THE HIGH COURT

[2023] IEHC 350

[Record No. 2021 137/173/174 MCA]

BETWEEN

ULSTER BANK IRELAND DAC

PLAINTIFF

AND

FINANCIAL SERVICES AND PENSIONS OMBUDSMAN

DEFENDANT

AND

U.H.K and F.K., P.C. and D.B., K.C.

NOTICE PARTIES

JUDGMENT of Ms Justice Bolger delivered on the 22nd day of June 2023

1. This is an appeal by Ulster Bank (*"the Bank"*) of three related decisions A, B and C of the Financial Services and Pensions Ombudsman (*"the FSPO"*) under s. 64 of the Financial Services and Pension Ombudsman Act 2017 (*"the 2017 Act"*). The Bank seeks to set aside each of the decisions in whole or in part and to remit the complaints to the FSPO with directions. For the reasons set out below I am refusing this application.

2. Each appeal arises out of complaints successfully made by the notice parties to the FSPO, that they were entitled to be charged a tracker interest rate on their mortgage ie a rate tracked to the ECB rate.

The C Decision

3. The FSPO's final decision in C issued prior to the expiry of the period allowed for submissions and the Bank was, therefore, wrongly denied their right to comment on the preliminary decision. Both parties agree that this decision should be set aside and remitted to the FSPO but the Bank argued that this Court should remit it with directions on the FSPO's contention from his A and B decisions, that the notice parties obtained an enduring entitlement to a tracker rate of interest. The parties have agreed to leave over the precise order to be made in C pending this Court's judgment in A and B.

The A Decision

4. The notice parties in A took out a mortgage with the Bank in 2006 on a tracker rate stated to be *"fixed for the life of the Home Loan term"*. In 2007, they transferred the maximum permissible amount of their mortgage to a staff fixed rate of 3%. In 2010 they sought to revert back to the tracker rate but the Bank refused because it had, by then, stopped offering a tracker rate to new customers. The notice parties complained that the Bank:-

(i) Failed to advise them of the consequences applying the staff fixed rate to their mortgage loan account in June 2007;

(ii) Failed to revert their mortgage to a tracker interest rate when requested in December 2010;

(iii) Inappropriately changed their terms and conditions in 2017 without notice. The FSPO did not uphold the complaint at (iii) and that decision was not appealed.

5. The Bank relied on the Staff Home Loan Scheme Rules, which it had made available to the notice parties via its intranet and which described the staff interest rate as *"3% per annum fixed for the term of the loan"*. The Bank claimed that this denied the notice parties any right to revert back to the tracker rate that was, by the time the notice parties applied to revert, no longer offered by the Bank to new customers.

6. The Bank requested an oral hearing which the FSPO refused on the basis there was no conflict of facts and the submissions and evidence were sufficient to enable him to reach a decision, relying on authorities of this Court that he said afforded him a broad jurisdiction whether or not to hold an oral hearing.

7. In his decision, the FSPO noted that when the notice parties transferred to the preferential staff rate, no new agreement was drawn up to amend the terms and conditions of the original offer of advance. There was no documentation incorporating the Staff House Loan Scheme Rules into the notice parties' then existing terms and conditions of their mortgage loan, even though the Bank may have intended those rules to amend or vary those terms and conditions. The issue was whether the Bank's intended application of the rules was clear to the complainants such that those rules ended their entitlement to a tracker rate or whether the reference to the life of the home loan, stated on the original offer, was still relevant. He held that the terms and conditions of the mortgage loan were not amended by the notice parties' move to the staff interest rate in May 2007 and therefore the condition providing for the tracker rate *"for the life of the Home Loan term"* remained in being. He found that the Consumer Protection Code 2006 imposed a duty on the Bank *"to ensure that all documents or instructions that change or remained contractual entitlements are clear as to the changes or amendments that are being made"*. He said he was:-

> *"at a loss to understand how the Provider could form the view that the Complainants would or should have known that the consequences of applying the staff fixed interest rate of 3% was that the Complainants were giving up their contractual entitlement to the tracker interest rate of ECB + 1.15% as per their original contractual terms, in circumstances where, this was not documented at all. While it may be the case that the Provider intended or would have liked that the application of the staff fixed rate of 3% to a portion of the mortgage loan, meant that the Complainants gave up the contractual entitlement to the tracker interest rate of ECB + 1.15% on that portion of the loan going forward, that is not documented anywhere, particularly in the* ***Staff House Loan Scheme Rules****, and there is no evidence that the Complainants agreed to this amendment to their original contractual terms."*

The FSPO noted that the staff preferential rate ceases to apply where the borrower leaves the Bank's employment and, unlike the tracker rate, the Rules do not describe the staff preferential rate as a lifetime product. He found that the Rules did not override the notice parties' entitlement to the tracker interest rate and the Bank should have made that clear if they intended the Rules to do so. The Bank was directed to apply the tracker interest rate to the notice parties' mortgage from December 2010, repay any interest overpaid and pay compensation of €3,500.

<u>The B decision</u>

8. The notice parties in B drew down a mortgage in 2004 on the Bank's then Home Loan Rate. In 2006 they switched to the Bank's tracker rate which was stated to be *"fixed for the life of the Home Loan term"*. In 2007, interest rates began to rise, and the notice parties elected to fix their interest rate for a specified period of time. They signed a Fixed Rate Authority (*"FRA"*) which stated that on the expiry of the fixed rate, the Bank might offer *"alternative available products"* but if no such offer was made or if such an offer was made but not accepted, the Bank's Home Loan Rate would apply. The fixed rate period came to an

end in 2010 and the notice parties sought to revert to their previous tracker rate but the Bank refused as it had stopped offering that rate to new customers since 2008. The FSPO did not accept the notice parties' argument that the Home Loan Interest Rate equalled a tracker interest rate or was to be construed as being related to it but he did find that the notice parties had a contractual entitlement to the tracker rate because signing the form to move to the tracker rate with a margin stated to be *"fixed for the life of the Home Loan"* had altered the terms and conditions of their original mortgage loan. The form did not say the rate was fixed provided the notice parties did not choose to move a different rate later, or for so long as they chose to avail of a tracker rate. If the Bank had intended that, the FSPO said it should have caveated the form with either or both of those conditions. The FSPO found that the terms or conditions of the notice parties' mortgage loan were therefore amended to include a contractual commitment to the tracker rate. He said he was at a loss to understand how the Bank could form a view that the notice parties would or should have known that the consequences of applying for the fixed rate was that they were giving up their entitlement to the tracker rate when this was not documented. It was not that the notice parties had a contractual right to revert to the tracker interest rate at the end of the fixed rate period in 2010 but, rather, that where the Bank was setting out interest rate options available to the notice parties, that they should have included the tracker rate among the available options.

