[2022] IEHC 678

Record No. 2021/JR 907

THE HIGH COURT
JUDICIAL REVIEW

BETWEEN:

JOSEPH BAYNES AND ANN BAYNES

APPLICANTS

-AND-

FINANCIAL SERVICES AND PENSIONS OMBUDSMAN

RESPONDENT

JUDGMENT of Mr Justice Cian Ferriter this 2nd day of December 2022

Introduction

1. In these judicial review proceedings, the applicants seek an order of *certiorari* quashing the respondent's decision of 5 August 2021 declining to investigate the applicants' complaint as to misconduct by a bank on the basis that the complaint was out of time ("the decision"). The complaint was lodged in April 2020 and related to allegations of mis-selling in the provision of a mortgage loan to the applicants in October 2007 by IIB Home Loans, a subsidiary of KBC Bank.

2. In the decision, the respondent (the "FSPO" or "the Ombudsman", as appropriate) determined that she did not have jurisdiction to investigate the applicants' complaint on the grounds that the complaint had not been made within the time limits set out in s. 51 of the Financial Services and Pensions Ombudsman Act, 2017 ("s.51" and "the 2017 Act") and there was no basis for an extension of time as the requirements for such an extension in s.51 had not been met. The applicant contends that the decision was unreasonable, irrational and failed to properly consider the provisions of s.51(2)(a)(ii) and s.51(2)(a)(iii) of the 2017 Act. Those provisions empower the FSPO in defined circumstances to extend the time limits otherwise applicable for the making of complaints to the FSPO under the 2017 Act in relation to the conduct of financial service providers relating to long-term financial service products (such as typical mortgage loans). The FSPO contends that the decision was not unreasonable or irrational and that the relevant statutory provisions were lawfully applied to the facts of the case.

Background

3. The relevant factual background to the matter is as follows. The applicants (who are husband and wife) took out a loan with IIB Home Loans, a subsidiary of KBC Bank ("the provider", "the bank" or "KBC", as appropriate) on 19 October 2007. The loan was in the amount of €150,000 and was for the purpose of paying a deposit on the acquisition of an investment property in Portugal. At the time of the loan, the first applicant was 62 and the second applicant was 57. The first applicant was unemployed and the second applicant was earning some €2,000 net per month. The applicants mortgaged their principal private residence in Dublin as security for the loan. The loan was initially interest-only for twelve months, although this interest-only period was subsequently extended. The loan was to be repaid in thirteen years, i.e. at a time when both applicants would have been beyond retirement age. The loan facility letter contained the usual warnings about the applicants' home being at risk if they did not keep up repayments on the loan. The applicants had a solicitor who assisted them with the execution of the loan and the mortgage. The applicants signed a form of acceptance notice in which they accepted that they had been advised on the letter of offer and the lender's standard form of mortgage by their solicitors. The loan was in fact procured through a broker at the time.

4. It appears that the purchase of the Portuguese property did not go through as the applicants could not raise finance in Portugal and the deposit they had paid was then forfeited. The applicants subsequently ran into difficulties in meeting their repayments on the loan. It appears that this happened in 2011 when the interest-only period came to an end. The applicants contacted the Money and Budgeting Service ("MABS") regarding the loan in 2011, after they had run into difficulty in servicing the debt. A restructuring agreement was reached with KBC between 2011 and 2014. A further deal was done between 2014 and 2019. The applicants were then introduced to Mr. Ben Hoey, a banking expert who advises individuals with distressed loans. He advised the applicants at the end of December 2019 that the loan that had been sold to them by the bank was inappropriate for their purposes on the basis that it was not suitable for them as they would never realistically have had the capacity to repay it and the bank was in breach of its obligations to assess their suitability for the loan at the time of its grant. The applicants say, as a result, that it was only at that point that they realised they had been mis-sold the loan.

5. Before addressing the complaint made by the applicants to the bank and thereafter, the FSPO, it is useful to briefly sketch the material provisions of the 2017 Act.

The 2017 Act

6. The Office of the FSPO was established by the 2017 Act. The 2017 Act (in s.2) defines a "*complaint*" as a complaint made in accordance with the Act in relation to the "*conduct of a financial service provider… specified in section 44(1)(a) and (b)*". Section 44(1)(a)(i) deals with complaints to the FSPO about, *inter alia*, "*the conduct of a financial service provider involving the provision of a financial service by the financial services provider*".

7. Section 50 deals with the jurisdiction on the FSPO. Section 50(2) provides that "*where a question arises as to whether the Ombudsman has jurisdiction, under this Act, to investigate a complaint, the question shall be determined by the Ombudsman whose decision shall be final*".

8. Section 60 addresses the redress that may be ordered by the FSPO where a complaint is upheld and provides that the FSPO may direct the financial services provider to, *inter alia*, "*review, rectify, mitigate or change the conduct complained of or its consequences*", "*pay an amount of compensation to the complainant for any loss, expense or inconvenience sustained by the complainant as a result of the conduct complained of*" or "*take any other lawful action that the Ombudsman considers appropriate having had regard to all the circumstances of the complaint*" (s. 60(4)(a),(d) and (e) respectively).

