

APPROVED

[2021] IEHC 668



THE HIGH COURT

2020 No. 245 MCA

BETWEEN

VIDETTE MOLYNEAUX

APPELLANT

AND

FINANCIAL SERVICES AND PENSIONS OMBUDSMAN

RESPONDENT

TRUSTEES OF THE ANALOG DEVICES INTERNATIONAL INVESTMENT
PARTNERSHIP PLAN

NOTICE PARTIES

JUDGMENT of Mr. Justice Garrett Simons delivered on 19 November 2021

INTRODUCTION

1. This matter comes before the High Court by way of a statutory appeal against a decision of the Financial Services and Pensions Ombudsman (“*the Ombudsman*”). The decision under appeal had been made in respect of a complaint concerning the payment of benefits pursuant to a pension scheme.

NO REDACTION REQUIRED

(Save when necessary to identify specific provisions of same, the shorthand “*the pension scheme*” will be used throughout this judgment when referring to the trust deed and rules governing the pension scheme).

2. The complaint relates to the extent of the benefits payable upon the death in service of a member of the pension scheme. The complainant is the widow of a deceased member of the pension scheme. In brief, the complaint centres on the question of whether the trustees of the pension scheme are obliged to make a lump sum payment in a particular amount, or, alternatively, exercise a discretionary power as to the amount, if any, of the payment. The complainant contends that the trustees are obliged to pay out the full amount of the figure notionally attributed to a member under what is described as their Retirement Benefit Account. The resolution of this complaint requires consideration of a number of interlocking provisions of the trust deed and rules governing the pension scheme.
3. For reasons which will be explained in detail presently, I have found that the Ombudsman erred in law in his approach to the interpretation of the pension scheme. In particular, the Ombudsman mistakenly considered that a particular rule under the trust deed was of no assistance to the question of interpretation. In truth, this rule was of central importance. This is a serious and significant error of law and vitiates the decision.
4. Having found that the Ombudsman erred in law, this court is now faced with the dilemma of either remitting the matter to the Ombudsman for reconsideration, or reaching its own determination on the interpretation of the pension scheme and substituting its own reasoning for that of the Ombudsman. To resolve this dilemma, it is necessary to consider the nature and extent of the appellate

jurisdiction conferred upon the High Court by the Financial Services and Pensions Ombudsman Act 2017.

PART I

THE LEGISLATIVE FRAMEWORK

OMBUDSMAN’S JURISDICTION

5. The Ombudsman’s jurisdiction to consider and determine complaints is created by Part 5 of the Financial Services and Pensions Ombudsman Act 2017 (“*the FSPO Act 2017*”). Unless otherwise stated, all references below to a section of an Act are intended to refer to the FSPO Act 2017.
6. The Ombudsman’s jurisdiction to consider and determine complaints in respect of the conduct of a pension provider arises under section 44(1)(b) of the FSPO Act 2017 as follows:
 - “44. (1) Subject to section 51(2), a complainant may make a complaint to the Ombudsman in relation to the following:
 - [...]
 - (b) the conduct of a pension provider involving—
 - (i) the alleged financial loss occasioned to a complainant by an act of maladministration done by or on behalf of the pension provider, or
 - (ii) any dispute of fact or law that arises in relation to conduct by or on behalf of the pension provider;”.
7. The Ombudsman enjoys what might be described as a hybrid jurisdiction, whereby not only may he adjudicate upon alleged acts of maladministration, he may also make determinations in respect of any dispute of fact or law that arises in relation to conduct by or on behalf of the pension provider. The statutory language indicates that the Oireachtas intended that the Ombudsman should have

jurisdiction to determine disputes of a type which would traditionally have been brought before the courts in plenary proceedings.

8. The potential for there to be an overlap between the issues raised on a complaint to the Ombudsman and those raised in legal proceedings before the courts is recognised at a number of points under the Act. The default position appears to be that the Ombudsman shall not investigate or make a decision on a complaint where there are or have been proceedings before any court in respect of the matter that is the subject of the complaint. This is subject always to the possibility of an application to stay the court proceedings under section 49 of the FSPO Act 2017. The test to be applied on such a stay application is whether there is sufficient reason why the matter in respect of which the legal proceedings have been commenced should not be investigated by the Ombudsman.
9. The Supreme Court has commented on the breadth of the jurisdiction enjoyed by the Ombudsman's statutory predecessor, the financial services ombudsman, in *Governey v. Financial Services Ombudsman* [2015] IESC 38; [2015] 2 I.R. 616. See paragraph 42 of the judgment as follows:

“[...] However, there are some cases where the sole, or virtually only, issue raised by the complainant may be one which is based on an assertion of legal rights. Such cases are, of course, within the jurisdiction of the F.S.O., and it is for the F.S.O. itself to decide whether to determine them. However, it is important to record that the F.S.O. does not have an obligation to determine by adjudication a complaint where the substance of the matters complained of is that a relevant financial institution has acted unlawfully in its dealing with the complainant and where, therefore, exactly the same issues of legal rights and obligations could be brought before a court. The legislation, therefore, permits, but does not require, the F.S.O. to deal with such complaints, being cases which are, in reality, matters which might otherwise be pursued by an appropriate form of court proceedings before whatever court might have jurisdiction to deal with the issues concerned.”