9. The Bank had sought an oral hearing by the FSPO which was rejected along the same lines as in the A decision.

The Bank's grounds of appeal

10. The Bank asserted over 40 separate errors of law in its Grounds of Appeal, which it grouped under a number of headings in its written and oral submissions.

A right to an oral hearing

11. There was a conflict on the facts which required cross-examination. Findings of fact were made about the terms of their agreement with the notice parties which meant the case fell within the ambit of the *dicta* of Finnegan J. in *J&E Davy v. FSO* [2010] IESC 30, [2010] 3 I.R. 324, such that a material dispute of correction of fact could only be resolved by an oral hearing.

The standard of review

12. The Bank cited the decision of Finnegan P. in *Ulster Bank Investment Fund v. FSPO* [2006] IEHC 323, as to the standard of review on such an application, i.e. that the decision was vitiated by a serious and significant error or a series of such errors. The Bank also emphasised the dicta of Murray J. in *Stanberry Investments Ltd v. Commissioner of Valuation* [2020] IECA 33, at para. 49, where he confirmed that administrative tribunals obtain no deference on pure issues of law but that in areas touching on their expertise, the court should be slow to interfere with its reasoning. There can be no deference to decisions which have been reached on foot of errors of law or unsustainable findings of fact; Simons J. in *Molyneaux v. FSPO* [2021] IEHC 668 where the court noted that, even insofar as it could be said the error of contractual construction was of mixed fact and law, the court was nonetheless obliged to intervene where the FSPO made a fundamental error of principles. The Court of Appeal in *Utmost Paneurope DAC v. FSPO* [2022] IECA 77 confirms the High Court's jurisdiction to draw different inferences from documentation than the FSPO in its appellate jurisdiction. Curial deference is effectively confined to situations in which the FSPO has some specific knowledge or information available to him which is not available to this Court in a statutory appeal. The FSPO is not entitled to curial deference in respect of defects in the procedure employed by the FSPO or unfair practices employed by him, clear errors of law including errors of contractual or documentary construction or errors in the inferences drawn by him from documentation and conclusions which are factually unsustainable.

The CBI's TME and TMI

13. In September 2015, the Central Bank of Ireland ("CBI") began their "Tracker Mortgage Examination ("the TME") to assess lenders' compliance with their legal and regulatory obligations in tracker mortgages, including compliance with the Consumer Protection Code (CPC). The CBI permitted the Bank to conclude the TME on the basis that borrowers in the position of the notice parties were deemed by the Bank not to be impacted.

14. In April 2016, the CBI commenced a "Tracker Mortgage Investigation" ("TMI") which ran in parallel with the TME and was concluded by a settlement agreement in which the Bank admitted to breaches of the CPC arising from the same Fixed Rate Authorities as were at issue in the B and C decisions. However, the courts were not conferred with any role in relation to the CPC and the FSPO has no express role either, save that his powers make specific reference to observance of regulatory standards.

15. The CBI had already considered the same cohorts of cases as the FSPO examined in A and B, and concluded that the conduct of the bank was in compliance with the CPC. The CBI's positions, decisions and communications in the TME and TMI established the proper construction and application of the CPC to those cohorts as a matter of law in the context of s. 117(3) and s.33AO of the Central Bank Act 1942, and constitute established practices and regulatory standards within the meaning of s.60(2)(C) of the 2017 Act.

16. The FSPO has deviated from those actions of the CBI and his only engagement with that is his averment in this appeal that the process conducted by his office is a different process to the TME. The FSPO himself treated the complaints as connected to the CBI process and the Bank cites his remarks to the Joint Committee on Public Petitions of the Oireachtas where he described his work as an entirely different process to that of the TME. While the FSPO was engaged in a different process to the CBI, it did not entitle the FSPO to disregard the CBI's interpretation of regulatory standards, as issued and developed by the CBI. The FSPO is required to act judicially and in accordance with constitutional justice; O'Donnell J. in *Zalewski v. Workplace Adjudication Officer* [2021] IESC 24, [2022] 1 I.R. 421. It was not open to the FSPO to impugn conduct, which accorded with an established practice or regulatory standard, as contrary to law or otherwise improper. The FSPO was not permitted to ignore the CBI's findings and conclusions in respect of identical documents and legal issues, especially by purportedly applying the CPC. S. 60 of the 2017 Act required the FSPO to have regard to an established practice or regulatory standard as developed by the CBI and only permits the FSPO to impugn conduct that accords with a regular regulatory standard with careful regard to the individual circumstances of the complainant and the individual application of the standard to the complainant. The wording of s. 60(2)(c) is meaningless if the FSPO is entitled to find conduct which accords with the regulatory standard of the CBI to be contrary to law or improper, by applying a theory of law which applies to all cases. The FSPO is obliged to take meaningful account of the fact that the Bank's approach met with the regulatory standards established by the CBI.