9. Section 60(2) provides that:-

> *"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;*
>
> *(b) the conduct complained of was unreasonable, unjust, oppressive or improperly discriminatory in its application to the complainant;*
>
> *(c) although the conduct complained of was in accordance with a law or an established practice or regulatory standard, the law, practice or standard is, or may be, unreasonable, unjust, oppressive or improperly discriminatory in its application to the complainant;*
>
> *(d) the conduct complained of was based wholly or partly on an improper motive, an irrelevant ground or an irrelevant consideration;*
>
> *(e) the conduct complained of was based wholly or partly on a mistake of law or fact;*

(f) an explanation for the conduct complained of was not given when it should have been given;

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

10. As pointed out by Hyland J. in *Danske Bank v. Financial Services and Pensions Ombudsman* [2021] IEHC 116, the FSPO can uphold a complaint and direct a redress even where the financial service provider has not breached any "*black letter*" duty under contract or statute. As she held in her judgment in that case (at para. 27):- *"…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*."

11. There are *dicta* to similar effect by Simons J., in *Utmost Paneurope v. FSPO* [2020] IEHC 538 (at para. 35).

12. Section 51 is headed "*Time limits for complaints to Ombudsman*". A complaint may not be made where it is in respect of conduct which occurred outside the time limits specified in s.51.

13. Section 51(1) provides, *inter alia*, that "*A complaint in relation to conduct referred to in section 44(1)(a)* [i.e. conduct of a financial service provider] *that does not relate to a long-term financial service shall be made to the Ombudsman not later than 6 years from the date of the conduct giving rise to the complaint.*"

14. Section 51(2)(a) provides that (subject to the requirements in s.51(3) which are not in issue here) a complaint in relation to conduct of a financial service provider which relates to a long-term financial service (defined essentially as a financial service of a duration of 5 years one month or more), shall be made to the Ombudsman:

"within whichever of the following periods is the last to expire:

(i) 6 years from the date of the conduct giving rise to the complaint;

(ii) 3 years from the earlier of the date on which the person making the complaint became aware, or ought reasonably to have become aware, of the conduct giving rise to the complaint;

(iii) such longer period as the Ombudsman may allow where it appears to him or her that there are reasonable grounds for requiring a longer period and that it would be just and equitable, in all the circumstances, to so extend the period."

15. It is common case that the loan to the applicants here was a "*long term financial service*" within s.51 such that the provisions of s.51(2) applied. It is further common case that s.51(2)(a)(i) could not be availed of by the applicants here. Accordingly, the focus was on the proper application of the provisions of s.51(2)(a)(ii) and (iii).

The applicants' complaints

Complaint to KBC

16. Mr. Hoey lodged a complaint on behalf of the applicants with KBC on 22 April 2020. This complaint alleged that "*the Baynes were mis-sold a residential mortgage on their private dwelling home in 2007 by IIB on behalf of KBC. The Baynes have only recently become aware that the mortgage was mis-sold*."

17. The complaint email complained of the bank's conduct as follows:

A. "There was no clear means of repayment for the advance and the bank did not exercise due care in assessing their ability to repay. The Baynes did not have the capacity to repay from inception and the bank failed in its duty of care to it customers.

B. The bank did not adequately explain the product sold nor the implications. The bank did not appear to follow lending policies and if it did follow its own

policies, those policies were inadequate and did not follow industry best practice. Exceptions to the bank's policy were requested by a broker but did not appear to be formally treated as exceptions by the bank according to information supplied to us. It is unclear what exceptions were requested. We can only assume that the requested exception to policy was to ignore the Baynes income which was inadequate to meet the repayment terms.

C. The funds advanced were for a speculative investment in an overseas property for rental income. The bank did not seek security over this property although it was mentioned in passing correspondence that this property could be sold to repay the loan if required.

D. The bank did not consider the suitability of the product nor inform the Baynes in writing of its suitability.

E. The bank's general treatment of the Baynes position over the term of the loan would indicate to us that the bank wanted to achieve a voluntary sale of the home although it would not have resulted in sufficient equity to allow the couple to downsize. One suspects that this was due to the facility of availing of a low margin ECB tracker in place and CCMA prevented the bank from removing it unless a sustainable affordable solution was available."

18. The complaint email then elaborated on each of those heads of complaint by reference to the facts and also by reference to the provisions of the Consumer Protection Code ("CPC") said to have been breached. The complaint email called for compensation for the mis-selling.

19. As can be seen, a core element of the complaint was that the bank misconducted itself in providing a loan which was not suitable for the applicants as they would not have had the capacity to repay the loan from its inception.

20. The bank rejected the complaint of mis-selling by letter of 19 May 2020.

Complaint to FSPO

21. Mr. Hoey, on behalf of the applicants, then lodged a complaint with the FSPO on 22 June 2020. As with the complaint to KBC, this complaint commenced by stating: "*We assert*

that KBCI through its subsidiary IIB Home Loans (the bank) mis-sold a mortgage to these consumers in 2007."

22. The letter then summarised the basis of the complaint arising including that the provider had not established the applicants' ability to repay the mortgage under the terms of the CPC applicable at the time of the loan.

23. The FSPO's office replied to Mr. Hoey on 12 November 2020 expressing the view that the complaint appeared to be out of time:

> *"Whilst I note from the complaint form that your clients state they became aware of matters on December 31st 2019, it is reasonable to assume that your clients were aware of the mortgage since drawdown and most certainly aware of potential issues when there were restructures on the facility, which I note from your correspondence dated April 22nd 2020 occurred in 2011 – some 9 years before the complaint was submitted to this Office. Indeed, I note that reference is made in your submission to your clients being "harassed" by the Provider "over the years"."*

24. Mr. Hoey then made a submission on 24 November 2020 in response to this communication. This submission addressed the question of time limits under s. 51(2)(a)(ii) and (iii). This submission stated that:-

