**THE HIGH COURT**

[2023] IEHC 234

**[Record No. 2022/51 MCA]**

**BETWEEN**

**KBC IRELAND PLC**

**APPELLANT**

**AND**

**FINANCIAL SERVICES AND PENSIONS OMBUDSMAN**

**RESPONDENT**

**AND**

**J.L.**

**NOTICE PARTY**

**JUDGMENT of Mr. Justice Barr delivered on the 5th day of May, 2023.**

**Introduction.**

**1.** The appellant is a bank licensed to carry on banking business within the State. The notice party was a customer of the appellant between 4th April, 2018 and 24th June, 2020, when he held an account known as a Smart Access Deposit Account in the appellant's bank.

**2.** This is an appeal by the appellant pursuant to s. 64 of the Financial Services and Pensions Ombudsman Act, 2017 (hereinafter "the 2017 Act"), against a decision of the respondent dated 18th January, 2022, in which the respondent held in favour of the notice party, who had lodged a complaint in relation to the lack of notification given to him by the appellant with regard to changes in the interest rate that would be payable on the funds in his Smart Access Deposit Account, during the lifetime of the account. Essentially, the notice party complained that he was never informed of a number of reductions in the interest rate payable in respect of funds held in the account during the relevant period.

**3.** The notice party submitted that, while the appellant was entitled to alter the rate of interest it would pay on monies held in the account from time to time; under the terms of the contract between the appellant and the notice party, they could only do so when they had given him notice ten days in advance of the impending change in the rate of interest. The notice party denied that he had ever been given such notification. In his complaint form submitted to the respondent, he stated that he first became aware of the reductions in the interest rate on 30th May, 2020.

**4.** The parties were agreed that the relevant clause which governed this matter was clause 78.4.1 in the terms and conditions which governed the operation of the account. That clause was in the following terms:

> *"Interest on a Demand Account is at a variable rate. We reserve the right, at all times, to vary any and all applicable variable interest rates, by giving you ten days notice thereof to you by whatever means that we, at our discretion, deem appropriate, save where the variation is to your benefit in which circumstances we may implement such variation as soon as is practicable and notify you thereafter. The rate of interest applicable to the Demand Account is determined by reference to the relevant Personal Deposit Rate Matrix applicable from time to time and the balance in the Demand Account. Interest is credited to the Demand Account periodically as set out in Clause 84."*

**5.** The kernel of the notice party's complaint was that he had never received personal notification in the form of an email, letter, text, or pop up on his mobile banking app, in respect of any of the reductions in interest payable on the account during the relevant period.

**6.** The appellant accepted that it had reduced the interest rates payable on the account on a number of occasions. It stated that it had chosen to provide notification of impending interest rate changes, by way of advertisement published in two national daily newspapers and on its website, ten days in advance of the implementation of the change in interest rate. It argued that under the terms of the contract, it was not obliged to provide personal, or specific notification to the notice party.

**7.** The respondent determined that having regard to other clauses in the terms and conditions governing the account, and having regard to the wording of the clause itself, and having regard to the provisions of the Consumer Protection Code (2015 edition) (hereinafter "the CPC"), the appellant was obliged under clause 78.4.1 of the contract, to provide specific notification to the notice party, rather than a general notification to the public at large, by means of publication of an advertisement in a daily newspaper, or by putting such notification on the appellant's website.

**8.** The respondent also found that the conduct of the appellant breached the provisions of the CPC and found that such conduct was contrary to law; was unreasonable; and was otherwise improper; accordingly, he found that the conduct came within s. 60(2) (a), (b) and (g) of the 2017 Act.

**9.** The respondent directed the appellant to pay to the notice party, the difference between the interest rate paid at different times and the initial interest rate of 0.3%, which, during the lifetime of the operation of the account, amounted to €75.47. The respondent also awarded the notice party the sum of €1,000 as compensation pursuant to s. 60 (4) of the 2017 Act.

**The Grounds of Appeal.**

**10.** The appellant accepted that to be successful on an appeal under s. 64 of the 2017 Act, it had to establish that the decision of the respondent was vitiated by a significant and serious error, or a series of such errors.

**11.** The appellant submitted that the decision of the respondent in this case was vitiated by a series of such errors. In this regard, the appellant pointed to seven discreet areas, in which it submitted that the respondent had fallen into error. First, it was alleged that the respondent had erred in finding that the notice requirement provided for in clause 78.4.1 of the contract, had been breached by the appellant.

**12.** In particular, it was submitted that the respondent had erred in his approach to interpreting the clause, because he had held that the fact that certain forms of notification had been provided for in other clauses of the contract, which forms of notification were not repeated in clause 78.4.1; such silence meant that the appellant had less discretion as to the means of notification, rather than more discretion, as to how it would notify its customers of an impending change in the rate of interest payable on the account. It was submitted that that interpretation was contrary to the ordinary and natural meaning of the words in the disputed clause.

**13.** In this regard, the respondent had had regard to clause 13.5 of the contract, which provided that in relation to fees and charges, the bank could determine at its sole discretion, the method by which they would notify the customer of changes to the fees and charges applicable to the account. The clause went on to provide: "*We may, without limitation, notify you by letter by way of an inserting enclosed with your statement, electronic mail, telephone (including recorded message) and/or advertisement in any Irish national daily or weekly newspaper or on our website*".

**14.** The respondent had also had regard to clause 18.2 of the contract, which dealt with amendments and variations to the terms and conditions of the contract. That clause provided that the bank would give the customer at least two months' notice of such amendments or

variations unless otherwise permitted by law. The clause went on to provide: "*Unless we are required by law to use a particular medium, notice will usually be provided via our website, your personal e-documents folder on your digital service or we may place an advertisement in at least two daily national newspapers outlining the changes. Changes to an interest rate or exchange rate, which will not adversely affect you may be implemented as soon as practicable*."

**15.** It was submitted that in holding that the terms of clauses 13.5 and 18.2 somehow limited the wide discretion given to the appellant in clause 78.4.1, in relation to the method by which it notified the customer, the respondent had not applied any known principles of interpretation of contract and had erred in law in construing this clause in the contract as meaning that the appellant had to give personal or specific notice to the notice party.

**16.** It was also submitted that the respondent had erred in holding that clause 78.4.1, required specific notification of the customer, because the clause referred to notifying "you", when very similar wording had been used in clauses 13.5 and 18.2, both of which expressly provided that notification could be given by advertisement published in a national newspaper. It was submitted that it was inconsistent to hold that such method of notification was sufficient to notify the customer of the matters covered in clauses 13.5 and 18.2, but would not be sufficient to serve the same function in relation to clause 78.4.1.

**17.** It was submitted that the respondent had further erred in law in his construction of the contract, in having regard to the provisions of the CPC, when interpreting the terms of the contract entered into between the parties. It was submitted that insofar as the respondent appeared in his decision to have relied on certain provisions in the CPC, as providing a basis for his interpretation of clause 78.4.1, he had erred in law in so doing.