The FSPO's legal theory

17. The Bank claims that the FSPO's decisions in A and B were decided according to the same legal theory, i.e. that the notice parties were contractually entitled to a tracker rate even though they executed documents that provided that the a particular rate would apply on the expiry of the fixed rate. The FSPO decided all the complaints based upon this proposition, irrespective of whether or not it formed part of the complaint that had been made. Each decision used identical language and the text was liberally copied from one decision to the next. The FSPO applied a theory developed by him in other cases, without referring to them or acknowledging that he was following them, whilst at the same time asserting that the theory is not reviewable by this Court. The Bank condemns this approach as asymmetric, inconsistent and irrational.

The Terms of the Contract

18. The material terms of contract were that the notice parties drew down (decision B) or transferred to (decision A) a loan on the Bank's Home Loan Rate which the Bank says applied for the entire term of the loan unless the parties agreed to vary the rate. The notice parties moved from the tracker rate to a different rate by agreement and thereafter, the default Home Loan Rate took effect as the tracker rate was not being offered by the Bank when the notice parties sought to return to it. The Bank says no other construction of the contract is possible and there is no basis on which the FSPO could have determined that the move to a tracker rate created a class of contractual terms capable of surviving express variation. The flexible form and FRA involved the notice parties agreeing to vary the interest rate. No caveats or stipulations were required to achieve that result.

19. The FPSO theory confers an immutability on a particular contractual term which is impossible to reconcile with contract law. The rate of interest applicable to a loan facility is one of the fundamental instruments of the lending contract; *Bank of Scotland Plc v. Mansfield* [2011] IEHC 463. There is no evidence that the Bank agreed to the contract on the basis contended and the term contended for does not appear in the contractual documents. In *Dunnes Stores Cornelscourt Ltd v. Lacey* [2005] IEHC 417, [2007] 1 I.R. 478 a decision of the Employment Affairs Tribunal was set aside because of the absence of evidence that the employer agreed to make the payments that the employee sought to claim. That error is analogous to the error of the FSPO here. The Bank would never have agreed to a term allowing the notice parties to retain an entitlement to a tracker rate. It was futile to suggest a term ought to be implied where one party would never have agreed to its inclusion.

The Consumer Protection Code

20. The FSPO should not have determined that a breach of the CPC occurred without identifying the precise provision breached and explaining how it had been breached. The import of his decisions is that the Bank can owe advisory duties to its customers, which is the reverse of the ordinary legal position between borrower and lender. The FSPO could not make findings which altered the duty of care owed or contravened principles of contract law by restructuring the arrangements.

The relevance of earlier FSPO decisions

21. The Bank does not contend that the FSPO was obliged to follow previous decisions but submits that if the FSPO proposes to reverse his office's position, he must explain the basis for that; *COI v. Minister for Justice, Equality and Law Reform* [2007] IEHC 180, [2008] 1 I.R. 208, where an order of *certiorari* of an asylum decision was granted on grounds of inconsistency. The decisions here amount to a volte face but does not explain why the FSPO's previous approach was abandoned.

Failure to give reasons

22. The Supreme Court in *NECI v. Labour Court* [2021] IESC 36, [2021] 2 I.L.R.M. 1, provided for an objective test where the reasons given for a decision have to be sufficient not just to satisfy the participants in the process that the Labour Court had engaged with the issues in accordance with its statutory duties, but also to satisfy the Minister, the Oireachtas, other affected persons or bodies and the public at large. The sparse nature of the reasoning employed by the FSPO which, it says, leaves the Bank uncertain as to what they are or not permitted to do.

Submissions of the FSPO

Standard of review

23. The FSPO's jurisdiction is different to that of the courts, as confirmed originally by MacMenamin J. in *Hayes v. FSO* (Unreported, High Court, 3 November 2008). The FSPO agrees with the Bank's acceptance of the application of the tests outlined by Finnegan P. in *Ulster Bank Investment Fund v. FSO* [2006] IEHC 323, approved by MacMenamin J. in *Malloy v. FSO* (Unreported, High Court, 15 April 2011) and frequently since. The jurisdiction of the FSPO is set out in s. 12(11) of the 2017 Act which provides that he *"shall act in an informal manner and according to equity, good conscience and the substantial merits of the complaint with undue regard to technicality or legal form"*. This is not a *de novo* appeal (as pointed out by MacMenamin J. in *Ryan v. FSO* (Unreported, High Court, 23 September 2011) and Simons J. in *Molyneaux*) and there may be an error within jurisdiction. Any appealable error of law must be material; Croft J. in *Westwood*, applied by Phelan J. in *Lloyds Insurance Company SA v. FSPO* [2022] IEHC 290 and confirmed by Hyland J. in *Danske Bank A/S v. FSPO* [2021] IEHC 116.

The language of the loan documents

24. Previous judgments of this Court have upheld FSPO and FSO determinations in favour of tracker complainants in similar circumstances, though here an additional feature is the wording *"fixed for the life of the Home Loan"* and the fact that nothing indicated that the tracker rate might not be an available product in the future during the life of the loan. The Bank has sought to complicate a clear straightforward case by introducing extraneous issues concerning the Central Bank, the approach of the former FSPO, purported constitutional issues and bias. The Bank claims that the complainants extinguished their entitlement to a tracker rate even though nothing in the unsigned staff loan scheme in A or the fixed authority in B stated that moving to the fixed rate extinguished the tracker rate that was expressly stated to apply *"for the life"* of the loan. Clarity is required under the Central Bank's Code and as a matter of law. The FSPO was entitled to find a lack of clarity pursuant to its own statutory jurisdiction; *Millar v. FSO* [2015] IECA 126, where the Court of Appeal held that it is *"not permissible for the High Court on an appeal pursuant to* [what is now s. 64] *'examine afresh' a contractual construction placed by the Ombudsman or on a relevant term of a contract"*, at para. 19 of the judgment of Finlay Geoghegan J.