> *"It is important to understand what is meant by the word conduct. Conduct, according to the Collins Dictionary, means the manner in which a person behaves. In that regard the conduct that they complain is the provision of a loan to our client in circumstances in which the bank acted contrary to law, unreasonably, unjustly, oppressively, improperly against our client or acted otherwise in an improper manner (see section 60(2) of the FSPO Act 2017). We have identified these wrongs in previous correspondence."*

25. The submission stated that, while the applicants accepted that the loan was taken out and the terms on which it was taken out, they "*only became aware of the manner in which the bank acted i.e. that the bank acted contrary to law etc. within three years of the complaint being made*". The submission then stated, in relation to s.51(2)(a)(ii):-

"However you fail to take into account, in reaching that conclusion, that the conduct that we are complaining of is that the Bank acted contrary to law etc. as we have identified above. Although our client accept that the loan was taken out and accepts that the terms on which it was given were set out in the loan documents, our client only became aware of the manner in which the Bank acted i.e. that the Bank acted contrary to law etc within 3 years of the complaint being made.

The first time that our client felt that there was the need to investigate the conduct of the Bank was when the Bank started writing to our client concerning arrears of a mortgage which now required payment in full. While the bank had restructured this loan over the years it was only in 2019 that it commenced actions to ensure that the loan was paid off in full and the borrowers could simply not pay. The Bank raised the monthly payments from €200 per month to €6,000 per month in 2019.

It was only then that our client took advice and contacted Homeoptions, through an introduction from MABS, and became aware of the conduct.

Accordingly, the complaint was made within three years within the meaning of section 51(2)(a)(ii)."

26. The submission then stated, in relation to s.51(2)(a)(iii):

"Even if your Office is not satisfied that we come within the above section, your Office is given jurisdiction to extend the period under Section 52(2)(a)(iii) if there are reasonable grounds for requiring a longer period and that it would be just and equitable in all the circumstances to extend the period. We believe it is reasonable to investigate this complaint. Our client was being asked to repay the loan in full and if this is not possible, that they should sell their family home and repay the bank. It is only reasonable before doing so your Office should, at the very least investigate the complaint. We would suggest that the section was introduced exactly for this reason and we urge you to allow the complaint be made."

27. It is clear from the terms of the paragraph prior to the paragraph quoted above that the reference to the applicants "*being asked to repay the loan in full and if this is not possible, that they should sell their family home and repay the bank*" is a reference to the escalation by the bank of matters to that level in 2019.

28. The submission then referenced a number of prior decisions of officers in the FSPO in which an extension of the time appeared to have been granted.

29. KBC then made its submissions in response to Mr. Hoey's submission. KBC's submission submitted as follows:-

> *"While it may indeed be the case that the complainants were not aware of the particular provisions of the Consumer Protection Code, and so may not have been in a position to assess whether the conduct complained of was contrary to law in the strict sense, certainly the complainants had the means by which they might have determined, in their own minds (and excluding for present purposes the fact that the complainants obtained independent legal and financial advice in connection with their mortgage at different junctures since 2007), whether they felt the provision of the mortgage facility to them had been unreasonable, unjust, oppressive or improper."*

30. KBC further submitted that the applicants had been legally advised in connection with the transaction at the time the conduct complained was alleged to have occurred, referencing the form of acceptance by them at the time they entered the loan and mortgage. KBC also relied on the fact that the applicants had access to financial advice both at the time of the loan and also following consultation with MABS on 5 April 2011 pointing out that, by this time, the applicants had obtained financial advice in connection with the mortgage facility at a stage "*where their financial situation did not facilitate their adherence to their monthly payment obligations*".

31. In this context, it is relevant to note a letter sent by the applicants to KBC, following their consultation with MABS, on 5 April 2011, which stated that:-"*Due to unforeseen changes in our personal position as detailed on our initial loan application form, we are writing to advise you that we have now completed a full assessment of our current financial situation taking into account all our living expenses and commitments."* It appears that,

at that point, Mrs. Baynes was not working and was in receipt of disability benefit and Mr. Baynes was shortly to be in receipt of a full State Contributory Pension.

32. KBC submitted, in relation to s. 51(2)(a)(iii), that the jurisdiction should be used "*cautiously and sparingly*" and said it would be normal when invoking such a jurisdiction to be able to point "*to the identification of exceptional circumstances which render an extension just and equitable*" and contended there were no such exceptional circumstances in this case. KBC provided the FSPO with extracts from various contemporaneous notes recorded by the bank in its dealings with the applicants' conduct between January 2011 and January 2014 from which they said it was clear that the applicants were aware that they were unable to meet their repayment obligations and were actively looking at an "*exit strategy*" which would involve sale of the secured family home and downsizing once their daughter (who was then living with them) had finished college. One of those extracts, dated 18 January 2011, noted that the "*it seems the only exit strategy on this account is to sell the property and downsize as client income will never be at level to support the full repayment and clear the balance owed in 10 years, clients are willing to look at this but would only review this in 5 years time when their daughter finishes college and is no longer dependent*".

FSPO Preliminary Opinion on Jurisdiction

33. The FSPO then wrote to Mr. Hoey, on behalf of the applicants, on 16 April 2021 setting out its "*preliminary opinion*" on jurisdiction. The preliminary opinion recited the background to the matter including the consultation with MABS in 2011 and a meeting with the bank in 2014 to discuss the possibility of a five-year arrangement with the sale thereafter to clear the mortgage balance. The preliminary opinion made reference to submissions made on behalf of the applicants and also the submissions made by KBC and then held as follows:-

> "*We note that* "[you] do not believe that [the Complainants] ought reasonably have become aware of the conduct any sooner" *as the Complainants are* "consumer[s] and [are] not well versed in banking matters". *We further note that the Provider in its letter to you dated* ***19 May 2020*** *details that* "[the Complaints] at the outset of the loan, engaged a mortgage broker […] The loan offer was made on the basis of confirmation that both independent financial and independent legal advice was obtained in accepting the terms of the loan offer agreement*" and the mortgage loan offer agreement* "was witnessed by the offices of Sheedy & Company Solicitors".