**18.** It was submitted that on a proper construction of the clause, the words had to be given their ordinary and natural meaning. This meant that the appellant enjoyed a wide discretion as to the means by which it could notify its customers, including the notice party, of impending changes in the interest rate payable on the account. It was submitted that the method of notification adopted in respect of each of the rate changes, being notification by advertisement in two national daily newspapers and on the bank's website, were sufficient to comply with the terms of clause 78.4.1.

**19.** As a second ground of appeal, the appellant submitted that the respondent had erred in finding that the appellant had been in breach of the terms of the CPC. In particular, the

respondent had found that the appellant had acted in breach of provisions 4.1 and 2.6 of the code. Provision 4.1 appears in the code under the heading "Provision of Information – General Requirements". It is in the following terms:

> *"A regulated entity must ensure that all information it provides to a consumer is clear, accurate, up to date, and written in plain English. Key information must be brought to the attention of the consumer. The method of presentation must not disguise, diminish or obscure important information."*

**20.** Provision 2.6 of the code appears under the heading "General Principles". It is in the following terms:

> "*A regulated entity must ensure that in all its dealings with customers and within the context of its authorisation it … (2.6) makes full disclosure of all relevant material information, including all charges, in a way that seeks to inform the customer.*"

**21.** The applicant submitted that both of these provisions were of a general nature. It was submitted that they had to be read in conjunction with provisions 4.5 and 4.6 of the code, which provided that when a regulated entity published a notice regarding a change in interest rates, the notice must state the old rate and the new rate and the date on which the changes will apply (4.5). At provision 4.6 the code provided that where a regulated entity publishes interest rates on its information services, including telephone helplines and website, the regulated entity must update such information services as soon as any interest rate change comes into effect.

**22.** It was submitted on behalf of the appellant that both of the provisions which had been relied upon by the respondent, were of a general nature. It was submitted that they had to be read in conjunction with provisions 4.5 and 4.6, which expanded upon the general obligations stated in provisions 2.6 and more particularly in 4.1. It was submitted that the CPC did not prescribe the medium, or manner in which such a notice must be published. It was submitted that while provision 4.1 used mandatory language in relation to the presentation of key information, which must be brought to the consumer's attention, it did not impose mandatory requirements on the appellant as to the method of notification whereby such key information must be brought to the attention of the consumer. Provisions 4.5 and 4.6 of the CPC explicitly provided for the "publication" of notices relating to rate changes in various forms, "including", telephone helplines and websites.

**23.** It was submitted that provision 2.6, requiring the appellant to make "full disclosure of all relevant material information", was a general provision, which made no reference to specific methods of notification. It was submitted that in providing the notification by means of advertisements in two national daily newspapers and on its website, the appellant had fully complied with the CPC, which was relevant to whether that conduct could be held to be contrary to s. 60 (2) (a), (b) or (g).

**24.** It was submitted that it was incorrect and an error in law, for the respondent to have contended that the less specific terms of provision 4.1 and 2.6 of the CPC, had overridden the very deliberate and specific requirements of provisions 4.5 and 4.6, which related to publication of notices relating to interest rate changes.

**25.** The appellant's third ground of appeal was that that the respondent had wrongly failed to have regard to an earlier decision which had been delivered by its predecessor, the Financial Services Ombudsman Bureau (hereinafter *"FSO"*) in 2016, wherein it had found that notification of information by means of an advertisement placed in a newspaper, was sufficient.

**26.** It was submitted that by simply stating that each complaint must be taken on its own facts and refusing to have regard to the earlier decision, the respondent had acted in an inconsistent and irrational manner and had acted contrary to law.

**27.** Fourthly, it was submitted that in refusing to hold an oral hearing, as had been requested by the appellant, the respondent had departed from fair procedures in his conduct of the investigation. It was submitted that it was necessary in the circumstances of this case to hold an oral hearing, to ascertain whether the notice party had been actually aware of the changes in interest rates, from a perusal of his mobile app. It was submitted that records held by the appellant showed that the notice party had accessed the app on a significant number of occasions during the relevant period. It was submitted that an oral hearing was also necessary to ascertain whether the notice party suffered any loss, as a result of any failure on the part of the appellant to notify him of changes in the interest rate payable on the account; in the absence of any better interest rate being available on the market at the relevant time. It was submitted that the respondent had wrongly refused the request of the appellant to hold an oral hearing to elucidate these matters, which it was submitted were relevant both to the issue of alleged breach of contract and alleged loss.

**28.** Fifthly, it was submitted that there had been a breach of fair procedures by the respondent, due to his failure to allow the appellant to make submissions on the loss allegedly suffered by the notice party, when in his preliminary decision, he had effectively made a finding that there had been no breach of contract by the appellant, but had simply held that the appellant had acted in breach of the CPC. It was submitted that in failing to allow the appellant to make such submissions and by proceeding to make a direction that the differential in interest rates be repaid to the notice party, and in making an award of compensation to him, without allowing the appellant an opportunity to make submissions thereon, the respondent had acted in breach of fair procedures.

**29.** Sixthly, the appellant submitted that the respondent had erred in directing repayment of the differential in the interest rate from the initial interest rate of 0.3% and the various reduced rates that had applied from time to time during the currency of the account. It was submitted that that had been incorrect, due to the fact that on the notice party's own submissions, he had been aware of the first reduction which had brought the interest rate down to 0.25%. It was further submitted that the direction to pay that differential in interest rates, did not take account of the fact that, for a portion of the time, the notice party had funds in excess of the maximum allowable amount in the account, which meant that for that period a much lower rate of interest, would only have been payable.

**30.** Seventhly, it was submitted that the decision was vitiated due to a lack of adequate reasoning and, in particular, due to a failure on the part of the respondent to tie in his findings with the specific sub-sections mentioned by him in the determination, being s. 60(2)(a), (b) and (g) of the 2017 Act. It was submitted that having regard to this series of errors, the appeal should be allowed and the respondent's decision be set aside.

**Submissions on behalf of the Respondent.**

**31.** On behalf of the respondent, it was submitted that it was settled that the investigation and consideration of complaints by the respondent's office under the 2017 Act, was not like the procedure adopted in the Superior Courts. It was submitted that the respondent enjoyed a much wider jurisdiction under the 2017 Act, than that enjoyed by the courts. The acting Ombudsman was specifically mandated to carry out his investigations in an informal, efficient and fair manner. The findings which he, or his staff, could make, were much wider than whether conduct was lawful or not. He could consider whether, in all the circumstances, the conduct, while lawful, was unreasonable, unjust or oppressive to the

customer. He was also entitled to find that the conduct was improper, if the evidence supported that conclusion.