This decision was supported by evidence

25. Contractual interpretation is not a pure question of law but a mixed question of law and fact. The issues of contractual interpretation arising here were clearly factual matters and, on the authority of *Millar*, the FSPO's assessment in his decisions is entitled to deference from this court. Kelly J. in *Millar*, at para. 44, regarding the construction of the contract, said *"it was for* [the FSO] *to then consider the factual material case before him and he is entitled to curial deference in that regard"*. Even where a pure question of law is involved, only the deference element of the standard of review considered falls away. The Bank's arguments are directly in tension with the clear import of *Millar*. *Utmost, Molyneaux and Stanberry* can and should be distinguished on their facts. In *Utmost*, the court was dealing with inferences from correspondence and not with contractual interpretation. In *Molyneaux*, Simons J. was critical of the FSPO focusing *"almost exclusively on one clause"* and thereby adopting a *"reductionistic approach"* to a detailed pension scheme. In *Stanberry* the respondent did not dispute the error of fact, but no such concession was made here.

26. In *Smart v. FSO* [2013] IEHC 518, Hedigan J. looked to whether *"…the FSPO had before him and relied upon relevant evidence upon which he could rely in coming to the*

decision he did" at para. 12; quoted with approval by Noonan J. in *Coleman v. FSO* [2016] IEHC 169 at para. 17. The point was also made by Phelan J. in *Lloyds*, at para. 117, where she said it was clear *"that where a finding is supported by evidence it should not be treated as unsustainable by me"*.

Section 60(2)(a) and (g)

27. The notice parties' complaints were upheld under both s. 60(2)(a) and s. 60(2)(g) – that the conduct complained of was contrary to law and otherwise improper. Section 60(2) allows a complaint to be upheld on *"one or more"* of the grounds contained therein. An error in one ground is not fatal (*Malloy*, *Lloyds*). The findings regarding contractual interpretation and the Bank not acting in accordance with the contract of themselves means the Bank's conduct was found contrary to law. In addition, the Central Bank Code is law. Whilst it has been held that the courts have not been vested with jurisdiction regarding the Code, the FSPO possesses jurisdiction regarding it; *Irish Life and Permanent v. Dunne* [2015] IESC 46, [2016] 1 I.R. 92, where Clarke J. (as he then was) found that the Central Bank's Code of Conduct on Mortgage Arrears *"forms part of the law"* and could be invoked by the FSO.

28. Hyland J. in *Danske* confirmed the wide discretion conferred on the FSPO by S.60(2)(g). Hogan J. in *Lyons and Murray v. FSO* [2011] IEHC 454 spoke of the how "*wider considerations of fairness and reasonableness should be brought to bear to mitigate a possible injustice caused by the bare language of a consumer contract*" (at para. 14).

Reasons for the Decision

29. In *Millar*, Kelly J. stated that the standard of reasoning required of the FSPO does not have *to "be as detailed or formal as a court judgment"*. In *O'Brien v. FSO* [2014] IEHC 111, O'Malley J. held the FSO was obliged *"merely to give the broad gist of his reasons"* (para. 59). The decision of *NECI v. Labour Court* indicates that the parties must *"in general terms"* know the reasons and that they must have enough information to consider whether they could or should seek to avail of judicial review. No one could plausibly contend that the Bank lacks any information in this regard given the wide ranging appeal it has brought. Even if there were lack of reasons, it does not follow the decisions would fall to be set aside. Although the Bank cite *Utmost* where Binchy J. referred to what the FSPO should have done, there was no suggestion there that this would give rise to a series of significant errors.

The Central Bank's TME and TMI

30. The FSPO contends that the Central Bank's powers differ considerably from those of the FSPO and the Bank is not entitled to draw an analogy between them. The Central Bank noted in its TME Final Report of July 2019 that dissatisfied consumers may wish to take their complaints to the FSPO. All that happened under the TME was that the Central Bank required the Bank to examine certain cohorts of customers but it did not make any finding about these notice parties. There was no finding that the Bank was actually compliant with the CPC regarding all customers except those who required redress under the TME.

31. The Bank did not raise any argument before the FSPO that it somehow lacked jurisdiction on this or, indeed, any other grounds. The FSPO is not bound by what the Central Bank did or did not pursue.

The FSPO theory of law

32. The Bank's arguments on the FSPO's theory of law does not identify an error that vitiates its decision. Some similarity in the language in both decisions should not be surprising as the same decision maker was dealing with similar arguments by the same provider in three complaints concerning similarly worded terms.

The Constitution

33. The points sought to be made in reliance on the Constitution are unclear, are not properly pleaded and do not properly arise in a statutory appeal under this s. 64 appeal which is not concerned with the constitutionality of the 2017 Act. To mount any such case the Bank would have to institute separate proceedings to which Ireland and the Attorney General would have to be joined. It is not disputed that the FSPO is required to act judicially and in accordance with constitutional justice.

Decision

An Oral Hearing

34. Situations may arise in which either party before the FSPO could be entitled to an oral hearing as part of the FSPO's obligation to conduct its proceedings in accordance with fair procedure, such as where a material or disputed question of fact arises that can only be resolved by an oral hearing. Where a dispute of fact arises solely on foot of documents, it is open to the FSPO to determine the issues by reference to the documents and written submissions only. It is only where the documentary evidence is insufficient to enable the FSPO to determine the dispute that a right to an oral hearing could arise, as confirmed by Feeney J. in *Dola Twomey v. FSO* (Unreported decision, 26 July 2013). The FSPO retains a broad discretion in determining whether or not an oral hearing is required (MacMenamin J. in *Ryan v. FSO* (23 September 2011, at p. 35) and the authorities cited therein).

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

36. The FSPO was entitled to refuse the Bank's request for an oral hearing and no error and/or serious or significant error of law arises from that refusal.