*Having regard to this, it appears to us that the Complainants were aware, or ought to have been, of the conduct giving rise to the complaint, the mis-sale of the mortgage, when they signed the mortgage application forms in **2007** or in 2011 at the latest, when the* "arranged a consultation with the Money Advice and Budgeting Service*".*

In this circumstance, it is this Office's preliminary opinion that the Complainants were aware or "ought reasonably to have become aware, of the conduct giving rise to the complaint*" in **2007** when the mortgage was sold to them or **in 2011 at the latest**. Consequently, the alternative time limit to make a complaint would have expired in **2014**."* [emphasis in original]

34. In relation to s. 52(2)(a)(iii), the FSPO gave its preliminary opinion that:

"There is no evidence in this particular matter that there are reasonable grounds for requiring a longer period of 13 years from the date of the conduct complained of with respect to the sale of the mortgage in 2007 such that it would be just and equitable to extend the period within which to make a complaint under s51(2)(a)(iii) of the Act."

Further submission on behalf of applicants

35. Mr. Hoey then made a further submission, on 22 April 2021, in response to the FSPO's preliminary opinion. Under the heading "*Clarification of our complaint*", he stated:-"*In summary, the provider granted a mortgage to a couple near their retirement dates with limited resources. Mr. B. was unemployed at the time and Mrs. B. was earning very little. The loan term exceeded their retirement dates and the provider did not enquire as to how payments would be made after that date when income levels naturally fall*."

36. In relation to time limits, in response to the FSPO's preliminary opinion under s.51(2)(a)(ii) that the applicants were aware or ought reasonably to have been aware of the conduct giving rise to the complaint when they signed the mortgage application forms in 2007 or 2011 at the latest, Mr. Hoey submitted that "*we cannot understand your*

interpretation as the conduct we complain of was not obvious to the borrowers when signing the loan documents or visiting MABS". He stated:

> *"They are consumers and had no knowledge at all nor aware of the existence of misconduct or the codes, best practice, regulator instructions, duty of care owed, etc. or other obligations placed on providers when granting and issuing consumer mortgages, let alone whether the bank followed any of them. They trusted the bank and trusted that the bank complied with all of their obligations. It did not occur to them, nor would it be reasonable for them ever to consider whether or not bank's conduct was unreasonable, until they were told by the writer."*

37. In a further submission in relation to s.51(2)(a)(ii), Mr. Hoey submitted that the FSPO should consider s.51(2)(a)(iii) "*with respect to equitable fraud*". He stated "*To put it another way, was it reasonable for the Baynes to have discovered the fact that the financial institution acted unreasonably and in an unjust manner on the dates identified due namely (1) when they signed the mortgage application; or (2) when they started to be unable to meet their loan repayments? We do not think so. We are therefore of the view that your preliminary decision is wrong on the matter.*"

38. The FSPO then issued its final determination on its jurisdiction by its decision of 5 August 2021. This is the decision challenged in these judicial review proceedings.

FSPO's Decision

39. The decision recites the background including that "*It appears that the loan commenced on interest-only repayments but the interest-only period was said to expire in 2011. Prior to the expiration of the interest-only period the complainants made contact with MABS regarding their loan in 2011. I also note that in or around 2014, the complainants met with the provider and discussed the possibility of a 5 year arrangement with the sale thereafter to clear the mortgage balance.*"

40. The decision summarised the complaint the applicants wished to maintain as being "*in 2007, the provider issued a mortgage to the complainants which was unsuitable to them*".

41. In relation to the time limit issue, the decision quoted from the preliminary opinion and the response of Mr. Hoey to that opinion. The decision then stated:

> *"For the avoidance of any doubt, this office does not require a complainant seeking to bring a complaint to the FSPO to have knowledge of the specific details of applicable lending codes. However, for the purposes of assessing the application at s.51(2)(a)(ii) of the Act to a complaint, this office must consider when a complainant 'became aware or ought reasonably to have become aware, of the* ***conduct*** *giving rise to the complaint [****my emphasis****]'. With respect to this complaint, the Complainants submit that the Provider issued a mortgage loan 'that was wholly unsuitable and inappropriate'. You submit on their behalf that it was not suitable as the Complainants were near retirement age with limited resources, the First Complainant was unemployed, the Second Complainant was earning very little, and the loan term exceeded retirement dates."* [emphasis in original]

42. The decision then proceeded as follows in relation to s.51(2)(a)(ii):

> *"While it may be the case that the Complainants only received advice from you in relation to 'the codes, best practice, regulator instructions, duty of care owed etc. or other obligations placed on providers when granting and issuing consumer mortgages' in or around 2020, having regard to their submissions on file, it is clear that the Complainants were aware of their own personal circumstances and were aware of the information regarding the term of the loan and repayments required in 2007 when the loan was issued to them.*
>
> *Further, the Complainants were on notice of issues in relation to the suitability of their mortgage and their repayment capacity in 2011 when they 'arranged a consultation with the Money Advice and Budgeting Service'.*
>
> *Consequently, it is my Final Determination that, because the complaint was made circa 13 years after the conduct complained of and circa 9 years after the Complainants ought reasonably to have become aware of the conduct complained of, the Complainants complaint falls outside the jurisdiction of this office and will not proceed to investigation."*

43. In relation to s.51(2)(a)(iii), the decision stated as follows:

> *"Further, there is no evidence in this particular matter that there are reasonable grounds for requiring a longer period of 13 years from the date of the conduct complained of with respect to the issue of the loan in 2007 such that it would be just and equitable to extend the period within which to make a complaint under s.51(2)(a)(iii) of the Act."*

This judicial review

44. Before addressing the applicants' grounds of challenge to the decision, it is necessary to consider the standard of review applicable to this judicial review.