10. The remedies available in respect of a complaint against a pension provider are prescribed at section 61 of the FSPO Act 2017. The Ombudsman's decision may contain such direction to the parties concerned as the Ombudsman considers necessary or expedient for the satisfaction or the resolution of the complaint. The Ombudsman may order such redress, including financial redress, for the complainant as he considers appropriate. Any financial redress shall be of such amount as the Ombudsman deems just and equitable having regard to all the circumstances, but shall not exceed any actual loss of benefit under the scheme concerned.
11. The Ombudsman's jurisdiction to make directions is subject to the following express restrictions under section 61(3) of the FSPO Act 2017. A direction shall not require either:
 - (a) an amendment of the rules of a scheme or the conditions of a scheme, or
 - (b) the substitution of the decision of the Ombudsman for that of the pension provider in relation to the exercise by the pension provider of a discretionary power under the rules of the scheme.
12. The latter of these two restrictions is of importance in the present case. This is because the complaint centres on the question of whether the trustees of the pension scheme are obliged to make a lump sum payment in a particular amount, or, alternatively, exercise a discretionary power as to the amount, if any, of the payment. If, on the correct interpretation of the trust deed and rules, the payment is discretionary, then the Ombudsman cannot direct the trustees to make a payment in any particular amount.

HIGH COURT'S APPELLATE JURISDICTION

13. The High Court's appellate jurisdiction is provided for under section 64 of the FSPO Act 2017 as follows:

64.(1) A party to a complaint before the Ombudsman may appeal to the High Court against a decision or direction of the Ombudsman.

[...]

(3) The orders that may be made by the High Court on the hearing of an appeal under this section include (but are not limited to) one or more of the following:

- (a) an order affirming the decision or direction of the Ombudsman, subject to such modifications as it considers appropriate;
- (b) an order setting aside that decision or any direction included in it;
- (c) an order remitting that decision or any such direction to the Ombudsman for review with its opinion on the matter;
- (d) such other order in relation to the matter as it considers just in all the circumstances;
- (e) such order as to costs as it thinks fit;
- (f) an order amending the decision or direction of the Ombudsman, as the case may be.”

14. As appears, the right of appeal is stated in general terms, and the High Court has very extensive powers as to the disposal of the appeal. In contrast to other similar legislative regimes, such as the Freedom of Information Acts, the appeal is not confined to an appeal on a point of law.

15. Notwithstanding that the right of appeal under the current legislation, and its statutory predecessor, Part VIIB of the Central Bank Act 1942 (as introduced in 2004), is stated in general terms, the courts have consistently held that the appeal

is not intended to take the form of a re-examination from the beginning of the merits of the decision appealed against.

16. The leading authority in this regard is the judgment of the High Court (Finnegan P.) in *Ulster Bank Investment Funds Ltd v. Financial Services Ombudsman* [2006] IEHC 323 (“*Ulster Bank*”). Having carefully considered a number of judgments addressing the nature of statutory appeals, the former President of the High Court observed that it was desirable that there should be consistency in the standard of review on statutory appeals. The threshold for a successful appeal was then stated as follows:

“[...] To succeed on this appeal the Plaintiff must establish as a matter of probability that, taking the adjudicative process as a whole, the decision reached was vitiated by a serious and significant error or a series of such errors. In applying the test the Court will have regard to the degree of expertise and specialist knowledge of the Defendant. The deferential standard is that applied by Keane C.J. in *Orange v The Director of Telecommunications Regulation & Anor* and not that in *The State (Keegan) v Stardust Compensation Tribunal*.”

17. The passage from the judgment of the Supreme Court in *Orange Ltd v. Director of Telecoms (No 2)* [2000] IESC 22; [2000] 4 I.R. 159 relied upon above reads as follows (at pages 184/85 of the reported judgment):

“In short, the appeal provided for under this legislation was not intended to take the form of a re-examination from the beginning of the merits of the decision appealed from culminating, it may be, in the substitution by the High Court of its adjudication for that of the first defendant. It is accepted that, at the other end of the spectrum, the High Court is not solely confined to the issues which might arise if the decision of the first defendant was being challenged by way of judicial review. In the case of this legislation at least, an applicant will succeed in having the decision appealed from set aside where it establishes to the High Court as a matter of probability that, taking the adjudicative process as a whole, the decision reached was vitiated by a serious and significant error or a series of such errors. In arriving at a conclusion on that issue, the High Court will necessarily

have regard to the degree of expertise and specialised knowledge available to the first defendant.”