The standard of review

37. The parties correctly agree that the standard of review is as determined by Finnegan P. in *Ulster Bank Investment Fund v. FSO* [2006] IEHC 323. The principles were summarised by MacMenamin J. in *Molloy v. FSO* at para. 27 as containing the following elements;

> "*1. the burden of proof is on the appellant;*
>
> *2. the standard of proof is the civil standard;*
>
> *3. the court should not consider complaints about process or merits in isolation, but rather should consider the adjudicative process as a whole;*
>
> *4. the onus is on the appellant to show the decision reached was vitiated by a serious and significant error or a series or such of errors – put in simple terms, the question is if the errors had not been made, would it reasonably have made a difference to the outcome; and*
>
> *5. in applying this test, the court may adopt what is known as a deferential stance and may have had regard to the degree of expertise and specialist knowledge of the F.S.O.*"

Since then, the 2017 Act has placed the FSPO's procedures on a statutory footing by providing, at s. 12(11), that the FSPO *"…when dealing with a particular complaint, 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."* The wide scope of the FSPO's statutory jurisdiction under s. 60 was emphasised by Hyland J. in *Danske*, at para. 27, where she said:-

> *"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."*

That jurisdiction includes the possibility that errors made by the FSPO may have been made within jurisdiction and/or potentially may not merit the overturning of a decision or the remittal of a complaint.

38. The statutory appeal afforded by s. 64 of the 2017 Act is, like many statutory appeals, limited to an appeal on a point of law. This is different to a *de novo* appeal on the merits of a complaint. Whether this Court would have reached the same decision on the evidence before the FSPO is irrelevant as the only issue for this Court is whether there was a serious or significant error or series of errors perpetrated by the FSPO in reaching his decision. That assessment is likely to involve affording the FSPO some level of curial deference, at least on his analysis of the facts. No deference is afforded to him on his analysis of the law, but some deference arises in findings involving mixed questions of law and fact. The case law makes it clear that this Court must have regard to the particular expertise of the FSPO in interpreting contractual arrangements or documents. For example, Barrett J. in *Minister for Education and Skills v. Pensions Ombudsman* [2015] IEHC 466 stated at para. 14

> *"As most complaints to the Financial Services Ombudsman, and perhaps also the Pensions Ombudsman, seem likely to concern a difference of interpretation of contractual arrangements or documentation, the effect of Millar appears to be that unless the Financial Services Ombudsman, clothed Page 65 of 119 7651602.2 13 in the expertise of his office, commits a serious error of law in how he approaches matters, as opposed to how he interprets arrangements or documentation, his view as to what a contract means, being a mixed question of law and fact, will now generally be final."*

In *Danske*, Hyland J. stated at para. 63 *"I must defer to [the FSPO's] evaluation of the contractual material, given his extensive experience of dealing with complaints from consumers relating to the clarity of mortgage documentation."* More recently Barr J. in *KBC Ireland PLC v FSPO* [2023] IEHC 234 said at paragraph 99 *"[T]he court should afford the decision of the Ombudsman some curial deference, as he is the person who has expertise in relation to the conduct of a vast range of service providers in the relevant market."*

39. Kelly J. in *Millar* found that the High Court had erred in finding that the term *"market conditions"* may be taken to refer to *"market conditions generally"*. He held it was for the Ombudsman to *"consider the factual material placed before him and he is entitled to curial deference in that regard"* (at para. 44). Finlay Geoghegan J. was similarly critical of the High Court and said it was not open to it on an appeal from the Ombudsman to *"examine afresh"* a contractual construction placed on a term of a contract *"rather he should consider whether an appellant has established on the balance of probabilities that on the materials before him the Ombudsman's construction contains a serious error."* (at para. 19).

40. The Bank urged on me what they said was a different approach adopted by the Court of Appeal in *Utmost*, *Molyneaux* and *Stanberry*. In *Utmost*, inferences were drawn from correspondence rather than a contract, which the Court of Appeal found was not a matter of any particular expertise on the part of the FSPO. That is not inconsistent with the conclusions

in *Millar*. In *Molyneaux*, Simons J. was critical of the FSPO's approach in failing to interpret a pension scheme in a holistic manner. No such focus on a single clause occurred in this case and neither has any such criticism been made by the Bank. In *Stanberry*, the Court of Appeal said that curial deference meant the court should be slow to interfere with a decision maker's reasoning in areas touching on their expertise. That that does not mean that the court should assume that a decision maker was correct in their conclusions where their reasoning is unclear such that there are differing possible interpretations of their decision. That is different to the interpretation of the terms of a contractual clause that was the subject of the FSPO decisions at issue here.

41. The decisions of *Utmost*, *Molyneaux* and *Stanberry* have not altered the jurisprudence on curial deference as established, particularly in *Millar*. I do not accept that the fact that the decision of the Court of Appeal in *Millar* did not refer to *Fitzgibbon v. The Law Society* [2014] IESC 48, [2015] 1 I.R. 516 (which was referred to in *Utmost*) questions the authority of *Millar* in any way that is appliable or relevant to this appeal, as was suggested by the Bank.

42. This court must establish whether the Bank has discharged the burden of proving *"On the balance of probabilities that on the materials before him the Ombudsman's construction contains a serious error"* (as per Finlay Geoghegan J. in *Millar*, at para. 19). This is consistent with the dicta of *Fitzgibbon* as analysed by Binchy J. in the Court of Appeal in *Utmost* to the effect that an appellate court in considering an appeal on a point of law "*may set aside primary facts if there was no evidence to support such findings. Moreover, it may reverse inferences drawn from such facts, if those inferences were based on the interpretation of documents, and should do so, if incorrect… [A] 'serious and significant error' of the kind referred to in Ulster Bank must surely include an inference drawn from documents which no reasonable decision maker could draw…"* (at paras. 91-92)

43. I now proceed to examine the decisions of the FSPO on the basis of that required standard of review.

The interpretation of the contract

44. A significant factor in the FSPO's analysis of the contract was the Bank's original commitment to offering the notice parties *"alternative available products"* at the end of the fixed rate period or when the notice parties chose to move off the staff rate. When the Bank set out the alternative products available to the notice parties, they did not include a tracker rate as the Bank had decided in 2008 not to offer such a rate to any new customer. The Bank never explained to the notice parties before they moved to the fixed or staff rate, that the tracker rate they had been on up to then might not be an *"alternative available product"* when those rates came to an end or when the notice parties chose to move off them. At the same time, the Bank had described the tracker rate to the notice parties as being at a margin fixed for the *"life"* of the loan. Had the Bank made the notice parties aware that the tracker rate might not be made available to them after the expiry of the fixed rate or some other time in the future, in advance of their decision to move to a fixed rate, the outcome of these complaints might have been very different.

