier in this judgment, the Ombudsman reached two decisions in respect of each of the complaints. Firstly, the Ombudsman dealt with the issue of the construction of the mortgage contracts under the provisions of s. 60(2)(a) which was clearly a matter of law. Secondly, he considered whether sufficient notice or explanation of the consequences of moving from one type of interest rate to another was given to the complainants. This clearly required the Ombudsman to consider the knowledge which the complainants had, or ought to have had, in their decision to change the applicable interest rate. This was the basis for the finding under section 60(2)(g).

47. The Bank submitted that the trial judge wrongly gave curial deference to the Ombudsman on the construction of the contracts. It was submitted that the trial judge failed to set out what, in her view, was the correct construction of the contracts but rather confined her judgment to whether or not the Ombudsman was entitled to have reached the decisions he did. As against this, the Ombudsman submitted that, based on the authority of *Millar*, the trial judge was prohibited from *"examining afresh"* the issue of construction.

48. In my view, an analysis of the contractual documentation in both complaints "A" and "B" establishes that the Ombudsman's construction of the mortgage contracts was incorrect.

49. In complaint "A", when the complainants took out their mortgage it was to be on a tracker rate which was stated to be *"fixed for the life of Home Loan term"*. On the transfer of a portion of the loan to a staff fixed interest rate, the "Staff House Loan Scheme" provided that the staff interest rate is *"fixed for the term of the loan"*.

50. Applying the normal contractual principles of construction to the above, it is clear that in moving a portion of the loan to a *"staff rate"* these complainants were agreeing to a variation in their contract concerning the interest rate which was applicable. If the complainants' contention is correct, it would mean that the *"tracker rate"* was *"suspended"* whilst the *"staff rate"* applied and returned to the *"tracker rate"* when this rate no longer applied. The mortgage contract clearly did not provide for this. Initially, the *"tracker rate"* was fixed *"for the life of the Home Loan term"*. Then, on the move to the *"staff rate"*, that rate applied *"for the term of the loan"*. Thus, the *"tracker rate"* no longer applied. These complainants identified no contractual entitlement to return to a rate of interest which they had agreed to move from.

51. The contractual analysis of complaint "B" yields much the same result. These complainants signed a loan offer for an interest rate of 2.95%, dated 1 July 2004. On 4 January 2006, they signed a form giving them a *"tracker rate" "fixed for the life of the Home Loan"*. On 28/29 May 2007, these complainants signed a form which fixed the interest rate on their mortgage up until 31 August 2010. The form stated clearly that at the end of the fixed period the bank may, *inter alia*, offer *"alternative available products"*. This form clearly did not state that at the end of the fixed period the complainants had the option to return to a *"tracker rate"*. By letter dated 14 August 2010, the bank offered the complainants a number of alternative *"fixed rates"*.

52. The letter of 14 August 2010 expressly stated that if the complainants opted for a further fixed rate and *"your current default interest rate is a tracker rate"*, that at the end of the new fixed rate period this option would no longer be available. Unfortunately for these complainants, when they moved to the fixed rate in May 2007 there was no provision in their contract that their default interest rate would be a tracker rate. Rather, the contract provided, as stated above, at the end of the fixed rate period they were offered a range of options of *"alternative available products"* which did not include a *"tracker rate"* as this was no longer available from the Bank. These complainants gave up their contractual right to a *"tracker rate"* when, having agreed to a variation in their mortgage contract, they moved to a fixed rate.

53. It follows from the foregoing paragraphs that the Ombudsman was incorrect when he held that in the case of complainant "B" that the conduct of the bank was *"contrary to law"*.

54. The High Court ought to have carried out its own analysis of the contractual documents and did not owe the Ombudsman any deference in this regard. The submission that the High Court was precluded from doing so by reason of the decision in *Millar* is not, for the reasons stated in paras 36 to 43 above, correct. For the same reasons, the suggestion in *Minister for Education and Skills v. Pensions Ombudsman* [2015] IEHC 466 – on which the trial judge relied – that *"... unless the [Ombudsman] clothed in the expertise of his office, commits a serious error of law in how he approaches matters, as opposed to how he interprets arrangements or documentation, his view as to what a contract means, being a mixed question of law and fact, will now generally be final"* is not correct.