Standard of review

45. It is common case that, as the 2017 Act does not provide for an appeal against a decision of the FSPO relating to acceptance or rejection of jurisdiction by reference to the time limits in s.51, the only remedy available to a party dissatisfied with a decision on jurisdiction is that of judicial review. Simons J. addressed the question of the standard of review applicable on such a judicial review in *Trustees of the Vodafone Ireland Pension Plan v. FSPO* [2022] IEHC 47 ("*Vodafone*").

46. Simons J. held in *Vodafone* that the 2017 Act "*draws a sharp distinction between (i) the pre-investigation stage wherein the eligibility of a complaint is being assessed, and (ii) the investigation and decision-making stage. There is no right of appeal against a decision made at the first stage. Instead, a party aggrieved is confined to a remedy in judicial review.*" (para. 44). He went on to note (at para. 45) that the legislative intent thus appears to be that the grounds upon which the High Court can intervene to set aside a decision made at the first stage are narrower than at the second stage, reasoning that the threshold to be met before a court will intervene on an application for judicial review will be higher than on a statutory appeal "*because it is implicit in the creation of a statutory right of appeal against a decision of a public authority that the Oireachtas intended to confer a broader jurisdiction upon the High Court than that which it would enjoy in any event as part of its inherent judicial review jurisdiction. See, for example, Fitzgibbon v. Law Society* [2014] IESC 48; [2015] 1 I.R. 516 (*at paragraphs 129 and 130*)."

47. He held that this interpretation was borne out by the terms of s.50(2) of the 2017 Act which provides (as noted earlier) that "*Where a question arises as to whether the*

Ombudsman has jurisdiction, under this Act, to investigate a complaint, the question shall be determined by the Ombudsman whose decision shall be final."

48. Simons J. further held in *Vodafone* (at para. 49) that the assessment of whether a complaint to the Ombudsman is time-barred is a mixed question of law and fact, the interpretation of the legislation being a question of law for the Court whereas the application of the legislation to the particular circumstances of any case may require the resolution of disputed questions of fact. In a similar vein, Simons J. held (at para. 50) that "*The making of a determination upon the nature and extent of a complaint is quintessentially a question of fact for the ombudsman*". On the facts of that case, Simons J. held that the assessment of whether the conduct there complained of represented serial or continual conduct or, alternatively, consisted of a single act or omission was a question of fact for the Ombudsman such that the Court on a judicial review application could only intervene to set aside such a determination where an applicant was able to demonstrate that the Ombudsman's determination was unreasonable or irrational.

49. For completeness, I should note that the authorities establish that the FSPO is not entitled to any deference when it comes to a pure question of law such that this court can intervene by way of judicial review where it is demonstrated that the Ombudsman has made a legal error in arriving at her determination (see Simons J. in *Vodafone* at para. 42, citing the decision of Finlay Geoghegan J. in the Court of Appeal in *Millar v. Financial Services Ombudsman* [2005] 2 IR 456 (at 480)).

50. While counsel for the applicants submitted that there remains some uncertainty as to the precise scope of the standard of review in judicial reviews flowing from decisions as to jurisdiction under the 2017 Act (referencing a comment in the judgment of Simons J. in *Utmost v FSPO* [2020] IEHC 538 (at para. 54) that the standard of review on an FSPO statutory appeal is "*more exacting*" than administrative unreasonableness in judicial review), he accepted, for the purposes of this case, that the applicable standard of review was what I might describe as the conventional judicial review standard of review i.e. a decision should only be set aside where it could be shown to be unreasonable or irrational in the *O'Keeffe/Keegan* sense (i.e. that the decision-making authority had before it no relevant material which would support its decision) or that there was a failure in process such as a failure to take into account relevant considerations or a material legal error in arriving at the decision.

51. The relevant conventional grounds of judicial review pleaded by the applicants here were irrationality and unreasonableness in the sense of a failure to take into account relevant

considerations which, it became clear in argument, also included a contention that there had been an error of law by the FSPO in failing to properly characterise the conduct, the subject of the complaint, for the purposes of assessing the correct application of the time limit tests set out in s. 51.

Summary of parties' submissions

52. The applicants' case was that the FSPO had acted both irrationally but also erred materially in law in that the decision legally mischaracterised the conduct which had been the subject of the complaint for the purposes of the application of the test for extension of time limits contained in s.51(2)(a)(ii) and (iii).

53. The decision was said, firstly, to be irrational and unreasonable in the sense that the FSPO had wholly failed to consider the actual conduct the subject of the complaint, being the bank's conduct in the provision of a mortgage in breach of the applicable consumer protection codes and constituting conduct coming within s.60(2)(b) and (g) of the 2017 Act.