45. The Bank asserts that the FSPO decided that an initial rate identified in the notice parties' loan offer continued to apply notwithstanding an express agreement by the notice parties to vary that initial rate. That is not what he decided. The FSPO decision is based on what was and was not included in the documentation furnished to the notice parties when they moved off the tracker rate, and how any alterations to the terms and conditions of their mortgage loans fell to be analysed in the light of the information and documentation made available to them when they elected to move from the tracker rate to a different rate of interest.

46. The Bank claimed that once the notice parties chose to move off the tracker rate to a different rate, the tracker rate was no longer relevant and could never be claimed as soon as the Bank decided not to offer a tracker rate to any new customers. The FSPO did not

agree and instead said that if that was what the Bank had intended, it should have made express provision for it. By failing to do so, the notice parties' contractual entitlement to the tracker rate continued at their election in accordance with the terms of their contract, which does not interfere with the parties' freedom to contract but, rather, requires the Bank to keep to the contractual commitments they made in accordance with the information and detail they furnished to the notice parties and on which the notice parties made their decision to move from the tracker rate to a different rate. The FSPO was entitled to reach that decision.

47. Whatever interest rate the notice parties were entitled to must come from the contract they entered into with the Bank. There was no recission of that contract when the notice parties elected, in accordance with the contract, to move to a new interest rate. The Bank described the move to the fixed rate as *"revised terms of a given loan facility"* (at para. 93 of their written submissions), in relation to which they say there is no requirement that some mechanical process such as a fresh drawdown should occur; *Governor and Company of Bank of Ireland v. Flanagan* [2015] IECA 56. I do not think that is a valid analogy as the notice parties here never entered into a new agreement that set aside their previous contractual rights to revert to a tracker rate of interest, unlike the borrower in *Flanagan* who had entered into a new, standalone restructuring agreement with their bank.

48. The FSPO did not accept the Bank's categorisation of the notice parties' move from the tracker rate to a fixed rate as a permanent surrender of their contractual right to the tracker rate, which had previously been described to them as existing for the life of their loan. The FSPO's analysis and reasoning was based on the information furnished by the Bank to the notice parties when they elected to move off the tracker rate to a fixed interest rate and what they were told, at that time, their entitlements would be upon the expiry of that rate or whenever when they might choose to move to another rate. In accordance with the standard of review confirmed in *Millar*, the Bank has not established a serious or significant error or series of errors in the FSPO's analysis of the terms of the contract between the Bank and the notice parties or of the documentary evidence surrounding their move from a tracker rate to a different rate or of their subsequent attempts to revert to, what they claimed and the FSPO confirmed, was their continuing contractual right to a tracker rate that had not been rescinded by the Bank.

49. For the avoidance of doubt, I do not consider that that the FSPO's finding was undermined by the FSPO's rejection of the notice parties' submission to him in B that the Home Loan Rate equated to the tracker rate. Neither is it undermined by the notice parties' clarification of their complaint in A in their submissions to the FSPO which were furnished after the lodgement of their complaint, that the Bank's refusal to allow them to revert to the previous tracker rate was unlawful.

50. The Bank claims that the FSPO's analysis failed to consider the Bank's perspective and/or the business efficacy test in circumstances where they dispute they would have ever agreed to the contractual terms as found by the FSPO. That is not a serious or significant error, if even an error at all. At the time the notice parties moved off the tracker rate the Bank was still offering tracker rates of interest to new customers and continued to be willing to do so until 2008 when the world of banking and interest rates changed dramatically. Had the business efficacy test been applied at the time when their contract was originally made and the terms were being drawn up by the Bank, an officious bystander may have seen little difficulty with the notice parties retaining a right to revert to a tracker rate in the future. Either way, whether or not the officious bystander test could have been satisfied at the time the contract was made does not satisfy me of a serious or significant error, particularly in the context of the respective positions of the Bank and a borrower.

Statutory provisions: Section 60(2)(a) and (g) of the 2017 Act

51. The FSPO's jurisdiction is not confined to the interpreting of a contract such as might face a court in determining a contractual dispute as they are also vested with a unique statutory jurisdiction by Section 60(2)(a) and (g) which state;

"60(2). A complaint may be found to be upheld, substantially upheld or partially upheld only on one or more of the following grounds:

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

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

52. Whilst I am satisfied that the FSPO's decisions can be upheld on both grounds, it is clear that the Bank would have to be able to establish a serious or significant error in relation to both in order to have the decision set aside (*Malloy*, *Lloyds* at para. 74 where Phelan J. stated;

> *"[T]he circumstances in which I am entitled to intervene to set aside the Ombudsman's decision on this appeal are limited. The Ombudsman has the right to get the decision wrong, by which I mean that even if I would have reached a different decision to the Ombudsman on hearing the details of the consumer's complaint, this is not grounds for the decision of the Ombudsman to be set aside, provided that the Ombudsman did not make a serious and significant error in reaching his decision."*

53. Having regard to my discussion on the FSPO's analysis of the contract at paragraphs 46 to 52 above, I am satisfied that the FSPO's decision to uphold the complaints on the grounds set out in s. 60(2)(a) was valid, as the Bank's conduct was found to be contrary to their contractual obligations. In addition, for the reasons expanded upon at paragraphs 59 to 62 below, I am also satisfied that the Bank's conduct failed to comply with their obligations pursuant to the Consumer Protection Code which has been held to be part of the law (Clarke J. (as he then was) in *Irish Life and Permanent v. Dunne* [2015] IESC 46, [2016] 1 I.R. 92 at 46).