18. The standard of review posited in *Ulster Bank* has been applied consistently by the High Court to appeals in respect of both the former and the current statutory regime. The approach has also been endorsed by the Court of Appeal in *Millar v. Financial Services Ombudsman* [2015] IECA 126 and 127; [2015] 2 I.R. 456; [2015] 2 I.L.R.M. 337.
19. It should be explained that, prior to 1 January 2018, complaints against (i) financial service providers, and (ii) pension providers were made to two separate ombudsmen, namely the financial services ombudsman and the pensions ombudsman, respectively. Both types of complaint are now heard and determined by a single entity, namely, the Financial Services and Pensions Ombudsman.
20. It is apparent from the earlier case law that the same attenuated standard of review applied to each of the former ombudsmen. See, for example, the judgment of the High Court (Kearns P.) in *Willis (Trustees of the Irish Blood Transfusion Service Superannuation Fund) v. Pensions Ombudsman* [2013] IEHC 352 (at pages 30 to 32) where it was accepted that the relevant test was the same. This approach was endorsed by the High Court (Baker J.) in *Department of Public Expenditure and Reform v. Pensions Ombudsman* [2015] IEHC 792 (at paragraphs 21 to 25). See also the judgment of the High Court (Barrett J.) in *Minister for Education and Skills v. Pensions Ombudsman* [2015] IEHC 466 (at paragraph 10).
21. It would seem to follow that the same standard of review applies, in principle, to all decisions made by the recently established Financial Services and Pensions

Ombudsman, irrespective of whether the impugned decision is made in respect of a complaint against a financial service provider or a pensions provider.

22. There is one further aspect of the case law on the standard of review which is potentially relevant to the issues which arise in the present appeal. This concerns the level of deference to be shown to a determination of the Ombudsman on a question of law. The Court of Appeal confirmed in *Millar* that the High Court, in hearing an appeal, should not adopt a deferential stance to a decision or determination by the Ombudsman on a “pure” question of law. The judgment went on to hold, however, that the complaint in that case presented a mixed question of law and fact. The position is put as follows by Finlay Geoghegan J. at paragraphs 15 and 16 of her judgment (page 480 of the Irish Reports).

“I agree with the trial judge that where the Ombudsman has made a decision or determination on a pure question of contract law which forms part of the finding under appeal, that the court should not adopt a deferential stance to the decision or determination on the question of law. This follows from the statutory scheme applicable to the Ombudsman and the judgments in *Orange Ltd v Director of Telecoms (No.2)* [2000] 4 I.R. 159 and *Ulster Bank Investment Funds Ltd v Financial Services Ombudsman* [2006] IEHC 323 and those following. Section 57CK(1) expressly permits the Ombudsman, at his own initiative, to refer a question of law to the High Court. The relevant deferential stance on appeal as explained by Keane C.J. in *Orange* at p.185 is that ‘...the High Court will necessarily have regard to the degree of expertise and specialised knowledge available to the [Ombudsman].’ With respect to the Ombudsman he does not have expertise or specialised knowledge, certainly relative to the High Court, in deciding questions of law.

However, it does not appear to me that it follows from this conclusion that as put by the trial judge where the appeal is taken against a finding of the Ombudsman which includes a decision on the question of a contractual construction that the High Court is required ‘to examine afresh’ that issue in the course of the appeal. Rather the correct position is that the general principles set out in *Ulster Bank Investment Funds Ltd v Financial Services Ombudsman* still apply to the

determination of the appeal save that the High Court in considering a decision of the Ombudsman on a pure question of law will not take a deferential stance to that part of the finding. [...]"

23. Similar sentiments have been expressed by the Supreme Court in *Governey*, albeit on a provisional basis only in circumstances where the application before that court was merely an application for leave to appeal. See paragraph 44 of the reported judgment in *Governey* as follows:

“There may well be a case for affording deference to the view which the F.S.O. [Financial Services Ombudsman] takes as to, for example, the unreasonableness of lawful conduct on the part of a financial institution. But it does not necessarily follow that a court is bound to afford similar deference to the F.S.O. on its view of the law or the application of the law to facts which task is, after all, one of the core functions to be found in the administration of justice.”

24. The judgment in *Millar* has been interpreted as follows by the High Court (Barrett J.) in *Minister for Education and Skills v. Pensions Ombudsman* (at paragraph 14):

“As most complaints to the Financial Services Ombudsman, and perhaps also the Pensions Ombudsman, seem likely to concern a difference of interpretation of contractual arrangements or documentation, the effect of *Millar* appears to be that unless the Financial Services Ombudsman, clothed in the expertise of his office, commits a serious error of law in how he approaches matters, as opposed to how he interprets arrangements or documentation, his view as to what a contract means, being a mixed question of law and fact, will now generally be final. There is perhaps a risk in such deference for people of limited or middling means who are effectively forced by financial circumstance into availing initially of the services of an Ombudsman: they will find on coming to court that the judge’s role is considerably constrained. This being so, and so it seems to be, it would appear appropriate that Ombudsmen operating in the financial services arena should consider whether they need prominently to advertise to consumers that invocation of the assistance of an Ombudsman may have constraining ramifications for those consumers if and when they later seek to invoke the protection of the courts.”