54. Counsel for the applicants next contended that it was irrational of the FSPO to rely on the 2011 meeting with MABS as the platform for a finding that the applicants had constructive awareness of the conduct now sought to be complained of, for the purposes of s.51(2)(a)(ii). He submitted that there was nothing at all in the MABS engagement which either did in fact or ought to have put the complainants on notice of the fact that there were breaches of the CPC or otherwise conduct actionable before the FSPO under the 2017 Act in respect of the bank's actions. The meeting with MABS was simply one in which advice was sought as to the restructuring of loan payments because the applicants were in financial difficulties at that time. The applicants also submitted that the FSPO erred in applying too rigid a test to the construction and application of the "ought reasonably to have been aware" constructive awareness criterion in s.51(2)(a)(ii).

55. In relation to the application of the test set out in s.51(2)(a)(iii), counsel for the applicants submitted that there was in fact no engagement at all with the case made by the FSPO in arriving at her decision and, rather, an improper reliance on the mere length of time since the conduct complained of (being 13 years). It was said that this was unreasonable and irrational. The FSPO should, as a matter of the correct legal application of that subsection, have considered all of the facts before her such as the age of the applicants, the date of their actual knowledge of the breaches and the seriously prejudicial impending consequences of potentially losing their family home.

56. An overarching submission on behalf of the applicants was that the court should take a flexible approach to the test to be applied by the FSPO under the subsections dealing with extension of time limits as the 2017 Act was not confined to breaches of "*black letter*" law but had a much wider reach to conduct that might be lawful but was nonetheless unreasonable, unjust, oppressive or improper. Counsel for the applicants emphasised that the complainant's subjective understanding of what he or she was signing up to, should be examined. He cited in this regard the decision of Baker J. in *Law v. FSPO* [2015] IEHC 29 at para. 30.

57. Counsel for the applicants submitted that the Court should construe the subsections in a flexible way such that there should be a tendency to investigate rather than not investigate. The provisions as to the application of time limits in s.51 in respect of long-term financial products were consistent with the reality that actionable breaches under the 2017 Act may only arise or become evident towards the end of the life of such a product.

58. The FSPO's case in response was that it was not permissible to seek to disaggregate the different components that compositely constituted the conduct complained of. Here, the applicants, through their advisor, complained of mis-selling of a mortgage loan and the provision of a loan/mortgage that was inappropriate and unsuitable. That was precisely the conduct addressed by the FSPO in its decision. The characterisation of the conduct was quintessentially a question of fact which could only be set aside by this Court if the very high bar of *O'Keeffe/Keegan* was satisfied i.e. that there was no relevant material before the FSPO on which it could have arrived at that view. That test was manifestly not met here; there had been no error of characterisation of the impugned conduct at all, still less an irrational one.

59. The FSPO submitted that the application of the criteria in s.51(2)(a) (ii) and (iii) involved the application of legal tests, which had been correctly identified by the FSPO, to the FSPO's judgment on the facts before it and therefore involved quintessentially a question of fact which could only be set aside if irrational, which was not the case here. It was submitted that the Court needed to show deference to the FSPO's judgment on the facts given that the FSPO was dealing with an area of special knowledge, skill and expertise within the meaning of the authorities on curial deference. It was submitted that, here, there was a more than ample basis on the materials before the FSPO to arrive at the decision which it did.

60. Finally, the FSPO submitted that there was no basis for a "tendency to investigate" approach to the construction and application of s.51(2)(a)(ii) and (iii); to do so would undermine the very purpose of having time limits in the first place. Rather, it was for the FSPO to determine whether the statutory tests were met on the facts of any given case.

Discussion

Alleged Mischaracterisation of Conduct

61. As noted, the applicants submitted that the FSPO's summary of the complaint as being "*in 2007, the provider issued a mortgage to the complainants which was unsuitable to them*" is fundamentally wrong in not at all correctly summarising the complaint made which focused on the bank's unreasonable and improper conduct in the provision of the mortgage.

62. I do not believe there was any such fundamental error as alleged. The complaint made was one which focused on the conduct of the bank in providing the loan without conducting any proper assessment as to the applicants' suitability or repayment capacity over the life of the loan. This was correctly set out by the FSPO in the decision when referencing (at page 3 of the decision) the submission made on behalf of the applicants on 22 April 2021 (in response to the FSPO's preliminary opinion of 16 April 2021) that "*the complaint is that the providers unreasonable and improper conduct, made without consideration, resulted in a mortgage being granted that was wholly unsuitable and inappropriate for the financing or refinancing of the family home, resulted in an unjust and burdensome situation for the consumers*". This makes clear that the decision-maker understood the complaint being made. Shortly thereafter in the decision (on page 6), the FSPO then summarised the complaint as being "*in 2007, the provider issued a mortgage to the complaints which was unsuitable to them"*. This seems to me, read in the context of the decision as a whole to that point, to correctly summarise the gist of the applicants' complaint. Indeed, this summary is very close to the summary of the complaint twice use by the applicant's adviser, Mr. Hoey, when making complaint initially to KBC and thereafter to the FSPO (as set out at paragraphs 16 and 21 above respectively).

63. I do not see that there is any error in that regard and certainly no error to warrant the Court intervening by way of judicial review.

s.51(2)(a)(ii) decision unlawful?

Lawfulness of decision under s.51(2)(a)(ii)

64. In my view, the test set out in s.51(2)(a)(ii) as regards constructive awareness is an objective one. This stands in distinction to the subjective test manifest in the actual awareness element of this provision. The question of the date on which the complainant "*ought reasonably to have become aware*" of the conduct giving rise to the complaint is accordingly to be determined by reference to an objective standard: when, reasonably assessed, should a reasonable person in the complainant's position have become aware that they had a basis for believing the provider acted in a way that could be complained of under the 2017 Act?