**32.** It was submitted that while the law on when courts should afford curial deference to decisions of inferior tribunals, had been clarified by the decision in *Stanberry Investments Ltd v. Commissioner of Valuation* [2020] IECA 33, it was still appropriate for the courts to afford the decision of the respondent, curial deference, in respect of certain areas within his expertise, such as in relation to the reasonableness of the conduct on the part of a regulated entity.

**33.** It was submitted that the interpretation of the terms of a contract, was a mixed question of law and fact, on which it was appropriate for the court to afford curial deference to a decision of the respondent in respect of matters of fact within her area of expertise, rather than on areas of pure law.

**34.** Turning to the specific grounds of appeal, it was submitted that the respondent had not erred in his approach to the interpretation of clause 78.4.1. It was submitted that he had adopted a text in context approach, which was the correct way to approach the interpretation of a contract. It was submitted that he had looked at similar terms elsewhere in the contract. That was perfectly permissible. It was submitted that the fact that the appellant did not like the result that the respondent had reached, which was to the effect that the clause required specific notification to the customer, did not mean that the respondent had applied the wrong principles in his interpretation of the contract. It was submitted that the court should not interfere with the respondent's interpretation, unless it was satisfied that the respondent had erred in his approach to the interpretation of the clause. It was submitted that there was no such error in this case.

**35.** Counsel submitted that the respondent was entitled to have regard to the terms of the CPC. The provisions of that code were mandatory on all regulated entities. It was submitted that it had been recognised in case law, that the respondent enjoyed a wide jurisdiction under the CPC to consider whether the conduct of a service provider was unreasonable, unjust, oppressive, or was otherwise improper.

**36.** It was submitted that the respondent had not erred in finding that a change in interest rate payable on a deposit account was *"key information"* for an account holder, and that, as such, it should have been specifically brought to the attention of the notice party,

which implied that the notification obligation provided for in clause 78.4.1, meant personal, or specific notification.

**37.** It was submitted that the respondent had not erred, or acted outside his jurisdiction, in finding that the method of notification adopted by the appellant had been unreasonable and that, therefore, its conduct was improper.

**38.** It was submitted that insofar as the appellant had attempted to call in aid provisions 4.5 and 4.6 of the CPC, to bolster its argument that a notification by advertisement in a newspaper was acceptable, it was submitted that these provisions merely specified what information must be provided when the service provider chose to adopt certain methods of communication. They did not curtail the mandatory nature of the obligation in provision 4.1 to provide key information to a customer, nor did they provide that notification by advertisement in a newspaper was sufficient to comply with the obligations under provision 4.1. It was submitted that the respondent had not erred in so finding.

**39.** In relation to the appellant's submission that the respondent had not provided adequate reasons as to why he had not been bound by the earlier decision of the FSO, it was submitted that the respondent had not erred in refusing to hold himself bound by that decision for two reasons: first, the decision was not relevant, as the sentence on which the appellant sought to place reliance, was *obiter dicta*, as the aspect of notification was not in issue in that case. The case concerned an allegation of mis-selling of a product to the customer. Secondly, it was submitted that there was no doctrine of precedence in relation to prior decisions of the Ombudsman at that time, because under the previous statutory regime, which had applied at the time when the 2016 decision was handed down, decisions of the FSO were not published. It was submitted that in these circumstances, the respondent had not erred in refusing to hold himself bound by a single, non-relevant sentence, in the 2016 decision.

**40.** In relation to the refusal to hold an oral hearing, it was submitted that the respondent enjoyed a very wide discretion as to how to conduct his investigation into a complaint. It was submitted that the respondent had a statutory mandate to hold an informal, efficient and fair investigation. The key issue here did not concern contested facts. The issue concerned a matter of contract, as to whether clause 78.4.1 required personal or specific notice to be given to the customer. It was submitted that that core issue did not

require an oral hearing and, therefore, the respondent had not erred in declining to hold such a hearing.

**41.** In relation to the assertion that there had been a breach of fair procedures in not allowing the appellant to make further submissions on any alleged loss that might have been suffered by the notice party, it was submitted that in the circumstances of this case, the appellant had been given more than ample opportunity to make whatever submissions it had wanted. There was no basis on which it could realistically be argued that they had been denied an opportunity to fully put their case before the respondent.

**42.** In relation to the direction to pay the differential in the interest rate between the initial interest rate of 0.3% and the reduced rates that had been applied to the account from time to time, it was submitted that once the respondent had held that it was a condition for the imposition of an alteration in the interest rate on an existing customer, that they be given personal notification and where it was accepted that such notification had not been given, it followed inexorably, that the notice party was entitled, as a matter of contract, to receive the amount payable under the initial interest rate. That was the basis on which the direction had been made. It was denied that the appellant had any valid complaint in relation to the direction to make good this deficit in interest.

**43.** In relation to the assertion that the respondent's decision was vitiated by a lack of reasons, or for a failure to specifically tie in the findings with the specific sub-paragraphs in s. 60, it was submitted that the appellant had a mistaken view of the extent of the reasons required in a decision of the respondent. It was submitted that case law had established that the respondent only had to give the broad gist of the reasons for his findings. It was submitted that it was well settled that a decision of the respondent was not the same as a judgment of the Superior Courts.

**44.** It was submitted that it was necessary to read the decision as a whole. When this was done, it was clear what findings had been made by the respondent; why they had been made; and, accordingly, on what basis the various findings had been made pursuant to s. 60 of the 2017 Act.

**45.** It was submitted that when one read the decision as a whole, it was entirely clear why the respondent had held that the conduct on the part of the appellant had been contrary to law; unreasonable and improper. It was submitted that while he may have tied the

findings more clearly to the specific subparagraphs of s. 60, when the decision was read as a whole, the basis for the respondent's findings was perfectly clear.

**46.** In summary, it was submitted that there was no single significant and serious error in the respondent's decision; nor were there a series of such errors; therefore, the court should not interfere with the decision of the respondent in this case.

**Chronology.**

**47.** As the appellant complains that it was not given an adequate opportunity to make submissions on certain aspects of the case when it was before the respondent, it is necessary to set out a chronology of the key dates on which actions were taken and submissions were made by the appellant and the notice party.

**48.** On 3rd April, 2018, the notice party signed an application form in relation to the opening of a Smart Access Deposit Account in the appellant's bank. In his application form, the notice party accepted that he had read the terms and conditions governing the account. The account was opened on the following day.

**49.** On 2nd June, 2020, the notice party made a complaint to the appellant, in which he complained that he had only learned on 30th May, 2020, that the interest rate payable on his funds in the account, had been reduced on various dates since the opening of the account. The appellant responded to the notice party's complaint on 9th June, 2020. On 16th June, 2020, the notice party made a further response thereto. On 23rd June, 2020, the bank gave its final decision in the matter, in which it did not accept that there had been any breach by it of its notification obligations under the terms and conditions governing the account.

**50.** On 18th June, 2020, the notice party submitted his complaint to the FSPO. When attempts to effect a mediated settlement of the complaint were not successful, a summary of complaint and list of questions were sent by the office of the FSPO to the appellant on 7th October, 2020.