54. An even wider discretion is conferred on the FSPO by s. 60(2)(g) confirmed by Hyland J. in *Danske*, where she confirmed, at para. 3 of her judgments, that "*the mere absence of a breach of law does not immune a financial services provider from a finding of unreasonable and improper conduct under s. 60(2)(b) and (g)."*

55. The FSPO set out, in his analysis of the contractual terms, the application of the Consumer Protection Code and the relevant provisions of the 2017 Act in a lengthy decision in both A and B running to some 32 pages for each. Nevertheless, the Bank claimed, at paragraph 30 of its notice of motion that *"The final decision is fundamentally flawed insofar as it fails to identify with sufficient recission the findings of primary facts made by the FSPO and the findings of whether of law or otherwise, made by the FSPO on foot of those findings of primary fact"*. The Bank goes on, at para. 31 of their Notice of Motion, to claim that *"It is impossible to say with any precision how it is that the FSPO says that the Bank's conduct was contrary to law or was 'otherwise improper' insofar as the 'otherwise improper finding' is concerned, the Final Decision refers to the provisions of the Consumer Protection Code (the 'Code') and suggests that the Bank has breached the Code without stating with any precision the provisions of the Code that the Bank is alleged to have breached or the conduct of the Bank that it is alleged was a breach of those provisions"*. They plead that the decisions' references to the Consumer Protection Code fail to identify the relevant provisions breached (discussed further below at paras. 60-63), or the Bank's conduct alleged to have been a breach. They categorise those errors as a failure by the FSPO to give reasons (discussed further below at paras. 66-67)

56. Given the level of detail, both in the FSPO's decisions, the Bank's notice of motions, their lengthy written submissions and their extensive oral submissions to this court over several days of hearing, I have found it difficult to accept the Bank's apparent lack of understanding of what the FSPO says they did that was contrary to law and otherwise improper. I am satisfied that the decisions set out, in sufficient detail, how and why the FSPO came to those conclusions in terms of the Bank's treatment of the notice parties' contractual rights and the Bank's noncompliance with their obligations under the Consumer Protection Code. In so doing the FSPO did engage with the detailed submissions that the Bank had made to him by way of extensive written submissions. I am satisfied that the

level of detail and engagement with the Bank's arguments in those decisions is of a very different magnitude to that before Simons J. in *Chubb European Group S.E. v FSPO* [2023] IEHC 74 in which he quashed a decision of the FSPO which had "*very little by way of reasoning for this finding*" (para 30) and "*a failure to engage at all with the arguments, advanced on behalf of the insurance provider*" (para 31).

The Consumer Protection Code

57. The Consumer Protection Code is binding on the Bank, as confirmed, if needed, by the Court of Appeal in *Utmost*. The FSPO set out the general principles of the Code in his decisions and confirmed the Bank's duty *"to ensure that all documents/instructions that change or amend contractual entitlements are clear as to the changes or amendments that are being made"* (the A decision at p. 18 and a similar finding in the B decision at page 19-20). The FSPO found, at p. 23 of the A decision, that if the Bank's intention was for that the specific conditions of the offer of advance to no longer apply to the notice parties' mortgage, they:-

> "*should have acted with due skill, care and diligence by making this clear to the* [notice parties]*. However the* [Bank] *failed to set this out in clear and unambiguous terms to the* [notice parties]*."*

In the B decision the FSPO stated at page 22:

> *"[T]he Provider owes a duty to its customers, including the Complainants, to ensure that all documents that change or amend contractual entitlements are clear as to the changes or amendments that are being made. I do not consider the language and information contained in the Fixed Rate Authority Transfer form to be so explicit and unequivocal in nature, as submitted by the Provider, such that the Complainants could fully understand that they were giving up their entitlement to a tracker interest rate by signing the form."*

The relevance of the general principles of the Consumer Protection Code quoted by the FSPO earlier in the decision is apparent.

58. The Bank plead at para 45.12-13 of their Notice of Motion:-

> *"The FSPO made a serious error in appearing to place reliance upon the provisions of the Code without applying them to the facts of the Complaint, whether adequately or at all.*
>
> *The FSPO made a serious error in appearing to conclude that the Bank had breached the Code, without identifying any specific provision thereof which had been breached or housed."*

59. Having regard to the provisions of the Code quoted by the FSPO and his findings that the Bank failed to make certain things clear to the notice parties when they were moving from the tracker rate to a different fixed rate, I do not accept that the FSPO fell into the errors of law as claimed by the Bank. If I am wrong on that, and there was a failure to apply the Code to the facts or a failure to identify the specific provisions of the Code that had been breached, I find this was not a sufficiently serious or significant error such as could justify setting aside the decisions and/or remitting them. In that regard, I note the High Court in *Utmost* criticised the FSPO for omitting any discussion of the clause of the Code recited in his decision but on appeal, the Court of Appeal did not find this to have been a serious or significant error, albeit the court confirmed the FSPO's obligation to have regard to the Code when assessing the reasonableness of a provider's conduct. Binchy J. describes the Code as serving:-

> *"an additional and useful purpose in providing an objective benchmark against which complaints of consumers and standards of service of financial services providers may be assessed, thereby affording both consumers and providers protection against potentially arbitrary or subjective decisions on the part of the FSPO"*.

However the Court of Appeal did not impose a requirement to precisely identify which specific provision of the Code has been breached or how it was breached or suggest that a failure to do so would be sufficiently serious to merit the decision being overturned.