65. It is for the FSPO to make its expert judgment on the facts as whether that legal standard is satisfied. The relevant question for the Court on a judicial review such as this is whether it can be demonstrated that the application of the statutory test to the facts has been done in a manner which can sound in relief by way of judicial review e.g. whether the finding is irrational on the facts before the decision-maker (was there no relevant evidence to support the findings?), or whether a material error of law was committed or whether relevant considerations were disregarded or irrelevant considerations taken into account in applying the statutory test.

66. I do not accept that the objective legal standard set out in this part of s.51(2)(a)(ii) should be any different because the FSPO otherwise has a very flexible jurisdiction when investigating and deciding on substantive disputes. The relevant provisions are not a form of screening process to determine, for example, whether there is a *prima facie* case of misconduct made out (such as often appears in statutory regulatory disciplinary processes). Limitation periods are fixed by the Oireachtas by way of seeking to balance the rights of complainants and those the subject of complaints. It is not a question of whether there should be a "tendency to investigate" or no such tendency; it is rather a question of when, reasonably assessed, a reasonable person in the complainant's position should have become aware that they had a basis for believing the provider acted in a way that could be complained of under the 2017 Act.

67. When coming to the application of the legal standard, it must be borne in mind that it is not a question of when the reasonable person might have become aware of legal breaches or of the fact that the conduct in question is actionable per se under the 2017

Act. This is a consumer-focused statutory scheme designed to be availed of by consumers without the necessity for legal or expert advice in formulating complaints. As we have seen, complaint may be made where a provider has acted lawfully but unreasonably or unjustly. These are concepts as capable of being understood by a layperson as by a lawyer or financial expert. A common-sense approach needs to be taken to the application of the constructive awareness test in s.51(2)(a)(ii) bearing in mind the very wide scope of the type of "conduct" that can be complained of to the FSPO under the 2017 Act.

68. Putting it in practical terms on the facts of this case, at what point was it open to the FSPO to form a view that the applicants should have been aware that the bank did not act appropriately in providing a €150,000 loan for a foreign investment property, total repayments for which were projected at €270,000, where that loan was secured on their previously unencumbered family home and where one of them was unemployed and therefore not earning any income at the time of the loan and both were not far off retirement age? At what point might it reasonably have occurred to them that the loan was totally unsuitable for them from the outset, particularly if one or both of them ran into difficulties with the capacity to generate income or the investment didn't work out as hoped for, and the Bank should therefore never have sold them the loan?

69. On the facts here, in my view, there was ample material before the FSPO to enable it take the view that, objectively, the applicants ought reasonably have been aware by the time they ran into serious financial difficulty in making repayments under the loan in 2011, once the interest-only period expired, that the product was never suitable for them in the first place in light of their actual repayment capacity and the obligations to pay off the entire of the loan post-retirement, and that the Bank had therefore acted inappropriately in providing the loan to them. By 2011, the acquisition of the Portuguese investment property had fallen through, the applicants were unable to make the scheduled repayments and the viability of them retaining their family home was under active consideration. It cannot be said that there is any irrationality in the O'Keeffe sense in the FSPO's determination that the applicants ought reasonably to have been become aware of the conduct complained of by 2011 in the circumstances.

70. Furthermore, I do not see that there was a failure to have regard to relevant considerations or any error of law. The decision maker clearly correctly identified the relevant terms of s.51(2)(a)(ii) and sought to apply the test there to the facts before her which included a series of facts as to the state of affairs as regards the applicants' repayment capacity in relation to the loan by 2011 (include the risk of having to sell their secured family home to pay off the loan) sufficient to ring alarm bells in the mind of the

reasonable borrower as to whether the Bank should ever have sold this loan to them in the first place.

71. In her decision under s.51(2)(a)(ii), the decision-maker held that the applicants "were on notice of the issues in relation to the suitability of their mortgage and the repayment capacity in 2011" when they arranged the consultation with MABS. The evidence of the issues they were on notice of appears in the letter of 5 April 2011 from the applicants to KBC. The letter references "unforeseen changes in our personal position" being that Mrs Baynes was not working but was now in receipt of disability benefit with the consequent impact on their ability to meet the loan repayments. There has accordingly evidence before the decision-maker as to their inability to repay at that time. There was also evidence contained in the KBC submission before the FSPO to the effect that the bank had noted in January 2011 that "*it seems only exit strategy on this account is to sell property and downsize as client income will never be at level to support the full repayment and clear the balance owed in 10 years, clients are willing to look at this but would only review this in 5 years time when their daughter finishes college and is no longer dependent*" i.e. that their home was on the line at that point. Accordingly, there was clearly evidence from which a view could be reasonably formed that the applicants ought to have been aware by that point that the bank had failed to properly assess their suitability for the loan in the first place.

72. Accordingly, I do not believe that the applicants have made out any unlawfulness as regards the FSPO's decision on their application for an extension of time under s.51(2)(a)(ii).

s.51(2)(a)(iii) decision

73. In relation to s.51(2)(a)(iii), counsel for the applicants submitted that the facts before the decision-maker - such as the fact that Mrs Baynes' was under disability, that the applicants' home was as of 2019 directly in jeopardy, and that MABS had referred them to a financial adviser who had brought their attention to the bank's wrongdoing only a short time before the complaint - should have been considered by the decision-maker and such consideration should be apparent from the terms of the decision.

74. In fairness to the decision-maker, those grounds were not all advanced in terms to the FSPO as reasons for the granting of an extension under this subsection. As noted earlier, Mr Hoey in a submission on the applicants' behalf, of 24 November 2020, had submitted in relation to the application for an extension of time under this subsection that "*our client*

was being asked to repay the loan in full and if this is not possible, that they should sell their family home to repay the bank."