**51.** By letter dated 11th November, 2020, the appellant responded to the schedule of questions and schedule of evidence that had been required of it. That was forwarded to the notice party for his comments on 13th November, 2020. On 17th and 18th November, 2020, the notice party furnished his response thereto.

**52.** When that response had been furnished to the appellant, it replied by email dated 24th November, 2020, confirming that it had no further submissions to make except in respect of one discreet matter. By email dated 29th November, 2020, the notice party made

comments on the further response from the appellant. That further response was sent by the respondent to the appellant by email on 22nd February, 2021. By email of the same day, the appellant confirmed that it had no further submissions to make.

**53.** A preliminary decision was issued by the respondent on 12th August, 2021. Subsequent to delivery of that decision, by email dated 29th August, 2021, the notice party responded to the preliminary decision with additional submissions. By email dated 2nd September, 2021, the appellant made a submission, which took issue with various points arising out of the preliminary decision. It also made other points, such as a request for an oral hearing.

**54.** The notice party furnished an additional set of submissions by email dated 16th September, 2021. By email dated 20th September, 2021, the appellant furnished a further submission. Further submissions were furnished by the appellant by email dated 30th September, 2021.

**55.** By email dated 2nd October, 2021, the notice party indicated that he did not propose to respond any further to the appellant's submissions; however, he made some concluding comments. He subsequently responded to the appellant's submissions by way of further submissions made by email on 14th October, 2021.

**56.** By email dated 19th November, 2021, further submissions were made by the appellant. By email dated 30th November, 2021, the notice party confirmed that he had no further submissions to make.

**57.** The final decision of the respondent issued on 18th January, 2022.

**The Law.**

**58.** The parties were agreed that the burden of proof lay on the appellant to establish that the respondent's decision was vitiated by a serious and significant error, or by a series of such errors: see *Ulster Bank v. FSO* [2006] IEHC 323; *Hayes v. FSO* (Unreported, High Court, MacMenamin J., 3rd November, 2008); *FSO v. Millar* [2015] 2 ILRM 337.

**59.** In *Lynch v. FSO* [2015] IEHC 298, Baker J. (then sitting as a judge of the High Court), held that it was established as a matter of law, that for the High Court to allow an appeal under the statutory scheme, it must be satisfied that the adjudicative process taken as a whole, was vitiated by a serious and significant error, or a series of such errors. She stated that the case law had established that it was the function of the High Court to look at the adjudication process as a whole and to determine whether real and substantial errors

were found, such as would require the High Court to intervene and make the form of orders which it was entitled to make (see paras. 51 and 52). In *Danske Bank v. FSPO* [2021] IEHC 116, Hyland J. held that in order to vitiate a decision of the FSPO, she must find not only that there were serious and significant errors, but also that they were material to the decision.

**60.** In *Lloyds Insurance Company v. FSPO* [2022] IEHC 290, Phelan J. held that given the consistent volume of case law concerning the FSPO, which envisaged judicial intervention only where factual findings were "unsustainable", it was clear that where a finding was supported by evidence, it should not be treated as unsustainable by the court: see para. 117.

**61.** In *Ryan v. FSO* (Unreported, High Court, 23rd September, 2011), MacMenamin J. stated that the court cannot and must not engage in a re-examination from the beginning of all the merits of the decision, or seek to step into the shoes of the Ombudsman, or arrogate to itself the decision making process. In *Molyneaux v. FSPO* [2021] IEHC 668, Simons J. stated as follows at para. 64:

> "*[…] The legislative intent, as identified in the well established case law, is that complaints in respect of the provision of financial services and pensions will be determined by a dedicated, specialist tribunal. The existence of a right of appeal to the High Court represents an important safeguard against serious error, but it is not intended as a* de novo *appeal. […]*"

**62.** The law is also well settled as to the nature of the investigation that must be carried out by the respondent when investigating a complaint under the relevant legislation, and in particular, under its most recent iteration, the 2017 Act. Section 12 of the Act deals with the functions of the Ombudsman. It provides that the principle function of the Ombudsman is to investigate complaints in an appropriate manner, proportionate to the nature of the complaint by informal means; mediation; formal investigation (including oral hearings if required); or a combination of these methods. The section further provides that the Ombudsman shall endeavour to be accessible to the public and ensure that complaints about the conduct of financial service providers, or pension providers, are dealt with in an informal manner, efficiently, effectively and fairly. The section further provides that when dealing with a particular complaint, the Ombudsman shall act in an informal manner and according

to equity, good conscience and the substantial merits of the complaint, without undue regard to technicality or legal form.

**63.** The wide nature of the jurisdiction exercised by the respondent when investigating complaints and the wide nature of the redress that he can award, has been commented upon in a large number of cases. In *O'Brien v. FSO* [2014] IEHC 111, O'Malley J. (then sitting as a judge of the High Court.) stated as follows at para. 59:

> "*The point, which by now does not really require repetition, is that the Financial Services Ombudsman is mandated to operate in a different way to courts (in an informal way, without regard to technicality or form); to pursue his investigations in a different manner (with, for example, a discretion as to the holding of oral hearings); to make findings not open to the courts (such as findings of impropriety or lack of clarity not amounting to breaches of legal rights) and to fashion remedies not available in court (such as directing a financial services provider to change its practice, or to pay compensation not related to loss). He is not obliged to provide the type of analysis expected in court, but merely to give the broad gist of his reasons.*"

**64.** The wide ranging nature of the jurisdiction exercised by the Ombudsman was also commented upon by Hyland J. in *Danske Bank v. FSPO* in the following way at paras. 27 and 28:

> "*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.*

> *28. Section 60(4) identifies the redress the Ombudsman may order, including directing a financial service provider to review, mitigate or change the conduct complained of or its consequences, provide reasons for the conduct, change a practice relating to the conduct, pay compensation to the complainant, or "take any other lawful action that the Ombudsman considers appropriate having had regard to all the circumstances of the complaint". The extensive and wide-ranging nature of the remedies at the disposal of the Ombudsman reinforce the sweeping nature of his or her redress jurisdiction*."

**65.** In *Chubb European Group S.E. v. FSPO* [2023] IEHC 74, Simons J. noted that the Ombudsman enjoyed what might be described as a "hybrid jurisdiction", whereby he may adjudicate not only on contractual disputes, e.g. where a complainant alleged that the conduct of a financial service provider in refusing to honour a claim was in breach of contract; but may also make determinations and direct remedies in respect of conduct which, while not contrary to law, was found by the Ombudsman to be "unreasonable" or "unjust".

**66.** The issue of when the court should show curial deference to a decision of the Ombudsman, has been considered in a number of cases. While decisions that were delivered prior to 26th February, 2020, have to be read in light of the decision of the Court of Appeal in *Stanburry Investments Ltd v. Commissioner of Valuation* [2020] IECA 33; those decisions are still relevant, as are subsequent decisions which deal with the issue of curial deference.