55. Turning now to the finding of the Ombudsman that the conduct of the bank was *"otherwise improper"* as per s. 60(2)(g) of the Act of 2017. In reaching this conclusion the Ombudsman found that the complainants in both "A" and "B" were unaware or did not understand or did not have it explained to them that by moving from a "*tracker rate"* to

another interest rate they would lose the *"tracker rate"*. This, with no disrespect, makes no sense. If – as the Ombudsman found – the complainants were entitled as a matter of contract to switch back to the tracker rate, I find it impossible to see how the Bank might have behaved *"otherwise improper[ly]"* in failing to spell out a consequence that could never arise. Even on the view to which this Court has come as to the meaning of the contract, it is difficult to see how this conclusion could have been reached. The Ombudsman reached this conclusion based on a consideration of the documentation furnished, having refused an oral hearing. The documentation sets out the terms, but it does not convey the level of knowledge or understanding that the complainants have of them.

56. Attempting to establish what the complainants knew or didn't know or ought to have known is a subjective exercise. In complaint "A", one or other or both of the complainants were staff members of the Bank. This raises the question as to whether, in the course of their employment or otherwise, they may have acquired knowledge which others, not in that position, might not have. There is little information concerning the "B" complainants as to the knowledge they had, or be expected to have, arising from their decision to move from one interest rate to another. In the absence of an oral hearing, I find it difficult to see how the Ombudsman could reach the conclusion that the complainants, essentially, did not know what they were doing.

57. The trial judge was correct in her conclusions concerning the various investigations overseen and conducted by the Central Bank into *"tracker mortgages"*. Any findings by the Central Bank did not preclude the complainants from maintaining or continuing their complaint as to their entitlement to a *"tracker"* interest rate. In any event, as the judge observed, this issue was never raised by the Bank in the course of its various submissions to the Ombudsman. As was stated by MacMenamin J. in *Ryan v Financial Services Ombudsman* (High Court, unreported, 23 September 2011): -

"71. The courts have consistently deprecated any tendency to seek to make a case that was not advanced before the Ombudsman (see J&E Davy v Financial Services Ombudsman [2010] 3 IR 324; Hayes v Financial Services Ombudsman & Ors IEHC (unreported, High Court, MacMenamin J., 3rd November 2008); Bandon Medical Hall Limited v Pensions Ombudsman & Anor IEHC (unreported, High Court, Dunne J., 21st June, 2010). …"

58. The trial judge was also correct to reject the Bank's submission that the decisions of the Ombudsman in these complaints was flawed as it was inconsistent with earlier decisions reached in other cases which involved similar documentation and facts. Firstly, and obviously, the Ombudsman is not bound by his previous decisions. Secondly, at the time, previous decisions of the Ombudsman were not available to the complainants. Thirdly, it does not appear that the Bank placed any reliance on previous decisions of the Ombudsman in its submissions on these complaints.

59. Finally, insofar as it was suggested that the Ombudsman failed to give adequate or sufficient reasons for reaching his decisions on these complaints, this is clearly not a sustainable criticism. The decisions of the Ombudsman were lengthy and set out in detail the basis and reasons for the decisions he reached.

Conclusions: -

60. By reason of the foregoing, I will allow the appeal against the judgment of the High Court. I would propose to make the following orders: -

(i) Setting aside the finding of the Ombudsman that in respect of complaint "A" and "B" that the conduct of the Bank was contrary to law under s. 60(2)(a) of the Act of 2017.

(ii) Setting aside the decision of the Ombudsman that the conduct complained of was *"otherwise improper"* under s. 60(2)(g) of the Act of 2017.

(iii) Setting aside the direction of the Ombudsman that the Bank pay to the complainants overpaid interest and compensation.

(iv) A direction that the issue under s. 60(2)(g) of the Act of 2017 be remitted to the Ombudsman for consideration following an oral hearing.

61. On the issue of costs, the provisional view of the Court is that as the appellant has been successful in the appeal that there be an order for costs of the application to the High Court and of the appeal against the respondent. In what I have referred to as Complaint "B" (2021 No. 174 MCA) on the application of the Bank, the originating notice of motion was amended to add the ground that the impugned decision was inconsistent with previous decisions of the Ombudsman, on which the Bank has failed. The respondent should have the costs of the application to amend, and the amended notice of opposition. The respondent, should it wish to do so, may take issue with this by filing written submissions (not in excess of 1,500 words) within 28 days of the date of delivery of this judgment. In response, the appellant may furnish written submissions (also not in excess of 1,500 words) within 28 days thereafter.

62. As this judgment is being delivered electronically, Allen and O'Moore JJ. have authorised me to confirm their agreement with it.