PART II

PROCEDURAL HISTORY

THE COMPLAINT TO THE OMBUDSMAN

25. The appellant, Mrs. Molyneaux, submitted the complaint the subject-matter of this appeal to the Ombudsman in 2018. Mrs. Molyneaux is the widow of the late James Molyneaux. Mr. Molyneaux had been a member of the pension scheme until his untimely death in December 2016.
26. For ease of exposition, Mrs. Molyneaux will be referred to hereinafter as “*the complainant*” or “*the surviving spouse*”. The use of these impersonal terms does not reflect any lack of respect or sympathy on behalf of the court towards Mrs. Molyneaux. Rather, these descriptive terms are employed in an attempt to assist the reader in better understanding the dense legal discussion which follows.
27. The pension scheme makes specific provision for the nature of the benefit to be paid in the contingency of a member’s death in service. This benefit is to be an aggregate of a number of separately identified components. The complaint relates to one only of these components. It is said that, on its proper interpretation, the pension scheme requires that the full amount of what is described as the “*Retirement Benefit Account*” in respect of the deceased member be paid out as a lump sum.
28. The full definition of the term “*Retirement Benefit Account*” is set out under the next heading below. For present purposes, it is sufficient to note that this term refers to the amount notionally held within the overall funds of the pension

scheme on behalf of the member; and consists of contributions paid by the member, any contributions paid by the employer, and any amount transferred.

29. It is common case that where a member reaches retirement age, he or she is entitled to have the “*full*” amount of their Retirement Benefit Account applied to secure benefits. The trustees of the pension scheme contend, however, that there is no equivalent obligation in the contingency of the death in service of a member. More specifically, the trustees submit that, in such a contingency, they enjoy a discretion as to what amount, if any, of the Retirement Benefit Account is to be applied to secure a lump sum payment for the deceased’s dependents. On the facts of the present appeal, the trustees exercised their supposed discretion to allow a lump sum payment in an amount which represents the value of the payments made by the employer to match the additional voluntary contributions (“*AVCs*”) made by the member.
30. The complaint made to the Ombudsman is that this approach is incorrect. It is said that the pension scheme requires that the full amount of the Retirement Benefit Account should have been paid. The Retirement Benefit Account is said to have been in an amount of €912,177. The lump sum which was, in fact, paid was €248,785.10.

THE PENSION SCHEME: RELEVANT PROVISIONS

31. Before turning to the provisions of the pension scheme which regulate the payment of benefit in the contingency of the death in service of a member, it is necessary first to cite a number of defined terms.
32. The term “*Retirement Benefit Account*” is defined as follows:

“‘*Retirement Benefit Account*’ means in respect of a Member at any time or on the happening of any event the amount held by the

Trustees within the Scheme on behalf of such Member being the then value (or if so determined by the Trustees the value within a period of three months thereof) of

- (i) contributions paid by such Member to the Fund in accordance with Rule 3, together with
- (ii) any contributions paid by the Employer in respect of such Member in accordance with Rule 4, together with
- (iv) any amount received by the Trustees under Clause 16 of the Trust Deed in respect of such Member

[...].”

33. The term “*Member’s Retirement Account*” is defined as follows:

“‘Member’s Retirement Account’ means in respect of a Member that part of his Retirement Benefit Account which relates to his Member Contributions.”

34. As appears, the Member’s Retirement Account is a subset of the Retirement Benefit Account, i.e. the contributions paid by the member are one of the components which make up the overall Retirement Benefit Account. This overlap between the two accounts is relevant to one of the arguments advanced on behalf of the Ombudsman at the hearing of the appeal. It is said by the Ombudsman that the interpretation advanced on behalf of the complainant would result in the amount of the Member’s Retirement Account being paid on the double. I will return to this submission at paragraph 38 below.

35. The Retirement Benefit Account assumes a particular significance in the contingency of a member retiring at the normal retirement date (as defined). It is agreed between the parties that, in such a contingency, the member is entitled under Rule 6 to receive out of the fund (as defined) a pension and/or a lump sum secured by the application of the member’s (full) Retirement Benefit Account. Put simply, it is envisaged that an amount equivalent to the full value of the

Retirement Benefit Account will have been applied to secure one of the benefits prescribed under Rule 5. For example, part of the monies might have been used to secure an annuity to provide the member with a monthly pension, and part used to pay a lump sum to the member.

36. The precise form of benefit to be provided under Rule 5 is within the discretion of the trustees. This is subject to the safeguard that the benefit secured shall be such that its actuarial value (as defined) is equal to the amount of the Retirement Benefit Account applied.
37. It is necessary next to consider how the contingency of a death in service is regulated under the pension scheme. Specific provision is made for this contingency at Rule 9 as follows:

“(a) Upon the death of a Member prior to or, if Rule 8 applies to the Member, after Normal Retirement Date while in the service of the Employer there shall be payable from the Fund in accordance with Rule 10 a sum equal to the aggregate of