60. The FSPO's reliance on the CPC in condemning the Bank's failure to provide clarity to the notice parties, is a very different reliance on the CPC by the Ombudsman that was condemned by Barr J. in *KBC Ireland PLC v FSPO* [2023] IEHC 234 in considering the correct interpretation of a particular clause of the contract between a bank and its customer pertaining to the rate of interest to be paid to the customer and how the customer was to be notified of a change in the rate. Barr J. stated that the CPC could not "*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 a contract"* (at paragraph 79). In this case, the FSPO found that the Bank had failed to comply with the duty imposed on it by the CPC to ensure clarity for its customers in any documents that changed their contractual entitlements. The Bank's failure to include what they had intended, i.e. that the tracker rate might not be part of the alternative available products to be offered to the notice parties when their fixed rate came to an end or when they decided to move off it, meant that no such restriction could be applied to them if they sought to return to the tracker rate in accordance with the entitlement to it that they thought they were retaining, when they moved off it previously.

The Central Bank's TNE and TMI

61. I find no merit in the Bank's arguments that the FSPO fell into an error of law and/or acted unfairly having regard to the TME and TMI conducted by the Central Bank. As confirmed by the FSPO in his affidavit, the findings of the Central Bank as to what loans were or were not impacted under its TME did not preclude a customer from continuing with or maintaining a complaint to his office about an entitlement to a tracker interest rate or a mortgage loan. The powers and jurisdictions of the Central Bank are different to those of the FSPO. The Central Bank never made findings in relation to the notice parties that could have bound the FSPO. I find it surprising that the Bank brought these unclear arguments before this Court where they had never raised them before the FSPO during the lengthy and detailed engagement the Bank had with the FSPO prior to the issuing of his final decisions that the Bank now seek to impugn.

The relevance of previous decisions of the FSPO and FSO

The Bank does not claim that the FSPO has a legal obligation to follow its previous decisions or the previous decisions of its predecessors, but argues that the FSPO must explain any departure from their previous decisions. It is only recently that the FSPO's decisions are published, albeit many would have been available to this Bank where they were a party to them but, of course, not available to the notice parties. Similar circumstances arose in *KBC* in which Barr J. had no hesitation in finding that prior decisions of the Ombudsman at a time when his decisions were not published, could not give rise to any binding precedent. The Bank does not suggest it placed any reliance on any previous decisions or suffered any prejudice as a result of the claimed inconsistencies between these decisions and earlier decisions of the same office. It says that this claimed lack of consistency is arbitrary, random and leads to a unreasoned decision. I do not agree. If, as the Bank claims, there have been any inconsistencies with previous decisions, which decisions are not binding on subsequent complainants, I am satisfied that fairness and the requirement to act judicially (insofar as the FSPO is obliged to do so) is ensured where the FSPO provides the level of reasons required of him (discussed further below at paras. 67-68), which were provided here and evidenced in the level of detail that the Bank has been able to engage in challenging the

decisions, as well as the fact that these decisions show how the FSPO engaged with the parties' arguments.

The FSPO Theory of law

62. The Bank claims that the decisions of the FSPO depend on a theory of law developed and applied by him in all three impugned decisions. The FSPO says he decided each case on its own facts and circumstances, as is his practice to do so. I found the Bank's criticism of the FSPO unclear and unconvincing. It is of no surprise that decisions on similar factual circumstances, where borrowers who had been on a tracker rate moved to a fixed rate and then sought to revert to a tracker rate that the Bank said was no longer available, would have similarities to each other. If they did not, the notice parties in one decision might potentially claim the very lack of consistency the Bank had sought to criticise in relation to what it says was the FSPO unfairly not following his previous decisions. I find no merit in this aspect of the Bank's case and no evidence of any error of law and certainly not a serious or significant one.

Failure to give reasons

63. A decision maker must give sufficient reasons to enable the parties to understand the decision and decide whether to challenge it by appeal or judicial review as well as to allow a court to properly engage in any such appeal or judicial review and allow other parties affected to know why the decision was made (*NECI v. Labour Court* [2021] IESC 36, and my decision in *S v. Minister for Justice* [2022] IEHC 578 at para. 28). The FSPO met this requirement, not least as evidenced by the extensive nature of the Bank's 40 claimed errors of law in their grounds of appeal and its extensive submissions in a hearing that ran over a number of days. This is not a case involving a paucity of reasons. The explanation of the FSPO may not have the structure of a decision of the Superior Courts, but that has repeatedly been permitted by this Court (*Millar*, *O'Brien v. FSO* [2014] IEHC 111, *Lynch v. FSO* [2015] IEHC 298 and *Westwood v. Information Commissioner* quoted with approval in *Lloyds*) and most recently in *KBC* where Barr J. at paragraph 129 said that a failure by the Ombudsman to specifically identify the basis for his jurisdiction in his decision is not fatal "*as that would require a degree of technicality, or legal form, which is expressly disavowed under the Act.*"

The Constitution

64. Submissions were made by the Bank as to the FSPO's constitutional obligations. The FSPO does not dispute his obligation to act judicially and in accordance with constitutional justice. The FSPO's analysis of the contract did not breach those obligations. I am satisfied that no such error of a serious or significant nature has been established.

65. The Bank also mentioned bias and pre-judgment, but these points were, wisely, not extensively explored. For the avoidance of doubt, I do not accept there is any validity to any such claim.

Conclusion

66. For the reasons set out above, I refuse the Bank's appeals and affirm the decisions of the FSPO.

Indicative view on costs

67. As the FSPO has succeeded in full in defending these appeals, in accordance with s. 169 of the Legal Services Regulation Act 2015, it is my indicative view on costs that the FSPO is entitled to their costs. I will put the matter in for mention on 11 July 2023 to allow either party make submissions on costs and on final orders to be made including in relation to the C decision. If either party wishes to furnish written submissions, they should be filed with the court 48 hours before the matter is back before me.

Counsel for the appellant: Eoin McCullough SC, Marcus Dowling SC, John Freeman BL, Stephen B. Byrne BL.

Counsel for the respondent: Eileen Barrington SC, Francis Kieran BL.