**67.** In *Utmost Paneurope DAC v. FSPO* [2020] IEHC 538, Simons J. noted at para. 89 that if the Ombudsman had jurisdiction to direct the payment of financial compensation in the particular circumstances of a case, then the assessment of the precise quantum thereof, was something to which deference will be shown by a court. That dictum was cited with approval by Burns J. in *Hiscox S.A. v. FSPO* [2022] IEHC 557. The decision of Simons J. in the *Utmost* case was affirmed on appeal by the Court of Appeal at [2022] IECA 77.

**68.** It is now settled law that in relation to pure questions of law, the decisions of an inferior tribunal, no matter how expert they may be in their particular area, will not acquire any particular curial deference. However, the question of the construction of a contract, has been held to be a mixed question of law and fact: *Millar v. FSO,* per Kelly J. (as he then was) at para. 38; per Finlay Geoghegan J. at para. 18. Finlay Geoghegan J. went on to state at para. 19, that when exercising its appellate jurisdiction from a decision of the FSPO, it was not possible for the High Court to "examine afresh" a contractual construction placed by the

Ombudsman on a relevant term of a contract. Rather, the Court should consider whether the appellant has established on the balance of probabilities that on the material before him, the Ombudsman's construction of the contract, contains a serious error.

**69.** In *Governey v. FSO* [2015] 2 IR 616, which was a determination on an application for leave to appeal to the Supreme Court, it was held that a court may show curial deference to a finding as to the unreasonableness of lawful conduct by a financial institution, made by the Ombudsman (see para. 44).

**70.** These are the main legal principles which the court must take into account in its determination of the present appeal. Further authorities will be referred to when dealing with the individual grounds of appeal.

**Discussion and Conclusions.**

**71.** The general principles that should be adopted when interpreting a contract, were established by the Supreme Court in *Law Society v. MIBI* [2017] IESC 31. These principles were applied and restated by McDonald J. in *Brushfield Ltd v. Arachas Corporate Brokers Ltd & Anor* [2021] IEHC 263, at para. 109, which principles were adopted and applied by Simons J. in *Chubb European Group S.E. v. FSPO*. These principles are well known and need not be repeated here.

**72.** Having regard to the authorities cited earlier in this judgment, I am satisfied that the interpretation of clauses in a contract is a mixed question of law and fact, as set out in the *Millar* case. That being the case, this court does not have to show curial deference to the issues of pure law that arise when the Ombudsman is interpreting the terms of a contract.

**73.** I find that in this case, the respondent erred in his approach to the interpretation of clause 78.4.1. While he was entitled to adopt the text in context approach, and to look at the whole contract, including looking at clauses 13.5 and 18.2; the court finds that he fell into error in concluding that because certain methods of notification had been encompassed in a non-exhaustive list of such methods in these clauses, and had not been repeated in clause 78.4.1; that that somehow circumscribed the breadth of the discretion afforded to the service provider, as to the means of notification that it could adopt under clause 78.4.1.

**74.** In other words, the respondent appears to have treated silence as to any means of notification in clause 78.4.1, as somehow modifying, or restricting the meaning of the words used in clause 78.4.1, which clearly provided that the appellant had the right at all times to

vary any and all applicable variable interest rates by giving the account holder ten days' notice "*by whatever means that we, at our discretion, deem appropriate*".

**75.** I do not see any legal basis on which silence in this regard can be construed as limiting, or negating the wide discretion given to the appellant in this contract. Accordingly, I have to find that the respondent fell into error in his approach to the construction of this term in the contract.

**76.** Put at its simplest level, this term in the contract was so wide in the discretion that it gave the appellant as regards notifying customers, including the notice party, of an impending rate change; that it was almost illusory. However, that is what the parties agreed.

**77.** I find that the respondent further fell into error in having regard to the terms of the CPC when considering the correct interpretation of clause 78.4.1 of the contract. That approach appears to me to be impermissible at law.

**78.** The code is not a statute that overrides, or even influences, the terms in a contract entered into between a service provider and a customer, unless it is specifically incorporated into the terms of the particular contract; which did not happen under the terms and conditions in this case. That meant that the respondent had before him two distinct legal documents: the contract between the appellant and the notice party, and the CPC. However, they remained at all times quite distinct. This arises from the nature of the CPC.

**79.** The CPC was drawn up by the Central Bank to ensure a consistent level of protection for consumers, regardless of the type of financial service provider they chose to engage. It is binding on all regulated entities. However, it does not have the status of a statute. Therefore, it cannot give rise to rights for the benefit of a customer, which are either not provided for in the contract between the customer and the financial services provider, or are inconsistent with the terms of such contract.

**80.** It was established in *Ryan v. Danske Bank* [2014] IEHC 236 and in *Irish Life and Permanent v. Dunne* [2016] 1 IR 92, that the CPC is not justiciable at the suit of an individual. In *Ryan v. Danske Bank*, Baker J. discussed the legal effect of the CPC at paragraphs 12 – 22 of her judgment. She referred to the dicta of Hogan J., who had referred to the "cross currents" of judicial opinion on the effect of various codes of practice on different causes of action. She concluded that in banking contract and debt cases, the code did not give rise to legally enforceable rights at the suit of the customer (see para. 22).

**81.** The decision in *ILP v. Dunne*, concerned an appeal to the High Court against the refusal to grant an order for possession in the Circuit Court; on appeal, Hogan J. stated a case for the opinion of the Supreme Court. The code in question in that case was the Code of Conduct on Mortgage Arrears (the CCMA). In delivering the judgment of the Supreme Court, Clarke J. (as he then was) held that the provisions of the code were not implied into a contract between a consumer and the bank (see para 48). However, in possession cases, the court in the exercise of its discretion as to whether to grant an order for possession, could have regard to whether the bank had complied with certain mandatory provisions in the code in bringing their application for possession before the court. He held that the court must refuse to make the order for possession, if the bank had not complied with mandatory provisions of the code, such as the obligation to allow a moratorium on recovery proceedings for a certain period; otherwise, the court would be aiding the commission of an illegal act; however, other provisions of the code were not justiciable at law (see paras 64 – 69).

**82.** The CPC provides that it is binding on regulated entities. The code provides that the Central Bank has the power to administer sanctions for a contravention of the code under Part III C of the Central Bank 1942 (as amended).

**83.** Thus, in holding that changing the interest rate was *"key information"* as provided for in the CPC and in respect of which specific notification must be given to the customer and using that finding to influence, or ground his interpretation that the notification requirement in clause 78.4.1 required personal or specific notification, the respondent fell into error, by conflating the provisions of the code and the terms of the contract, such that the provisions of the code were used as a means of supporting his construction of the disputed clause in the contract. In so doing, I find that the respondent fell into error.