75. The response in the preliminary opinion on jurisdiction to this submission was in identical terms to that found in the decision itself i.e.

> *"There is no evidence in this particular matter that there are reasonable grounds for requiring a longer period of 13 years from the date of the conduct complained of with respect to the sale of the mortgage in 2007 such that it would be just and equitable to extend the period within which to make a complaint under s51(2)(a)(iii) of the Act."*

76. It is not evident from the forgoing extract from the preliminary opinion that the reason advanced in the November 2020 letter was engaged with at all and if it was engaged with, why it was rejected.

77. As we have seen, precisely the same basis for rejecting the s.51(2)(a)(iii) extension request was given in the impugned final decision. While Mr. Hoey also raised the issue of equitable fraud in relation to s.51(2)(a)(iii) in his further submission of 22 April 2021, this was primarily in the context of a contention that the FSPO had erred in relation to s.51(2)(a)(ii). The FSPO separately rejected in its decision that it had jurisdiction in relation to fraud and this aspect of the FSPO's decision was not challenged in this judicial review. That does not seem to me to detract from the proposition that the decision-maker had before her at the time of the decision a submission (as set out in Mr. Hoey's 24 November 2020 letter) that there were reasonable grounds for the grant of an extension under s.51(2)(a)(iii) and that it was just and equitable to grant the extension on the basis that the applicants' family home was on the line in light of the bank's insistence in 2019 that the full amount of the loan be repaid, a submission supported by the evidence before the decision-maker.

78. As with s.51(2)(a)(ii), in my view s.51(2)(a)(iii) involves the application to the facts before the FSPO of a legal test, namely whether there are "reasonable grounds" for requiring a longer period (than 6 years from the conduct or 3 years from when the complainant became aware or ought reasonably to have become aware of the conduct) and that it would be "just and equitable" in all the circumstances to so extend the period. Was that test lawfully applied here?

79. Addressing firstly the question of the periods under consideration, the relevant periods here, on the FSPO's decision under s.51(2)(a)(ii), were 13 years from the conduct or 9 years from when the FSPO thought the applicants ought reasonably to have become aware of the conduct. I note in this regard that the decision-maker appears to have overlooked the latter 9 year period in her decision on this application as she simply refers in her decision to "*a longer period of 13 years from the date of the conduct complained of with respect to the sale of mortgage in 2007*". However, I do not believe that this was such a material error as to invalidate this part of the decision.

80. As regards the application of the legal criteria set out in the subsection to the facts, this involves consideration of two separate matters: whether there are "reasonable grounds" for requiring a longer period and, if there are, whether it is "just and equitable" in all the circumstances to so extend the period. Here, the case was made that the two-step test was satisfied in essence because the applicants now stood to lose their family home, a home which had been unencumbered before the conduct complained of.

81. In my view, that submission might arguably be regarded as satisfying the two-step test, although whether it would so satisfy the test is ultimately a matter of judgment on the part of the FSPO in light of all the facts. It was nonetheless a submission which needed to be at least considered.

82. However, the decision (that there was "no evidence" that there were reasonable grounds such that it would be just and equitable to extend the time), does not appear to me to demonstrate any engagement with the submission in fact made by the applicants; no regard was had to the relevant consideration of that submission.

83. I do not believe it is a sufficient answer for the FSPO to say that following the rejection of the case under s.51(2)(a)(ii), there was nothing left to expressly address in the s.51(2)(a)(iii) application. While put in net terms, a separate case had been made under s.51(2)(a)(iii) and required to be meaningfully addressed. No elaborate reasoning was required but some reasoning was required as to why that case was not regarded as satisfying the test. None at all was provided.

84. I do not accept the submission made on behalf of the FSPO that while it would be necessary to identify and reason in the decision the factors being relied upon by the FSPO

where an extension of time under s.51(2)(iii) on just and equitable grounds was being allowed, there is no such obligation to reason a refusal under the subsection where the FSPO had already rejected a s.51(2)(a)(ii) extension application on the same facts. The form of decision on the extension of time application under s.51(2)(a)(iii) in this case (i.e. simply that there is "no evidence" that there are reasonable grounds that it would be just and equitable to extend time for the complaint), if permitted as lawful, would risk allowing conclusory rejections of applications for exercise of discretion in extending the time limit under this subsection without proper engagement with the case made by an applicant in support of such an application and without any means of an applicant understanding whether the basis for his or her application had been understood and if so, in broad terms why it had been rejected.

85. Accordingly, in my view, this aspect of the decision was unlawful in failing altogether to demonstrate any engagement with the case made under this subsection.

86. As a final observation of this part of the case, I do not think it would be helpful for me to seek to identify the types of factors which might be relevant to an exercise of the FSPO's discretion under s.51(2)(a)(iii). The factors will inevitably be case sensitive. However, it is worth noting that factors such as the gravity of the impact of the conduct complained of and when the complainant in fact became aware of the misconduct in question might well be relevant factors on any given set of facts. It is also pertinent to point out that, as fairly accepted by counsel for the FSPO at the hearing, it is not necessary to read into the subsection a standard of "exceptional circumstances" as appears to have been advocated by KBC in its submission to the FSPO; rather, the FSPO will be concerned in any application under this subsection to apply the statutory criteria set out in the subsection to the particular facts before it.

Conclusion

87. For the reasons set out in this judgement, I believe that the FSPO's decision under s.51(2)(a)(ii) was lawfully arrived at but its decision under s.51(2)(a)(iii) was not lawfully arrived at.

88. I will discuss with counsel the appropriate form of order in light of this judgment.