- (i) the amount specified in Rule 9(a) of the applicable Benefits Schedule;
- (ii) such amount (if any) as has been secured by the application of the Retirement Benefit Account in respect of such Member to secure a lump sum death benefit in accordance with the provisions of paragraph (vi) of Rule 5(a); and
- (iii) the amount of death benefit (if any) by which the Member’s lump sum death benefit has been augmented by the Trustees at the request of the Principal Employer pursuant to Clause 13 of the Trust Deed provided that the contributions in respect of such augmentation have not been taken into account in determining the Retirement Benefit Account in respect of the Member

PROVIDED THAT of the amount payable under this Rule 9(a) an amount not exceeding the limits laid down by the Revenue Commissioners in relation to lump sum death in service benefits shall be payable in lump sum form in accordance with Rule 10 and any balance shall be applied to secure a pension or pensions for such

one or more of the Member's Dependants as the Trustees in their absolute discretion shall decide."

38. As appears, there is a cross-reference to rule 9(a) of the Benefits Schedule. Insofar as relevant to the deceased member, this provides that the amount specified for the purpose of Rule 9(a)(i) shall be the aggregate of 400% of the member's salary at the date of his death, and the Member's Retirement Account as at the date of death. The fact that the payment of an amount equivalent to the value of the Member's Retirement Account is mandatory gives rise to the "*double payment*" argument: it is said that to interpret Rule 9(a)(ii) as imposing an obligation to pay an amount equivalent to the value of the Retirement Benefit Account would result in the value of the Member's Retirement Account being reckoned twice, i.e. it would be paid under both Rule 9(a)(i) and Rule 9(a)(ii).
39. In addition to the above benefits, provision is also made under rule 9(e) of the Benefits Schedule for the payment of an annual pension to the surviving spouse or civil partner of the deceased member.
40. Finally, it is necessary to set out the provisions of Rule 5(a)(vi) in full as follows:

"5. APPLICATION OF RETIREMENT BENEFIT ACCOUNT

- (a) Where under these Rules all or part of the Retirement Benefit Account is to be applied in providing benefits on an Application Date such amount shall be applied by the Trustees on that Application Date (or within such period thereafter as the Trustees may reasonably require to arrange the application) to secure such one or more of the following benefits as they having consulted with the Member shall determine (or where the application arises following the Member's death as they at their absolute discretion shall determine) provided that the benefit so secured shall be such that its Actuarial Value on the Application Date is equal to the amount of the Retirement Benefit Account applied on that date and subject always to the provisions of Rule 15

[...]

- (vi) Where prior to the application by the Trustees of the full Retirement Benefit Account to secure benefits under such one or more of paragraphs (i), (ii), (iii), (iv) and (v) of this sub-Rule as are relevant the Member dies, a lump sum payable in accordance with the provisions of Rule 10 subject to any requirements of the Pensions Act.”

41. It should be noted that Rule 5(a)(vi) is not confined to the contingency of a death in service. Rather, the sub-rule addresses circumstances where a member dies prior to the full Retirement Benefit Account having been applied to secure benefits, irrespective of whether the death occurs before or after retirement.
42. The effect of the rule is that, in the event of the death of a member, a lump sum may only be paid in circumstances where the full Retirement Benefit Account has not yet been applied to secure other benefits. Put otherwise, it imposes qualifying criteria on the making of a lump sum payment. It does not necessarily follow as a corollary, however, that where the qualifying criteria are met, then the “*full*” of the Retirement Benefit Account must automatically be applied to secure a lump sum payment. Rather, it is at least arguable that in circumstances where the Retirement Benefit Account has not been exhausted, the trustees *might* enjoy a discretion to make a lump sum payment rather than being obliged to do so. This was the precise question which fell for determination by the Ombudsman.

THE OMBUDSMAN’S DECISION

43. The Ombudsman distilled the issue in dispute between the parties to the complaint as follows (at page 16 of his decision):

“While there was a very detailed exchange of submissions between the parties, including detailed post Preliminary Decision submissions, the issues in dispute between the parties can be clearly distilled. In essence, the complaint

concerns the question of whether paragraph (ii) of Rule 9(a) of the Trust Deed and Rules obliges the Trustees to make a lump sum payment to the dependents of a member who dies in service representing the total value of the Retirement Benefits Account held by the Trustees in respect of that member or, instead, the Trustees have a discretion to pay any or no lump sum from that total as they consider appropriate.”

44. Having correctly identified the issue, the Ombudsman then purported to resolve that issue as follows (at page 18 of his decision):

“Paragraph (ii) of Rule 9(a) provides for the payment of *‘such amount (if any) as has been secured by the application of the Retirement Benefits Account in respect of such Member to secure lump-sum death benefit in accordance with the provisions of paragraph (vi) of Rule 5(a)’*. Rule 5(a)(vi) does not provide any interpretive assistance in this regard. The Complainant argues that as the only amount specified in the paragraph is that of the Retirement Benefits Account, and as the paragraph does not expressly provide for the exercise of discretion of the Trustees in determining the amount of any lump sum, paragraph (ii) should be interpreted as requiring the Trustees to make a lump sum payment of the entire balance of the Retirement Benefits Account.