**84.** On the first ground of appeal, I find that the respondent fell into error in the manner in which he construed clause 78.4.1 of the contract between the appellant and the notice party. Accordingly, his finding that the appellant acted in breach of contract in the manner in which it notified the notice party of the changes in interest rate during the lifetime of the account, has to be struck down.

**85.** The second ground of appeal, raises the question as to whether the respondent was entitled to make the finding that the appellant had acted in breach of the terms of the CPC. I am satisfied that on the evidence before the respondent, he was entitled to make that finding.

**86.** When considering whether there was a breach of the CPC, the respondent was exercising the second limb of what Simons J. termed his *"hybrid jurisdiction"*. Under this jurisdiction, he was specifically enjoined to act in an informal, efficient and fair manner. He was required to adopt a sensible and straightforward approach to the circumstances before him. He did just that.

**87.** I find that the respondent's finding that a change in the interest rate payable on a deposit account was *"key information"*, within the meaning of provision 4.1 of the CPC, cannot realistically be challenged. It is self-evident that for a person with money in a deposit account, the rate of interest received on such funds, can fairly be described as *"key information"* for him or her.

**88.** Provision 4.1 is very clear in its terms. It states *inter alia*:-

*"Key information must be brought to the attention of the consumer."*

I hold that the respondent acted within his jurisdiction in finding that such key information had to be specifically brought to the attention of the customer.

**89.** The appellant submitted that the respondent erred in his interpretation of provision 4.1, by reference to the provisions of 4.5 and 4.6. I do not think that this argument is well founded. The terms of provisions 4.5 and 4.6, made it clear that when a service provider gives notification in a particular manner, they must include certain information in that notification. These provisions do not alter the nature of the obligation cast upon the service provider by provision 4.1. They simply deal with the content of the information that must be given when certain forms of notification are chosen. In considering the provisions in 4.5 and 4.6, one has to remember that these forms of notification are given to the world at large, because they are aimed at prospective, as well as existing, customers of the financial services providers. The two provisions are clearly designed to operate in certain defined circumstances. The provisions of 4.5 operate *"when a regulated entity publishes a notice regarding a change in interest rates…"*. The provisions in 4.6 are operative *"where a regulated entity publishes interest rates on its information services…"*.

**90.** Moving on from these findings, one has to consider whether the respondent erred in finding that the appellant had acted unreasonably in the manner in which it gave notice to the notice party of the reductions in interest rate payable on his account. Under clause 78.4.1, the appellant had reserved to itself the choice of how it would notify customers of changes in the applicable interest rate. They did not tell the notice party what form of

notification they would use. They did not tell him when he would be notified; that being ten days in advance of the imposition of the new rate of interest.

**91.** In the events which transpired, the appellant chose to notify the notice party by an advertisement in a newspaper. The advertisement would appear in two of three national daily newspapers. Which two, would only be determined by which of the three national newspapers had advertising space available for the day in question. The ad only appeared for one day, being the tenth day prior to imposition of the change of interest rate.

**92.** One would be forgiven for describing that means of notification as Kafkaesque in nature: we will notify you by means of our choosing; which will not be disclosed to you; we have in fact chosen notification by advertisements in two national newspapers; but you will not know that, nor in which two papers it will appear in; it will only appear in the papers for one day, being the tenth day in advance of the imposition of the change in interest rate; and that will suffice to notify you.

**93.** In these circumstances, if the notice party had been lucky enough to learn of the means of notification that were going to be employed by the bank, he would have to buy two of the three national daily newspapers each day, to be sure that he would see the advertisement in at least one newspaper, on the day that it was published.

**94.** The appellant stated that notification was also published on their website. However, Mr. O'Riagain, a director of the appellant bank, was not very clear in this regard in his affidavit sworn on 21st February 2022. It was not clear where on the website the notification appeared. It could not have been in the *"live rate"* section, as the existing rate would be stated therein. It was not stated for how long the notification of change in interest rate, would be published on the website. In the absence of any specific averment in this regard, I presume that it was only published on the appellant's website for the same length of time as in the newspaper, being one day.

**95.** It could be argued that if the notice party clicked onto the appellant's website every day of the year, he would be sure of seeing any notice of an impending change in the interest rate. However, the appellant did not suggest that it would be reasonable to expect the notice party to have done so.

**96.** In his affidavit, Mr. O'Riagain pointed out that after the implementation of the changes in interest rate, the bank had notified its customers of the change in rate in the following ways: by including the new rate in the "live rate" section on its website; by

including a statement of the current interest rate on the mobile banking app available to customers; and customers would receive an annual account statement in hard copy, which would show any changes in interest rate that had occurred during the previous year.

**97.** Mr O'Riagain accepted that these methods of notification were not relevant to the issue of whether the applicant had been given adequate prior notification of the implementation of the change in interest rate payable on the account, as required by clause 78.4.1. However, he maintained that these provisions were relevant to a consideration of the overall reasonableness of the conduct of the applicant in relation to notifying its customers of changes in the interest rates payable on these accounts.

**98.** It seems to the court, that this submission misses the point of the complaint which was before the respondent. He was not determining a question as to the overall reasonableness of the notification given by the appellant to its customers of the applicable interest rate payable on various accounts that were available in the bank. He was determining a specific complaint which had been lodged by the notice party, to the effect that the bank had not complied with its contractual obligations in giving him adequate prior notification of a change in interest payable on the account. Thus, the sole focus of the respondent's investigation was on the question of the adequacy of the prior notification that had been given by the applicant bank to the notice party. In determining that question the respondent was entitled to have regard, *inter alia*, to the reasonableness of the conduct of the applicant bank in adopting the method of notification which it chose to adopt in relation to giving prior notification of the rate change to the notice party.

**99.** Under the CPC, the Ombudsman is entitled to take a common sense approach to the question of whether a service provider's conduct is reasonable in all the circumstances. In reaching that determination, the 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.

**100.** In *Governey v. Financial Services Ombudsman*, Clarke C.J. noted that while the Ombudsman was given a jurisdiction to consider, and, if appropriate, to find substantiated, complaints which involved issues based purely on questions of legal rights and obligations, his jurisdiction was much broader than the determining of such legal questions. He stated that it was clear that the Ombudsman retained a jurisdiction to find a complaint

substantiated, even though there had been no breach of the legal entitlements of the complainant. He went on to state as follows at para. 39 and 40:

> *"39. Thus it may be seen that, while the F.S.O. is given a jurisdiction to consider, and if appropriate to find substantiated, complaints which involve issues based purely on questions of legal rights and obligations, the jurisdiction is much broader than the determining of such legal questions. It is absolutely clear that the F.S.O. retains a jurisdiction to find a complaint substantiated even though there has been no breach of the legal entitlements of the complainant.*
>
> *40. It is also clear from the provisions of s. 57CI(4) that the range of remedies which can be imposed by the F.S.O. in the event that a complaint is substantiated are wide and go beyond (but do include) the form of redress which might be available in the case of someone whose legal rights have been interfered with."*

**101.** I find that the determination reached by the respondent that the appellant did not act reasonably in the manner in which it gave notice of the changes in interest rate, to the notice party in this case, is not vitiated by any error. It was a finding that was clearly open to him on the evidence before him. Accordingly, I find that the respondent was not in error in finding that the conduct of the appellant was unreasonable, contrary to s. 60(2)(b), and/or improper, contrary to sub-para. (g), of the 2017 Act.

**102.** Given my findings on these two major grounds of appeal, the remainder of the grounds of appeal can be dealt with reasonably succinctly. The third ground of appeal concerned the manner in which the respondent dealt with the earlier decision of the FSO in its 2016 decision in a different case. The appellant submitted that the respondent had erred, when he held that that decision was not relevant to the complaint before him, as each complaint had to be considered individually on its own merits.

**103.** I find this ground of appeal is without substance for a number of reasons: first, at the time when the 2016 decision was given, decisions of the Ombudsman were not published. For that reason, prior decisions of the Ombudsman could not give rise to any binding precedent, for the simple reason that in the vast majority of cases, the parties would not be aware of any previous decisions of the Ombudsman touching on the issues that arose. The appellant was only aware of the previous decision in 2016, because they had been a party to the complaint that gave rise to that decision. That fortuitous coincidence, could not

establish a general doctrine of binding precedent in relation to decisions of the FSPO, or its predecessor, the FSO.

**104.** Secondly, I find that the Ombudsman was correct in holding that each complaint must be looked at on its own merits. When one considers the nature of the complaints system, which is supposed to be accessible to ordinary customers of financial services providers, and that it is supposed to be an informal procedure, it is desirable that each case be determined on its own facts, unburdened by an excessively legalistic adherence to binding precedent.

**105.** It would be unduly onerous to expect complainants, who may be completely unversed in the law, to obtain relevant precedents and to argue for or against their relevance to their complaint. For the most part, complainants will not be lawyers. It would be unfair to expect them to act as such, by imposing a doctrine of binding precedent on the FSPO in carrying out its investigations.

**106.** Thirdly, when one looks at the sentence in the earlier decision in its context, it is clear that it is not in fact supportive of the appellant's contention that advertisement by newspaper had been found to be sufficient notification to customers. The appellant wished to rely on the following sentence in the 2016 decision:-

> *"These rate changes were appropriately advertised and notified to customers, including the complainant, by means of advertisement in the national press, and on the bank's website."*

That is all very well as far as it goes; however, it misses the point that notification of the change in interest rate, was not at issue in that case.

**107.** The case concerned a complaint by a customer, who alleged that he had been missold a product on the basis that a particular rate of interest would apply, when it was alleged that the representatives of the bank, who had sold him the product, knew that there was likely to be a reduction in the interest rate in the near future. When that change in interest rate occurred, the customer became aware of it. The issue of notification of the interest rate, did not arise. The case concerned alleged misselling of the product by the representatives of the bank, when it was alleged that they knew that the interest rate was going to adversely change shortly after the customer was induced to purchase the product.

**108.** In the circumstances of that case, the Ombudsman found that the complaint was not well founded. He accepted that those selling the product were not aware of the likelihood

of an impending adverse change in the interest rate, when they sold the product to the complainant. In these circumstances, I hold that the sentence in the earlier decision was not supportive of the argument that the appellant was making in the present case.

**109.** In support of the argument that the respondent should have had regard to the earlier decision, the appellant relied on the decision in *Grealish v. An Bord Pleanála* [2007] 2 IR 536. In that case, the applicant had obtained planning permission for an advertising structure in 1990 and again in 1997. In 2003, the applicant applied for a third time for planning permission for the same advertising structure. On this occasion, he was refused permission.

**110.** In setting aside the decision of An Bord Pleanála, O'Neill J. noted that while the legal obligation resting on the respondent to explain its decision, was a very light one, which could even be described as minimal, it was still incumbent upon the respondent to give some reasons as to why they had reached a different conclusion on the same issue, to that reached by them in 1990 and 1997. As they had not provided any such reasons, the decision was fatally flawed and had to be quashed.

**111.** I am satisfied that that decision is not truly supportive of the appellant's contention in the present case. In the *Grealish* case, binding decisions had been given by the respondent on two occasions on the exact same facts as were presented to it on the third occasion. When it decided on the third occasion to depart from its previous practice, when the same application had been presented to it, the court held that it was incumbent on them to provide reasons why it was so doing. The respondent in that case had failed to provide any reasons why it was departing from its earlier stance in relation to the same structure. The circumstances of that case, are materially different to the circumstances in this case.

**112.** I hold that the respondent did not act in error in failing to hold himself bound by the earlier decision in 2016. That decision was not binding on him; nor was it even relevant to the issues that arose in this case. He was correct to determine that each complaint should be determined on its own merits.

**113.** The appellant also submitted that the respondent had erred in refusing its request to hold an oral hearing. It is well settled that the respondent has a wide discretion as to when he will hold an oral hearing in relation to the complaint that is before him. In *J. & E. Davy T/A Davy v. FSO* [2010] 3 IR 324, Finnegan J., delivering the judgment of the Supreme

Court, adopted the dicta of Costello P. in *Galvin v. Chief Appeals Officer* [1997] 3 IR 240, where he stated as follows at p. 251:

> "*There are no hard and fast rules to guide the appeals officer, or on an application for judicial review, this Court, as to when the dictates of fairness require the holding of an oral hearing. The case (like others) must be decided on the circumstances pertaining, the nature of the inquiry being undertaken by the decision- maker, the rules under which the decision-maker is acting,* and *the subject matter with which he is dealing and account should also be taken as to whether an oral hearing was requested.*"

**114.** In the circumstances of that case, the court held that fair procedures required that those officers of the credit union, to whom the applicant had given oral advice, should be produced for cross examination. Likewise, it was held that in relation to the nature and suitability of the bonds that had been advised by the service provider, the expert who reported to the notice party and whose reports were before the respondent, although not furnished to the applicant, should be made available for cross examination.

**115.** As pointed out by the respondent in his final decision, in *Ryan v. Financial Services Ombudsman* (Unreported, High Court, 23rd September 2011), MacMenamin J. stated that "*The Ombudsman enjoys a broad discretion as to whether or not to hold such a hearing*". Later in the judgment he stated that "*It is important to recognise that, if the Ombudsman's office is to be permitted to carry out his statutory function effectively, it should not be placed in the situation of being called upon to exercise all the procedures and requirements of a court of law*".