The trouble with such an interpretation is that it fails to take into account the words *‘such amount (if any) as has been secured by ...’*. Although this wording does not expressly envisage the exercise of Trustee discretion in determining the amount of the lump sum to be paid, I am of the view that taking the paragraph in context, paragraph (ii) does allow for the exercise of discretion that the Trustees have argued they have. I accept that there is a distinction to be made between paragraphs (i) and (ii) in that the payment of a member’s own contributions (that is, the Members Retirement Account) is mandatory under paragraph (i) while the payment of any additional lump sum from the Retirement Benefits Account is discretionary under paragraph (ii)”.

45. As appears, the Ombudsman’s interpretation is informed largely by the presence, under Rule 9(a)(ii), of the qualifying words *“such amount (if any) as has been secured by”*, and the distinction between that wording and the mandatory language used in respect of the Member’s Retirement Account.

46. Crucially, the Ombudsman specifically states that Rule 5(a)(vi) does not provide any interpretive assistance in this regard. For the reasons explained under the next heading, this proposition is incorrect as a matter of law.
47. The Ombudsman's decision goes on to consider certain additional documentation, external to the trust deed and rules, as follows (at page 19 of the decision):

“Although the legal obligations of the Trustees in respect of payments due to the Complainant are set out in the Trust Deed and Rules, I am of the view that it is of assistance in understanding the overall operation of the scheme to bear in mind the benefits that were provided under the former defined benefit plan and communications made to members, including the Complainant's deceased husband, at the time of its winding up. It is common case that the benefits that were provided under the defined benefit plan where the member died in service were restricted to a lump sum of 400% of salary plus a lump sum equal to the value of the member's own contributions to the plan in addition to the spouse's pension. When the defined benefit plan was being wound up, multiple communications were made to members which confirmed that the death in service benefits that had been applicable would be broadly maintained under the new scheme. At no time were any existing members, including the Complainant's deceased husband, informed or led to believe that the additional funds that would be provided to the new scheme by the employer to safeguard the retirement benefits of its employees would be paid out to member's dependents in the event of their death in service (that is, prior to normal retirement age).”

48. The details of certain correspondence in respect of the deceased member specifically are next set out.
49. The Ombudsman then sets out his overall conclusion as follows:

“In all of the circumstances, I accept that the Trustees were entitled to exercise their discretion under paragraph (ii) of Rule 9(a) in opting to make a lump sum payment to the Complainant of the amount of the employer's matching AVC contributions out of the Retirement Benefits Account, rather than opting to pay the entirety of that account to the Complainant. I also accept that this intention was clearly communicated to the Complainant's deceased husband by

way of multiple communications at the time of the winding up of the previous defined benefit plan. I accept that the Trustees had discretion in relation to the application of the totality of the Retirement Benefits Account held in respect of the Complainant's deceased husband in this regard and I do not have a legal basis to interfere with the discretion of the Trustees.”

50. There had been much debate in the written legal submissions filed in this court as to whether it was appropriate for the Ombudsman to take into account what the complainant characterises as “*extrinsic evidence*” to interpret the pension scheme. It is said on behalf of the complainant that, for the most part, this material post-dates the execution of the trust deed and the ratification of the rules; amounts to no more than evidence of the trustee's subjective state of mind; and cannot prevail over the contractual documentation.
51. However, this issue largely fell out of the appeal as a result of the refinement of the Ombudsman's case in oral argument. Counsel on behalf of the Ombudsman invited the court to decide the appeal by reference to the trust deed and the rules alone. The documentation relied upon in the latter part of the Ombudsman's decision (cited above) was said to have been relied upon for the purpose of a sense check, and not as part of the core decision that was made.

PART III

FINDINGS OF THE COURT

52. The Ombudsman erred in law in his approach to the interpretation of the pension scheme. In particular, the Ombudsman mistakenly considered that Rule 5(a)(vi) was of no assistance to the question of interpretation. In truth, this rule was of central importance.

53. There is self-evidently a direct relationship between the two rules. It is simply not possible to properly understand what the effect of Rule 9(a)(ii) is intended to be without considering the provisions of Rule 5(a)(vi). Whereas there might be room for debate as to whether the latter sub-rule, in this context, continues to be subject to the absolute discretion in the opening paragraph of Rule 5, or, alternatively, is transformed into a mandatory obligation by Rule 9(a)(ii), there can be no doubt but that the two rules must be read together.
54. Moreover, it is at least arguable that the words “*if any*” employed in Rule 9(a)(ii) should be understood as intended to reflect the possibility that the “*full*” amount of the Retirement Benefit Account may have already been exhausted prior to the member’s death, i.e. by having been applied to secure other benefits. On this interpretation, there is a symmetry between Rule 5(a)(vi) and Rule 9(a)(ii): there will not be “*any*” amount available to be paid under the latter rule if the “*full*” amount of the Retirement Benefit Account has already been applied to secure other benefits.
55. The proper resolution of the complaint made by the surviving spouse in the present case required consideration of whether the combined effect of Rule 9(a)(ii) and Rule 5(a)(vi) is to make the payment of a lump sum in the amount of the Retirement Benefits Account mandatory in the event of a death in service.
56. The Ombudsman’s reductionistic approach to the interpretation of the pension scheme, which focussed almost exclusively on one clause, is inconsistent with the well established principles governing the construction of pension schemes. These principles have been set out, in particular, in *Irish Pensions Trust Ltd v. Central Remedial Clinic* [2005] IEHC 87; [2006] 2 I.R. 126 and *Greene v*

Coady [2014] IEHC 38; [2015] 1 I.R. 385. Relevantly, the interpretation must be one that is practical and purposive, rather than detached and literal. A pension scheme should be construed so as to give reasonable and practical effect to it.