**116.** In *Dola Twomey v. Financial Services Ombudsman* (Unreported, High Court, 26th July 2013), Feeney J. stated as follows:

> "*An oral hearing may be required as a matter of fair procedures, but such a requirement arises where there is a clear identified dispute as to a particular event central to the case, and where there is not sufficient documentary evidence available to enable the FSO to come to a conclusion on the evidence and where the resolution of a dispute requires oral evidence."*

**117.** I am satisfied that the authorities establish that it is only necessary for the Ombudsman to hold an oral hearing, where there are disputed issues of fact on a question

that is material to the determination of the complaint. The Ombudsman is entitled to a wide discretion as to whether an oral hearing is necessary in each case. The Ombudsman must be careful not to allow the procedure to become too legalistic; while at the same time, ensuring that the investigation is carried out fairly. It would be a considerable disincentive to members of the public, who might wish to make complaints against financial services providers, if they felt that by so doing, they would open themselves up to an adversarial oral hearing, where they would probably face a formidable legal team on behalf of a well-resourced financial services provider.

**118.** In the present case, the material facts were not in dispute. It was agreed that the notice party had opened the account and deposited funds therein. It was agreed that the interest rate had been reduced from time to time. It was agreed that notification thereof had been given ten days in advance by advertisement in newspapers and on the bank's website.

**119.** The appellant wished to cross examine the notice party in relation to two issues: whether he had had actual notice of the changes in interest rate by virtue of his having accessed his mobile banking app for the account on numerous occasions; and whether any better rate of interest was available on the market at the relevant time.

**120.** The respondent was entitled to reach the conclusion that these were peripheral issues. The main issue was whether the method of notification employed to give notice in advance of the impending rate change, was in compliance with the terms of the contract. That did not depend on whether the notice party had obtained notice elsewhere, either before, or after, implementation of the change in the interest rate.

**121.** In relation to the issue of the non-availability of any better rates of interest at the relevant times, while that may perhaps have been of relevance to the direction by the respondent that the appellant should repay the difference in the interest rates, amounting to €75.47, it was not relevant to the issue of compensation under the 2017 Act, which is not compensation for financial loss, but for inconvenience. In the circumstances, I find that the Ombudsman did not act in error in refusing to hold an oral hearing in relation to his investigation of this complaint.

**122.** The fifth ground of appeal concerned an allegation that the appellant had not been given an adequate opportunity to make submissions on the issue of any loss having been suffered by the notice party, due to any alleged breach of contract on the part of the appellant. Having regard to the extensive submissions that were exchanged, both before

and after, delivery of the preliminary decision, as set out in the chronology section above, I find that there is no substance in this ground of complaint. The appellant had been given more than ample opportunity to make whatever submissions it wished. It had availed of the opportunities that were given to it to make comprehensive submissions on a number of occasions.

**123.** The sixth ground of appeal concerned the allegation that the respondent had erred in directing repayment of the difference in the interest rates between the initial interest rate and the reduced interest rates that were applied from time to time to the account. As previously noted in this judgment, the Ombudsman has wide powers in relation to the forms of redress that can be given under the 2017 Act: see *Governey v. FSO* (para. 40) and *Danske Bank v. FSPO* (para. 28).

**124.** While it could be argued that the sum for the differential in interest rates of €75.47 was not absolutely correct, having regard to the fact that the notice party apparently accepted that he was aware of the initial reduction of the interest rate to 0.25% and yet had still kept his money in the account, I am satisfied that having regard to the wide nature of the remedies that can be ordered by the respondent under the 2017 Act, he was entitled to make an order for the repayment of the differential in interest rate that occurred between the initial rate on the account and the subsequent reductions thereof. While there may have been a slight error in the calculation thereof, I am satisfied that having regard to the small amount awarded under this heading, that any such error can be ignored under the *de minimus* principle.

**125.** As far as the award of compensation is concerned, I am satisfied that having regard to the findings made by the respondent as to the reasonableness of the appellant's conduct, he was entitled to award this modest sum as compensation to the notice party for the inconvenience involved in making numerous lengthy submissions in the prosecution of his complaint before the respondent.

**126.** Finally, the appellant argued that the decision should be struck down due to the fact that it was not properly reasoned and because the Ombudsman had not tied his findings to the specific subsections in s. 60 (2) of the 2017 Act.

**127.** I do not think that there is any substance to that submission. It is well settled that while the Ombudsman has to provide a reasoned decision, as required by the decision in

*Balz v. An Bord Pleanála* [2020] 1 ILRM 367; it is equally well settled that he is not expected to provide a decision that is akin to a judgment of the Superior Courts.

**128.** In *O'Brien v. FSO,* O'Malley J. held that it was only necessary for the Ombudsman to give "the broad gist of his reasons". It is also well settled that in looking to see if adequate reasons have been given, one must have regard to the whole of the decision: see general statement of principles as set down by Humphreys J. in *Killegland Estates Ltd v. Meath County Council* [2022] IEHC 393, at para. 82.

**129.** It has been held in a number of cases that the Ombudsman should tie his findings to the specific subsections in s. 60 (2) of the 2017 Act. In *Utmost Paneurope DAC v. FSPO,* the Court of Appeal held that when upholding a complaint, the FSPO should, when explaining his decision, expressly refer to the statutory ground or grounds on which each element of complaint is upheld and on what basis, see para. 114. However, a failure to specifically identify the basis for his jurisdiction in terms of the decision, is not fatal, as that would require a degree of technicality, or legal form which is expressly disavowed under the Act. As long as the decision of the Ombudsman properly identifies a jurisdiction under s. 60 (2) (b) and (g), which accords with the findings of law and fact contained in the decision, that will suffice: see: *Lloyds Insurance v. FSPO* at paras. 129/130.

**130.** I am satisfied that when one reads the decision as a whole, it is perfectly clear why the respondent reached the findings that he did in this case. It will be perfectly clear to anyone who reads the decision, why the respondent reached the determination that the conduct of the appellant in this case was unreasonable and improper. Accordingly, it will be clear to them why he made the requisite findings under s. 60 (2) (b) and (g) of the 2017 Act.

**131.** Having regard to the finding of this court, that the finding that the appellant acted in breach of contract, was made in error, it follows that the respondent's finding under s. 60 (2) (a) that the appellant acted contrary to law, was also reached in error.

**132.** Having regard to the findings of the court as set out in the judgment, while the appellant's appeal has been successful under the first ground of appeal, against the finding by the respondent that it had acted in breach of contract; the court is satisfied that the overall decision of the respondent is not vitiated by that error.

**133.** The court is satisfied that the respondent was entitled to reach a finding that the conduct of the appellant breached the CPC and to make the findings that he did under s. 60

(2) (b) and (g) of the 2017 Act. The respondent was entitled to award the redress that is contained in his decision.

**134.** The Court holds that the appellant had not demonstrated that the respondent's decision of 18th January, 2022, was vitiated by a serious and significant error, or a series of such errors. Accordingly, the Court dismisses the appellant's appeal.

**135.** As this judgment is being delivered electronically, the parties will have two weeks within which to furnish brief written submissions on the terms of the final order and on costs and on any other matters that may arise.

**136.** The matter will be listed for mention at 10.30 hours on 24th May, 2023 for the purpose of making final orders.