57. It is incorrect to confine the analysis to a single clause within a pension scheme: this is especially so where the clause in question expressly cross-refers to another clause. Rather, it is necessary to interpret the pension scheme in a holistic manner.
58. In summary, even allowing that the interpretation of a pension scheme may involve a mixed question of fact and law, the approach of the Ombudsman in the present case entailed a fundamental error of principle such as to justify intervention on appeal.
59. It is, of course, possible that notwithstanding his error in interpretative approach, the overall result of the Ombudsman's decision might nevertheless have been correct, albeit for the wrong reasons. To elaborate: it might well be that the pension scheme, properly interpreted, does indeed afford the trustees discretion as to whether to make the payment of a lump sum death benefit equivalent to the value of the Retirement Benefit Account. Were this court now to embark upon its own detailed analysis of the terms of the pension scheme, it might come to the same conclusion as the Ombudsman by way of a different line of reasoning. It might, therefore, have been possible for this court to affirm the Ombudsman's decision by substituting the court's own reasoning for that of the Ombudsman.
60. The parties were in disagreement as to whether it is open to the court to proceed in this way, i.e. by substituting the court's own reasoning for that of the Ombudsman. Counsel on behalf of the Ombudsman submitted that the court is as well placed, if not better placed, than the Ombudsman to determine the correct

interpretation of the trust deed and rules. In response, counsel on behalf of the complainant submits that, in circumstances where Rule 5(a)(vi) is crucial and central to the proper interpretation of the trust deed, but the Ombudsman expressly disavowed use of that rule in his decision, the matter must now be remitted to the Ombudsman. It is further submitted that it is not open to the Ombudsman to supplement or vary the decision under appeal by making detailed submissions to the court, at the hearing of the appeal, as to the meaning and effect of Rule 5(a)(vi). The Ombudsman, it is said, had been required to give the complaint the consideration it deserves at first instance. An order for remittal now would afford the complainant an opportunity to make further submissions to the Ombudsman and to have her complaint considered in detail.

61. Having carefully weighed the submissions on both sides, I have concluded that the matter must be remitted to the Ombudsman for reconsideration, for the reasons which follow.
62. It would be inconsistent with the principle that the High Court exercises only a limited appellate jurisdiction under the FSPO Act 2017 for the court to embark upon its own *de novo* consideration of the merits of a complaint made to the Ombudsman. The case law on the standard of review applicable to an appeal has been discussed in detail at paragraphs 13 to 24 above. As appears, the standard of review is analogous to that posited in *Orange Ltd v. Director of Telecoms (No 2)*. An appeal against the Ombudsman's decision is not intended to take the form of a re-examination from the beginning of the merits of the decision appealed from, culminating in the substitution by the High Court of its adjudication for that of the Ombudsman.

63. This limitation on the appellate jurisdiction is achieved by the court only intervening to set aside a decision where it is shown to disclose a serious and significant error of law. The decision under appeal exhibits precisely the type of error which justifies judicial intervention, for the reasons summarised at paragraphs 52 to 58 above. In such circumstances, the appropriate order is to remit the decision to the Ombudsman for review, having regard to the court's opinion on the matter, pursuant to section 64(3)(c) of the FSPO Act 2017.
64. The court must resist the temptation to embark upon its own *de novo* consideration of the merits of the complaint. The identification of a serious and significant error of law in the Ombudsman's decision at first instance does not open a gateway, whereby the statutory fetters on the High Court's appellate jurisdiction are suddenly unlocked and the court conferred with full jurisdiction to decide the matter afresh. 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. Rather, the rights of the parties are vindicated by an order for remittal. The Ombudsman must then reconsider the matter and reach a fresh decision in accordance with the opinion of the court.
65. This rationale extends even to those cases where the issues arising on the complaint can be characterised as involving a pure question of law. The Court of Appeal in *Millar v. Financial Services Ombudsman* explained that whereas the High Court does not have to defer to the Ombudsman's finding on a question of law, the overall approach to the appeal remains the same. The general

principles set out in *Ulster Bank Investment Funds Ltd v. Financial Services Ombudsman* still apply to the determination of the appeal, save that the High Court in considering a decision of the Ombudsman on a pure question of law will not take a deferential stance to that part of the finding.

66. The Court of Appeal further held that it is not permissible for the High Court on an appeal to “*examine afresh*” the interpretation placed by the Ombudsman on a relevant term of a contract. Rather, the High Court should consider whether an appellant has established, on the balance of probabilities, that on the materials before it the Ombudsman’s interpretation contains a serious error. The judgment also explains that the construction of a contract is not a pure question of law but is a mixed question of law and fact. (See paragraphs 62 to 67 of the judgment of Finlay Geoghegan J. in *Millar v. Financial Services Ombudsman* as reported in the Irish Reports).
67. It would seem to follow that where a serious error is identified, the complaint should be remitted for reconsideration. Were it otherwise, the High Court would be carrying out precisely the type of fresh examination of the complaint disavowed by the Court of Appeal in its judgment in *Millar*.
68. There are pragmatic reasons for this approach. The case law consistently emphasises that the complaints procedure before the Ombudsman (and his statutory predecessors) is intended to afford an informal, expeditious and inexpensive mechanism whereby complaints in respect of the provision of financial services and pensions might be resolved. The Ombudsman’s decision should, in principle, be capable of resolving the complaint without it becoming *necessary* for the parties to resort to court by way of appeal. It follows as a corollary that the first-instance decision of the Ombudsman should be a reasoned

decision which properly engages with and addresses all of the relevant legal and factual issues raised in the complaint. In circumstances where, as in the present case, the decision does not achieve this objective, then the appropriate remedy is for the High Court to identify the serious and significant error, and then to remit the matter to the Ombudsman for reconsideration. Were the court, instead, to carry out its own *de novo* assessment of the complaint, this would dislocate the complaint mechanism by transferring it to the High Court with the attendant costs implications.

69. The making of an order for remittal also advances the legislative intent that the question of the appropriate remedy, where relevant, is decided upon by the Ombudsman. The FSPO Act 2017 envisages that the Ombudsman will examine complaints against pension providers, and, where maladministration is found, will determine the appropriate remedy. The range of remedies which the Ombudsman may grant is wider than those available in conventional civil litigation.
70. The principle that the remedy be decided upon by the Ombudsman is, admittedly, of far more significance in the context of a complaint against a financial service provider. This is because the range of remedies against a pension provider are more limited, and subject to certain statutory restrictions (as discussed at paragraphs 11 and 12 above).
71. Finally, counsel on behalf of the appellant/complainant in this case has made it clear that whereas his client is, obviously, anxious to bring finality to the matter, her preference is that the matter be remitted to the Ombudsman for reconsideration in light of the findings of the court. Whereas the question of remittal is, ultimately, a matter for this court alone, some weight can be attached

to the fact that the complainant, who is the type of person for whom the informal, expeditious and inexpensive complaints mechanism has the greatest benefit, wishes the matter to be remitted.

CONCLUSION AND PROPOSED FORM OF ORDER

72. The Ombudsman's approach to the interpretation of the trust deed and rules discloses a serious and significant error of law. The decision is vitiated by this error of law. (See paragraphs 52 to 58 above).
73. In such circumstances, the appropriate order is to remit the decision to the Ombudsman for review, having regard to the court's opinion on the matter, pursuant to section 64(3)(c) of the Financial Services and Pensions Ombudsman Act 2017.
74. The identification of a serious and significant error of law in the Ombudsman's decision at first instance does not open a gateway, whereby the statutory fetters on the High Court's appellate jurisdiction are suddenly unlocked and the court conferred with full jurisdiction to decide the matter afresh. 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. Rather, the rights of the parties are vindicated by an order for remittal. The Ombudsman must then reconsider the matter and reach a fresh decision in accordance with the opinion of the court.
75. As to costs, my *provisional* view is that the appellant/complainant, having been successful in her appeal, is entitled to the costs of the statutory appeal as against the respondent. This reflects the default position under Part 11 of the Legal Services Regulation Act 2015. The notice parties should bear their own costs.

76. The attention of the parties is drawn to the notice published on 24 March 2020 in respect of the delivery of judgments electronically, as follows:

“The parties will be invited to communicate electronically with the Court on issues arising (if any) out of the judgment such as the precise form of order which requires to be made or questions concerning costs. If there are such issues and the parties do not agree in this regard concise written submissions should be filed electronically with the Office of the Court within 14 days of delivery subject to any other direction given in the judgment. Unless the interests of justice require an oral hearing to resolve such matters then any issues thereby arising will be dealt with remotely and any ruling which the Court is required to make will also be published on the website and will include a synopsis of the relevant submissions made, where appropriate.”

77. If any party contends that the form of order should be other than that indicated above, it should file written legal submissions with the registrar by close of business on Monday, 6 December 2021. The proceedings will be listed before me, for final orders, on Friday, 10 December 2021 at 10.30 am.

Appearances

Paul McGarry SC and Jack Tchrakian for the appellant instructed by Robert Emmet Bourke & Co.

Michéal O’Connell SC and Mark William Murphy for the respondent instructed by Eversheds Sutherland

Joe Jeffers for the notice parties instructed by Matheson

Approved
Gemma S. Mans